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Evidentiary Privilege: The Development of Federal Common Law Press Privilege

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EVIDENTIARY PRIVILEGE: THE DEVELOPMENT OF FEDERAL COMMON LAW PRESS PRIVILEGE—*Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

I. INTRODUCTION

"A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

The inability of the British press to publish information unfavorable to the Crown without the incessant threat of being charged with sedition,[2] compelled the founding fathers to constitutionally guarantee the American press' right to gather and disseminate news under the aegis of the first amendment.[3]

While newsgathering and publishing enjoy a constitutionally protected position,[4] the Constitution, itself, does not expressly extend this privilege to cover a reporter's work product.[5] This lacuna has repeatedly given rise to a rather peculiar conflict between a reporter/citizen's duty to testify and his professional/ethical obligation not to reveal the source of confidentially obtained material.[6]

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1. 9 J. MADISON, WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910) (to W. T. Barry, August 4, 1822).

2. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 298-387 (1883).

3. U.S. CONST. amend. I.

4. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

5. *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

6. Ex parte Nugent, 18 F. Cas. 471 (D.C. Cir. 1848) (reporter jailed for contempt of Congress for refusing to reveal the source of his information regarding the contents of secret documents before the Senate, concerning the cessation of hostilities with Mexico); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957) (no reportorial privilege recognized in the absence of a state statute); Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897) (reporter held in contempt of the state senate after refusing to answer interrogatories concerning confidential information); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919) (refusal to respond to grand jury inquiries for "personal reasons" considered an inadequate basis upon which to recognize privilege); Clein v. State, 52 So.2d 117 (Fla. 1950) (canon of journalistic ethics regarding nondivulgence of confidential sources found not to be recognized at common law); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911) (reporter's promise of confidentiality and fear of dismissal for compelled violation of this trust considered inadequate grounds for the application of privilege); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887) (journalist ordered to reveal the source of a reported statement, which had become the subject of a libel suit); In re Grunow, 84 N.J.L. 235, 85 A. 1011 (N.J. 1913) (reporter's pledge to maintain a confidence deemed not to be sanctioned by law);

The press has long maintained that the compelled disclosure of these sources would necessarily impair their ability to obtain confidential information in the future,[7] and would, thereby, have a chilling effect on both their right and obligation to gather and report news under the first amendment.[8]

The federal judiciary, in a number of recent decisions,[9] has attempted to ameliorate the frequency of such clashes between professional and civic duty by expressly delineating the parameters of press privilege. *Riley v. City of Chester*[10] is the most recent of those decisions.

II. FACTS

On October 19, 1979, policeman and mayoral candidate, William Riley, filed a civil rights action in the United States District Court for the Eastern District of Pennsylvania against Joseph F. Battle, Mayor of the City of Chester, and John Owens, the city Chief of Police.[11] Riley's suit alleged an abridgement of his constitutional right to freely conduct a campaign for public office, as a result of unwarranted surveillance and investigation into his conduct as a police officer. When the results of these investigations were subsequently leaked to the press for publication, Riley sought a preliminary injunction to halt any such further activity.[12]

At the preliminary injunction hearing, Geraldine Oliver, staff writer for the Delaware County Daily Times, was called as a witness regarding one of several articles which Riley had previously submitted into evidence. Ms. Oliver testified that she had written the article without actually having seen Riley's personnel file. When questioned about the source of her information, however, she refused to answer, stating that the information sought was privileged, pursuant to both

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People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936) (court refused to recognize reportorial common law privilege).

7. *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

8. 259 F.2d at 547-48.

9. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966, (1973); Zerilli v. Bell, 458 F. Supp. 26 (D.D.C. 1978).

10. 612 F.2d 708 (3d Cir. 1979).

11. The complaint was filed pursuant to 28 U.S.C. § 1343 (Supp. 1979) and 42 U.S.C. § 1983 (Supp. 1979).

12. 612 F.2d at 710-11 n.2. Riley was investigated over a 13 year period for abuse of sick leave, failure to report for work, failure to take a citizen's complaint report, possible complicity in leaking confidential information about vice raids and rental cars used by vice officers, failure to possess a proper Pennsylvania driver's license, and for the alleged transport of bootleg whiskey into the State of Pennyslvania.

the first amendment and the Pennsylvania Shield Law.[13] When Ms. Oliver again refused to answer, after having been directed by the court to do so, she was cited for civil contempt.

