Cautions About Applying Neuroscience to Batterer Intervention

Edward Gondolf

Researchers have recently pointed out the high prevalence of “intermittent explosive disorder” (IED) underlying many of the violent outbursts in our society. They estimate that at least a third of domestic violence perpetrators, or those we frequently refer to as “batterers,” are likely to suffer from this disorder. This claim, along with a number of related findings, appears to have implications for domestic violence courts and judges’ decisions to mandate offenders to batterer programs. The issue is that if this disorder is related to brain activity that warrants medical treatment, then in many cases, domestic violence offenders may be unresponsive to more conventional counseling and education efforts that typify batterer intervention. The assertions about IED come from a rapidly advancing line of research in neuroscience—that is, brain activity and its association with behavior. The emerging concern is that the implications stemming from this research are subject to misuse and overuse and therefore warrant some clarification and caution.

NEUROSCIENCE AND ITS IMPLICATIONS

Advances in neuroscience over the last decade are increasingly entering the courtroom. Specifically, research on the brain has established associations between certain brain activity and outward behavior. Current brain activity has, in turn, been traced to developmental experiences, such as traumatic events in one’s past. The research has led to a broader and more complex view of how individuals think and act, but it has also raised questions about how to deal effectively with the more violent offenders. Parts of the brain that regulate moral reasoning and judgment, for instance, may not be sufficiently or fully developed, and an individual with this type of brain function may therefore be prone to violent outbursts. Brain scans tend to corroborate this association. To what extent do we, then, “blame the brain” for violent behavior and treat it in the course of intervention? The implications of neuroscience seem to be that medication influences the brain’s activity, or incarceration may be more appropriate than trying to persuade the person to change through conventional cognitive-behavior counseling. The latter may appeal to a reasoning capacity that many violent offenders simply don’t have.

This view has immediate implications for so-called batterer counseling or education programs used with men who are arrested for domestic violence. These programs typically follow cognitive-behavioral approaches that prompt men to take responsibility for their behavior. They imply that some “free will” is possible in making a choice not to act violently toward others. They also shift attention toward the well-being and safety of the victim, rather than the men’s self-centered wants and desires. Those who doubt the effectiveness of these programs are likely to see the implications of neuroscience as an answer. Many men might not have the capacity to benefit from such programs and may need biomedical treatment that addresses their brain development or deficiencies.

The recent brain studies substantiate the diagnosis of “intermittent explosive disorder” (IED) to explain much of the anger-filled violence in our society—from road rage to domestic violence. As the name suggests, intermittent explosive disorder is typified by outbursts of temper and violence that occur...
in response to minimum provocation. A low-level of activity appears in the cognitive and reasoning part of the brain, which checks impulsive reactions. IED proponents argue that the biological and structural roots of violence warrant treatment along the lines of hypertension or diabetes—that is, as a medical problem, rather than treatment of character, beliefs, and actions.

LIMITATIONS AND CONCERNS

The main concern in the legal field has been in the potential misuse and overuse of neuroscience research and its application in classifications like IED. The tendency among practitioners in general is to draw conclusions based on the bottom-line of research, which is complex, nuanced, and qualified. Most of the neuroscience researchers themselves caution against this. One recent review of the applications of neuroscience concludes:

Neuroscience is increasingly identifying associations between biology and violence that appear to offer courts evidence relevant to criminal responsibility…. However, there is a mismatch between questions that the courts and society wish answered and those that neuroscience is capable of answering. This poses a risk to the proper exercise of justice and to civil liberties.

A recently commissioned book on the topic, Neuroscience and the Law, similarly questions using the implications of neuroscience in legal decision-making. It cautions that the law assumes that individuals are responsible for their actions and are capable of learning and abiding by the rules of society. The assumption that an individual is not capable of these behaviors enters an arena of competency that requires a stronger body of evidence than is currently available in neuroscience.

Researchers themselves point out several limitations. How the brain works and translates into “mind” is still a mystery. The association between brain activity and violent behavior is just that—an association and not necessarily a “cause.” Moreover, the effectiveness of brain-related treatments is still uncertain. Most researchers, including those promoting IED, still acknowledge a role for cognitive-behavioral group counseling. The research does not therefore indicate replacing current batterer counseling and education but raises additional considerations and supplemental treatment for extreme cases. In fact, proponents of IED acknowledge that conventional cognitive-behavioral approaches can assist and reinforce behavioral changes, but the focus of treatment does clearly shift under IED assumptions.

QUESTIONS FOR BATTERER INTERVENTION

At the heart of the issue is the extent of brain-related problems like “intermittent explosive disorder” among domestic violence offenders and the need for medically oriented treatments. Should most batterers first go through an extensive assessment for such disorders and brain problems? Should batterer treatment be delivered in medical settings or clinics that may recommend counseling as a supplement to the medical treatment for violence? Or is it sufficient to keep batterer programs in the community with the possibility of additional referrals for extreme behavioral problems?

