

Court Review

Volume 43, Issue 4

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

T A B L E O F C O N T E N T S

EDITORS

Judge Steve Leben
Kansas Court of Appeals

Professor Alan Tomkins
University of Nebraska

ASSISTANTS TO THE EDITOR

Kimberly Applequist
University of Nebraska

Rachel Sharpe
Kansas Court of Appeals

EDITORIAL BOARD

Judge B. Michael Dann
National Institute of Justice

Julie Kunce Field
Fort Collins, Colorado

Professor Philip P. Frickey
University of California at Berkeley

Mark D. Hinderks
Overland Park, Kansas

Judge Leslie G. Johnson
American Institute for Justice

Professor Steven Lubet
Northwestern University

Judge Gregory E. Mize
Washington, D.C.

Elizabeth Neeley, Ph.D.
University of Nebraska

C. Robert Showalter, M.D.
Harrisonburg, Virginia

Professor Charles H. Whitebread
University of Southern California

NATIONAL CENTER FOR STATE COURTS STAFF

Charles F. Campbell
Managing Editor

ARTICLES

- 156** A Judges' Guide to Social Science

John Monahan & Laurens Walker

- 164** Mental Illness and the Courts:
Some Reflections on Judges as Innovators

John P. Petrila & Allison D. Redlich

- 178** Cautions About Applying Neuroscience to Batterer Intervention

Edward Gondolf

- 182** Breaking News:
Miller is Distinguishable from Branzburg

Levon Q. Schlichter

DEPARTMENTS

- 154** Editor's Note

- 155** President's Column

- 196** The Resource Page

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 43, Issue 4

Winter 2007

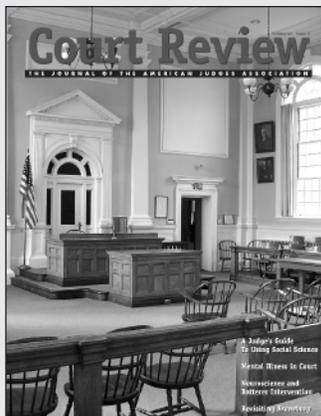
EDITOR'S NOTE

Divorce cases were part of my docket when I began my judicial career. I was single then and had not had children. I quickly faced lots of situations well beyond my experience: a breast-feeding mother who wanted the father's visitation limited to four hours in her presence each week, a parent who wanted to move across the country with the child, or even a dispute about parent-child access in a "typical" divorce. In the absence of expert testimony, could I look anywhere for answers other than court decisions that may—or may not—have been based on sound research?

I looked into this question and discovered the work of two Virginia law professors, John Monahan and Laurens Walker. Their original 1991 article on this subject (in a journal not readily available to most judges) continues even today to be cited by courts. See *Baxter v. Temple*, ___ A.2d ___, 2008 Westlaw 2097123 at n.1 (N.H. May 20, 2008). Monahan and Walker have refined their work over the years since 1991, and I'm proud that they have prepared a thoroughly updated version of their 1991 article especially for *Court Review*. Judges in trial and appellate courts regularly rule on issues that are significantly impacted by social-science information. Monahan and Walker discuss when and how we may take that substantial body of information into account in contested cases. Their work represents an important contribution to effective judicial decision-making.

This issue contains two additional articles that demonstrate the importance of social-science information in court. John Petrla and Allison Redlich discuss strategies that have been used in mental-health courts to reduce recidivism by defendants with mental illness. They also discuss ways in which judges in these courts are involved in what some view as nontraditional roles for judges.

Specialized courts like mental-health courts and domestic-violence courts rely upon judicial training regarding background social-science information like mental illness so that judges may more effectively deal with the situations confronting us. Ed Gondolf presents information of this sort that a judge handling a domestic-violence case might want to consider. Specifically, he suggests that some who have specific mental illnesses may not be helped by traditional batterer-intervention programs often ordered by judges. We can be better judges by being better-informed judges. The mission of *Court Review* is to help you to be that type of judge.—Steve Leben



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 128. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to one of *Court Review's* editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Comments and suggestions for the publication, not intended for publication, also are welcome.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Deloris Gager at (757) 259-1864.

Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo was taken in the historic Carroll County Courthouse in Ossipee, New Hampshire. The building was built in 1916 and has been restored to closely match its original condition. For more information about the courthouse, go to <http://carrollcountycourthouseproject.org/index.htm>.

©2008, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, Williamsburg, Virginia 23185-4147. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

Cite as: 43 Ct. Rev. ___ (2007).

President's Column

Eileen Olds

I can hardly believe that I am halfway through my term as your president. Time really does fly when you're having fun! Fun I have had, but more importantly, I have had the opportunity to represent this prestigious, premier organization of judges in many different venues. As an organization, we are addressing critical issues facing our judiciary. With our initiatives, such as our "Tell It to the Judge" project, we are also examining those issues relevant to the public that we serve. Through it all, I have been proud to witness the stature that AJA enjoys all over the country.

Just recently, I had the fascinating opportunity to participate in a roundtable discussion in partnership with the Bureau of Justice Assistance and the Center for Court Innovation regarding the future of problem-solving courts. Problem-solving courts take many forms: drug courts, mental-health courts, prostitution courts, housing courts, and domestic-violence courts, to name a few. We took a critical look at the successes as well as the challenges encountered in these specialized courts. At the forefront was the discussion of whether statewide coordination should be implemented. That is perhaps something we all should deliberate about as the need for such courts continues to grow. As individual judges, we are all problem-solvers. Our inclusion as a participant is but one example of how AJA benefits from its recognition as an organization "of judges, for judges, by judges." When and where significant discussions are being held, **we are at the table.**

As the "Voice of the Judiciary," we are not only speaking, but we are being heard. At every turn, newspapers, respected legal journals, and scholarly publications seek our input. Other judicial organizations are joining forces with us to make our judicial system all that it should be. Whether it is convening with other judicial officers at their meetings and conferences, or answering calls and emails on topics of concern to others, collaboration is necessary. The old adage, "It's not just what you know, but who you know," is applicable to the relationships we have been afforded.

Because of our rich history, we are fortunate to have the

credibility to call on the expertise and assistance of others. I am convinced that collaborative efforts are a necessary hallmark of this organization. Collective resources and information sharing of trends and best practices—as they emerge—keep us on the cutting edge. All of us should be grateful for the partnerships we enjoy with such organizations as Justice at Stake, the National Judicial College, the National Association of Women Judges, the National Bar Judicial Council, the National Council of Juvenile and Family Court Judges, the Conference of Chief Judges, the Conference of State Court Administrators, the National Association for Court Management, and for the immeasurable assistance given by the National Center for State Courts, among others.



In closing, let me take this opportunity to welcome some of you in advance, and to invite others of you to our 2008 annual education conference. This is where much of the collaboration ignites. It is at our meetings that collegiality is also at work. Our well planned and well executed annual meetings allow members, their families, and guests to become familiar with those who they otherwise would never meet. The conference allows for an exchange of ideas and as a foundation for life-long affiliations: **Collaboration and Collegiality.** Our meetings are a distinct opportunity to renew old friendships and to make new ones. They allow each of us to reach out to other judges to discuss common concerns; or to just catch up on what is going on in each other's lives. Even with our differences, we are united in our common bond—our profession. I know that there are those of us, like me, who have not missed an annual conference once we started. We were hooked from the start. For those of you who have put it off, give it a try. Mark your calendars!! Maui, Hawaii, awaits you. What better time or location to get acquainted with what AJA has to offer? You won't want to miss it! I promise you will leave well-educated, revived, and renewed to forge ahead in this most honorable profession. I look forward to seeing you.

A Judges' Guide to Using Social Science*

John Monahan & Laurens Walker

Since the first glimmerings of legal realism early in this century, American courts have been remarkably open to using social science research when that research could help resolve empirical issues that arise in litigation. Increasingly in recent decades, courts have sought out research data on their own when the parties have failed to provide them. Social scientists, for their part, are investigating questions of judicial interest at an accelerating pace. In this article, we examine the three principal uses that courts have found for social science research.¹ For each use, we review early and current approaches to dealing with social science in court. We conclude by offering judges a step-by-step guide to incorporating social science research in cases that call for a determination of empirical issues.

Social science research was first urged upon an American court in 1908 by Louis Brandeis in *Muller v. Oregon*,² a landmark case dealing with the constitutionality of social welfare legislation limiting the work day of any female employed in a factory or laundry to ten hours. Brandeis assembled a substantial body of medical and social science research tending to show the debilitating effect on women and girls of working long hours, and presented this material to the United States Supreme Court in a brief defending Oregon's limits on the number of hours females could be employed. In the opinion in *Muller* upholding the legislation, after referring to the social science materials in a lengthy footnote, the Court stated that although they "may not be, technically speaking, authorities,"³ the studies would nonetheless receive "judicial cognizance."⁴

Although the use of what came to be known as "Brandeis briefs" became common in the years after *Muller*, legal commentators were hard pressed to explain an apparent anomaly: How was it that Brandeis could present research to an appellate court in a written brief, when "facts" were supposed to be introduced at the trial level by the oral testimony of witnesses? This conundrum persisted until the late Kenneth Culp Davis, in a seminal article published in 1942, distinguished two types

of "fact."⁵ The first type, *legislative fact*, referred to facts that were used by courts to help decide broad questions of law or policy, as Brandeis had used research to help decide the constitutionality of social welfare legislation. The second type, *adjudicative fact*, referred to facts that were used to decide questions of interest only to the specific parties to a lawsuit, such as whether a particular traffic light was red or green.

Davis's distinction soon became widely accepted and now forms the traditional scheme used by courts and commentators to describe the judicial uses of social science.⁶ As the following sections make clear, Davis's concepts have been severely criticized in recent years and may well have outlived their usefulness as tools for managing the introduction of empirical information in contemporary American law.

USING SOCIAL SCIENCE TO MAKE LAW

Early Approaches

Professor Davis defined *legislative facts* as follows:

"When an agency [or court] wrestles with a question of law or policy, it is acting legislatively, [and] the facts which inform its legislative judgment may conveniently be denominated legislative facts."⁷

Legislative facts, in other words, are facts that courts use when they make law (or "legislate"), rather than simply apply settled doctrine to resolve a dispute between particular parties to a case. Whereas the determination of adjudicative facts affects only the litigants before the court, the determination of legislative facts influences the content of legal doctrine itself and, therefore, affects many parties in addition to those who brought the case. It was Professor Davis's position that "the rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case."⁸ In this manner Davis justified the Supreme Court's practice in *Muller* of disregarding the rules of evidence by accepting "facts" on appeal and in a brief. The rules of evi-

* A version of this article was originally published as John Monahan and Laurens Walker, *Judicial Use of Social Science Research*. 15 LAW AND HUMAN BEHAVIOR 571 (1991). It is reprinted with the kind permission of Springer Science and Business Media, and has been thoroughly updated for COURT REVIEW.

Footnotes

1. Many of the cases discussed here can be found in JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (6th ed. 2006) [hereinafter *SOCIAL SCIENCE IN LAW*].
2. 208 U.S. 412 (1908).
3. *Id.* at 420.
4. *Id.* at 421.

5. Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942) [hereinafter Davis, *An Approach to Problems of Evidence*]. Davis's concepts were originally advanced in the context of administrative law, but they were rapidly generalized to other areas of the law.
6. The concept of legislative fact "has been widely accepted in the federal appellate courts." Broz v. Schweiker, 677 F.2d 1351, 1357 (11th Cir. 1982). The United States Supreme Court has invoked the term on numerous occasions, e.g., Lockhart v. McCree, 476 U.S. 162, 169 n. 3 (1986); Concerned Citizens v. Pine Creek Conservancy Dist., 429 U.S. 651, 656-57 (1977);
7. Davis, *An Approach to Problems of Evidence*, *supra* note 5, at 402.
8. *Id.* at 364.

dence did not apply to Brandeis's social science materials: They were "legislative" facts.

Judicial acceptance of social science research as a form of legislative fact became commonplace throughout the law after *Brown v. Board of Education*.⁹ In that case, the United States Supreme Court cited the published research of numerous social scientists to support its empirical assertion that the segregation of public schools instills in an African-American child "a sense of inferiority [that] affects the motivation of a child to learn."¹⁰ In the decades since *Brown*, research has frequently been invoked by courts to demonstrate the validity of empirical assumptions made in the process of modifying existing law or creating new law.¹¹ In *Roper v. Simmons*,¹² for example, the Supreme Court considered the question of whether the Eighth and Fourteenth Amendments permitted the execution of offenders who were under the age of 18 at the time they committed a capital crime. The Court held that the Constitution prohibited such executions. In arriving at this conclusion, the Court noted that "as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"¹³ Numerous social science studies were brought to bear on this and other conclusions reached by the Court regarding empirically demonstrated developmental differences between adolescents and adults.

The Federal Rules of Evidence do not address Davis's concept of legislative fact. Rather, the Advisory Committee that wrote the Rules stated that it could construct "no rule"¹⁴ to address how courts should deal with legislative facts. It appears from the Committee's commentary to the Rules that legislative facts can (a) be presented by the parties in briefs on appeal; (b) be presented by the parties at trial by the testimony of expert witnesses; (c) be found by the court through *sua sponte* library research; or (d) be obtained by an appellate court remanding a case back to the trial court "for the taking of evidence."¹⁵

Current Approaches

Criticism of the concept of legislative fact has focused on three topics: How should social science research used to create or modify law be *obtained*? Once obtained, how should it be *evaluated*? And once evaluated, how should a court's conclusions about research be *established* so as to affect subsequent courts that address the same empirical issue?¹⁶

On the first issue, the acknowledgement of the Advisory Committee to the Federal Rules of Evidence that there was "no rule" that addressed legislative facts has been taken by many to

illustrate the "total failure"¹⁷ of the notion of legislative fact to provide guidance to courts regarding how to obtain social science research for the purpose of creating or modifying law.

After social science research has been obtained by some unspecified procedure, the court must evaluate it. Social science research varies enormously in quality, and the risk of basing a legal rule on flawed research is significant. Yet neither Davis nor the Federal Rules that rely on his concept address this issue at all.

Likewise, if one court draws conclusions from social science research about an empirical assumption underlying a legal rule, the concept of legislative fact gives no guidance to the next judge who confronts the same empirical question. The options for an appellate court, for example, range from deferring to the trial court's evaluation of the research under a "clearly erroneous" standard of review to performing a "de novo" evaluation of the studies.

It is difficult, therefore, to gainsay the conclusion of a leading text on evidence that "a viable formulation of rules . . . with regard to legislative facts has not proved feasible."¹⁸ Improvements in the manner that courts use social science information to create rules of law may be possible only by abandoning the notion of legislative fact entirely and developing a new concept that fundamentally alters the ways in which courts view social science materials. *Social authority* has been proposed as one alternative to legislative fact as an organizing principle for courts' use of social science to create or modify a rule of law. Under this rubric, courts would treat social science research relevant to creating or modifying a rule of law as a source of authority rather than a source of facts. More specifically, courts would treat social science research much as they treat legal precedent under the common law.

In outline, the argument for this theory is that although there is a clear conceptual analogy between social science research and fact (both are "positive" in the sense that they concern the way the world is, with no necessary implications for the way the world ought to be), there is an equally clear conceptual analogy between social science research and law (both are "general" in that they produce principles applicable beyond particular instances). It is, therefore, plausible to classify social science research either as fact or as law. The criterion for classification—whether to give priority to the fact analogy or to the law analogy—should depend on the quality of the judicial procedures that flow from it.

A number of coherent procedures for obtaining, evaluating, and establishing social science research flow from conceiving of it as social authority rather than as legislative fact. Making the heuristic presumption that courts should treat social science data the same way they treat legal precedent produces two

9. 347 U.S. 483 (1954).

10. *Id.* at 494.

11. See SOCIAL SCIENCE IN LAW, *supra* note 1, at 185-382.

12. 543 U.S. 551 (2005).

13. *Id.* at 560 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

14. Advisory Committee Note to Fed. R. Evid. 201(a).

15. *Id.*

16. See John Monahan & Laurens Walker, *Social Authority: Obtaining,*

Evaluating, and Establishing Social Science in Law, 134 U. PA. L. REV. 477 (1986).

17. STEPHEN SALTZBURG & KENNETH REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 43 (3d ed. 1982).

18. JOHN STRONG, KENNETH BROWN, GEORGE DIX, EDWARD IMWINKELRIED, D. KAYE, ROBERT MOSTELLER & E. ROBERTS, MCCORMICK ON EVIDENCE 503 (5th ed. 1999). Strong, et al. summarize our approach at 499.

corollary ideas about how a court should obtain empirical research: The parties should present empirical research to the court in written briefs, and judges may find social science research by searching for it themselves. This is the way that courts obtain the law. Oral testimony of expert witnesses and remanding cases to the trial court to obtain evidence would be disallowed. Likewise, under this view, the way that courts should evaluate empirical data can be found in the way they evaluate legal precedent. Courts should evaluate scientific research studies along four dimensions analogous to those used to evaluate case precedent:¹⁹ Courts should place confidence in social science research to the extent that the research (a) has survived the critical review of the scientific community, (b) has used valid research methods, (c) is generalizable to the legal question at issue, and (d) is supported by a body of other research. Finally, because legal rules make clear that appellate courts are not bound by trial courts' conclusions about law, appellate courts should also not be bound by trial courts' conclusions about empirical research: De novo review is the appropriate standard.²⁰

USING SOCIAL SCIENCE TO DETERMINE FACTS

Early Approaches

Professor Davis defined *adjudicative facts* as follows:

"When an agency [or court] finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency [or court] is performing an adjudicative function, and the facts may conveniently be called adjudicative facts."²¹

Adjudicative facts, in other words, are facts that apply only to the particular parties before the court. They are used to determine (or "adjudicate") what happened in a specific case, and not for some larger purpose, such as to argue that the law should be changed. What Davis called an adjudicative fact has been referred to by other commentators as a "case fact"²² and by one court as "a plain, garden-variety fact."²³

One of the most frequent uses of social science research as adjudicative or case-specific facts involves trademarks. The Lanham Trademark Act of 1946, as amended by the Trademark Law Revision Act of 1988,²⁴ states that the Patent and Trademark Office will refuse to register a new trademark if it so resembles a trademark already registered to another person "as to be likely . . . to cause confusion."²⁵ A person who sells a

product that is likely to cause confusion with an already trademarked product is liable for trademark infringement. Social science research in the form of surveys of consumers or potential consumers to ascertain the degree of confusion between products has been admitted in American courts at least since 1940.²⁶ Initially, such evidence was often successfully challenged as contravening the prohibition against hearsay, since the respondents to the surveys were not present in court to testify. In *Zippo Manufacturing Co. v. Rogers Imports*,²⁷ however, the hearsay objection was definitively laid to rest:

"The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted public surveys."²⁸

A wide variety of methodologies are now routinely used by both plaintiffs and defendants in trademark cases to determine the presence of consumer confusion.²⁹ In *Kis v. Foto Fantasy*,³⁰ for example, the plaintiff and the defendant both owned photo booths that were placed inside shopping malls throughout the United States. Foto Fantasy, the defendant, placed a sketch of the actor Tom Cruise outside its booths, with a sign reading "Scan in Your Favorite Celebrities." Kis, the plaintiff, sued Foto Fantasy for violating the Lanham Act by creating confusion as to the association of Tom Cruise with defendant's photo booths, leading consumers to patronize Foto Fantasy booths rather than Kis booths. To demonstrate consumer confusion, Kis introduced as an expert witness a social scientist who conducted an experiment in a shopping mall. In this experiment, several hundred potential consumers (demographically matched to the typical consumers of photo booths) were given pictures of a photo booth. A random half of these potential consumers were given pictures that included a sketch of Tom Cruise, and a random half were given pictures of photo booths without such a sketch. Of the subjects in the former group, 56 percent believed that the actor was associated with Foto Fantasy booths, a view shared by only 7 percent of the subjects in the later group. The court denied the defendant's motion to exclude the social science expert, and held that any alleged methodological defects of the experiment went to the weight, and not to the admissibility, of the evidence. The use of survey research in consumer-confusion trademark cases like *Kis* has become so routine that the failure of a trademark owner to conduct a survey may now give rise to an adverse inference.³¹

19. *Id.* at 498: "At least four indices of precedential persuasiveness can easily be abstracted from the jurisprudential literature: (1) cases decided by courts higher in the appellate structure have more weight than lower court decisions; (2) better reasoned cases have more weight than poorly reasoned cases; (3) cases involving facts closely analogous to those in the case at issue have more weight than cases involving easily distinguished facts; and (4) cases followed by other courts have more weight than isolated cases."

20. For a discussion of how these dimensions can be made operational by courts, see *Social Authority*, *supra* note 16, at 498-508. What trial or appellate courts should do when confronted with an empirical question underlying a rule of law for which no research, or only inadequate research, is available is discussed in John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WISCONSIN L. REV. 569.

21. Davis, *An Approach to Problems of Evidence*, *supra* note 5, at 402.

22. E.g., THOMAS MARVELL, *APPELLATE COURTS AND LAWYERS* (1978).

23. *Bowling v. Department of Ins.*, 394 So.2d 165, 174 (Fla. Dist. Ct. App. 1981).

24. The Lanham Act is found at 15 U.S.C. § 1051 *et seq.* The 1988 amendments are scattered throughout the Act.

25. 15 U.S.C. §1052(d).

26. *Oneida v. National Silver*, 25 N.Y.S.2d 271 (N.Y. Sup. Ct. 1940).

27. 216 F. Supp. 670 (S.D.N.Y. 1963).

28. *Id.* at 682.

29. See *SOCIAL SCIENCE IN LAW*, *supra* note 1, at 95-130.

30. 204 F. Supp. 2d 968 (N.D. Tex. 2001).

31. *Pharmacia Corp. v. Alcon Laboratories*, 201 F. Supp.2d 335 (D.N.J. 2002).

The party with the burden of proving an adjudicative fact such as consumer confusion will be severely disadvantaged by a failure to provide the fact-finder with the best possible evidence.