III. DECISION

A November 2, 1979 hearing before the Third Circuit was scheduled on Ms. Oliver's motion for bail and for a stay of execution of her contempt order. Both parties consented to expand the hearing to encompass not only Ms. Oliver's motion for summary reversal, but also Officer Riley's motion for summary affirmance of the district court's contempt citation. After reviewing the merits, the court of appeals overturned this citation, based upon Officer Riley's failure to adequately demonstrate a specific need for the source of Ms. Oliver's information sufficient to overcome the assertion of a qualified first amendment privilege.

IV. ANALYSIS

A. Historical Background

Traditionally, courts have been singularly unsympathetic to the press' assertion that confidential sources and information should be recognized as privileged at common law.[14] For policy reasons, courts have been loathe to recognize privilege in any but a few limited circumstances.[15] The prevailing judicial attitude has been that "[t]he public interest is best served by the paramount requirement that all facts relevant to a litigated issue should be available to the court to the end that the truth may be ascertained."[16]

Thus having failed to obtain the desired protection of their work product at common law, journalists turned to state legislatures for support, and achieved a certain modicum of success. Since 1896, twenty-

13. 42 PA. CONS. STAT. ANN. § 5942(a) (Purdon Supp. 1979) provides that:
No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

14. *See* note 6 *supra*.

15. *E.g.*, Alexander v. United States, 138 U.S. 353 (1891) (at common law, confidences between attorney and client in a professional relationship are considered to be privileged); Schreffler v. Chase, 245 Ill. 395, 92 N.E. 272 (1910) (at common law, private conversations or communication between husband and wife are deemed to be confidential and privileged).

16. S. GARD, JONES ON EVIDENCE § 21:1 at 745 (6th ed. 1972).

six states[17] have enacted laws which, at least, partially shield confidentially obtained sources and information. Frequently, however, the relative degree of protection offered by these statutes has been found to be inadequate.[18]

The failure to obtain common law status, and the equivocal nature of state shield laws led columnist Marie Torre to assert that, by extrapolation, the first amendment mandated judicial recognition of journalistic privilege.[19] This argument was presented relative to a claim of defamation filed by actress Judy Garland against the Columbia Broadcasting System, following the publication of allegedly "false, defamatory, and highly damaging"[20] remarks in Torre's column, which were attributed to a CBS "network executive."[21] Torre refused to reveal the identity of her informant, and was held in criminal contempt.

On appeal she argued that the compelled disclosure of confidential information results in restraint of the flow of news from news sources to the press and thereby to the public. This result was in direct contravention to both the privileged status and the spirit of the first amendment. Despite the logic of Ms. Torre's appeal, however, Circuit Judge Potter Stewart held that although compelled disclosure might indeed infringe upon the freedom of the press, the information sought

17. ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (West 1980); ARK. STAT. ANN. § 43-917 (Bobbs-Merrill 1977); CAL. EVID. CODE § 1070 (West Supp. 1980); DEL. CODE ANN. tit. 10, §§ 4320-4326 (Michie 1974); ILL. ANN. STAT. ch. 51 §§ 111-119 (Smith-Hurd Supp. 1980); IND. CODE § 34-3-5-1 (1976); KY. REV. STAT. ANN. §§ 421.100 (Baldwin 1979); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1981); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. COMP. LAWS ANN. § 767.5a (1968); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1981); MONT. CODE ANN. § 26-1-901 to 903 (1979); NEB. REV. STAT. §§ 20-144 to 146 (1977); NEV. REV. STAT. § 49.275 (1979); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13, -29 (West 1976 & Supp. 1980); N.M. STAT. ANN. 38-6-7 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976); N.D. CENT. CODE ANN. § 31-01-06.2 (Allen-Smith 1976); OHIO REV. CODE ANN. § 2739.12 (Page 1954); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1979); 42 PA. CON. STAT. ANN. § 5942 (Purdon Supp. 1979); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Bobbs-Merrill Supp. 1980); TENN. CODE ANN. § 24-113 (Michie Supp. 1979).