The fundamental question is the numbers of men who might be identified as having brain-related impairments that warrant medical treatment in addition to, or instead of, batterer counseling or education. The assertion that as many as one-third of batterers may be acting out of IED seems high in light of our batterer research. In our court-mandated samples, we found very little evidence of symptoms associated with IED. A psychological test (Millon Clinical Multiaxial Inventory-III) administered to 864 batterers in four different cities showed less than 10% having symptoms of impulsivity, post-traumatic stress, or borderline disorders. We found similar results using the Brief Symptoms Inventory (BSI) with nearly 1,000 men in Pittsburgh. Moreover, approximately two-thirds of the men who screened positive on the BSI for psychological distresses, and received a clinical evaluation at a major teaching hospital, were diagnosed with an adjustment disorder requiring no further treatment. Only 5% received a diagnosis related to impulse control. An additional study of the women’s descriptions of violent incidents produced very few cases in which the pattern of violent events could be characterized by independent outbursts or explosions of rage.

A practical issue is the resistance of court-ordered batterers to comply with psychiatric or neurological evaluation and treatment. Their resistance to such referrals appears in our studies to be very high, and the ability and willingness of psychiatric clinics to supervise compliance seems low. Less than a quarter (23%) of the men who were required to obtain mental-health referrals were actually evaluated; 15% were advised to receive treatment; and 8% attended a treatment session. Only 6% of voluntary referrals ever received an evaluation. This low compliance rate, even under the mandated stipula-

13. "Id." 
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The consensus of these experts is that social messages, including: “From the legal and research perspective, available neuroscience has done much to elaborate the development of behavior over time and to confirm the impact of childhood experiences on adult behavior. Questions remain as to the centrality of brain activity in determining behavior and the malleability of behavior. An analogous controversy has emerged over “attention deficient and hyperactivity disorder” (ADHD). One side has promoted the use of drugs like Ritalin to alter the brain activity underlying the problem, while opponents argue that the ADHD diagnosis and its assumptions have been overused and misused for a problem that has primarily social roots and corrections. Interestingly, several books by psychiatrists, psychologists, and researchers are now exploring the development of aggression, bullying, and violence in boys. The consensus of these experts is that social messages, interactions, images, and roles pressured on boys today warrant our primary attention. Our best intervention is ultimately to help boys and young men recognize and counter the socialization and social pressures that result in aggression and violence. The implication is that we need to do the same with adult men as well.

CAUTIONS FOR THE COURTS

The point here is for the courts to be cautious about applying the implications of neuroscientific research at this stage. As another article examining the advances of neuroscience concludes: “From the legal and research perspective, available neuroscience has done much to elaborate the development of behavior over time and to confirm the impact of childhood experiences on adult behavior. Questions remain as to the centrality of brain activity in determining behavior and the malleability of behavior. An analogous controversy has emerged over “attention deficient and hyperactivity disorder” (ADHD). One side has promoted the use of drugs like Ritalin to alter the brain activity underlying the problem, while opponents argue that the ADHD diagnosis and its assumptions have been overused and misused for a problem that has primarily social roots and corrections. Interestingly, several books by psychiatrists, psychologists, and researchers are now exploring the development of aggression, bullying, and violence in boys. The consensus of these experts is that social messages, interactions, images, and roles pressured on boys today warrant our primary attention. Our best intervention is ultimately to help boys and young men recognize and counter the socialization and social pressures that result in aggression and violence. The implication is that we need to do the same with adult men as well.

THE CASE FOR BATTERER COUNSELING

The case can certainly be made that the structured cognitive-behavioral approach is appropriate for the vast majority of the men court-ordered to batterer programs. This approach is generally prescribed for individuals with narcissistic and antisocial tendencies, and the majority of men in our studies show either or both of these tendencies. The reviews of intervention research, moreover, identify cognitive-behavioral approaches as the most effective in dealing with violent criminals. According to batterer-program evaluations, cognitive-behavioral approaches produce at least equivalent, and perhaps more efficient, outcomes compared to other approaches or formats. The vast majority of men’s partners endorse these programs, attribute the men’s change to them, and feel safer as a result.

Additionally, victim advocates have raised concerns over the implications of brain-based and pathological explanations for domestic violence. The explanations appear to displace the responsibility for the violence from the individual and reinforce batterers’ tendency to project blame and accountability. Batterers frequently play out this displacement of responsibility in their presentation of violent incidents. They describe themselves as losing control or “snapping” to make the violence appear accidental or to minimize a constellation of abuse. Without corroborating information carefully gathered from victims, what appears like IED may be a form of narcissistic or antisocial manipulation.

The brain-based explanations for violence may also counter batterer counseling or education programs that emphasize the need and ability to acknowledge and take responsibility for one’s behavior. In the cognitive-behavioral approaches, this acknowledgment is considered a key step toward the motivation and empowerment necessary to create change. The pathological explanations, furthermore, naively shift the focus from the institutional and social supports that reinforce—if not promote—domestic violence and the need to address the socialized beliefs, attitudes, and expectations that underlie domestic violence. There is much more to violence than “he just snaps.” Even violent outbursts associated with IED might be reduced if the expectations that cause frustration were lowered or changed.

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findings (regarding neuroscience) must be viewed as preliminary at best, and caution must be exercised so the information is not inappropriately applied from general findings to a specific case.”

In sum, it makes sense for now to continue to refer men to batterer programs and reinforce their compliance with this programming through supervision and sanctions, much as has been established in the “drug court” model. Batterer programs obviously need to send men with problems of explosive rage, depression, and alcohol abuse for additional evaluation and treatment. But most importantly, interventions need to better contain men who do not comply to batterer programs or those who re-offend, and provide more protection and safety planning for their victims. The striking finding in our batterer intervention research has been the apparent failure of the intervention system to restrain repeat offenders and the most violent offenders, which allows them to continue getting away with it.