The key to understanding how courts deal with social science research used to determine an adjudicative or case-specific fact is that, unlike legislative facts, adjudicative facts are susceptible to proof by the usual rules of evidence. Under the Federal Rules of Evidence and similar state codes, the admissibility of social science evidence of a case-specific fact turns on the issue of “relevance.” According to Rule 401:

“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

There are two components to this definition.³² First, to be relevant, evidence must bear on a fact that is “of consequence.” This means that even flawlessly executed research is inadmissible if the substantive law governing the case does not put in issue the fact that the research seeks to demonstrate. Second, evidence must make that fact “more probable or less probable” than it would otherwise be. This means that even if social science research directly addresses a fact of central concern to the substantive law, it will not be admitted unless the research data provide insight into the likelihood that the fact exists. The first of these components of relevance is often called *materiality* and the second *probative value*.

Note that under Rule 401 it is not necessary for social science evidence to be determinative of a fact at issue in a case, or even to make the existence of a fact, such as consumer confusion, “more likely than not,” for the evidence to be admitted. As long as the research has “any” tendency to be probative of the existence of material fact, the evidence is relevant and therefore presumptively admissible (that is, admissible unless some other rule, such as Rule 403, excluding evidence on the grounds of prejudice, confusion, or waste of time, is violated).

Obtaining social science research that bears on an adjudicative fact, therefore, is governed by the normal rules of evidence. Evaluating the research for the purpose of admissibility is limited to determining whether it is material, whether it has any probative value, and whether its admission violates any other evidentiary rule. The ultimate weight to be placed on the evidence is a matter for the fact-finder. As with any other adjudicative or case-specific fact, the standard of review an appellate court will apply to a trial court’s decisions regarding social science evidence is “clear error.”

Current Approaches

The law regarding social science research used to determine adjudicative facts (or what have been called “social facts”³³ to distinguish empirical research from historical case-specific facts such as who-hit-whom) is much more settled than that governing research used to determine legislative facts or social authority. Such evidence is now routinely admitted not only in trademark cases, but also in obscenity litigation,³⁴ and many other areas. Recently, social science research has come to play a decisive role in adjudicating damages in mass-tort cases.³⁵

One view of determining what is precedential about court decisions on social science evidence used to ascertain adjudicative facts requires that a fundamental distinction be made between the methodology of the research offered in evidence and the application of that methodology in a particular case.³⁶ *Methodology* refers to the broad research design employed to generate the data and the analytic procedures used to interpret them. *Application* refers to the concrete way that a particular study was carried out. Under this view, precedent attaches only to the generic methodology of studies—such as the use of a particular statistical test—in a given area.³⁷

USING SOCIAL SCIENCE TO PROVIDE CONTEXT

Early Approaches

Most of the judicial uses of social science fall into one of the two categories originally described by Davis. In recent years, however, courts have begun to confront uses of social science research that do not conform to the established classification. There are increasing indications that a new, third use of social science in law is emerging. Examples can be found in cases concerning eyewitness identification and sexual victimization.³⁸

In *Weatherred v. State*,³⁹ the state’s only direct evidence that the defendant had committed murder was the word of two eyewitnesses. At trial, the expert testimony of a research psychologist was offered by the defendant to counter the testimony of the eyewitnesses. In a proffer of the evidence, the psychologist described published studies on factors such as the speed with which memory decays over time and the relationship between the confidence of a witness and the accuracy of identification, both of which were issues in the case. The trial court excluded the expert. However, the Court of Criminal Appeals of Texas reversed and remanded the case for a new trial, stating that the testimony survived a *Daubert*⁴⁰ analysis and that “the trial court abused its discretion in refusing to admit said evidence before the jury.”⁴¹

32. Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877, 882-85 (1988) [hereinafter *Social Facts*].

33. *Id.*

34. See, e.g., *Kaplan v. California*, 413 U.S. 115 (1973); *Saliba v. State*, 475 N.E.2d 1181 (Ind. App. 1985). See generally SOCIAL SCIENCE IN LAW, *supra* note 1, at 130-57.

35. Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998); Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999).

36. *Social Facts*, *supra* note 32, at 885-87.

37. The application of a particular methodology in a given case would be evaluated under the pertinent federal or state rules of evidence.

In federal courts, of course, this would mean an evaluation under Federal Rule of Evidence 702, incorporating *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

38. See generally SOCIAL SCIENCE IN LAW, *supra* note 1, at 383-605. Other examples discussed there include the battered-woman and rape-trauma syndromes.

39. 963 S.W.2d 115 (1998). See also John Brigham, Adina Wasserman, and Christian Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, COURT REVIEW, Summer 1999, at 12.

40. *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

41. *Id.* at 131.

The defendant in *State v. Kinney*⁴² was found guilty of aggravated sexual assault. The trial court had allowed the prosecution to introduce a social scientist as an expert witness to describe “the behavioral patterns of victims of sexual assault,” patterns that were also seen in the complainant (e.g., a delay in reporting the crime). The defense objected to this evidence at trial and appealed. The Supreme Court of Vermont upheld the conviction, however, stating that the testimony survived a *Daubert* analysis and that “expert evidence of rape trauma syndrome and the associated typical behavior of adult rape victims is admissible to assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim’s behavior after the alleged rape is inconsistent with the claim that the rape occurred.”⁴³

In neither of these cases was social science research being used to provide legislative facts. No creation or modification of a rule of law was sought. Rather, in both cases the parties offering the research accepted the applicable legal rules and sought to show that the research would help the jury to decide the specific factual issues being litigated. Yet in neither of these cases was social science research being used to provide adjudicative facts either. The parties to the cases were not involved in the research at all: The experts relied on “off-the-rack” research studies published before the events that gave rise to the litigation took place.

The way social science was used in *Weatherred* and *Kinney*, however, does reflect the defining characteristics of both legislative fact and adjudicative fact. In each case, the research used demonstrated the critical component of legislative fact—generality. Just as the research used in *Roper* focused on “juveniles’ diminished culpability in general,”⁴⁴ the research used in *Weatherred* focused on factors that “on average” affect eyewitnesses.⁴⁵ Similarly, the research in *Kinney* concerned symptoms that victims of rape “commonly experience.”⁴⁶ In each case, the research also possessed the critical component of adjudicative fact—specificity. Just as the research used in *Kis* spoke only to whether consumers were confused between two given products, the studies in *Weatherred* were used only to challenge the testimony of eyewitnesses to a particular crime, and the research in *Kinney* was used only to show that the named victim was, in fact, sexually assaulted.

The research used in these cases and many like them is thus neither wholly legislative nor wholly adjudicative fact but has the essential elements of both of the conventional categories. Therefore, a third category has been proposed, termed *social framework*,⁴⁷ to denote the use of general conclusions from

social science research to determine factual issues in a specific case.

Current Approaches

Social science research used as a social framework is becoming common in American courts. It is now often introduced as if it were simply an adjudicative fact—by expert testimony before a jury, as it was in *Weatherred* and *Kinney*. Commentators have pointed out that treating social frameworks as adjudicative facts has two significant liabilities.⁴⁸ First, it is an inefficient use of court time. The same testimony about the same research studies must be heard in case after case whenever a framework for a given type of factual determination is sought. Second, introducing frameworks as social facts is expensive. The pool of expert witnesses is limited to a small group of basic researchers in each topical area and those researchers must be transported and paid to repeat their testimony in each new case. Access to expert testimony is therefore effectively precluded in a large number of cases in which the introduction of a social framework would seem justified.

An alternative to treating social frameworks as if they were simple adjudicative facts has been proposed that recognizes the similarity of social frameworks to both adjudicative fact and legislative fact as well.⁴⁹ The proposal is for a two-stage set of procedures for the judicial management of this use of social science in court. First, the generality that social frameworks share with research used as legislative fact or social authority suggests analogous procedures for obtaining, evaluating, and establishing social frameworks—obtain the research either in briefs or through the court’s own investigation, evaluate it as legal precedent is evaluated, and have one court’s decision on a social framework affect later courts as one court’s decision on a matter of law affects later courts. Second, the specificity that social frameworks share with research used as adjudicative or social fact suggests similar procedures for communicating the court’s conclusions to the jury: via instruction.⁵⁰ The jurors would then be in a position to apply the general social framework to the specific evidence produced at trial.

In *Dukes v. Wal-Mart*,⁵¹ the Ninth Circuit recently upheld the certification of the largest employment-discrimination class in history, with more than 1.5 million women employees seeking over \$1.5 billion in damages. A crucial piece of evidence supporting class certification came from a sociologist who testified that he performed a “social framework analysis” to evaluate Wal-Mart “against what social science research shows to be factors that create and sustain bias”⁵² and found

42. 762 A.2d 833 (Vt. 2000).

43. *Id.* at 842.

44. *Roper*, 543 U.S. at 572.

45. *Weatherred*, 963 S.W.2d at 127.

46. *Kinney*, 762 A.2d at 839.

47. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987).

48. *Id.* at 583-584.

49. *Id.* at 587-98. For judicial discussions of this proposal, see *State v. Alger*, 764 P.2d 119 (Idaho 1988); *Skinner v. State*, 33 P.3d 758 (Wyo. 2001); Steve Leben & Megan Moriarty, *A Kansas Approach*

to *Custodial Parent Move-Away Cases*, 37 WASHBURN L. J. 497, 524-32 (1998).

50. On the use of jury instructions to convey empirical information, see *State v. Long*, 721 P.2d 483 (Utah 1986); *State v. Cromedy*, 727 A.2d 457 (N.J. 1999); *State v. Ledbetter*, 881 A.2d. 290 (Conn. 2005).

51. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007).

52. *Id.* at 1178. See Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs’ Motion for Class Certification, at 5, *Dukes v. Wal-Mart Stores, Inc.*, Case No. C-01-2252 MJJ (N.D. Cal. Feb. 3, 2003).

MONAHAN AND WALKER'S GUIDE FOR USING SOCIAL SCIENCE INFORMATION IN COURT

In outline, our view is that courts should adhere to the following steps when addressing an empirical question concerning human behavior:

1. Determine whether the substantive law governing the case raises an empirical issue to which social science research may be pertinent.
2. If so, determine whether the empirical issue bears on an assumption underlying the choice of a legal rule that has general applicability, a factual dispute pertaining only to the parties before the court, or a mixture of the two in which general empirical information provides a context for determining a specific fact.
3. If the empirical issue concerns an assumption underlying the choice of a legal rule of general applicability:
 - a. Receive social science studies in briefs submitted by the parties or amici.
 - b. If the parties or amici do not submit social science studies, request such studies from the parties or amici, or obtain them from the court's own sua sponte investigation of published sources.
 - c. Evaluate any available research by determining whether the research has survived the critical review of the scientific community, has used valid research methods, is generalizable to the legal issue in question, and is supported by a body of related research.
 - d. If no acceptable research is available, candidly state this conclusion in the opinion. In common-law cases, rely upon the empirical assumption that appears to be the most plausible. In reviewing state action, rely upon the legally appropriate standard of review in determining where to place responsibility for resolving the empirical issue.
4. If the empirical issue concerns a factual dispute bearing only on the parties before the court:
 - a. Determine the party with the burden of proving the contested fact.
 - b. Determine whether the law governing the case makes empirical research an appropriate form of evidence for meeting this burden.
 - c. If empirical research does constitute an appropriate form of evidence, allow the admission of direct and rebuttal expert testimony subject to the applicable federal or state rules of evidence.
 - d. If the party with the burden of proof does not produce relevant expert testimony, weigh this omission in determining whether the burden has been met.
5. If the empirical issue concerns the provision of a general context within which to determine a fact pertaining only to the parties, then

EITHER:

 - a. Obtain and evaluate social science research as specified in 3a-3c above.
 - b. In cases tried before a jury, communicate the conclusions by means of jury instructions.

