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Constitutional Law: Newsgathering: Reporters Have No Right to Use Hidded Recording Devices

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closely at the factual situation and the evidence presented in each case. Since this is the one remaining method o favoiding reversal, the court may become more prone toward finding harmless error in order to affirm convictions when curative language would have been relied upon in the past. On the other hand, the court may tend more toward reversal, to avoid what would be blatant disregard of the majority's precise mandate and explicit goal of eliminating the designated charges.

The members of the majority now have outlined their position regarding past and possible future use of *Mann*-type charges with great precision and clarity. The instant case may ultimately end the use of the condemned charges.[89] However, it seems equally likely that the court's action will be interpreted, as the panel opinion described the court's past decisions, to be merely one more instance of crying "wolf",[90] and that more affirmative action will be needed to eliminate effectively the use of the *Mann*-type charge.

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CONSTITUTIONAL LAW: NEWSGATHERING: REPORTERS HAVE NO RIGHT TO USE HIDDEN RECORDING DEVICES

Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977)

Prior to 1974, Florida law permitted news media reporters to use hidden recording devices during interviews in order to conceal their taping activity from the interviewee.[1] In October of that year, the Florida legislature amended section 934.03(2)(d), Florida Statutes,[2] to prohibit the interception of wire or

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or undisputed, and must decide just how vital proof of specific intent was to the outcome of the case.

89. See Judge Brown's concurring opinion: "Now after 14 years of *Mann* and manless *Mann*, we are overwhelmingly of the view that *Mann* and its satellites are forbidden. By the Court's opinion we know what we have imposed on ourselves. The District Judges, with a time interval to eradicate from mind and jury instruction forms, know what we have imposed on them. It is up to each of us to carry this out." 560 F.2d at 1256.

90. See note 8 *supra*.

1. Brief for Appellees at 11-12, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977). Investigative reporting is frequently used to expose consumer fraud, official corruption and other forms of conduct by which the public is being misled, cheated, or otherwise harmed. John Paul Jones, former dean of the College of Journalism at the University of Florida, has summarized various expert reporters' explanations of investigative reporting as: "1. Investigative reporting is a *way* of reporting, a way of reporting that makes it a tool for the depth writer. 2. Investigative reporting is master detective work. 3. Investigative reporting is the art of digging out information that someone wants to keep secret. 4. Investigative reporting is situation reporting rather than event reporting, although events may be involved." J. JONES, GATHERING AND WRITING THE NEWS 180 (1976). For an example of the use of concealed recording equipment, see text accompanying notes 41-42 *infra*.

2. Although no official legislative history exists for the 1974 amendment, the Florida

oral communications by private parties unless all persons involved gave prior consent.[3] Because violation of this law constitutes a third-degree felony,[4] the

Legislature's findings, which serve as an introduction to the Security of Communications Act of 1969, include among the Act's purposes: "To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused." FLA. STAT. §934.01(4) (1977). This finding indicates that the legislature was not concerned with the effect that the 1974 amendment would have upon the news media. In contrast, it appears that a statutory modification of FLA. STAT. §934.02(2) (1977), in 1974 removing a justifiable expectation of privacy for "any public oral communication uttered at a public meeting" was enacted so that the press could tape record any statement at the public meeting without the consent of the speaker. *See* State v. News-Press Publishing Co., 338 So. 2d 1313, 1316 (Fla. 2d D.C.A. 1976).

3. FLA. STAT. §934.03(2)(d) (1977) provides: "It is lawful under this chapter for a person to intercept a wire or oral communication when *all* of the parties to the communication have given prior consent to such interception." (Emphasis added). Prior to the 1974 amendment, the statute required consent from only one party who, of course, could be the reporter himself. The statutory language was: "It is not unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or when *one* of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act." (Emphasis added). 1969 Fla. Laws ch. 69-17, §3 (amended 1974). The following definitions are provided in FLA. STAT. §934.02(2) (1977): "(2) 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting; (3) 'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device . . . ." FLA. STAT. §934.02 (1977) fails to define the term "consent." Thus it is unclear whether the consent required by the news media for interview recording is to be oral or written. Furthermore, there is no clear standard for "implied" prior consent. *See* State v. News-Press Pub. Co., 338 So. 2d 1313 (Fla. 2d D.C.A. 1976); Horn v. State, 298 So. 2d 194 (Fla. 1st D.C.A. 1974), *cert. denied*, 308 So. 2d 117 (Fla. 1975).

Florida's Security of Communications Act was patterned after Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§2510-2520 (1970) [hereinafter referred to as Title III], which authorizes one-party interception of an oral or wire communication. *Id.* §2511(2)(d). Title III outlines the court authorization procedures, the penalties and crimes related to electronic surveillance, and the immunity of witnesses. This federal law was a legislative response to Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1962). In *Berger*, the Supreme Court invalidated a state wiretapping statute on various grounds, including the absence of any requirement that applications for court authorization of electronic surveillance demonstrate exigent circumstances justifying the failure to give prior notice to the investigated person. 388 U.S. at 60. In *Katz*, the Supreme Court held that the fourth amendment protects a person from warrantless search and seizure if, under the circumstances, he has a justifiable expectation of privacy, regardless of whether an actual physical trespass occurred. 389 U.S. at 351, 353. In Florida, the prohibition of the interception of communications by private parties does not apply to consensual participatory monitoring of communications by, or under the direction of, law enforcement officers, which is governed by FLA. STAT. §934.03(2)(c) (1977): "It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to

amendment effectively banned the use of hidden recording equipment by the press. Appellees, a television broadcaster and a daily newspaper,[5] sought declaratory and injunctive relief, alleging that the amended statute substantially impaired their newsgathering capabilities and acted as a prior restraint in violation of their first amendment rights.[6] Concealed recorders, appellees argued, are necessary to insure the candor of the interviewees, corroborate news reports, and preserve interview conversations.[7] Appellees further claimed that any privacy interests protected by the statute were subordinate to their first amendment rights. A Dade County circuit court declared the statute unconstitutional.[8] The Florida supreme court reversed and HELD, section

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the communication or *one* of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act." (Emphasis added).

4. FLA. STAT. §934.03(1) (1977). An individual convicted of a third degree felony may be imprisoned for a term not exceeding five years and fined up to $5,000. FLA. STAT. §§775.082-.083 (1977).

5. The appellees were the Sunbeam Television Corp., owner of a television station in Miami, Fla., and the Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., which publishes the Miami Herald, Florida's largest daily newspaper of general circulation. The complaint was filed by Sunbeam and the Miami Herald intervened as a party plaintiff. Appellants were Florida Attorney General Robert Shevin and Dade County State Attorney Richard E. Gerstein. 351 So. 2d at 724-25.