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30. Id.
Amidst a fog of political divisiveness, Judith Miller found herself in the untenable situation of having to breach the journalists’ code of ethics, as well as her own personal promise of confidentiality, or go to jail. According to the government, she had obtained illegally disclosed information from a high-ranking member of President George W. Bush’s administration. Eventually, a grand jury issued Miller a subpoena that directed her to breach her promise of confidentiality by revealing the identity of her source. Miller claimed that she had a First Amendment right to withhold her confidential information from the grand jury. The court disagreed and, although she never published the information, Miller was sent to jail as punishment for protecting her source.

If nothing else, Judith Miller’s 85-day-prison term put America on notice of the alarming rate at which the government is using its unbridled subpoena power to splinter the press’s traditional role as the public’s government watchdog. In fact, the government is currently issuing subpoenas upon members of the press at a rate unmatched in at least 30 years. Additionally, the length of time that reporters are being held in prison, as punishment for honoring their covenant of confidentiality, is increasing at a similarly astonishing pace. Remarkably, the outcome of Judith Miller’s case could only encourage the government to subpoena reporters in droves. As the government is steadily increasing its use of subpoenas on reporters, the press’s ability to gather and disseminate information of public concern is simultaneously weakening.

Arguably, the scope of a reporter’s privilege should directly correlate with the nature of the proceeding through which the movant attempts to compel disclosure. Courts generally adhere to this principle, reasoning that the moving party’s countervailing interests differ in degree between civil, criminal, and grand jury proceedings. For instance, in a criminal proceeding, the movant/defendant who seeks to compel disclosure from a reporter has countervailing Fifth and Sixth Amendment rights to this information. Conversely, a movant/defendant who seeks to compel disclosure from a reporter in a civil proceeding does not have a competing constitutional right to the information. Thus, a reporter’s privilege is generally broader in civil proceedings than in criminal ones.

Interestingly, the efficacy of a grand jury’s right to compel a reporter to disclose confidential information falls somewhere between the criminal and civil contexts. In our society, the grand jury “serves the invaluable function . . . of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.” Although a grand jury is constitutionally mandated, it does not have a constitutional right to a reporter’s confidential information. Thus, this article will explore only the proper scope of a reporter’s privilege to withhold confidential information from a grand jury.

I. OVERVIEW

A. The Supreme Court’s Analysis

*Branzburg v. Hayes* is the only Supreme Court case that has precisely addressed the scope of a reporter’s privileged right to withhold confidential information from a grand jury. In *Branzburg*, the majority held that, absent a showing that the grand jury is conducting a bad-faith investigation, the First Amendment does not vitiate a reporter’s legal obligation to testify in front of a grand jury.

In *Branzburg*, the Court consolidated three separate cases where the reporters were asserting their right to withhold privileged information from a grand jury investigation. In all three of the cases, the reporters’ ability to gather news of public concern was conditioned on the reporters’ promise to keep certain information confidential. In the first case, the grand jury was seeking to compel disclosure of the reporter’s source after two separate stories were published; the first story was about the illegal synthesizing of hashish from marijuana and the second story reported on the local drug scene. In the other two consolidated cases, the grand juries were seeking to compel the reporters to disclose information about the suspected illegal activity of the Black Panther Party. After hear-

Footnotes
4. See e.g. Seth Sutel, *Legal Pressure Prompts Anxiety Among Sources*, Miami Herald, Oct. 25, 2004, at A3 (reporting two examples of sources refusing to provide newsworthy information out of fear that a subpoena would disclose their identity).
5. United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).
ing these three separate cases below, the outcomes in the circuit courts were inconsistent and, thus, the Supreme Court granted certiorari.11

Writing for the majority in Branzburg, Justice White held that, absent a showing of bad faith or harassment by the grand jury, the Constitution does not grant a reporter any privilege to withhold information from a grand jury investigation. Justice White premised the Court’s conclusion on the notion that rejecting the reporters’ privilege would not forbid or restrict the press’s use of confidential sources.12 Accordingly, the Court did not review the reporter’s claim under heightened scrutiny.

Initially, the Court articulated the dual purpose of a grand jury within our government. First, a grand jury must determine whether there is probable cause to believe that a suspected person has committed a crime; and, second, it is designed to protect innocent citizens from “unfounded criminal prosecution.”13 Furthermore, the Court concluded that grand juries are both constitutionally mandated and deeply “rooted in long centuries of Anglo-American history.”14 Therefore, according to the Court, a grand jury’s investigative powers are necessarily broad, including its ability to subpoena witnesses material to its task.

After providing this backdrop, the majority rejected the reporters’ contention that denying them a First Amendment privilege to protect confidential sources would significantly deter informants from providing reporters with confidential information in the future. Specifically, the majority explained that the reporters’ proffered evidence in support of their asserted privilege merely showed that reporters rely on confidential sources and not that the majority’s holding would unconstitutionally chill future informants from disclosing confidential information. Furthermore, the Court stated that the data was unpersuasive because it included opinion polls on this subject, which were highly speculative and completed by self-serving reporters. Thus, the Court concluded, “We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.”15 Ultimately, the Court found that it did not need to recognize a reporter’s privilege in order to protect the press’s ability to gather news and, therefore, the press’s right to withhold information from a grand jury was no greater than an average citizen.