OR:

 - c. Allow the admission of direct and rebuttal expert testimony subject to the applicable federal or state rules of evidence.
 - d. However, do not allow the expert to link general research findings to a specific party before the court.

the company wanting. As authority for introducing this analysis, the expert—and the Ninth Circuit—relied on the work by Walker and Monahan, described above, introducing the concept of social framework.⁵³ In a recent article,⁵⁴ we reviewed and recast the procedures originally proposed for apprising juries of general research results to assist in resolving the case before them.

Experience over the past 20 years has shown that that courts will typically allow general contextual information from social science research to be conveyed to the jury by expert witnesses rather than via instructions, as originally envisioned. Where this occurs, we believe it essential that courts limit expert testimony to a description of the findings of relevant and reliable research and of the methodologies that produced those findings, and preclude the witness from linking the general research findings to alleged policies and practices of a specific firm. The landmark class action of *Dukes v. Wal-Mart* illustrates both the centrality of social framework evidence to modern employment litigation, as well as the need for courts to clarify and circumscribe the role of the experts who introduce them.

SUMMARY AND CONCLUSION

The exponential growth of social science research dealing with questions of relevance to the law and the increasing practice of courts in incorporating that research into legal decisions combine to make the development of a coherent scheme for the judicial management of social science information a priority for courts and scholars.⁵⁵ There is longstanding agreement that one legitimate use of social science is to assist in the creation and modification of legal rules of general applicability. Legislative fact has been the rubric that has subsumed this use of research for over 50 years. Given the elasticity and lack of direction inherent in this concept, it is unlikely to hold sway much longer. A second accepted use of social science is to provide adjudicative facts for resolving disputes specific to the parties before a court. The law here is much more settled. Finally, there is a trend rapidly gaining credibility in American courts to use social science in a third way, as a social framework providing a general empirical context within which to determine specific facts at issue in a case. Procedures for the judicial management of this new use of social science must blend existing or proposed procedures for the management of both the law-making and fact-finding uses of research.



John Monahan is the John S. Shannon Distinguished Professor of Law at the University of Virginia School of Law. Monahan has a Ph.D. in psychology from the University of Indiana; a former psychology professor, he was only the second non-lawyer to join the law faculty at Virginia. He has been a visiting fellow at Harvard Law School, Stanford Law School, Oxford, and the New York University School of Law. Monahan is the author or editor of 15 books, including *Social Science in the Law*, coauthored with Laurens Walker and now in its sixth edition. Two of his other books have won the Manfred Guttmaker Award of the American Psychiatric Association for outstanding research in law and psychiatry: *The Clinical Prediction of Violent Behavior in 1982* and (with others) *Rethinking Risk Assessment in 2002*.



Laurens Walker is the T. Munford Boyd Professor of Law at the University of Virginia School of Law. Walker earned his J.D. from Duke University and also earned an S.J.D. from Harvard Law School. He has been a member of the Virginia law faculty since 1978. His early empirical research focused on procedural justice; Walker received the Biennial Distinguished Contributors Award in 1988 from the American Psychology-Law Society for his studies of the legal process. Walker's later research has focused on the use of social science research techniques, including the use of sampling to bring complex civil cases to trial and judgment. Walker is the coauthor, with John Monahan, of the book, *Social Science in the Law*, a widely used law school casebook.

53. 509 F3d at 1178-80.

54. John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* VA. L. REV. (forthcoming).

55. David Faigman & John Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, 56 ANN. REV. PSYCH. 631 (2005).

Mental Illness and the Courts: Some Reflections on Judges as Innovators

John P. Petrila and Allison D. Redlich

Issues raised by the influx of defendants with serious mental illnesses are some of the most important that criminal judges confront. Because of the volume of defendants with mental illnesses, the impact goes beyond that of the individual case and extends to jails, police and sheriff departments, the treatment system, and ultimately to the role of the judge. This article suggests some of the ways in which communities have attempted to respond to these issues, and highlights the fact that judges have become significant leaders as well as innovators in such efforts. Not every judge will decide to adopt one or more of these roles, but regardless, it is likely that the issues that mental illness creates for the criminal justice system will exist far into the future.

PART 1. MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM

On January 18, 2006, the Conference of Chief Justices adopted a resolution endorsing the use of problem-solving courts to address the impact of mental illness upon the criminal justice system.¹ This resolution formally acknowledged the emergence of therapeutic courts as part of the jurisprudential mainstream. As important, it highlighted the changing role of the judiciary in response to the many issues caused by the prevalence and volume of serious mental illnesses among defendants in courts across the country.² In fact, as this article suggests, state judges have been responsible for some of the most innovative solutions to these issues, a trend likely to continue for the foreseeable future. Some judges have embraced this new role, others have not, but—regardless of perspective—it is difficult for any criminal judge today to simply ignore the issue of mental illness.

There were approximately 14 million arrests in the United States in 2005.³ The most conservative estimate is that approximately 900,000 of these arrestees were acutely mentally ill at the time of the arrest.⁴ When substance abuse and other mental illness diagnoses are considered, the prevalence of mental disorder among arrestees is over 70%.⁵ In addition, it is estimated that between 16% and 24% of people who are in jails and prisons have a major diagnosable mental illness such as depression, schizophrenia, or other psychotic or bipolar disorders.⁶ Again, if all mental disorders—including substance-abuse disorders—are included, the prevalence of mental disorder in incarcerated populations is over 70%.

Until three decades ago, the majority of people with severe mental illnesses were confined for at least part of the time in state psychiatric hospitals. However, since then there has been a major diminution of the role of state hospitals, while the number of people with mental illnesses in jails and prisons has increased significantly. For example, in 2000, people with severe mental illnesses were more than five times likely to be confined to a jail than to a state psychiatric hospital (the rate of hospitalization in state psychiatric hospitals was 22 people per 100,000, but the rate of confinement in jail was 113 people with severe mental illnesses per 100,000.⁷) This is not to suggest that the answer to the problem of mental disorder in the criminal justice system is to recreate the state psychiatric hospital system. Rather, as we suggest below, the lack of effective community treatment in many jurisdictions is a more pressing issue than the absence of state hospital beds. In addition, changes in sentencing policy, particularly regarding substance-abuse offenses, has contributed to the influx of people with mental disorders. However, regardless of *why* it has hap-

Footnotes

1. Conference of Chief Justices, Policy Statements and Resolutions, Resolution 11, *In Support of the Judicial Criminal Justice/Mental Health Leadership Initiative*, January 18, 2006, available at <http://ccj.ncsc.dni.us/CriminalAdultResolutions/resol11JudicialCriminalJusticeMentalHealthInitiative.html>.
2. Therapeutic courts are a comparatively recent development; the first drug court emerged in 1989 in Dade County, Florida, and the first mental-health courts of this era began in 1997 in Broward County, Florida and Marion County, Indiana. Today there are more than 1,000 such courts in the United States and their “fit” within the traditional justice system has been the subject of frequent discussion, including in this journal. For an example, see Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts Into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Courts Committee*, COURT REVIEW, Spring 2002, at 1. See also Aubrey Fox and Greg Berman, *Going to Scale: A Conversation About the Future of Drug Courts*, COURT REVIEW, Fall 2002, at 4. Therapeutic courts have been developed in a number of other countries as well. John Petrila, *An Introduction to Special Jurisdiction Courts*, 26 INT’L J. LAW AND PSYCH. 3 (2003).
3. Table 29, U.S. Dept. of Justice, Fed. Bureau of Investigation, *Crime in the United States* (2005), available at http://www.fbi.gov/ucr/05cius/data/table_29.html.
4. NAT’L GAINS CTR., THE PREVALENCE OF CO-OCCURRING MENTAL ILLNESS AND SUBSTANCE USE DISORDERS IN JAILS (rev. ed. 2004), available at <http://gainscenter.samhsa.gov/pdfs/disorders/gainsjail-prev.pdf>.
5. *Id.*
6. RICHARD LAMB AND LINDA E. WEINBERGER, *THE SHIFT OF PSYCHIATRIC INPATIENT CARE FROM HOSPITALS TO JAILS AND PRISONS*, 33 J. AMER. ACAD. PSYCH. & LAW 529 (2005). For the underlying data behind Lamb and Weinberger’s estimates, see NAT’L COMM’N ON CORRECTIONAL HEALTH CARE, 2 THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS ix-x, 57-80 (2002), available at http://www.ncchc.org/pubs/pubs_stbr.html.
7. *Id.*

pened, it is clear that there are many more individuals with major mental illnesses in the criminal justice system today than was the case 20 or 30 years ago.

The increase poses serious problems for the individual and for the justice system. People with mental illnesses are jailed on average two to three times longer than individuals without a mental illness arrested for a similar crime. A stay in jail may exacerbate the person's illness, and an arrest record may further complicate the person's efforts to live successfully in the community. In addition, jails incur significant costs associated with the oversight of individuals with mental illnesses (particularly regarding the threat of suicide) and for medication and other health-care services.

Mental-illness issues also present complications for a judge. Many criminal courts have overburdened dockets, which allow little time for an individual case. Yet dispositional questions involving a defendant with an acute mental illness are often not readily resolved. Ordering a competency examination may be easy; deciding whether and how to gain access to treatment that the individual needs may be considerably more difficult.⁸ In addition, judges often encounter the same defendant with mental illness repeatedly; the individual is arrested usually for a comparatively minor offense, is released often for time served but with no access to treatment, and is then rearrested for the same type of offense. This cycle with "repeat defendants" creates frustration for judges unable to gain access to treatment that might have some impact on the defendant's behavior.

As the impact of mental illness on the criminal justice system has grown, judges increasingly have become leaders in seeking innovative solutions. This has often been by default; few judges take the bench with a primary goal of designing solutions to systemic issues that often appear to flow from failures in the mental-health and human-services systems. Yet in many communities, judges may be the only officials with the necessary formal and symbolic authority to create change.

This article describes a number of innovations that have been developed by individual judges and others within the criminal justice system in response to mental-illness issues. We first briefly describe the realities of today's mental-health system, which provides the context in which many criminal courts now sit. We then briefly discuss a number of discrete initiatives (pre-arrest diversion programs; post-arrest diversion programs, including therapeutic courts; post-disposition oversight, including specialty probation for defendants with mental illness) that various communities have tried. We conclude with some comments on the role of the judge in identifying and resolving these issues. We do not suggest that these initiatives are a good fit for every community. In fact, it is quite clear that local circumstances are the first thing that must be considered in determining which solutions to attempt. Nor will

every judge wish to adopt a proactive role in seeking solutions. But addressing the needs of defendants with serious mental illnesses will be a problem that confronts virtually every criminal court judge, and so it may be useful, particularly for judges new to these issues, to have information regarding the strategies communities have used in response.

[M]any defendants with serious mental illness are arrested on relatively minor charges, and therefore formal competency adjudications . . . may have little appeal

Contextual issues. Mental illness has always been an issue in the criminal justice system, primarily because of its potential impact on mental state. Competency to stand trial assessments were (and continue to be) a staple of criminal proceedings, and the insanity defense and related pleas—such as guilty but mentally ill—have continuing relevance in a modest number of cases. In addition, courts have long made mental-health treatment a condition of disposition in resolving some criminal cases.