6. Sunbeam Television Corp. v. Shevin, 45 Fla. Supp. 53, 54 (11th Cir. Ct.), *rev'd*, 351 So. 2d 723 (Fla. 1977). No prosecutions under the statute were at issue; rather, the news media plaintiffs chose to challenge the law facially, claiming that it was unconstitutionally vague and overbroad and its existence impermissibly "chilled" reporters' exercise of protected first amendment rights. *See* Brief for Appellees at 39-45, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977).

7. Brief for Appellees at 20-25, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977).

8. Sunbeam Television Corp. v. Shevin, 45 Fla. Supp. 53, 55 (11th Cir. Ct. 1977), *rev'd*, 351 So. 2d 723 (Fla. 1977). The trial court found that the state failed to demonstrate the compelling state interest required to justify impairment of newsgathering activities and granted a temporary injunction enjoining the enforcement of FLA. STAT. §934.03(2)(d) (1977). Holding also that the statute was overbroad, the trial court stated that the goal of the statute "can only be discerned in a most general way although the statute prohibits conduct on a wholesale basis. For instance, the statute prohibits all electronic recording unless both parties give prior consent in all situations including those in which there is no conceivable right or expectation of privacy such as in consumer fraud or official corruption." 45 Fla. Supp. at 56.

Prior to the trial court's decision, the Federal District Court for the Southern District of Florida refused to apply the federal interpretation of the term "oral communication" under 18 U.S.C. §2510(2) (1970) to FLA. STAT. §934.02(2) (1977). Sunbeam Television Corp. v. Shevin (S.D. Fla. 1976) (Case No. 75-1443-Civ-CA) (an unreported decision). The federal statute, like the Florida statute, provides that an "oral communication means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation*. 18 U.S.C. §2510 (1970). (emphasis added). See note 3 *supra*. In United States v. Carroll, 337 F. Supp. 1260 (D.D.C. 1971), the District Court interpreted the phrase "under circumstances justifying such expectation" to exclude situations in which the individual's conversation could be heard under contrived circumstances. Naturally, when one is a party to the conversation, as is the case with an investigative reporter conducting an interview, he hears the conversation under contrived circumstances. Thus, the federal statute exempts from prosecution the interception of an oral communication by a person who is a party to the communication. However, the

934.03(2)(d) is constitutional and does not chill or restrain first amendment rights, since any interference with newsgathering is outweighed by the legislature's legitimate decision to protect the privacy of nonpublic communication.[9]

The first amendment to the United States Constitution[10] was fashioned to assure that "debate on public issues should be uninhibited, robust and wide open . . . ."[11] Under this expansive constitutional mandate, courts have assumed the responsibility of protecting the news media from governmental interference.[12] The dual goals of this protection are an informed and critical citizenry and a government responsive to the political and social changes desired by the people.[13] In order for the news media to continue to function as a free forum for discussion of public issues and as a disseminator of information and ideas, the Supreme Court has recognized a limited right of the press to seek out and gather news. However, the extent of this derivative right implicit in the Free Press Clause has not yet been clearly defined.[14]

A claimed first amendment right to gather information was examined by the Supreme Court in 1965 in *Zemel v. Rusk*.[15] There, a United States citizen requested that his passport be validated for travel to Cuba on the basis of his desire to become better informed about world affairs.[16] The Court rejected his

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Federal District Court for the Southern District refused to apply the *Carroll* interpretation to Florida's statutory scheme, stating that "the Florida statute . . . was clearly amended in 1974 to extinguish the prior unconditional exemption from the prosecution for intersection [sic] for a party to the communication." Sunbeam Television Corp. v. Shevin (S.D. Fla. 1976) (Case No. 75-1443-Civ-CA) at 6.

9. 351 So. 2d at 724.

10. The first amendment provides: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." U.S. CONST. amend. I. The fourteenth amendment due process clause protects the press against infringement of this fundamental right by state action. Pell v. Procunier, 417 U.S. 817, 842 (1974). For a modern effort to summarize the values and functions of freedom of expression, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970): "First, freedom of expression is an essential process as a means of assuring individual self-fulfillment . . . . Second, freedom of expression is an essential process for advancing knowledge and discovering truth . . . . Third, freedom of expression is essential to provide for participation in decision making by all members of society. This is significant for political decisions . . . . Finally, freedom of expression [is] an essential mechanism for maintaining the balance between stability and change." *See also, Z. Chafee,* FREE SPEECH IN THE UNITED STATES 33 (1946).

11. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

12. Implicit in the press' role in promoting responsive government is its duty to expose defects in government. This, it is argued, can only be done when the press is free from governmental interference. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); Martin v. City of Struthers, 319 U.S. 141 (1943); Grossjean v. American Press Co., 97 U.S. 233 (1936).

13. Mills v. Alabama, 384 U.S. 214, 218-19 (1966). *See also* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1965); Grossjean v. American Press Co., 297 U.S. 233, 250 (1936).

14. The "right to know" also has been accorded derivative first amendment right status. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1823 (1976): "If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."

15. 381 U.S. 1 (1965).

16. Restriction on travel to Cuba by U.S. citizens was imposed because the United States and the Organization of American States determined that travel between Cuba and other

claim and concluded that an unrestrained right to gather information was not within the purview of the first amendment.[17] Seven years later, in *Branzburg v. Hayes*,[18] a newspaper reporter asserted a first amendment right to gather news. The reporter claimed that this right would be abridged if he were required to divulge the identity of his confidential sources before a grand jury investigating alleged criminal activities.[19] Refusing to recognize a special first amendment privilege for the press, the Court required the reporter to testify and held that the need for effective law enforcement outweighed the public interest in unfettered gathering and dissemination of the news.[20] The majority emphasized that the first amendment does not guarantee the press a right of special access to information not available to the general public.[21] However, the Court acknowledged the existence of a right to gather news deserving of some first amendment protection, without which "freedom of the press could be eviscerated."[22] The dimensions of this right to gather news were not

countries of the Western Hemisphere was an important element in the spread of communism. Zemel v. Rusk, 381 U.S. 1, 14 (1965).