Alternatively, Justice Stewart’s dissent proposed a classic balancing test designed to ensure that every reporter’s assertion of a constitutional privilege is determined on the facts of the case. The dissent’s balancing test proposed that, before attempting to compel a reporter to disclose confidential information to a grand jury, the government must:

1. show that there is probable cause to believe that

the newsman has information that is clearly relevant to a specific probable violation of law;

2. demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and

3. demonstrate a compelling and overriding interest in the information.16

Therefore, the dissent’s approach differed from the majority’s because it opined that limiting the scope of the reporters’ privilege to cases of bad faith or harassment would unconstitutionally infringe on the press’s First Amendment right to gather news.

Similarly, the dissent contended that the majority’s rule would cause future confidential informants to withhold information from the press. Justice Stewart’s dissent emphasizes the notion that a flexible reporter’s privilege is necessary to protect the newsgathering process and, thus, to promote the free flow of information that the First Amendment was meant to ensure. In contrast to the majority, Justice Stewart believed that the Court’s limitation of a reporter’s privilege would have a significant chilling effect, thereby suppressing the free flow of information.

Notably, Justice Powell wrote a concurrence to “emphasize what seem[ed] to [him] to be the limited nature of the Court’s holding.”17 According to Justice Powell, the Branzburg holding was not as formally rigid as it may appear. Instead, Justice Powell stated that a reporter has a remedy against compelled grand jury testimony where the reporter asserts any one of the following claims: (1) the grand jury is conducting its investigation in bad faith; (2) the reporter’s confidential information has too remote and tenuous a relationship to the grand jury’s investigation; or (3) “if [the reporter] has some other reason to believe that his testimony implicates [a] confidential source relationship without a legitimate need of law enforcement.”18 According to Justice Powell’s concurrence, if the reporter asserts one of these claims, then the court must balance the reporter’s freedom of press interest against the “obligation of all citizens to give relevant testimony with respect to criminal conduct.”19

B. The Judith Miller Case

Three decades after the Supreme Court’s decision in Branzburg, the United States Court of Appeals for the District

11. Id. at 679.
12. Id. at 681.
13. Id. at 686-87.
14. Id. at 687, 690 (citations omitted).
15. Id. at 695.
16. Id. at 743 (Stewart, J., dissenting).
17. Id. at 709 (Powell, J., concurring).
18. Id.
19. Id.
Thus, the Court Review - Volume 43

Thus, he concluded that

and

at 1168 (citations omitted).

Compare

that recognized Congress’s power to enact a quali-

Id.

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Miller

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Id.

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Times

20. 438 F.3d 1141 (D.C. Cir. 2006) [hereinafter Miller].

The opinion was initially issued in 2005 with substantial redactions because of its discussion of national security materials. In re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005). As explained in a separate opinion a year later in which the court concluded some of the redacted material could then be made public, the opinion was reissued with additional pages included, though some materials were still redacted. This article cites to the reissued opinion. In between Branzburg and Miller the circuit courts had applied the Branzburg rule inconsistently. Compare Storer Communications, Inc. v. Giovan, 810 F.2d 580, 584-85 (6th Cir. 1987) (ordering reporter to disclose to a grand jury the identity of a confidential source who was suspected of murder), and Lewis v. United States, 501 F.2d 418 (9th Cir. 1974) (ordering reporter to reveal information to a grand jury relating to the bombing of a government building), with In re: Williams, 766 F.Supp. 358, 370 (W.D. Pa. 1991), aff’d by an equally divided court, 963 F.2d 567, 569 (3d Cir. 1992) (quashing a grand jury subpoena that sought identity of the reporter’s source who violated a court order by providing the reporter with copies of documents used as evidence in a criminal trial).


24. Miller, 438 F.3d at 1144.

25. Id. at 1146-47.

26. Id. at 1148-49.

27. Id. at 1163-83 (Tatel, J., concurring).

28. Rule 501 became effective June 1, 1975 and provides in relevant part: “Privilege[s]…shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.” FED. R. EVID. 501.

29. Miller, 438 F.3d at 1166 (Tatel, J., concurring) (quoting Jaffee v. Redmond, 518 U.S 1, 14 (1996)).

30. Id. at 1168 (citations omitted).

31. Id. at 1169.
II. DISCUSSION

The following discussion attempts to illustrate how and why Branzburg should not control cases that, like Miller, deal with “illegal disclosures of confidential government information.” Initially, it distinguishes Miller from Branzburg based on the nature of the reporters’ information. Relying on this distinction, it contends that the First Amendment protects a reporter from disclosing the identity of a confidential government-agent informant. In addition, it proposes a reporter’s privilege whose scope is guided by the public’s interest in the reporters’ information and concludes that this approach is the best way to strike a balance between the competing constitutional interests of the government and the press. It then examines Branzburg’s reasoning against Miller’s facts to support the logic of its distinction. Lastly, this section applies its proposed rule to current conflicts between the press and the government in order to demonstrate its propriety.