However, these traditional tools have little relevance to the vast majority of the people arrested each year who are acutely ill at the time of arrest. This is for at least two reasons. First, many defendants with serious mental illness are arrested on relatively minor charges, and therefore formal competency adjudications and pleas of insanity may have little appeal as a practical matter, though legally they might be preferred. Second, even if these mechanisms were employed in every one of the 900,000 cases in which the defendant is acutely ill at the time of arrest, it would only further exacerbate the problem of overburdened court dockets, because these issues do not lend themselves to quick disposition. As a result, many of the innovations discussed below are designed either to reduce the number of acutely ill defendants who enter the criminal justice system or to shorten the time spent there.

There have also been major changes in the last few decades in the treatment of people with serious mental illnesses.⁹ Three are relevant here. First, the location and duration of much treatment has changed. State psychiatric hospitals used to provide most long-term care for serious mental illnesses. Most psychiatric hospital care today is provided in community outpatient settings because of a number of factors, including horrific conditions that developed in many state hospitals, as well as changing philosophies of—and advancements in—treatment. Community outpatient care is designed largely to control and reduce symptoms. Inpatient care is generally

8. It may be difficult even to gain access to treatment services for competency restoration. In Florida, judges held the Secretary of the state agency responsible for providing such services in contempt because of long waiting lists for beds in the hospitals charged with providing competency restoration. Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails*, N.Y. TIMES, Nov. 15, 2006.

9. It should be noted that the influx of people with drug-abuse disorders that eventually resulted in the development of drug courts was caused in large part by changes in criminal laws, which brought more defendants into the criminal justice system for offenses related to substance abuse and resulted in lengthier sentences as well. See Petril, *supra* note 2.

Formal diversion programs for persons with mental illness are growing in popularity and number.

short-term, and occurs most often in psychiatric units of community hospitals. There is little long-term, inpatient care for psychiatric illnesses available in the United States today.

Second, and relatedly, most people with serious mental illnesses spend the vast majority of their time in the commu-

nity. At this juncture, it is beyond dispute that most people with serious mental illnesses can be treated successfully in the community and live productive lives, even if they suffer relapses during treatment.¹⁰ However, the network of treatment services, social supports, and housing necessary to provide such treatment is rarely available in sufficient supply and in many communities is woefully lacking. As a result, many people with serious mental illnesses receive little or inadequate treatment. As a result, the symptoms of serious mental illness may be exacerbated. Mental illness does *not* necessarily lead to arrest, but conduct that may lead to arrest, such as loitering, public urination, or petty theft, may become more likely in the absence of treatment and social stability for at least some individuals with serious mental illnesses.

Third, the primary locus of responsibility for dealing with these failed treatment systems has shifted in many places from state government to local communities. The federal government funds many mental-health services through the Medicare and Medicaid programs but plays virtually no role in designing treatment systems. State governments traditionally assumed a leadership role for designing mental health services through the state mental health agency. However, many states have reduced funding for mental-health as a percentage of human services funding, and the authority of many state mental-health commissioners has been reduced as states grapple with rising costs in their Medicaid programs.

While there may not be a direct correlation between these changes and the impact of mental illnesses on local courts, they are contextual factors that have shifted the venue for innovative responses to local communities. Over time, a number of strategies have emerged in various communities that

appear to hold some promise. We discuss the most common strategies below.

PART 2. STRATEGIES

As indicated above, the volume of persons with mental illness coming into contact with the justice system is so immense that the majority of communities have developed their own informal and formal strategies to combat associated issues. We focus here on formalized strategies that occur at different points along the criminal justice continuum, including 1) pre-arrest diversion programs; 2) post-arrest diversion programs, including mental-health courts; and 3) specialty probation. Below we provide brief descriptions and operational definitions of these three subtypes. For more detailed information, we refer interested readers to the National GAINS Center and its Technical Assistance and Policy Analysis Center for Jail Diversion¹¹ and the Council of State Governments' Criminal Justice Mental Health website.¹² These on-line resources offer many free publications, including guides on how to implement different diversion programs as well as an overview of the mental health service system for criminal justice professionals.¹³

Formal diversion programs for persons with mental illness are growing in popularity and number. While it is accurate to state that these diversion programs have resulted from local initiatives, the federal government also has demonstrated support. Specifically, the President's New Freedom Commission on Mental Health¹⁴ recommended "widely adopting adult criminal justice and juvenile justice diversion....strategies to avoid the unnecessary criminalization and extended incarceration of non-violent adult and juvenile offenders with mental illness." Further, over the past five years, federal government agencies, such as the Bureau of Justice Assistance and the Substance Abuse and Mental Health Administration, have contributed millions of dollars in grant funds toward the creation of local diversion programs.¹⁵

Pre-arrest diversion. As the name implies, pre-arrest—or pre-booking—diversion programs focus on diverting persons to treatment as an alternative to arrest. Such programs depend on law enforcement given that police and sheriff's deputies make the vast majority of decisions whether or not to arrest an individual engaged in criminal behavior. It is becoming increasingly popular because this type of diversion when suc-

10. Relapse is common for the most serious mental illnesses, for example, schizophrenia. As one group of commentators recently noted, "the course of early-phase schizophrenia is characterized by initial improvement in symptoms followed by repeated relapse and a low rate of sustained recovery." However, the same authors note that early intervention with effective medications can result in good control of symptoms and that even those who may not respond to treatment of an initial episode of treatment may attain recovery over time, given adequate treatment. Delbert G. Robinson et al., *Pharmacological Treatments for First-Episode Schizophrenia*, 31 SCHIZOPHRENIA BULL. 705 (2005). Not all mental illnesses are as devastating as schizophrenia, but because they often manifest themselves episodically, it is difficult to assume that an individual with a serious mental illness will necessarily be wholly compliant with court orders, particularly in the absence of adequate treatment and supervision.

11. See <http://gainscenter.samhsa.gov/html/default.asp>.

12. See <http://www.consensusproject.org/>.

13. JACKIE MASSARO, OVERVIEW OF THE MENTAL HEALTH SYSTEM FOR CRIMINAL JUSTICE PROFESSIONALS (2005), available at http://209.132.230.103/pdfs/jail_diversion/MassaroII.pdf.

14. PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 43-44 (2003) (hereinafter ACHIEVING THE PROMISE], available at <http://www.mentalhealthcommission.gov/reports/FinalReport/toc.html>.

15. See, e.g., *America's Law Enforcement and Mental Health Project*, 42 U.S.C. §§ 3711, 3796ii-3796ii-7, 3793, Pub. L. 106-515 (2000). It is also worth noting that these grants have often been comparatively small, and while they have been important in seeding local projects, the funds allocated by the federal government for diversion are rarely adequate to enable the programs to sustain themselves.

Three core factors have been identified as essential to the success of a pre-arrest diversion program.

Successful can have an impact on court dockets and the use of jail beds.

There are three basic types of pre-arrest diversion: 1) police-based specialized police response, 2) police-based specialized mental-health response, and 3) mental-health-based specialized mental-health response.¹⁶ In

the first model, police officers are specially trained in crisis intervention and act as liaisons to the mental-health system. In the second model, mental-health professionals collaborate with police to provide on-site or telephone consultation on responding to individual cases. In the third model, which is the most common, mental-health professionals provide on-site help to the police in situations involving persons with mental illness.¹⁷

One of the most successful and most duplicated models for pre-arrest diversion is the Crisis Intervention Team (CIT) model, originally developed in Memphis, Tennessee. Today, many major and smaller U.S. cities have adopted CIT programs of their own. The CIT program in Memphis has been described in the following manner: A cadre of selected patrol officers (10 to 20 percent of those assigned to patrol) receive extra training (40 hours initially) and then serve as generalists/specialists; they perform the full range of regular patrol duties, but respond immediately (from anywhere in the city) whenever crisis situations occur involving people with mental illness. In those situations, these officers assume on-scene command as soon as they arrive. They are trained to handle the crisis situations as well as to facilitate the delivery of treatment and other services. In particular, they become knowledgeable about voluntary and involuntary commitment, plus they become well known to professionals in the mental-health community, facilitating the delivery of treatment and other services to the people in crisis.¹⁸

Three core factors have been identified as essential to the success of a pre-arrest diversion program. The first is training. The Memphis CIT model prides itself on its 40-hour (plus) intensive training for officers selected for the program. The cur-

riculum includes information on mental illness, crisis skills, and a heavy concentration on interactive activities, such as role play. Refresher trainings are utilized as well. The second core element is the creation of partnerships between community mental-health providers and law-enforcement officials. Pre-arrest diversion programs require that police have access to treatment services reliably, predictably, and at all hours. If an officer finds it more difficult to gain access to assessment and treatment than to arrest the individual, diversion programs will founder. Therefore, in developing this option, communities often use a single point of entry to services, assure that no one referred for services will be refused at least an assessment, and provide streamlined intakes for police officers.¹⁹ The third core element is re-conceptualizing the traditional police-officer role for the specialized-diversion officers. That is, under the CIT model, officers volunteer or are specially selected rather than randomly assigned, and the agency promotes collegiality and a sense of shared responsibility among the officers. It is also important that relevant statutes and policies encourage and support rather than create impediments to diversion. For example, crisis facilities must be enabled legally to accept and detain persons who may or may not have criminal charges pending.

Early research suggests that pre-arrest diversion programs can be successful in creating access to treatment without creating additional community risk. For example, in comparison to persons not diverted, persons diverted were more likely to be in counseling and to be taking prescribed medications. Re-arrest rates were not higher than those for non-diverted populations, despite the fact that individuals diverted before arrest were typically in the community for longer periods of time (and therefore potentially at risk for behavior leading to another arrest) than non-diverted individuals.²⁰ Currently, a major evaluation is underway of 32 pre and post-booking diversion programs, which may provide more definitive answers to whether pre-diversion programs are successful, for whom, and why.

Post-arrest diversion. After a person is arrested, formal diversion can occur at any point during the criminal process. We first discuss post-arrest, or post-booking diversion programs generally, and address mental-health courts (MHCs) separately.

16. For discussions of the various methods for organizing pre-arrest diversion, see Martha Williams-Dean et al., *Emerging Partnerships between Mental Health and Law Enforcement*, 50 PSYCH. SERVICES 99 (1999); Henry Steadman et al., *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 PSYCH. SERVICES 645 (2000).

17. MELISSA REULAND, A GUIDE TO IMPLEMENTING POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS (2004), available at http://gainscenter.samhsa.gov/pdfs/jail_diversion/PERF.pdf.

18. This description is taken from an article at the website of the Center for Problem-Oriented Policing: Gary Cordner, *People with Mental Illness* 4 (2006), available at http://popcenter.org/problems/mental_illness. The article provides a good description not only of the CIT model but also of a number of other approaches adopted by police departments across the United States in addressing issues involving people with mental illnesses.

The growing popularity of CIT as a strategy is reflected in attendance at the 2nd National CIT Conference held in fall 2006 in Orlando. It was attended by more than 800 individuals from 40 states, Canada, and Australia. Many of the attendees were police officers, and there were a number of judges in attendance and presenting as well.

19. Henry Steadman et al., *A Specialized Crisis Response as a Core Element of Police-Based Diversion Programs*, 52 PSYCH. SERVICES 219 (2001).