17. 381 U.S. at 16-17. The Court in *Zemel* did not reach the question of possible special access rights. It has been suggested that the claimant's position might have been stronger had he been a newsman gathering information on Cuba for publication, rather than a private citizen merely wishing to satisfy his curiosity. Note, *The Right of the Press to Gather information*, 71 COLUM. L. REV. 838, 846 (1971). One writer suggests that the dismissal of Zemel's first amendment claim might have been the result of judicial reluctance to interfere with congressional and executive control over foreign affairs. Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1520 (1974) [hereinafter cited as *The Rights of the Public and the Press*].

18. 408 U.S. 665 (1972). *Branzburg* was a consolidation of four state and federal cases. The first two were Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), and Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971). Both cases involved Paul Branzburg, a reporter who authored two articles involving the illegal manufacture of drugs in Kentucky. Branzburg refused to divulge the identity of his confidential sources to grand juries investigating the illegal drug trade. In the third case, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), a New York Times reporter wrote several articles about the Black Panthers. Caldwell contended that requiring him to testify would destroy his working relationship with the Black Panthers Party by "driving a wedge of distrust and silence between the news media and the militants." 408 U.S. at 676. The fourth case, *In re* Pappas, 358 Mass. 604, 206 N.E.2d 297 (1971), involved another reporter investigating the Black Panthers. The Supreme Judicial Court of Massachusetts rejected his motion to quash a grand jury subpoena on first amendment grounds, holding that any adverse effect on the free flow of news was merely speculative.

19. Petitioner argued that a reporter should be exempt from the obligations of ordinary citizens to testify before grand juries unless the government can show that the reporter possesses information relevant to the crime and that such information is unavailable elsewhere. 408 U.S. at 680. *See also* Garland v. Torre, 259 F.2d 545, 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). The Second Circuit acknowledged that compelled disclosure of a journalist's confidential sources during pretrial depositions could constitute an infringement of freedom of the press by limiting access to news sources. Nevertheless, the court held that the newsmen's first amendment privilege was not absolute and ruled that all witnesses called by a grand jury must testify.

20. 408 U.S. at 690-91. The Court emphasized that it would not tolerate official harassment of the press solely for the purpose of disrupting a reporter's relationship with his news sources. *Id.* at 707-08.

21. *Id.* at 684. The press, however, must be afforded newsgathering access to the same extent as the general public. Estes v. Texas, 381 U.S. 532, 540 (1965) (dictum).

22. 408 U.S. at 681; *accord*, Lewis v. Bakley, 368 F. Supp. 768, 775 (M.D. Ala. 1973). The

defined; Justice Powell's decisive concurrence maintained that the holding was limited to the question of grand jury testimony and that the constitutional and public interests involved in first amendment litigation should be balanced on a case-by-case basis.[23]

Although *Branzburg* provided little guidance for subsequent decisions, its acknowledgment of a first amendment right to gather news encouraged the media to test the limits of that right. In a large number of cases challenging direct restraints on media access to places and information, lower court decisions, relying upon different statements from *Branzburg*, reached inconsistent results,[24] particularly in cases involving disclosure of confidential news sources and interviews of prisoners.[25]

Court in *Branzburg* suggested some limitations on the extent of newsgathering rights: "[T]he press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial . . . ." 408 U.S. at 684-85.

23. 408 U.S. at 709-10 (Powell, J., concurring). Justice Stewart, joined by Justice Brennan and Justice Marshall, dissented, feeling that without a right to gather news, the right to publish would be abridged; therefore Justice Stewart favored recognition of a right to gather news among other well established "corollary" rights involved in the news dissemination process. *Id.* at 727-28 (Stewart, J., dissenting). In Near v. Minnesota, 283 U.S. 697, 713 (1931), the Court sanctioned the right to publish without prior governmental approval.

Justice Douglas' dissent to the *Branzburg* decision contended that the first amendment should be interpreted broadly to include an absolute privilege for newsmen not to appear before a grand jury. 408 U.S. at 712 (Douglas, J., dissenting). For more recent cases in which a qualified privilege to protect newsmen's sources and information has been recognized, see Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977), *cert. denied*, 46 U.S.L.W. 3294 (U.S. Nov. 1, 1977) (No. 76-1848); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977).

24. *E.g.*, Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and Pell v. Procunier, 417 U.S. 817 (1974) (interviews with prisoners); McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973), *appeal dismissed*, 415 U.S. 970 (1974) (government documents); Borreca v. Fasi, 369 F. Supp. 906 (D. Hawaii 1974) (government news conferences); Sigma Delta Chi v. Speaker, Md. House of Delegates, 270 Md. 1, 310 A.2d 156 (1973) (legislative floor).

Three decisions by the Florida supreme court prior to the instant decision seemed to indicate that first amendment rights would generally be held to prevail over restrictions on the operations of the news media. In Morgan v. State, 337 So. 2d 951 (Fla. 1976), the Florida supreme court held that a reporter was not required to reveal her source of a grand jury summary presentment critical of an unindicted person. The court reasoned that the only interest affected by this premature disclosure was reputation and that because there was no showing that the person could have succeeded in suppressing the presentment, any harm suffered was speculative. *Id.* at 955-56. In State v. McIntosh, 340 So. 2d 904 (Fla. 1976), the Florida supreme court invalidated as an unconstitutional prior restraint a circuit court order prohibiting the news media from publishing certain information about a securities fraud case. The Florida supreme court also struck down a proposed local rule prohibiting broadcasting, televising, recording or taking photographs in parts of the Dade County Justice Building during criminal proceedings because of the availability of reasonable alternatives having a lesser impact on first amendment freedoms. *In re* Adoption of Proposed Local Rule 17, 339 So. 2d 181 (Fla. 1976).

25. Comment, *News Gathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1447 (1975).

In an effort to reconcile the conflict among the courts concerning media access to prisoners, the Supreme Court reviewed the companion cases of *Pell v. Procunier*[26] and *Saxbe v. Washington Post Co.*[27] The factual settings in the two cases were virtually identical; news media plaintiffs challenged prison regulations prohibiting face-to-face interviews between members of the press and certain prisoners as violative of their first amendment right to gather news.[28] In both cases the Court held that the regulations limiting the media's newsgathering opportunities were constitutional, and that the press was entitled to no greater access to information than that afforded the general public.[29] Al-

26. 417 U.S. 817 (1974).

27. 417 U.S. 843 (1974).