A. Distinguishing Miller from Branzburg

Despite the Miller court’s conclusory pronouncement that the case was indistinguishable from Branzburg, the very nature of the information sought in the two cases is distinguishable. The confidential information sought in Branzburg was evidence containing the identity of self-purported drug dealers and drug users and the suspected illegal activity of a radical minority group. On the other hand, the information sought in Miller related to the identity of a government official who was suspected of unlawfully leaking information regarding government activity. Thus, Miller is distinguishable from Branzburg because a First Amendment reporter’s privilege to withhold only the identity of confidential government-agent informants will particularly foster the detection of governmental misconduct. Additionally, such a narrow reporter’s privilege will not significantly impede on a grand jury’s function of prosecuting extrinsic crimes, which was of paramount concern in Branzburg.

Quoting Branzburg, the Miller court reasoned that a reporter’s attempt to conceal a crime, via an assertion of a reporter’s privilege, is unconditionally outweighed by a grand jury’s good-faith interest in punishing the crime. However, this reasoning is misplaced in the context of “illegal disclosure of confidential government information” because it does not consider the nature of the information. This distinction is necessary because “information generated from press reports about government, serves as a ‘powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.’” Therefore, the scope of a reporter’s privilege should protect reporters from compelled disclosure of their confidential government-agent informants, provided that the information properly relates to an abuse of government power.

B. The First Amendment Provides a Qualified Reporter’s Privilege

It is axiomatic that the purpose of the First Amendment is to protect the public against the government’s control of thoughts, behavior, and expression. The text of the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or, of the press.” Various interpretations of the disjunctive “or” have ranged from claims that it does not create any additional rights beyond freedom of speech to claims that the Press Clause provides the press with “special rights.” The Supreme Court, however, has refused to recognize that the First Amendment’s disjunctive “or” creates special protections for the press.

Undeniably, the function of the press is to gather and disseminate information. Within this raison d’être, “the press’s most important [role] is to [gather and disseminate information about] the government.” The press’s ability to obtain confidential information from government officials is unques-

32. Id. at 1183.
33. See Monica Langley & Lee Levine, Branzburg Revisited: Confidential Sources and First Amendment Values, 57 GEO. WASH. L. REV. 13, 14 n.7 (1988) (contending that Branzburg should not apply, at the very least, to cases where the reporter’s information relates to the identity of a confidential government-agent source).
34. This is evidence which would likely help the grand jury to prosecute the perpetrators of an extrinsic crime.
35. This is evidence of the identity of a government-agent informant, where the only crime the grand jury is seeking to prosecute is, in fact, the informant’s disclosure of confidential information.
36. Id. at 13.
37. Miller, 438 F.3d at 1147.
40. U.S. CONST. amend. I.
41. See generally, John H. F. Shattuck & Fritz Byers, An Egalitarian Interpretation of the First Amendment, 16 HARV. C.R.-C.L. L. REV. 377, 377 (1981) (discussing various interpretations of the disjunctive within the First Amendment). Some scholars have settled on a middle ground, taking the position that the Constitution does not provide the press with “extraordinary constitutional protection” but that it does require courts to be more protective of the press’s special responsibilities within our society. See e.g. Laurence H. Tribe, American Constitutional Law 976 (2d ed. 1988).
42. In re Ridenhour, 520 So.2d 372, 376 (La. 1988). Thus, the press is often referred to as the Fourth Estate. Id. at n.14.
tionably its most effective means for providing the public with information about government activity. Accordingly, the press must have a right to keep the identity of their official government sources confidential in order to elicit information pertaining to otherwise inaccessible government activity. In this sense, “a press right to gather information is compatible with the concept of freedom of the press understood by many politicians and political theorists of the early American republic.”

Notably, the Supreme Court has interpreted the Speech Clause broadly in order to vehemently protect an individual’s right to freedom of expression. Most often, whenever the Court extends First Amendment protection, it relies on the notion that “public discussion and debate of issues, and criticism and investigation of public bodies are essential to a free society.” However, the ability to freely express oneself is severely impaired without the constitutionally protected right of reporters to obtain confidential government information that will likely influence public opinion. In fact, the many Supreme Court cases emphasizing the importance of an “uninhibited marketplace of ideas in which truth will ultimately prevail” implicitly rely on the speakers’ ability to obtain information that will influence their assessment of the truth. Thus, protection of a reporter’s right to gather (and subsequently publish) confidential information is required under the First Amendment in order to protect the sanctity of our self-governing process.

C. A Proposed Qualified Privilege with Respect to Confidential Government Sources

This article proposes a narrow rule that does not purport to grant reporters an absolute privilege in every case where a reporter has obtained illegally disclosed, confidential information from a government agent. Instead, where a reporter has received confidential information from a government-agent informant, the reporter should have a qualified privilege that protects him or her from compelled disclosure only where the reporter establishes the following two conditions: (1) the disclosure was related to possible government misconduct and (2) reporting the information to the general public did not injure the nation’s military, diplomatic or national security interests or any other similarly compelling government interest. Consequently, a reporter could successfully assert a privilege only where the illegal disclosure of information, which the grand jury is seeking to punish, was in the public’s interest.

Notably, this proposed rule is similar to the standard that the Supreme Court implemented to define the scope of a presidential privilege in United States v. Nixon. Applying this standard to Miller is logical because “any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.” Therefore, a reporter should have a privilege to withhold the identity of a confidential, government-agent informant from a grand jury in the limited situations where the privilege advances the public’s First Amendment interest in facilitating an effective process of self-government.