18. In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div. 1972), *cert. denied*, 410 U.S. 991 (1973) (shield law protecting confidential information deemed inapplicable after the identity of the informant had been published). Forest Hills Util. Co. v. City of Heath, 37 Ohio Misc. 30, 302 N.E.2d 593 (1973) (off-the-record information not covered by shield law); People v. Dan, 41 A.D.2d 687, 342 N.Y.S.2d 731, *appeal dismissed*, 32 N.Y.2d 764 298 N.E.2d 118, 344 N.Y.S.2d 955 (1973) (personal observation of events not covered by shield law).

19. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

20. 259 F.2d at 547.

21. *Id.*

went to the very heart of the case, thereby, rendering the recognition of privilege to be inappropriate.[22]

Recent developments,[23] however, have reflected that despite Torre's personal defeat, she nevertheless discovered the only alembic from which judicial recognition of press privilege could be distilled—the apparatus of the first amendment.

B. Journalistic Privilege at Federal Common Law

In a non-diversity federal issue case, a federal court does not sit as a local tribunal.[24] Its decision, therefore, must turn upon the law of the United States, rather than that of the forum state.[25] The permissibility of evidence in such a case is governed by the Federal Rules of Evidence. Rule 501, which pertains to testimonial privilege, states the following:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . .[26]

Thus the *Riley* court turned to an examination of federal common law in an effort to determine the validity of the assertion of press privilege.

The Supreme Court's first treatment of the issue of reportorial privilege occurred in *Branzburg v. Hayes*.[27] *Branzburg* was composed of four companion cases[28] in which the court examined the press' con-

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22. *Id.* at 550.
23. *See* note 9 *supra*.
24. *See* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).
25. *Id.*
26. FED. R. EVID. 501.
27. Branzburg v. Hayes, 408 U.S. 665 (1972).
28. Two of the cases, *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), *aff'd*, 408 U.S. 665 (1972) and *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd*, 408 U.S. 665 (1972), involved reporter Branzburg's refusal to identify the sources used in two articles on drug production and use. Relying upon the first amendment, Branzburg refused to testify before a grand jury. The third case, *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd*, 408 U.S. 665 (1972), involved newsman Pappas' refusal to testify before a grand jury concerning what he had witnessed inside the New Bedford, Massachusetts headquarters of the Black Panther Party during a period of civil disorder. Pappas, too, relied upon the first amendment privilege protecting confidential sources and information. The fourth case, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972), involved reporter Caldwell's refusal to

tention that the first amendment privileged their confidential information and sources, and therefore, excused them from the obligation to testify about such matters before grand jury investigations into related criminal activities. Mr. Justice White, in delivering the opinion of the Court, formulated the press' position to be as follows:

> [T]o gather news it is often necessary to agree not to identify the source of information published . . .; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measureably deterred from furnishing publishable information all to the detriment of the free flow of information protected by the First Amendment.[29]

The Supreme Court took cognizance of the fact that at common law, throughout the course of Anglo-American jurisprudential history, courts have "consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."[30] Moreover, the Court noted, "[I]t [was] clear that the first amendment [did] not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[31]

Thus the Court concluded that "the public interest in law enforcement and in ensuring effective grand jury proceedings" sufficiently out-weighed "the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation on criminal trial."[32]

For the purpose of examining the development of federal common law applicable to instances of compelled disclosure in a civil case, such as *Riley*, Mr. Justice Powell's concurring opinion is more relevant than the opinion of the majority. Taking cognizance of Justice White's concluding remark that, despite the rejection of privilege in specific instances of criminal investigations, "news gathering [was] not without its First Amendment protections."[33] Justice Powell concluded that the Court did not hold that newsmen were "without constitutional rights

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either appear or testify before a federal grand jury investigating the activities and aims of the Black Panther Party. Caldwell asserted that such an appearance and testimony would destroy his credibility with the Black Panthers, and, thereby, frustrate the reportorial process protected by the first amendment.