28. Pell v. Procunier, 417 U.S. 817, 829 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 846 (1974). In *Pell*, news media plaintiffs contended that they should be permitted to interview any consenting inmate in the absence of a clear and present danger to some other substantial interest served by the corrections system. 417 U.S. at 829 (1974). Four California inmates and three journalists challenged the California Department of Corrections Manual §415.071 (1971), which provided: "Press and other media interviews with specific inmates will not be permitted." This regulation was adopted on Aug. 23, 1971, two days after an escape attempt at San Quentin Prison in which three staff members and two inmates were killed. 417 U.S. at 832. Suit was brought seeking injunctive and declaratory relief under 42 U.S.C. §1983 (1970). The district court granted the inmate plaintiffs' motion for summary judgment, finding that the government failed to show a compelling state interest in removing administrative burdens attendant to greater press access to prisoners. Hillery v. Procunier, 364 F. Supp. 196, 202 (N.D. Cal. 1973), *vacated*, 417 U.S. 817 (1974). The court granted a motion to dismiss against the news media plaintiffs, stating that "the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates." 364 F. Supp. at 200. Both the defendant Corrections Officer Procunier and the media plaintiffs appealed. The Supreme Court reversed the district court's judgment that §415.071 of the manual infringes upon the freedom of speech of prison inmates, and affirmed its judgment that the regulation does not abridge the constitutional rights of the press. 417 U.S. at 835.

In *Saxbe*, the Washington Post newspaper and one of its reporters challenged Policy Statement 1220.1A ¶46(6) (1972) of the Federal Bureau of Prisons, which provided: "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs, and activities." The district court found that the regulation violated the news media plaintiff's rights to gather news and enjoined enforcement of the regulation. Washington Post Co. v. Kleindienst, 357 F. Supp. 779, 784 (D.D.C. 1972), *modified and aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

29. The Court's decision to define the right of access to information strictly in terms of that afforded to the public generally has been criticized on two grounds. First, the statement that "newsmen have no constitutional right of access . . . beyond that afforded the general public," 417 U.S. at 834, provides little guidance, since the public's right of access to news remains undefined. See *The Rights of the Public and the Press, supra* note 17, at 1507. Given this uncertainty, mere nondiscriminatory treatment of the public and the press does not insure that the first amendment rights of both may not be unconstitutionally limited. 417 U.S. at 841 (Douglas, J., dissenting). Secondly, the constitutional basis for the holding in *Pell* has been criticized on the grounds that, under the Free Press Clause, the news media should have special access to information not made available to the public generally. Comment, *Ninth Circuit Holds Press Entitled to Greater Access to Prison Than That Afforded General Public*, 45 FORDHAM L. REV. 1524, 1529-30 (1977); Comment, *Constitutional Law — Freedom*

though the Court premised the *Pell* decision on *Branzburg*,[30] the reasoning in both *Pell* and *Saxbe* departed from the balancing approach urged by Justice Powell in *Branzburg*[31] inasmuch as the Court chose to define the right of press access strictly in terms of that afforded the public generally.[32]

The Court's holdings in *Pell* and *Saxbe* affirmed the authority of the state and federal governments to set constitutional limits on first amendment news-gathering rights. Subsequently, however, the lower courts have been unable to reach a consensus regarding application of this "no greater access"[33] doctrine to other restraints upon the media.[34]

Whatever its parameters, the first amendment right to gather news has never been interpreted to afford newsmen the opportunity to invade unreasonably an individual's privacy.[35] While the Constitution does not explicitly recognize a fundamental right of privacy,[36] the Supreme Court has held that

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of the Press—Prison Regulation Prohibiting Interviews Between Newsmen and Inmates Held Unconstitutional, 60 CORNELL L. REV. 446, 459-60 (1975). *See also* Pell v. Procunier, 417 U.S. 817, 839-40 (Douglas, J., dissenting).

30. 417 U.S. at 833-34.

31. See text accompanying note 20 *supra*.

32. 417 U.S. at 834-35, 850.

33. This phrase appears in the opinion of Justice Rehnquist, as circuit justice, in Houchins v. KQED, Inc., 429 U.S. 1341, 1344 (1977).

34. *Compare*, Central South Carolina Chapter, Etc., v. Martin, 431 F. Supp. 1182, 1187 (D.S.C.), *modified*, 556 F.2d 706 (1977) ("[The press'] right to particular information apart from equal protection considerations is factually limited to information which should be categorized as 'public information' "), *with* KQED, Inc. v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976), *cert. granted*, 431 U.S. 928 (1977) ("*Pell v. Procunier* does not stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically").

In United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), newspapers and their reporters sought review of orders of the United States District Court for the Middle District of Florida denying their requests to examine certain trial documents in a criminal proceeding. The Fifth Circuit affirmed the court's actions. Citing *Branzburg* and *Pell*, the Court stated that the right to gather news is defined in terms of information available to the public generally. Accordingly, the press cannot be denied access to any information already within the public domain, nor can they demand information not available to the public generally, such as that contained in the trial documents in question. *See also* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977) (first amendment does not prohibit the state from denying access to news cameramen to film executions in Texas State prison for showing on television).

35. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971). Four forms of privacy have been judicially recognized. Prosser's formulation of the four torts, which has been generally accepted is: 1) Intrusion upon an individual's physical solitude; 2) Publication of private information about an individual; 3) Placement of an individual in a false light in the public eye; 4) Appropriation of an individual's name or likeness for commercial gain. W. PROSSER, LAW OF TORTS, 804-14 (4th ed. 1971). Some writers suggest that reporters should be subject to the same restraints as private citizens when engaging in unreasonable conduct to extract information. *See The Rights of the Public and the Press to Gather Information*, *supra* note 17, at 1517.

36. The right of privacy has been defined as the right to be let alone. Prior to 1890 no English or American court had expressly recognized such a right, although there were decisions which retrospectively appear to have protected it in some manner. The doctrine of a legal right of privacy was first developed in a famous law review article by Samuel D. Warren and Louis D. Brandeis, Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193

such a right does exist and is protected by various provisions of the Bill of Rights.[37] However, an individual's right to privacy is not absolute; privacy rights must yield to overriding social interests.[38] If the right to privacy collides with the first amendment guarantees of freedom of the press and speech, a balancing of the competing interests is required.[39]

Conflict between freedom of the press and individual privacy rights springs most often from publication of facts that expose an individual's private life.[40] However, newsgathering activities may constitute an actionable invasion of privacy absent the publication element. In the seminal case of *Dietemann v. Time, Inc.*,[41] two investigative reporters for Life Magazine attempted to secure information concerning possible criminal violations in the unauthorized practice of medicine. A reporter who did not reveal his true identity or purpose was "wired" to enable the secret transmission and recording of conversations in the plaintiff's home. Additionally, a photographer furtively took pictures of the plaintiff, a reputed "medical quack." The Ninth Circuit, finding an invasion of the plaintiff's privacy, concluded that a person should not be required to assume the risk that what is seen or heard in his home or office will be secretly transmitted or recorded.[42] Although emphasizing that newsgathering is an integral part of press function, the court stated that the first amendment

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(1890). The authors felt that tort law should afford relief to an individual whose privacy has been invaded either "by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing sounds." *Id.* at 196. Although recognition of a right of privacy as urged by Warren and Brandeis was initially refused in Michigan and New York, it was accepted by the Georgia Supreme Court in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). Since that decision, the right of privacy has been recognized in the vast majority of American jurisdictions. For a history of the legal right of privacy *see* W. PROSSER, LAW OF TORTS 802 (4th ed. 1971).

37. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court recognized a right of privacy emanating from a variety of interests found within penumbras of the first, third, fourth, fifth, ninth and fourteenth amendments. *Id.* at 484. Justice Goldberg stated in his concurring opinion, in which Chief Justice Warren and Justice Brennan joined, that "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" *Id.* at 494, *quoting* Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas J., dissenting). *See also* Note, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?* 64 MICH. L. REV. 197, 205-06 (1965).

38. *See* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes §652F, Comment b, at 127-28 (Tent. Draft No. 13, 1965).

39. *See* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973). *See also* Comment, *Constitutional Law — Right of Privacy — Freedom of the Press Does Not Justify the Invasion of Privacy Through Subterfuge*, 50 TEX. L. REV. 514, 515-16 (1972).

40. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967) (libel action alleging that magazine publisher falsely portrayed experience suffered by plaintiff and his family at the hands of escaped convicts); Fletcher v. Fla. Publishing Co., 319 So. 2d 100 (Fla. 1st D.C.A. 1975) (publication of photograph of silhouette of plaintiff's deceased daughter after a fire at plaintiff's home was not, per se, an invasion of privacy). *See generally* Pember & Teeter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57 (1974) [hereinafter referred to as *Privacy and the Press*].

41. 449 F.2d 245, 249 (9th Cir. 1971).

42. *Id.* at 249.

is not a license to invade the privacy of an individual by mechanical contrivances.[43]

Following the *Dietemann* decision, at least two other courts have indicated a willingness to recognize a reasonable expectation of privacy[44] despite media claims of a first amendment right to newsgathering.[45] However, prior to the instant decision, no court had addressed the first amendment implications of a security of communications act intended to safeguard the privacy rights of individuals.[46]

The instant case reflected the inherent tension persisting in a society that recognizes both freedom of the press and an individual's right of privacy. A collision between these two fundamental liberties required that the Florida supreme court decide whether the burden on newsgathering imposed by section 934.03(2)(d) outweighed the privacy rights of individuals.[47] The court

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43. *Id.*

44. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1975); Katz v. United States, 389 U.S. 347 (1967). In *Galella*, the Second Circuit Court of Appeals rejected a news photographer's assertion that the first amendment immunized newsmen from criminal and tortious liability for their conduct while gathering news. The court found that Mrs. Onasis, a public figure, had a "reasonable expectation of privacy and freedom from harassment." 487 F.2d at 995. The Court in *Katz* held that the protection of a person's right to privacy is left largely to the states. 389 U.S. at 350-51.

45. *But cf.* Cantrell v. Forest City Publishing Co., 484 F.2d 150 (6th Cir. 1973), *rev'd*, 419 U.S. 245 (1974). In *Cantrell*, a reporter and a photographer entered plaintiff's home during her absence through an open door. During their uninvited visit, the reporter interviewed plaintiff's children, while the photographer took pictures for which her children posed. The Sixth Circuit Court of Appeals refused to hold the newspaper published liable even though it recognized that reporters might well have trespassed. The court distinguished *Dietemann* by observing that the gravamen of Cantrell's action lay "in the claim that the publication of the article, not physical intrusion, damaged the plaintiffs." 484 F.2d at 155. However, the United States Supreme Court reversed and held the newspaper vicariously liable for known falsehoods contained in its reporter's story. 419 U.S. 245, 254 (1974).

The United States Supreme Court has decided other cases involving factual patterns similar to *Dietemann* in which it was contended that *police* conduct violated the fourth amendment. In Hoffa v. United States, 385 U.S. 293 (1966), the Court permitted the use of evidence obtained by a paid government informer, whom petitioner had trusted, to convict petitioner of jury tampering. The Court dismissed the fourth amendment claims stating that petitioner was merely the victim of his own misplaced confidence. *Id.* at 302. Five years later in White v. United States, 401 U.S. 745 (1971), the court permitted the introduction of testimony obtained through the use of a radio transmitter concealed on the person of an informer because the defendant had consented to the presence of the informer. *See generally* Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

46. "Security of Communications Act is a generic term subsuming various statutes prohibiting the interception of wire or oral communications unless prior consent has been obtained from at least one of the parties to the communication. For an example of a typical statute see note 3 *supra*.

Although several states have adopted statutes similar to Florida's Security of Communications Act, FLA. STAT. §§934.01-.10 (1977), these statutes have been interpreted only in criminal cases addressing the evidentiary issue o fsuppression of allegedly illegal interceptions against the defendant. *See, e.g.*, Parkhurst v. Kling, 266 F. Supp. 780 (E.D. Pa. 1967); People v. Murphy, 105 Cal. Rptr. 138, 503 P.2d 594 (1972).

47. 351 So. 2d at 725.

resolved the conflict in favor of the individual's privacy rights, applying the "no greater access" doctrine of *Pell* and *Saxbe* to hold that first amendment protection does not extend to corroborative newsgathering activities that infringe upon privacy rights even though such activities admittedly promote speed and accuracy in reporting.[48] Quoting extensively from *Branzburg*, the court emphasized the limited nature of the burden imposed upon the news media by the statute, and stressed that the statute "is not a restraint or restriction on what the press may publish."[49]

Responding to the appellees' claims of governmental interference with newsgathering, the court noted that the statute did not prevent the media from contacting sources or prevent parties to a communication from consenting to the recording.[50] The court affirmed the authority of the legislature to enact regulations protecting an individual's right of privacy and held that the first amendment rights of the press do not include a constitutional right to corroboration of newsgathering activities with recording equipment "when the legislature has statutorily recognized the private [sic] rights of individuals."[51] Although acknowledging that concealed recording equipment might promote greater speed and accuracy in reporting, the court refused to find those interests within the purview of the first amendment.[52] Citing *Dietemann*, the court

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48. *Id.* at 727. The witnesses for appellees suggested methods of corroboration other than hidden recording devices: "transcribing or note taking; relying on records to corroborate statements; accompanying public officials; interviewing victims; using two reporters to corroborate; using another individual from the Better Business Bureau; and using [the CBS-Television public affairs program] 60 Minute[s] technique of recording [the] conversation of [the] undercover reporter only." Brief for Appellants at 1B, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977). These methods, however, may not prove to be as effective as actual recording since documentation of the investigated conduct will often depend upon the precise words used and even their intonation. See note 1 *supra*. In addition, the use of concealed recording devices will insure the candor of the person investigated, since he will not know that his statements are being recorded. Steve Rogers, supervisor of the *Miami Herald* reporters, stated that, "[i]t has indeed been the experience of our reporters . . . to learn, when they must inform someone that they are taping a call, that the party they are speaking to tends to become a more reluctant . . . interviewee, and is, in effect, chilled, less inclined to speak." Brief for Appellees at 23, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977).