Admittedly, the second prong of this proposed standard is difficult to clearly define and, therefore, it does not appear to provide a substantial degree of guidance for all interested parties. Nevertheless, the Supreme Court has relied similarly on a “national/public security” limitation in First Amendment cases as well as in other areas of law. Furthermore, as long as courts insist that the government’s “threat to national security” claim is asserted with the same level of specificity as the

43. Shattuck & Byers, supra note 39, at 384-85.
44. Comment, The Right of the Press to Gather Information After Branzburg and Pell, 124 U. Pa. L. Rev. 166, 174 (1975). However, this right does not necessarily amount to a “special right.” See Barry P. McDonald, The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age, 65 Ohio St. L.J. 249, 328 (2004) (recognizing “some right . . . for information-gathering activities to a manageable subset of our society that the general public relies on to gather and disseminate important information to it [should be determined] by focusing on the recognized functions that certain groups perform for society, instead of on the perceived inequities in allowing some groups to invoke constitutional rights not available to individual citizens”).
46. Comment, supra note 44, at 175.
47. The term “possible government misconduct” is intended to include not only allegations that the government has violated an existing criminal or civil law but also situations where the government is acting secretly under a claim of authority that is suspect. See infra notes 82-89 for examples of recent events where the government has acted under a suspect claim of authority.
48. 418 U.S. 683, 706 (1974). Thus, the president has a First Amendment privilege to withhold confidential information from a court only where disclosure of the information would be “injurious to the public interest.” Id. at 713.
49. Langley & Levine, supra note 33, at 38-39 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 (Brennan, J., concurring)).
50. In Nixon, the Supreme Court stated that the scope of a presidential privilege is necessarily determined by a rule which preserves the essential function of each competing branch of government.
reporter's claim of "possible government misconduct," then certain underlying principles will emerge to help clarify the second prong's limitations. Most importantly, however, the difficulty in administering this proposed rule is not an adequate reason for abandoning well-established First Amendment objectives.

Notably, the Branzburg Court rejected an application of heightened scrutiny because it would have required courts to "distinguish [ . . . ] between the value of enforcing different criminal laws." The Court stated that "[b]y requiring testimony from a reporter in investigations involving some crimes but not in others, [courts] would be making a value judgment that a legislature had declined to make . . . ." However, this proposed rule applies only to "illegal disclosures of information." Accordingly, the proposed scope of this reporter's privilege is not controlled by the classification of the underlying crime that the grand jury is investigating, but rather is controlled by the public value of the illegal disclosure. Considering that this proposed rule is designed to prevent the government from abusing its power, Branzburg's approach of blindly deferring to the other branches of government is patently ineffective.

D. Applying Branzburg's Reasoning to Miller's Facts

Preliminarily, Branzburg recognized that reporters have certain First Amendment rights to gather news. Unfortunately, however, the Branzburg Court failed to elaborate on the extent of those rights and as a result it appears to propose that a reporter's constitutionally protected right to withhold confidential information exists only where the grand jury's interests stem from bad faith or harassment. However, "[i]f . . . Branzburg only requires balancing where a grand jury subpoena is issued in bad faith or for purpose of harassment, no balancing test would ever be required: [Any individual's] legitimate First Amendment interest would always outweigh a subpoena issued in bad faith or harassment. Therefore, a strict interpretation of the Branzburg majority's rule, which the Miller court applied, results in an illusory rule that pretends to provide a reporter with protection from compelled disclosure in form, but provides little protection in function. Accordingly, Justice Powell's concurring opinion logically, as he expressed, clarified and broadened the majority's scope of a reporter's privilege.

Significantly, the Branzburg majority rejected the reporters' asserted privilege under the First Amendment. The Court relied primarily on the following two factors before reaching this conclusion: (1) the case did not implement the reporters' First Amendment right to gather news; and (2) its decision promoted the grand jury's purpose of protecting the public's interest. Interestingly, based on these factors, Branzburg's reasoning is misplaced in the context of the Miller facts.

First, the Branzburg Court rejected the reporters' First Amendment claim by relying heavily on the notion that "the case did not present an issue of restricting the press from using confidential sources." In fact, in the process of rejecting the proposition that the First Amendment "protects a newsman's agreement to conceal the criminal conduct of his source," the Court noted that this conclusion "involves no restraint on . . . the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources." In reaching this conclusion, the Branzburg Court found that the reporters' empirical data did not prove that its decision would have a significant deterrent effect on the press's future ability to obtain confidential information. Instead, it merely showed that reporters rely on confidential informants. Nevertheless, the Branzburg Court did acknowledge that its rule would impose an incidental burden on the press's ability to gather news. Notwithstanding this undetermined burden, the Court presumed that without evidence proving otherwise, its decision would not unconstitutionally chill the newsgathering process.