29. Branzburg v. Hayes, 408 U.S. 665, 679-80 (1972).
30. *Id.* at 685.
31. *Id.* at 682.
32. *Id.* at 690-91.
33. *Id.* at 707.

with respect to the gathering of news or in safeguarding their sources."[34]

Thus recognizing the narrow range of applicability of the *Branzburg* decision, and taking note of the lack of any further Supreme Court direction on the validity of the assertion of privilege in civil cases, the lower federal courts have utilized Justice Powell's opinion as an appropriate source from which to delineate the parameters within which the assertion of such privilege would be acceptable.[35]

Baker v. F & F Investment,[36] for example, involved a magazine article which graphically detailed "blockbusting" techniques that were being utilized by Chicago area realtors.[37] A motion to compel the disclosure of the non-party journalist's confidential sources was denied by the United States District Court for the Southern District of New York.

The Second Circuit Court of Appeals affirmed, noting that the journalist was not a party to the underlying action, that there were other available sources through which the information might have been obtained, and that the appellants had not exhausted these sources. Moreover, citing *Garland v. Torre*,[38] the court specified that the appellants had failed to demonstrate that the identity of the informant in question was essential to the disposition of their case.

Citing Justice Powell's concurring opinion, the court distinguished *Branzburg v. Hayes*[39] noting that the rule in *Branzburg*,[40] narrowly applied to grand jury investigations into alleged criminal activities. *Branzburg* did not, therefore, dictate the disposition of a first amendment reportorial privilege claim in a civil action. Thus the court concluded that compelled disclosure, in this case, was not essential to protect the public interest in the orderly administration of justice.

Silkwood v. Kerr-McGee Corp.,[41] involved a non-party investigative reporter's motion for a protective order against the compelled disclosure of confidential sources and information during a pretrial proceeding. The Tenth Circuit found the district court to be in error for failing to balance the opposing considerations relevant to a proper determination of whether a compelling interest sufficient to

34. *Id.* at 709.
35. *See* note 9 *supra*.
36. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).
37. 470 F.2d at 780.
38. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).
39. 408 U.S. 665 (1972).
40. *Id.*
41. 563 F.2d 433 (10th Cir. 1977).

overcome the assertion of a first amendment privilege existed. The court stated that the following considerations, as set forth in *Garland v. Torre* must be examined: "1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been successful. 2. Whether the information goes to the heart of the matter. 3. Whether the information is of certain relevance. 4. The type of controversy."[42]

The *Silkwood* court further cited as error the failure of the district court to consider the existence of a qualified privilege covering confidential news sources and information related to non-criminal activities, in light of Justice Powell's concurring opinion in *Branzburg*.[43]

Zerilli v. Bell[44] similarly involved the assertion of a qualified first amendment privilege, relative to a motion to compel discovery of the sources of confidential information in a civil action.

In examining the weight that should be given to a claim of privilege in a civil suit, the court cited the following comment made by the Second Circuit Court of Appeals in *Baker v. F & F Investment*:

> [I]f . . . instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.[45]

Thus, considering the weight that should be given a claim of privilege in a civil suit and the failure of the party demanding disclosure to exhaust all other available means of possibly obtaining the information sought, per the *Garland* criteria,[46] the *Zerilli* court deemed compelled disclosure to be inappropriate.

In light of these and other lower federal court decisions following *Branzburg*,[47] the *Riley* court determined that there is now little question that the refusal to divulge confidential sources and information has been recognized as qualifiedly privileged under the first amendment.

C. *Applicability of Press Privilege in Riley*

The applicability of this qualified evidentiary privilege is determined on an ad hoc basis by weighing the significance of the constitutional

42. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). *Construed in* Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

43. 408 U.S. 665 (1972).

44. 458 F. Supp. 26 (D.D.C. 1978).

45. Baker v. F & F Inv., 470 F.2d 778, 785 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

46. *See* note 42 *supra*.