49. *Id.* at 725-26. Finding a parallel between *Branzburg* and the present case, Justice Adkins emphasized dictum from that opinion denying the press the authority to establish a "private network of informers" and a source operation different from that of the general public. Such a network of informers, according to the *Branzburg* majority, would be impervious to governmental control since their identities would remain undisclosed and therefore "pose a threat to the citizen's justifiable expectations of privacy . . . (emphasis omitted)." *Id.* (quoting Branzburg v. Hayes, 408 U.S. at 698). For discussion of the opposing view, see *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1271, 1280-81, 1169 n.207 (1972).

50. 351 So. 2d at 727.

51. *Id.* Apparently "private" should have read "privacy."

52. *Id.* The court cited with approval Sigma Delta Chi v. Speaker, Md. House of Delegates, 270 Md. 1, 310 A.2d 156 (1973). In that case, the news media challenged a Maryland House of Delegates regulation banning reporters with tape recorders from the legislative floor. The news reporters argued that the prohibition was violative of their first amendment rights because "speed and accuracy are essential attributes of media news services." 270 Md. at 3,

stated that the first amendment does not give the press a "license to trespass" or intrude on an individual's privacy by electronic means, and that "[a] different rule could have a most pernicious effect upon the dignity of man."[53] The court then proceeded to dismiss summarily appellees' claim that the amended statute was impermissibly vague.[54]

In sustaining the constitutionality of section 934.03(2)(d), the instant court reasoned that electronic and "hidden mechanical contrivances" are not indispensable tools to investigative reporting, and that prohibiting their use will not significantly impair the newsgathering activities of the press.[55] The court also noted that the statute did not absolutely ban the use of recorders, because a party who expressly consents to the recording clearly removes the communication from the restrictions of section 934.03(2)(d).[56] Furthermore,

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310 A.2d at 157. The Maryland supreme court stated that newsgathering should be afforded some first amendment protection, but refused to recognize a constitutional interest in the promotion of accuracy and speed in news reporting. 270 Md. at 6, 310 A.2d at 159. *But see* McMillan v. Carlson, 369 F. Supp. 1182 (D. Mass. 1973), *vacated and remanded*, 493 F.2d 1217 (1st Cir. 1974); Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972), *modified and aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965); Nevins v. City of Chino, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (Ct. App. 1965).

53. 351 So. 2d at 727.

54. *Id.*

55. *Id.* at 727.

56. *Id.* Possibly, concealed recordings may still be used if the individual *impliedly* consents to the recording, indicating by his actions a grant of permission to divulge the conversation. For instance, a person entering a bank or an apartment house utilizing surveillance equipment impliedly consents to the interception of his conversation, since he has actual notice that these security devices are present. Accordingly, an individual who is aware that taping activity is being conducted by the news media, but who has not expressly consented to such recording, might be deemed by a court to have impliedly consented to interception of his statements. The statute, however, fails to set clear standards for the possible application of the doctrine of implied consent. The implied consent concept has been judicially recognized in cases interpreting similar Security of Communications Acts. In Massachusetts v. Jackson, 76 Mass. Adv. Sh. 1587, 349 N.E.2d 337 (1976), the Massachusetts supreme court held that where the defendant made statements on the telephone evidencing a clear recognition that the calls were being taped, but continued to speak in apparent indifference to the consequences, such recordings did not constitute an "interception" within the meaning of the Massachusetts Security of Communications Act and were not subject to suppression during criminal proceedings. In Pennsylvania v. Gullet, 459 Pa. 431, 329 A.2d 513 (1974), the Pennsylvania supreme court found that an anonymous telephone call made to police, to inform them of the occurrence of a homicide and the possibility that it would be but one in a series of killings, necessarily carried with it, as a matter of law, permission to use the communication to investigate the reported crime by any reasonable means. On this basis, the court found that use of the secret tape recording of the conversation for the purpose of making a voice print comparison with the voice of the defendant (caller) did not violate Pennsylvania's anti-wiretapping statute. The use of concealed recordings also has been upheld in situations where the reporter is able, without aid, to hear communication in a public place. Florida's First District Court of Appeal found that FLA. STAT. §934.02(3) (1977), defining the term "intercept," was inapplicable to statements of the defendant which, because of his loud voice, were overheard by two police officers outside the closed door of a station lineup room. Taylor v. State, 292 So. 2d 375 (Fla. 1st D.C.A. 1974). For the statutory definition of "intercept" see note 3 *supra*.

concealed recordings may still be used in situations in which an individual's expectation of privacy has been removed.[57] But since the statute fails to specify what circumstances remove an individual's justifiable expectation of privacy, the press is still faced with the difficulty of determining whether or not a reasonable expectation of privacy exists in a given situation. Such determinations are presently made according to an objective standard based on the particular circumstances of each case.[58] Thus, although alternative investigative techniques exist, the immediate impact of the court's decision will be to hinder the ability of the press to gather and disseminate the news with the maximum possible accuracy.

Justice Adkin's concern that continued use of hidden recording devices might provide reporters with a "license to trespass or to intrude by electronic means into the sanctity of another's home or office"[59] seems unfounded. Even if the amended statute with its attendant criminal penalties were invalidated, reporters would probably still be subject to civil liability in tort for invasion of privacy and trespass.[60] Furthermore, the court's preoccupation with invasion

57. For example, no "reasonable expectation of privacy" exists as to any statement made openly in a crowded section of a public park with the knowledge that others can hear the statement. *See* Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133. *See also* Katz v. United States, 389 U.S. 347, 351 (1967).