20. See Michelle Naples & Henry Steadman, *Can Persons with Co-Occurring Disorders and Violent Charges Be Successfully Diverted?*, 2 INT'L J. FORENSIC MENTAL HEALTH 137 (2003); THE NATIONAL GAINS CTR. FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYSTEM, *WHAT CAN WE SAY ABOUT THE EFFECTIVENESS OF JAIL DIVERSION PROGRAMS FOR PERSONS WITH CO-OCCURRING DISABILITIES?* (2004), available at http://gainscenter.samhsa.gov/pdfs/jail_diversion/WhatCanWeSay.pdf.

Post-booking diversion. Post-booking diversion programs, like pre-arrest diversion programs, seek to engage eligible persons in community treatment with the hope that treatment will reduce the risk of behavior leading to future arrests. An obvious difference between the two approaches is that pre-arrest diversion attempts to keep the person from entering the criminal justice system at all, while post-arrest programs are not used until the person has already been arrested.

Post-booking diversion programs may seek to divert the individual to treatment at any point during the criminal process, and therefore, depending on the program, referrals may come from a variety of parties to the criminal justice system, including jail officials, law enforcement, magistrates, judges, and attorneys. One commentator suggests that there are two particularly important points at which defendants may be diverted post-arrest. The first is at the person's first court appearance, which in many jurisdictions will occur within a day or two after arrest. At this point, an arraigning judge might order the person released to community treatment as an alternative to continuing custody. A second point at which diversion might occur is when the prosecutor decides whether to proceed with charges. If the prosecutor is aware that the person has been accepted into a diversion program, he or she may be more willing to hold charges in abeyance pending successful completion of the program. Six critical elements of these diversion strategies have been identified: 1) involvement of all key parties (e.g., judges, prosecutors, defense attorneys, mental-health providers, etc.), 2) strong judicial leadership, 3) quick access to services to assess the defendant's mental health, 4) availability of mental-health-treatment resources, 5) assistance to the defendant in complying with imposed treatment conditions, and 6) patience among professionals from differing and sometimes conflicting systems. Of importance, both options—pretrial release and deferred prosecution—can occur in a matter of days after arrest.²¹

Post-diversion arrest also can take place much later. For example, a person may come before another judge who suspects the person may have a mental illness and be eligible for diversion. Similarly, a person's attorney, after some interaction, may conclude that the best option for his or her client is the diversion program. Diversion may even occur after sentencing, such that the sentence of jail or prison time is put on hold pending successful completion of treatment. Each of these options is available even if there is no formal effort at diversion; however, many communities have begun to attempt to formalize the processes by which defendants may be diverted

into treatment as the criminal process proceeds.

A successful example of a post-booking diversion program attempting to address the needs of individuals charged with felonies is New York City's Nathaniel Project. The Nathaniel Project is "exclusively for people with psychiatric disabilities who have been indicted on a felony offense and are facing a lengthy sentence in New York State prison.... the program will consider any defendant regardless of offense, including violent offenses."²² The Nathaniel Project began in 2000 and appears to be very effective in gaining access to treatment while reducing re-arrest: new arrests among their clients have dramatically decreased, 100% of their clients are engaged in treatment, and after one year, 79% had permanent housing. While many communities will choose not to focus diversion efforts on those charged with felonies, the Nathaniel Project provides evidence that diversion to treatment in lieu of incarceration can be effective in some circumstances even for a difficult population of offenders with mental illness.

Mental-health courts. Mental-health courts are one of the fastest growing vehicles for addressing the needs of mentally ill defendants. The first two mental-health courts appeared in 1997 in Marion County, Indiana and Broward County, Florida. However, today, there are estimated to be more than 150 U.S. mental-health courts with the number continuing to grow rapidly. A survey completed in January 2005 determined that MHCs were in operation in 34 states with many of the states operating multiple MHCs in different counties and jurisdictions.²³ Like other diversion programs, these therapeutic courts attempt to provide defendants with access to treatment and oversight with the goal of reducing the likelihood of future cycling through the criminal justice system.

Although MHCs vary in their procedures, operations, and eligibility requirements, there are several defining characteristics. First, MHCs are criminal courts, usually with one judge carrying a dedicated docket.²⁴ Second, MHCs typically have mental-health and criminal justice eligibility criteria in that they will only allow in persons with certain diagnoses and/or certain criminal charges. Earlier, or first-generation, mental-health courts usually limited their docket to misdemeanants,

**New York City's
Nathaniel Project . . .
began in 2000 and
appears to be very
effective in gaining
access to treatment
while reducing
re-arrest**

21. For a general discussion of this type of diversion, see JOHN CLARK, NON-SPECIALTY FIRST APPEARANCE COURT MODELS FOR DIVERTING PERSONS WITH MENTAL ILLNESS: ALTERNATIVES TO MENTAL HEALTH COURTS (2004), available at http://gainscenter.samhsa.gov/pdfs/jail_diversion/pre_trial_nocover.pdf.
22. For a description of the Nathaniel Project, see THE NATIONAL GAINS CTR. FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYSTEM, THE NATHANIEL PROJECT: AN ALTERNATIVE TO INCARCERATION PROGRAM FOR PEOPLE WITH SERIOUS MENTAL ILLNESS WHO HAVE COMMITTED FELONY OFFENSES (rev. ed. 2005), available at http://gainscenter.samhsa.gov/pdfs/jail_diversion/nathaniel_project.pdf.

23. Allison D. Redlich et al., *Patterns of Practice in Mental Health Courts: A National Survey*, 30 LAW & HUMAN BEHAV. 347 (2006).
24. It is worth noting that most mental-health courts have been created from existing resources; few jurisdictions have obtained additional judicial or attorney resources for these courts. In addition, caseloads in most jurisdictions are comparatively small (a mental-health court with a docket of more than 100 cases would be a relatively large mental-health court), and so the judge who presides over the court typically does so in addition to his or her usual responsibilities.

but a number of more recent courts use a mixed (misdemeanor-felony) caseload or only felony cases.²⁵ Third, MHCs not only require the defendant to receive treatment but also arrange for supervision and oversight of treatment compliance. Oversight takes several forms; for example, the judge will hold periodic status hearings on most cases, and ongoing supervision is provided by the probation officers, case managers, and/or MHC personnel. Fourth, the courts use a mix of incentives and sanctions in an effort to gain compliance. Incentives might include praise in the courtroom from the judge or gift cards marking progress with treatment, while punishment can range from reprimands from the judge to incarceration. Fifth, the courts generally adopt the philosophy of “therapeutic jurisprudence,” which is an approach to law that places the therapeutic or non-therapeutic impact of legal rules and processes at the core of judging and practice.²⁶ Finally, participation in all mental-health courts is voluntary, and it is generally estimated that approximately 5% of defendants offered participation in a mental-health court decline.²⁷

While MHCs continue to proliferate, they are not without controversy. Some of the controversies concern the use of jail as a sanction, whether the courts are truly voluntary, and whether MHCs are appropriate venues for persons charged with low-level crimes. Another issue is whether or not the courts “work.” That is, do mental-health courts cause people to engage in treatment and ultimately reduce or eliminate future criminal justice involvement? Preliminary research suggests that the courts can be effective, especially when demographic, criminal, and diagnostic factors are considered, but the studies done to date have been of single courts, and so it is difficult to generalize from their findings.²⁸

To encourage standardization of MHC operations and requirements, the Council of State Governments (CSG) has proposed 10 “essential elements” of mental-health-court design and implementation.²⁹ Although we list them here, readers are referred to the original document for more specific information on each element. The elements that must be tended to in the CSG’s judgment are 1) Planning and Administration, 2) Identification of the Target Population, 3) Timely Participant

Identification and Linkage to Services, 4) Terms of Participation, 5) Informed Choice, 6) Treatment Supports and Services, 7) Confidentiality, 8) Identification of the Mental Health Court Team, 9) Monitoring Adherence to Court Requirements, and 10) Sustainability. In addition, CSG has identified five MHCs as “learning sites.” The learning sites have been designated to provide support, including observation opportunities, to other courts looking to set up or expand upon an existing mental health court.” The five courts were chosen primarily because of their fidelity to the Essential Elements. Judges and others who are considering establishing a MHC in their community might first obtain the *Essential Elements of a Mental Health Court* guide, and perhaps contact one or more of the MHCs identified as learning sites.³⁰

Specialty probation. A more recent development for addressing the needs of defendants with mental illness is specialty probation. Because probationers with mental-health issues often have distinct issues that might affect their ability to comply with the usual conditions of probation, they may require more intensive supervision. While specialty probation is not a diversion program, a growing emphasis on it as a tool makes it worth mentioning here.

As discussed by Skeem, Emke-Francis, and Eno Loudon,³¹ specialty probation differs from traditional probation in several ways. In comparison to traditional probation officers, specialty probation officers 1) have exclusive caseloads of persons with mental illness, 2) have reduced caseloads (e.g., 30 open cases), and 3) receive mental-health training. Additionally, specialty probation officers tend to forge close working relationships with other professionals in the community relevant to the probationers’ well-being. For example, specialty probation officers report having close relationships with treatment providers and

[T]he Council of State Governments has proposed 10 “essential elements” of mental health court design and implementation.

25. Allison Redlich et al., *The Second Generation of Mental Health Courts*, 11 PSYCH., PUB. POL’Y & LAW 527 (2005).

26. David Wexler and Bruce Winick, two law professors, are primarily responsible for the emergence of “therapeutic jurisprudence” as an approach to law. They have written extensively regarding the topic, as well as the manner in which therapeutic jurisprudence might be applied to various legal issues. One of their books is devoted specifically to therapeutic jurisprudence and the role of a judge. BRUCE WINICK & DAVID WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003).

27. Allison Redlich, *Voluntary, But Knowing and Intelligent? Comprehension in Mental Health Courts*, 11 PSYCH., PUB. POL’Y & LAW 605 (2005).

28. For results from two single court studies, see Annette Christy et al., *Evaluating the Efficiency and Community Safety Goals of the Broward County Mental Health Court*, 23 BEHAV. SCI. & LAW 227 (2005); Merith Cosden, Jeffrey Ellens, Jeffrey Schnell & Yasmeen

Yamini-Diouf, *Efficacy of a Mental Health Treatment Court with Assertive Community Treatment*, 23 BEHAV. SCI. & LAW 199 (2005), available at http://czresearch.com/dropbox/Cosden_BehavSciLaw_2005v23p199.pdf.

29. COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT* (2008), available at <http://consensusproject.org/mhcp/essential.elements.pdf>.

30. *Id.* Additional resources may be viewed at <http://consensusproject.org>. The five learning sites are the Akron (Ohio) Municipal Mental Health Court, the Bonneville (Idaho) County Mental Health Court, the Bronx (New York) County Mental Health Court, the Dougherty (Georgia) Superior Court, and the Washoe County (New York) Mental Health Court. See <http://consensusproject.org/mhcp/>.

31. Jennifer Skeem et al., *Probation, Mental Health, and Mandated Treatment*, 33 CRIM. JUSTICE & BEHAV. 158 (2006).

[A] judge who wishes to play an active role in addressing mental illness issues may find that leadership is not forthcoming from the treatment community.

case managers. Finally, specialty officers report utilizing problem-solving strategies as their first strategy to deal with probationers' non-compliance (e.g., generating alternative strategies, and modifying treatment plans jointly with the probationer) rather than initially seeking punishment for violation of probation conditions. Currently, a comprehensive research study is underway

comparing outcomes (e.g., re-arrests, treatment utilization) of probationers under traditional and specialty models.