47. *See* note 9 *supra*.

interest in nurturing freedom of the press against the interest of the litigant and/or society in obtaining the information sought. Accordingly, the circumstances under which privilege is claimed, necessarily, will play a paramount role in this determination.

Citing *United States v. Nixon*,[48] the Third Circuit in *Riley* noted that when a privilege is grounded in constitutional policy, a "demonstrated, specific need for evidence" must be shown before it can be overcome.[49] It therefore became incumbent upon Officer Riley to demonstrate how the vindication of his civil rights were necessarily dependent upon the compelled disclosure of the source of Ms. Oliver's information.

The *Riley* court determined that a showing of specific need could be made by conclusively establishing the existence of each of the primary elements reflected in the previously discussed post-*Branzburg* cases.[50] First, there must be a threshold showing of the materiality and relevance of the information being sought.[51] Second, there must be a showing that no other source for this information exists.[52] Third, if other sources do exist, there must not only be a good faith showing that an attempt has been made to obtain the denied information from these other sources, but that such other means of obtaining this information have, in fact, been exhausted.[53]

The court recognized that the establishment of these elements would adequately reflect that the only "practical access to crucial information necessary for the development of the case is through the newsman's sources,"[54] and that such a showing would be sufficient to overcome the assertion of a qualified first amendment privilege.

In examining the record of the trial court's consideration of these elements, however, the Third Circuit found it to "contain only a general assertion of necessity . . . fall[ing] far short of the type of specific findings of necessity which may overcome the privilege."[55]

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48. 418 U.S. 683 (1974).

49. *Id.* at 713.

50. *See* note 9 *supra*.

51. *See also* New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978); Gulliver's Periodicals, Ltd. v. Charles Levy Circulating Co., 455 F. Supp. 1197 (N.D. ILL. 1978).

52. *See also* Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Altemose Constr. Co. v. Building & Constr. Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975); Apilcella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975); Democratic Nat'l. Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

53. *See also* Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976); In re Roche, 101 S. Ct. 4 (1980).

54. Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976), *quoted in* Riley v. City of Chester, 612 F.2d 708, 717 (3d Cir. 1979).

55. Riley v. City of Chester, 612 F.2d 708, 717 (3d Cir. 1979).

The appellate court cited five specific instances in the lower court record, which reflected the clearly erroneous nature of that court's finding of need. First, "at the time the appellant was adjudged to be in contempt,"[56] neither the testimony of Mayor Battle nor that of the other reporters had yet been heard. Second, "no inquiry had been made into the identity of other persons who had access to plaintiff's personnel file and who may have been the source of the 'leak' of information."[57] Third, "no attempt was made to elicit testimony from the other defendant, John Owens, Chief of Police of the City of Chester, who clearly would have been someone with access to the personnel file."[58] Fourth, "plaintiff's counsel who questioned Mayor Battle in detail during the hearing never asked him if he was the source of the information which appeared in appellant's news story."[59]

These four instances clearly reflect that other obvious sources of information did, indeed, exist, and that Officer Riley failed to make any effort to obtain the desired information from these other sources.

The fifth instance of error cited by the Third Circuit was that the news story in question "referred to investigations completed long before the election campaign began,"[60] thereby, bearing only marginal relevance to Riley's allegation of current civil rights interference.

Thus the requisite showing of specific need in this case was wholly inadequate to the purpose of overcoming the assertion of reportorial privilege under the aegis of the first amendment.

CONCLUSION

Both the narrow import of the *Branzburg*[61] decision and the unwillingness of the Supreme Court to further expand its position on press privilege have encouraged a number of lower federal courts to explore and establish the parameters within which the assertion of first amendment journalistic privilege will be acceptable. The *Riley* court explored the boundaries of the privilege controversy so succinctly as to conclusively elucidate the guidelines that must be followed in the determination of future questions of press privilege.

Thus reporters need no longer rely on either the existence or the caprice of state shield laws to protect their work product. Rather, the protection which they have long sought has qualifiedly, but une-

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 718.
61. Branzburg v. Hayes, 408 U.S. 665 (1972).

quivocally been recognized to exist within the penumbra of the very instrument which guarantees their right to be free of unwarranted governmental intrusion—the first amendment.

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