58. See note 44 *supra*. While FLA. STAT. §934.02(2) (1977) removes reasonable expectations of privacy regarding "any public oral communication uttered at a public meeting," it does not remove the privacy expectations of persons speaking to reporters. The statute defines the term "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation*" (emphasis added). Whether a person possesses this reasonable expectation of privacy will necessarily depend upon the particular situation since the fourth amendment "protects people, not places." Katz v. United States, 389 U.S. 347, 351. The fact that a conversation takes place with a news reporter is not dispositive of the issue. The determination of whether the interviewee possesses a reasonable expectation of privacy must be based upon the unique circumstances of each case. Consequently, in many situations the investigative reporter will be forced to make the determination of whether this "reasonable expectation of privacy" exists at the scene of the interview, something even a judge would have trouble determining. Because of the potential criminal penalties for violation of the amended statute, certain techniques of investigative reporting allowed by the statute may not be attempted at all. For example, a politician speaking to shoppers in a shopping plaza might not possess a reasonable expectation of privacy as to his statements; therefore, the communication would be removed from the restrictions of FLA. STAT. §934.03 (1977). Nonetheless, reporters may be deterred from tape recording the politician's statements without permission since they will have to make an instant legal judgment as to the politician's reasonable expectation of privacy under threat of criminal prosecution if they reach the wrong conclusion. See note 4 *supra*. Thus, the amended statute may "chill" certain newsgathering activities protected by the first amendment. For an interesting discussion of "reasonable expectation of privacy" under Florida's Security of Communications Act with regard to police department monitoring of telephone calls, see [1976] FLA. ATT'Y GEN. ANNUAL REP. 375.

59. 351 So. 2d at 727.

60. Admittedly, there has been a paucity of cases in this area. Nevertheless, the case law that does exist supports a cause of action against intruding newsmen. See text accompanying notes 40-45 *supra*. One writer has explained the lack of lawsuits against newsmen in the intrusion area as a consequence of several factors: "First, the press has generally conducted its information-gathering without the use of surreptitious devices. It has been only recently that a few newsmen have become as comfortable with hidden cameras and microphones as with

of privacy and trespass seems misplaced with respect to those situations in which reporters have already obtained consent to make public the individual's statements but would like to discreetly record the conversation, while maintaining a relaxed air during the interview.[61] In this context the instant opinion is inconsistent with the view of privacy adopted in *Katz v. United States*[62] that "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of [constitutional protection]."[63]

The court's reliance on precedent to exclude corroborative newsgathering activities from first amendment protection also seems misplaced. Prior decisions are not dispositive of the novel issue presented in the instant case. Neither *Branzburg* nor *Pell* and *Saxbe* present a barrier to independent consideration of the news media's first amendment challenge to section 934.03(2)(d).

Although the Court in *Branzburg* rejected a first amendment argument in the unique context of a grand jury investigation, it did not hold that the government may freely restrict the newsgathering activities of the press.[64] To the contrary, the *Branzburg* decision acknowledged that the constitutional guarantee of freedom of the press extends to certain antecedent newsgathering activities.[65] *Pell* and *Saxbe* involved prison regulations that prohibited in-person interviews between members of the news media and specific prisoners.[66] In the prison environment, "it is obvious that institutional considerations, such as security and related administrative problems . . . require that some limitation be placed on such visitations."[67] Application of the "no greater access" doctrine of *Pell* and *Saxbe* should be limited to cases in which there exist overriding interests such as security and administrative efficiency. In sum, neither *Branzburg* nor *Pell* and *Saxbe* mandate the conclusion reached by the Florida supreme court under the facts of the instant case.[68]

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pencil and paper. Second, persons whose privacy is secretly violated rarely know it. Third, even if they are aware that someone has been snooping, the evidence to support a law suit is usually difficult to produce. Finally, a party ordinarily learns that a newsman has penetrated the so-called zone of privacy only after the information acquired is disseminated by use of mass media. In those cases, it is normally easier for the aggrieved party to maintain an action based on the publication of the material than to pursue legal redress for the intrusion itself." *Privacy and the Press, supra* note 40 at 66. *See also* W. PROSSER, LAW OF TORTS §117 at 802-09 (4th ed. 1971).

61. *Cf.* Sunbeam Television Corp. v. Shevin, 45 Fla. Supp. 53, 55 (11th Cir. Ct.), *rev'd*, 351 So. 2d 723 (Fla. 1977): "Certain terms of the statute now are almost [sic] meaningless when applied to a situation in which one party to a conversation is recording it without advising the other party, such as by referring to the recording activity as an 'interception' and by describing the offending conduct as intruding upon an 'expectation of privacy.'"

62. 389 U.S. 347 (1967).

63. *Id.* at 351. It may be contended that an individual who gives permission to make public his statements does not consent to public exposure of his voice, inflections, mood, etc. *See* Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

64. See text accompanying notes 18-23 *supra*.

65. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

66. See text accompanying notes 26-28 *supra*.

67. Pell v. Procunier, 417 U.S. 817, 826 (1974).

68. Moreover, the instant court's use of the Sigma Delta Chi v. Speaker, Md. House of Delegates, 270 Md. 1, 310 A.2d 156 (1973) decision to reject the news media's assertion that greater speed and accuracy are within the purview of the first amendment is not convincing.

Significantly, the instant court's approach to the media's claim of governmental interference departed from conventional first amendment analysis. When government regulations conflict with first amendment rights, the courts typically employ the more stringent judicial analysis of the "compelling state interest" test or "strict scrutiny" approach.[69] Strict scrutiny removes the presumption of validity usually accorded a state regulation[70] and shifts the burden to the state to demonstrate that the regulation promotes a compelling state interest.[71] The strict scrutiny approach further requires that the legislation in question substantially further the governmental interest sought to be advanced,[72] and that the regulation be the least restrictive means of doing so.[73] If a less restrictive means is found, the court usually strikes down the regulation in order to preserve first amendment freedoms.[74] In the present case, the court declined to employ this mode of analysis. First, it did not require the state to demonstrate a compelling state interest that is substantially furthered

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That decision is not binding on the Florida supreme court and there are numerous subsequent decisions holding to the contrary. See note 51 *supra*.