However, if one can accept the following four assumptions, then Branzburg improperly presumed that a denial of any reporter's privilege, absent a showing of bad faith or harassment, does not create a chilling effect: (1) reporters rely on informants for news; (2) many informants will not provide a reporter with information unless the reporter promises to keep their identity confidential; (3) the use of unbridled subpoena

54. Id.
55. Considering that the rule applies only to grand jury subpoenas, it follows that this rule would apply only to communications between reporters and their sources that the government alleges are illegal.
56. Branzburg, 408 U.S. at 681.
58. See Newsmen's Privilege to Withhold Information from Grand Jury, 86 Harv. L. Rev. 137, 144 n.37 (1972) [hereinafter Newsmen's Privilege] (recognizing that a reporter's ability to prove bad faith is seemingly illusory because a reporter is not likely to have access to this evidence until after the grand jury has completed its investigation).
59. Branzburg, 408 U.S. 681 (emphasis added).
60. This language implies that the Branzburg Court's decision was heavily influenced by the fact that the reporters' information could aid the grand jury's investigation of an extrinsic crime.
62. Id. at 695.
64. Branzburg, 408 U.S. at 693-94.
65. See e.g. Newsmen's Privilege, supra note 58, at 147 (noting that there is significant evidence which shows that reporters extensively rely on confidential informants).
The quantum of evidence that Branzburg demands from the reporters in order to overcome its presumption is unattainable... power will deter informants from disclosing confidential information; and (4) the use of unbridled subpoena power will deter reporters from publishing confidential information. Even assuming that the existing data does not absolutely refute Branzburg’s presumption, common sense suggests that the Branzburg presumption was backwards because, all things being equal, an informant is more likely to provide a reporter with confidential information where the reporter promises that the informant’s identity will remain anonymous. Consequently, Branzburg’s decision to compel the reporters to disclose their confidential information does burden the press’s ability to gather news.

Moreover, the quantum of evidence that Branzburg demands from the reporters in order to overcome its presumption is unattainable because it is almost impossible to quantify the deterrent effect. Similarly, “the magnitude of the [burden] a privilege imposes on [the courts’] truth-seeking [function] depends on exactly the same empirically unverified factor that determines the benefit gained by a privilege: namely, the extent to which people would communicate in the absence of the privilege.” Although this empirical data is nonexistent, there is increasingly more evidence of specific instances where Branzburg’s deterrent effect has burdened the press’s ability to gather and report news. This evidence demonstrates that the deterrent effect manifests itself most prominently between reporters and government-agent informants. Thus, Branzburg’s rule imposes a burden on the press’s right to gather news; however, this burden is constitutionally significant only where it adversely affects the press’s ability to gather information about possible government misconduct.

Second, Branzburg rejected the reporters’ privilege in order to protect the grand jury’s purpose of aiding in the detection of criminal activity. According to Branzburg, the grand jury’s ability to fully perform this function ultimately helps to protect the public’s security. However, when the reporter’s information relates to issues involving government misconduct, recognizing a reporter’s privilege to protect confidential sources furthers the detection of wrongdoing. Hence, the proposed rule set forth here attempts to provide a reporter’s privilege only where it will not run contrary to the public’s security interest. Meanwhile, if a reporter’s privilege does not threaten the public’s security, then it is presumably advancing the public’s interest in a free-flow of information, which facilitates our self-governing process.

E. An Actual Demonstration of How This Proposed Rule Can Co-exist with Branzburg to Clarify the Precise Scope of a Reporter’s First Amendment Privilege

Indeed, Branzburg’s rule is appropriate in the arena of the facts in which it was decided because a grand jury’s interest in prosecuting extrinsic crimes undoubtedly outweighs reporters’ interest in protecting the identity of their confidential, non-government sources. Therefore, notwithstanding the contention that Branzburg does cause a chilling effect, its reasoning should support a grand jury’s unbridled subpoena power only where the grand jury seeks information relating to an extrinsic crime. However, Branzburg should not apply where a reporter obtains confidential information from a government-agent informant for the following three reasons. First, government abuse is an evil that must be curtailed through media exposure. Second, secrecy within the government has steadily increased since Branzburg. Third, government misconduct is unlikely to be disclosed to reporters without the reporters’ legitimate ability to promise confidentiality.

Notably, Branzburg’s analysis explicitly considered the effects that its rule would have only on the relationship between minority groups (informants) and reporters. In doing so, the Court “[bespoke] a palpable focus upon both the confidential source at issue—i.e. dissident political or cultural groups, and the [extrinsic] crimes that they had allegedly committed.” Thus, Branzburg concluded that denying the reporters’ asserted privilege was unlikely to deter informants from disclosing confidential information to the

66. See e.g. Laura R. Handman, Protection of Confidential Sources: A Moral, Legal, and Civic Duty, 19 Notre Dame J.L. Ethics & Pub. Pol'y 573, 587-88 (2005) (concluding that modern day restrictions on a reporter's privilege have a “censoring effect . . . about matters of vital public concern”).

67. See e.g. Modes of Analysis: The Theories and Justifications of Privileged Communications, 98 Harv. L. Rev. 1471, 1477 (1985) [hereinafter Modes of Analysis] (contending that an absolute denial of a reporter's privilege will deter reporters from gathering confidential information).

68. Miller, 438 F.3d at 1168 (Tatel, J., concurring).


70. Guest & Stanzler, supra note 43, at 43 n.129.

71. Modes of Analysis, supra note 67, at 1477.

72. See e.g. Robert D. McFadden, Newspaper Withholding Two Articles After Jailing, N.Y. Times, July 9, 2005, at § A (reporting that two "profoundly important" stories of "significant interest to the public" were not published solely out of fear that the reporter would be subpoenaed); Sutel, supra note 4, at A3 (reporting two examples where fear of a subpoena deterred source).


74. Schmid, supra note 8, at 1463.


76. See Gonzales, 382 F.Supp. 2d at 462 n.3 (noting that in 2001 the number of classified government documents reportedly rose 18%).