PART 3. JUDICIAL ROLES

All judges with a criminal docket must address issues created by the presence of growing numbers of defendants with serious mental illnesses. However, individual judges will have different views about the appropriateness of assuming an active role in addressing these issues.

A recent article in this journal by Roger Hanson asserted, "...there are few judges who would claim that judging today is just like it was 30 years ago, or like they think it was 30 years ago."³² Hanson observed that the emergence of problem-solving courts and problem-solving judges was having a significant impact on the discussion regarding judicial role. He characterized the discussion in the following manner:

"Frequently the discussion is framed in terms of whether the judiciary should be expected to behave in one of two polar-opposite ways. Should they be primarily almost aloof finders of fact, impartial and nearly devoid of intimate contact with and

knowledge of litigants and their circumstances? Or should they be one of many possible partners to a diagnostic, therapeutically oriented response process to ameliorate underlying and messy problems of litigants?"³³

Therefore, the manner in which a particular judge defines his or her role is a threshold question that will significantly influence whether the judge then plays the additional roles described briefly below. It should be noted that there is considerable evidence that many judges are interested in assuming a more active role in assuring access to community services for defendants with mental illnesses or substance-abuse problems and for those who have been victims of domestic violence.³⁴

The judge as community convener and leader. Problem-solving or therapeutic courts by definition create a different relationship between the court and the surrounding community. Community treatment providers may lack experience in dealing with the needs of individuals who come into treatment through the criminal justice system, may be reluctant to assume responsibility for such clients because of liability concerns, and may be wary of working too closely with the criminal courts.³⁵ In addition, the lack of adequate housing is a systemic issue that affects the ability of nearly all people with serious mental illnesses to live successfully in the community and will become an issue for judges who seek to achieve successful treatment outcomes for defendants, particularly in therapeutic courts.³⁶

For these reasons and for the reasons noted in Part 1 of this article, a judge who wishes to play an active role in addressing mental-illness issues may find that leadership is not forthcoming from the treatment community. As a result, a judge may find that assuming a leadership role is critical in bringing together community stakeholders. There has been considerable commentary in the last decade regarding why and how courts might reach out to communities, so the topic is not new.³⁷ The need for such a leadership role also is assumed as a sine qua non for

32. Roger Hanson, *The Changing Role of a Judge and Its Implications*, COURT REVIEW, Winter 2002, at 10.

33. *Id.*

34. See, e.g., Aubrey Fox, *And the Survey Says . . . : State Court Judges and Problem-Solving Courts*, in CTR. FOR COURT INNOVATION, A PROBLEM-SOLVING REVOLUTION, MAKING CHANGE HAPPEN IN STATE COURTS (2004); Fox's chapter is available at http://www.courtinnovation.org/_uploads/documents/andthesurveysays.pdf. Fox reports the majority of judges responding to a survey of approximately 500 judges believed that the courts should be active in attempting to create access to services; he also reported widespread interest in problem-solving courts among the respondents. In a number of judicial systems, creating access to treatment for some types of defendants has become an article of faith; for example, the Massachusetts Supreme Judicial Court has asserted "Court involvement creates a crisis in a person's life, and courts are uniquely situated to take advantage of the crisis by directing the person toward treatment. A timely response to the individual's crisis is most likely to lead to success in treatment." Supreme Judicial Court Standards on Substance Abuse, Standard 5, Commentary. This and the other standards set by the Massachusetts Supreme Judicial Court can be found at <http://www.mass.gov/courts/formsandguidelines/substanceev.html>

35. DEREK DENCKLA & GREG BERMAN, RETHINKING THE REVOLVING

DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS (2001), available at http://www.courtinnovation.org/_uploads/documents/rethinkintherevolvingdoor.pdf.

36. Finding housing for people with mental illnesses is a long-standing problem in part because of stigma associated with mental illness and in part for economic reasons. In the last two decades, there has been significant experimentation with different models of housing, particularly regarding the linkage between housing and treatment. See, e.g., Sam Tsemberis, Ph.D. & Ronda F. Eisenberg, M.A., *Pathways to Housing: Supported Housing for Street-Dwelling Homeless Individuals with Psychiatric Disabilities*, 51 PSYCH. SERVICES 487 (2000); Pamela Clark Robbins et al., *The Use of Housing as Leverage to Increase Adherence to Psychiatric Treatment in the Community*, 33 ADMIN. & POLY MENTAL HEALTH & MENTAL HEALTH SERVICES RES. 226 (2006).

37. For example, David Rottman et al. have suggested that six benefits accrue from judicial outreach to communities: 1) an opportunity to influence public opinion and increase accessibility and fairness, 2) the opportunity to permit judges to respond to public criticism thereby strengthening judicial independence, 3) the opportunity to create better case dispositions, 4) the opportunity to create new programs required by defendants and victims in court proceedings, 5) an opportunity to strengthen communities by combining the force of judicial sanctions with the power of

[T]hese are parties that are typically not used to working together, and the building of enough trust to have non-defensive conversations ordinarily takes time.

judges overseeing therapeutic courts.³⁸ However, a judge may wish to convene community leaders *before* a therapeutic court or other specific initiatives are developed. A judge may be the one community official with sufficient prestige and authority to create a venue for discussion that other community leaders feel obligated to attend. Indeed, the Conference of Chief Justices, in the resolution noted at the beginning of this article, stated, “while

leadership can come from different facets of the criminal justice and mental health systems, judges are particularly well positioned to lead reform efforts because of their unique ability to convene stakeholders.”³⁹

In considering strategies for addressing mental-illness issues, a judge might consider convening a number of parties, including the state’s attorney, the public defender, the major local treatment providers, the local hospital that operates the major emergency services (since many people with mental illnesses may be hospitalized in the emergency room during an acute phase of illness), the sheriff and other local law-enforcement representatives, and social-welfare administrators. Each of these parties (and this list may not be exhaustive) will have

some responsibility for—and feel the impact of—the issues associated with serious mental illness. Each will be necessary to creating any solutions to these issues.

If such a meeting occurs, little can be done in a single session. In most communities, these are parties that are typically not used to working together, and the building of enough trust to have non-defensive conversations occur ordinarily takes time. But over time, at least three things may happen. First, some measure of trust will develop. Second, once it does, problem identification may occur at both the individual-case level and at a systemic level. In many communities, a number of individuals will be known to all parts of the system; discussion of those individuals may assist in identifying gaps in services at a more general level.⁴⁰ Finally, such meetings, over time, will enable community leaders to discuss a variety of strategies, rather than a single strategy. Not every strategy fits every community, and efforts by one part of the criminal justice or treatment systems to impose a solution on all parts of those systems may have little chance of success. However, a group of community leaders that has developed trust may have the opportunity to sift through a variety of strategies, considering them against the backdrop of the group’s collective knowledge of local resources, capacities, and political realities.⁴¹

The judge as program designer. Few communities have adequate treatment capacity for individuals with mental illnesses, and judges may conclude that treatment services for defendants in the criminal justice system are particularly lacking. This may be true, especially for the very high percentage of defendants with co-occurring mental illness and substance-

community networks to create better access to treatment and other resources, and 6) an opportunity to better accommodate concerns regarding diversity. David B. Rottman, Pamela Casey & Hillery Efke, *Court and Community Collaboration: Ends and Means* (1998), available at <http://www.courtinfo.ca.gov/programs/community/endsmeans.htm>. For another of many examples, the work of the California Court and Community Collaboration Project provides a number of documents on community collaboration largely initiated by the courts. See <http://www.courtinfo.ca.gov/programs/community/>

38. In other countries where therapeutic courts have been created, the judge as community leader is also considered essential. For example, a commentary reporting on such courts in Australia, Canada, and the United States observed “Judges in community courts are expected to have a high profile in the local community and to maintain good contacts with the community leaders. This is outside the normal judicial role.” JOYCE PLOTNIKOFF & RICHARD WOOLFSON, REVIEW OF THE EFFECTIVENESS OF SPECIALIST COURTS IN OTHER JURISDICTIONS (2005), available at http://www.dca.gov.uk/research/2005/3_2005.pdf.

39. Conference of Chief Justices, *supra* note 1.

40. The identification of needs within a particular system has become quite sophisticated in recent years. One example, called Sequential Intercept Mapping Training, enables community representatives to create a map of how individuals with mental illnesses move across the criminal justice (and treatment) systems. In turn, this permits better planning for the allocation of assessment and treatment resources, as well as the identification of gaps in services. Information about this training may be obtained at

<http://gainscenter.samhsa.gov/html/tta/trainings.asp>.

41. There are many examples of judicial leadership in convening community stakeholders on these issues. One occurred in Miami, Dade County, Florida, where the county was paying 16 million dollars per year to house and treat people with mental illnesses in the jail. Under the leadership of Judge Steve Leifman, a summit of key stakeholders was convened; this in turn led to the creation of Miami-Dade’s 11th Judicial Circuit Criminal Mental Health Project under Judge Leifman’s leadership. The group, which continues to meet, has been instrumental in efforts to create systemic responses to these issues. For a description, see <http://www.naco.org/CountyNewsTemplate.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=8091>. In Broward County, Florida, Judge Mark Speiser created a multiagency Criminal Justice Mental Health Task Force in 1994. The Task Force continues to meet and has spawned a number of initiatives, including two mental-health courts (the first a misdemeanor court, the second a felony court) and specialty probation. In Ohio, Supreme Court Justice Evelyn Stratton has been a forceful advocate for the creation of mental-health courts, and, at least in part as a result, Ohio has more mental-health courts than any state in the United States. More recently, the Florida Supreme Court, under Judge Leifman’s leadership, published a comprehensive report suggesting reforms in both the mental-health and criminal justice systems to provide better care for people with mental illnesses at risk of entering the criminal justice system. The report can be found at <http://mhlp.fmhi.usf.edu/web/mhlp/documents/Supreme-Court-Report-2007.pdf>.

abuse diagnoses. Treatment is often lacking for people with co-occurring disorders in the general population, and so the lack of adequate treatment capacity will be an issue confronting therapeutically oriented judges as well.⁴²

Given these difficulties, judges may find themselves a part of an effort to create or design treatment and other services for defendants. Certainly there is precedent for this; judges presiding over drug courts are often intimately involved in overseeing treatment, and drug courts may operate services directly as well as contract with other treatment providers.⁴³ While a discussion of appropriate treatment services for defendants with mental illnesses is beyond the scope of this article, a judge in this position might consider the following:

First, creation of the capacity to assess serious mental-health issues rapidly and effectively is important, clinically and programmatically. From a clinical perspective, early assessment increases the chances for effective treatment to be provided. From a programmatic perspective, early assessment is important in determining whether an individual is suited for a particular intervention, for example, whether the individual meets criteria governing admission to a mental-health court. Therefore, the availability of good assessment services is critical, whether a community focuses on pre-arrest diversion, therapeutic courts, or post-sentencing alternatives such as specialty probation.⁴⁴

Second, the development of treatment services does not occur in a scientific vacuum. In recent years, there has been a move toward the use of “evidence-based practices” for treating mental illnesses. Such practices are based on research and have been described as “specific interventions and treatment models that have been shown to improve client functioning and the course of severe mental illness.”⁴⁵ According to the President’s New Freedom Commission on Mental Health, a number of treatments can be characterized as evidence-based practices, including specific medications for specific conditions, cogni-

tive and interpersonal therapies for depression, preventive interventions for children at risk for serious emotional disturbances, multi-systemic therapy, parent-child interaction therapy, medication algorithms, family psycho-education, assertive community treatment, and collaborative treatment in primary care.⁴⁶

It should be noted that these treatments have not been proved effective in treating every type of mental illness, and therefore should not be adopted without first considering the clinical profile of individuals that are the focus of an intervention. However, they can provide a common frame of reference for discussions between representatives of the criminal justice and mental-health treatment systems.