69. *See, e.g., In re* the Adoption of Proposed Local Rule 17, 339 So. 2d 181, 184 (Fla. 1976): "Any direct restraint by government upon First Amendment freedoms of expression and speech must be subjected by the courts to the closest scrutiny . . . ." Sunbeam Television Corp. v. Shevin, 45 Fla. Supp. 53, 56 (11th Cir. Ct. 1977). The "strict scrutiny" test was articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), although it probably originated with Justice Stone's famous "Footnote Four" in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

70. In cases involving the authority of the state to establish economic regulations, the Supreme Court has upheld such regulations as long as they bear a "rational relationship" to their objectives. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). For a detailed discussion of the less strict "rational relationship" test, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

71. *In re* Adoption of Proposed Local Rule 17, 339 So. 2d 181, 184 (Fla. 1976) ("[T]he government carries a heavy burden of showing a justification of its imposition [of restraints upon first amendment freedoms] . . .); State v. McIntosh, 340 So. 2d 904, 908 (Fla. 1976) ("Any form of prior restraint of expression comes to a reviewing court bearing a heavy presumption against its constitutional validity; therefore, the party who seeks to have such a restraint upheld carries a heavy burden of showing justification for the imposition of such a restraint.") *See also* Elrod v. Burns, 427 U.S. 347, 362 (1976); Buckley v. Valeo, 424 U.S. 1, 25, 66-88 (1976); NAACP v. Button, 371 U.S. 415, 438 (1963).

72. *See,* Elrod v. Burns, 427 U.S. 347, 362 (1976) ("[I]t is not enough that the emans chosen in furtherance of the interest be rationally related to that end."). *See also* Buckley v. Valeo, 424 U.S. 1, 64 (1976); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

73. *See In re* Adoption of Proposed Local Rule 17, 339 So. 2d 181, 185 (Fla. 1976) ("the proposed Rule is too broad in that there are available reasonable alternatives which have a lesser impact on First Amendment freedoms."); Elrod v. Burns, 427 U.S. 347, 362-63 (1976) ("the Government must emplo[y] means closely drawn to avoid unnecessary abridgement . . . .") (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976)).

74. If a less drastic means of achieving the governmental objective is available, the first amendment interest conflicts with the statutory means of achieving the objective rather than with the objective itself. In that situation, the first amendment interest should predominate because the first amendment is a specific restriction upon governmental authority. *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

by the statute.[75] Moreover, the instant court failed to consider whether less drastic means exist to safeguard the privacy interests that the statute purports to protect.

Instead of conducting an independent inquiry into the necessity of an absolute prohibition of the use of hidden recording devices, the instant court simply deferred to legislative judgment, holding that enactment of the statute to protect privacy was a valid "policy decision" for the Florida legislature.[76] In adopting this approach, the court avoided its duty to actively scrutinize state actions which conflict with first amendment guarantees. This represents a retreat from the usual judicial protection accorded constitutional rights.[77] When the fundamental liberties of privacy and freedom of the press conflict, the courts should conduct their own balancing test, rather than defer mechanistically to legislative judgment.[78] The instant court's decision that the first amendment rights of the press do not include a constitutional right of corroboration of newsgathering activities "when the legislature has statutorily recognized the private [sic] rights of individuals," is disturbing.[79] The decision may encourage future courts to affirm summarily the validity of privacy statutes that abridge first amendment rights, rather than to balance the particular privacy interests at issue against the social interest in freedom of the press. Moreover, since the constitutional underpinnings for the decision were not apparent, the instant opinion fails to provide guidance for other courts in interpreting this limitation upon newsgathering.[80]

The extension of the "no greater access" doctrine of *Pell* and *Saxbe* to the instant case indicates that the Florida supreme court will view media challenges to restraints upon newsgathering with skepticism. Further, courts following the reasoning of this decision will be more likely to apply the "no greater access" doctrine despite the absence of compelling reasons for limiting public

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75. The Florida supreme court apparently applied the traditional "rational relationship" test, which presumes the validity of the state regulation. 351 So. 2d at 726-27 ("This was a policy decision by the Florida Legislature to allow each party to have an expectation of privacy from interception by another party. . . ."). However, it could be argued the statement, "[t]he First Amendment is not a license to trespass or to intrude by electronic means into the *sanctity* of another's home or office" (emphasis added), *id.*, indicated the court's belief that the privacy interests protected by the statute are compelling. It is interesting to compare the instant court's approach with the mode of analysis employed by the trial court, 45 Fla. Supp. 53, 56 (11th Cir. Ct. 1977), which stated: "Any restraint by government upon First Amendment freedoms of expression must be subjected by the courts to the closest scrutiny, and the government carries a heavy burden of showing justification for its imposition." (quoting *In re* the Adoption of Proposed Local Rule 17, 339 So. 2d 181, 189 (Fla. 1976)). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971); Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975); State v. McIntosh, 340 So. 2d 904, 908 (Fla. 1976).

76. 351 So. 2d at 726-27.

77. Compare the approach employed in the instant case with previous Florida supreme court decisions involving restraints upon the news media, discussed at notes 24, 71 & 73 *supra*.

78. See text accompanying note 39 *supra*.

79. 351 So. 2d at 727. The instant court failed to cite any authority which directly or indirectly supports this statement, nor did the court articulate the premises upon which it was based.

80. See note 79 *supra* and accompanying text.

and press access.[81] Thus, the instant decision will certainly compound the media's difficulties in challenging restraints upon newsgathering activities.

Although the decision in the instant case signals a laudable commitment to the individual's right of privacy, it nonetheless represents an anomolous deviation from established principles of constitutional adjudication. When first amendment freedoms conflict with a state regulation, conventional constitutional analysis requires a thorough judicial evaluation of the necessity for the regulation. The judiciary should not automatically subordinate newsgathering activities to legislative recognition of privacy rights, since such an interpretation could significantly and unnecessarily limit first amendment rights. Only a statutory change could assure that neither press nor privacy rights are needlessly limited. The Florida Legislature should again amend the challenged statute to its previous form allowing for the lawful interception of communications when one or more of the parties to the communication has consented to the interception.[82] Reporters working under deadline pressure should not be required to make instant legal judgments about another person's "reasonable expectations of privacy" under a threat of criminal penalty if they reach the wrong conclusion.[83] A criminal statute that necessitates such risks should be upheld only when a compelling state interest is demonstrated.

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81. See text accompanying notes 56-67 *supra*.

82. Fla. S. 57 (Reg. Sess. 1978, introduced by S. Gallen), proposes to amend FLA. STAT. §934.03(2)(d) (1977) to its form prior to the 1974 amendment. The bill provides: "It is lawful under this chapter for a person to intercept a wire or oral communication when *one or more* of the parties to the communication have given prior consent to such interception." (words italicized would be additions).

83. See note 58 *supra* and accompanying text. For an example of the deadline pressures placed upon investigative reporters, B. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN, 170-98 (1974).