77. Langley & Levine, supra note 33, at 45.

78. Id. at 20.
Evidently, Branzburg did not expressly consider the deterrent effects that its rule may have on the relationship between government-agent informants and reporters.

Applying the proposed rule to the Miller case presents a unique challenge. It appears that the press's publication of Valerie Plame's identity did in fact impair our government's national security efforts because it both crippled Plame's ability to carry out any future covert operations and allowed foreign intelligence services to learn how the CIA operates by tracing Plame's steps and contacts in their countries.

In addition, the leak may well have put Plame's life in jeopardy, as well as the lives of her friends and associates. In sum, the public value of the information was minimal compared to the harm that it caused.

However, Judith Miller never actually published this information. This is a pertinent fact because it is widely understood within the political sphere of journalism that reporters routinely rely on off-the-record confidential disclosures as a means of ensuring that the reporter has sufficient background information to publish credible and accurate news. Thus, a reporter's privilege that does not absolutely protect the press's ability to merely obtain, as opposed to publish, information from a confidential government-agent informant appears to be constitutionally deficient. As Judge Tatel stated in Miller, reporters' interests mirror the public's. Accordingly, reporters should have the initial freedom to obtain confidential government information, and then to subsequently determine whether it is consistent with their duty to publish that information. In other words, unless and until the reporter affirmatively reports confidential government information which harms the public's interest, he or she should have an absolute privilege to gather it.

Although Miller's case is unique, there are several recent developments where a pure application of the proposed rule helps to demonstrate its propriety. For example, on November 2, 2005, the Washington Post published an article that reported that the United States government had set up secret CIA terrorist prison camps across the world in order to skirt America's higher standards of prisoner treatment. In response, the CIA formally referred the matter to the Justice Department, suggesting that a government agent may have illegally disclosed classified information to the reporter. There was speculation that a grand jury would eventually issue a subpoena upon the reporter, Dana Priest, in an effort to learn the identity of the reporter's confidential source. If a grand jury were to issue a subpoena to Priest, the Miller decision has created a precedent that will severely hinder the reporter's ability to assert a testimonial privilege. However, under the proposed rule, the reporter's privilege would protect Priest from compelled disclosure as long as the reporter could prove that disclosure of this information did not threaten the nation's security.

Similarly, in December 2005, the press reported that, in response to the September 11, 2001 terrorist attacks, President Bush authorized a secret surveillance program whereby the government has been intercepting telephone and email communications between the United States and Afghanistan. The controversial aspect of Bush's surveillance program, however, lies in the fact that the government is authorized to spy on people with suspected links to terrorist organizations without first getting a court's approval. Due to this departure from traditional procedure, some security officials have questioned the legality of Bush's program. In an address to the American people, Bush stated that information about his surveillance program was "improperly provided to news organizations." Thus, the government could conceivably attempt to compel disclosure of the reporters' confidential source via a grand jury subpoena.

If the government did issue subpoenas, the proposed rule requires the press to comply with the subpoena unless they can show that publishing this information related to possible government misconduct and it did not injure the nation's security. In this instance, it appears that the press's reports do relate to possible government misconduct because it is unclear whether the President is authorized, under the Constitution, to implement this surveillance program. However, it is quite possible that publishing this information did threaten the security of
our nation because it “alert[ed] our enemies and endanger[ed] our country.” Thus, even if President Bush’s tactics are unlawful, a court should compel disclosure of the reporter’s confidential government-agent informant only if it finds that, by publishing the information, the reporter actually hindered the government’s ability to prevent future terrorist attacks.

Unquestionably, in these modern-day examples, the confidential information was or may have been illegally disclosed. However, in these examples, the illegal disclosure arguably benefited the public because it contributed to the free flow of information about government conduct, which is required to protect the sanctity of our self-governing process. Therefore, in the Miller context, the scope of a reporter’s privilege directly implements First Amendment rights and the Branzburg reasons for strictly denying such a privilege must be examined in light of the reporter’s countervailing freedom of press.

III. CONCLUSION

The First Amendment should provide reporters with a meaningful degree of protection from grand jury subpoenas that seek the identity of a confidential government-agent informant. This protection is necessary in order to ensure that the press can effectively gather and report information relating to government misconduct. In addition, a rule that provides reporters with a qualified privilege in the narrow context of “illegally disclosed confidential government information” would not conflict with either the rule or the reasoning in Branzburg. On the contrary, it respects Branzburg’s desire to protect the public’s interest by promoting a grand jury’s ability to prosecute criminal activity. However, it recognizes that applying Branzburg in the context of Miller suppresses this precise concern because it inhibits the press’s ability to serve as the government’s watchdog. Finally, since Branzburg the press’s reliance on confidential government-agent informants has significantly increased and, therefore, Branzburg’s refusal to extend the press’s First Amendment right to gather news should be reconsidered in the context of the Miller facts.

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91. Id. (quoting President Bush). But see Paul Farhi, N.Y. Times Held Off Publishing Domestic-Eavesdropping Story, PHILA. INQUIRER, December 18, 2005, at A22 (reporting that the New York Times purposely delayed publishing this story until it “satisfied itself through more reporting that it could write the story without exposing ‘any intelligence-gathering methods or capabilities that are not already on the public record.’”).