Third, the use of “boundary spanners” seems essential to cross-system collaboration. Henry Steadman describes boundary spanners as positions that link two or more systems whose goals and expectations are at least partially conflicting.⁴⁷ Specifically, an individual in a boundary-spanning position manages the day-to-day interactions between the criminal justice and mental-health systems. Whether the person works for the criminal justice system or the mental-health system is less important than whether the person has authority to make decisions regarding interactions between the systems.⁴⁸

The judge as advocate. Judges may not act as lobbyists for ethical and legal reasons. However, judges increasingly play a role as advocates for services to people with mental illnesses. This role as advocate is a natural out-growth for a judge who becomes a community leader on these issues or who presides over a therapeutic court such as a mental-health court.

Frequently the discussion is framed in terms of whether the judiciary should be expected to behave in one of two polar-opposite ways.

42. The President’s New Freedom Commission on Mental Health found that individuals with co-occurring mental-illness and substance-abuse disorders are “treated for only one of the two disorders—if they are treated at all.” According to the Commission, only 19% of individuals with serious co-occurring disorders received treatment for both disorders, while 29% received treatment for neither. The Commission observed that such individuals often use the most expensive forms of care, including hospital emergency rooms and inpatient facilities, and that the lack of treatment increased their risk for suicide attempts, violent behavior, legal problems, serious medical problems, and homelessness. See *ACHIEVING THE PROMISE*, *supra* note 14.

43. For a good overall discussion of drug courts, including recidivism and treatment issues, see U.S. GOV’T ACCOUNTABILITY OFFICE, *ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES* (2005), available at <http://www.gao.gov/new.items/d05219.pdf>.

44. Rapid assessment has long been a benchmark of drug-court programs, and it is also considered critical in the treatment of mental illnesses more generally. See, e.g., NAT’L ASS’N OF DRUG CT. PROFESSIONALS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997 ed., reprinted 2004), available at <http://www.ojp.usdoj.gov/>

[BJA/grant/DrugCourts/DefiningDC.pdf](http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf). See also *ACHIEVING THE PROMISE*, *supra* note 14.

45. COUNCIL OF STATE GOVERNMENTS, *CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 251* (2002), available at http://consensusproject.org/downloads/Entire_report.pdf. Policy Statement No. 35 of the consensus project report urges the use of evidence-based practices in mental-health treatment. *Id.* at 250-56.

46. *ACHIEVING THE PROMISE*, *supra* note 14, Goal 5. The development of evidence-based practices is in an embryonic stage, and there is not complete consensus on which treatments should be classified as evidence-based practices. In addition, most jurisdictions rely on a treatment system in which some or all such practices are absent. This does not mean that treatment in such jurisdictions is necessarily suspect in all cases; however, in developing services to fill gaps in treatment, it seems useful to focus on evidence-based practices as an anchor for discussion.

47. Henry J. Steadman, *Boundary Spanners: A Key Component for the Effective Interactions of the Justice and Mental Health Systems*, 16 *LAW & HUMAN BEHAV.* 75 (1992).

48. Steadman notes that there is no best way to create a boundary-spanner position and that deciding where to place a boundary-spanner position “depends upon local politics, history, economics, and personalities.” *Id.* at 84 n.23.

An example of such advocacy, as part of a broader coalition of stakeholders, is provided by the Florida Partners in Crisis. This coalition was begun in central Florida in 1999 under the leadership of Judge Belvin Perry in response to mental-health and substance-use issues affecting the mental-health system. Members include judges, law-enforcement officials, behavioral-health providers, correctional officials, and family members. Partners in Crisis has a number of goals, including increasing public awareness of mental-health and substance-use service needs throughout Florida.⁴⁹

The emergence of organizations like Partners in Crisis is an important development politically. For years, mental-health providers, in particular, were suspicious of the legal system and the courts for a variety of reasons including malpractice concerns, and treatment providers also associated client involvement in the legal process with long, uncompensated hours spent waiting to testify. However, given declining financial support for mental-health services in many states, and given the reality that law-enforcement officials typically have more clout politically than mental-health providers, a coalition such as Partners in Crisis has the potential to focus legislative and executive branch attention on service needs in a way that treatment providers, acting alone, often cannot.

The judge as a member of the treatment team. Finally, therapeutic courts, in particular, require the judge to play a role that may conflict with the more traditional role of the judge. One commentator in this journal has written, "Specialized courts...are manifestations of a change in the role of the judge from 'dispassionate, disinterested magistrate' to that of a 'sensitive, emphatic counselor.'"⁵⁰ Justice Kaye, Chief of the New York Court of Appeals, has observed that therapeutic courts require a change in the role of lawyers as well, writing that in therapeutic courts, "the lawyers also have new roles. The prosecution and defense are not sparring champions, they are members of a team with a common goal: Getting the defendant off drugs. When this goal is attained, everyone wins. Defendants win dismissal of their charges...the public wins safer streets and reduced recidivism."⁵¹

Others have criticized these roles on a number of grounds including a claim that they may lead to the derogation of important legal rights enjoyed by the defendant. As noted earlier, this conflict over judicial role is not new. Boldt, for example, has argued that the creation of a "therapeutic relationship" between judge and defendant may compromise the role of defense counsel, among other things.⁵²

Indeed, these arguments over the appropriate role of judges and lawyers have been at the heart of many of the debates regarding such roles in the context of civil commitment.⁵³ As with other role issues discussed in this article, judges will make individual decisions regarding the roles they wish to play, but the potential role conflict is worth noting.

Judges are providing critical leadership in communities across the United States in responding to the crisis of mental illness in the criminal justice system. In doing so, judges have adopted new and sometimes unfamiliar roles. While not all judges are comfortable with these new roles, it seems clear that in many instances, reform is simply impossible without judicial leadership.



John F. Petrila is chair and a professor in the Department of Mental Health Law and Policy at the Louis de la Parte Florida Mental Health Institute at the University of South Florida. He received his law degree and an advanced degree in mental-health law from the University of Virginia School of Law. Petrila writes frequently on forensic mental-health issues, as well as on legal and ethical issues in managed care. He is the coauthor of, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (3d ed. 2007).



Allison D. Redlich is a senior research associate at Policy Research Associates in Delmar, New York, where she focuses on psychology and the law. She received her Ph.D. in developmental psychology from the University of California, Davis, in 1999 and then completed a post-doctoral fellowship at Stanford University. Redlich is currently the principal investigator or the co-principal investigator on two multi-site studies evaluating mental-health courts funded by the National Science Foundation and the John D. and Catherine T. MacArthur Foundation. She has published extensively on mental-health courts, as well as on other forms of community-mandated treatment. In addition, Redlich is a nationally recognized expert on police interrogations and false confessions, particularly with vulnerable populations such as persons with mental illness and juveniles.

49. For a description of Partners in Crisis and its membership and activities, see <http://www.flpic.org>.

50. David Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (And Do Specialized Courts Imply Specialized Judges)?*, COURT REVIEW, Spring 2000, at 22. Rottman provides an excellent summary of the arguments for and against specialization. He concludes that "the long-term future of the new specialized courts depends upon their successful incorporation into larger trial court systems...the investment of so many resources in special courts must ultimately be justified in terms of their role as agents of change beyond a few courtrooms." *Id.* at 26.

51. Judith Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1 (1998).

52. Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Treatment Movement*, 76 WASHINGTON UNIV. L.Q. 1206 (1998).

53. The most used legal textbook on mental-disability law notes "numerous studies have documented that attorneys rarely spend more than a few minutes preparing for the [civil commitment] hearing, seldom call witnesses, and usually fail to engage in vigorous cross-examination of the experts." RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 800 (4th ed. 2003).

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.¹ 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.² 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.³

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.⁴ 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.⁵ 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 that 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.⁶ 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.⁷ 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.⁸ As the name suggests, intermittent explosive disorder is typified by outbursts of temper and violence that occur

Carol Warshaw, M.D., Domestic Violence and Mental Health Policy Initiative; Barbara Hart, J.D., Battered Women Justice Project; Jennifer Skeem, Ph.D., University of California at Irvine; and Marlene O’Leary, M.S.W., Western Psychiatric Institute and Clinic, contributed advice, comments, and discussion.

Footnotes

1. Ronald Kessler et al., *The Prevalence and Correlates of DSM-IV Intermittent Explosive Disorder in the National Comorbidity Survey Replication*, 63 ARCH. GEN. PSYCH. 669 (2006).
2. Ronald Kotulak, *Anger Attacks Common and Research Tells Why: Intermittent Explosive Disorder Affects 1 in 20*, CHICAGO TRIBUNE (June 6, 2006), available at <http://www.chicagotribune.com/news/nationworld/chi-0606060117jun06,1,868023.story>.
3. NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004); see also Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (2006).
4. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical*

Development During Childhood Through Early Adulthood, 101 PROCEED. NAT. ACAD. SCI. U.S.A. 8174 (2004); see also Henry Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, JUV. FAM. CT. J. 1 (Fall 2004); JAN VOLAVKA, NEUROBIOLOGY OF VIOLENCE (2d ed. 2002).

5. Garland & Frankel, *supra* note 3.
6. EDWARD GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS (2002); for a summary see Edward Gondolf, *Evaluating Batterer Counseling Programs: A Difficult Task Showing Some Effects*, 9 AGG. VIOL. BEH. 605 (2004).
7. Donald Dutton, *Treatment of Assaultiveness*, INTIMATE VIOLENCE: CONTEMPORARY TREATMENT INNOVATIONS (Donald Dutton & Daniel Sonkin, eds. 2003).
8. Kotulak *supra* note 2; Carey Goldberg, *Out of Control Anger: As Many as 5 Percent of People Suffer from a Disorder That Can Ruin Their Lives*, BOSTON GLOBE (August 8, 2005), available at www.boston.com/news/globe/health_science/articles/2005/08/08/out_of_control_anger?mode=PF.

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.⁹ 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.¹⁰

A recently commissioned book on the topic, *Neuroscience and the Law*, similarly questions using the implications of neuroscience in legal decision-making.¹¹ 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.¹² 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.¹³ 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.¹⁴ We found similar results using the Brief Symptoms Inventory (BSI) with nearly 1,000 men in Pittsburgh.¹⁵ 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.¹⁶

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.¹⁷ 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-

The assertion that as many as one-third of batterers may be acting out of IED seems high in light of our batterer research.

9. Garland & Frankel, *supra* note 3.

10. Eastman & Campbell, *supra* note 3, at 31.

11. Garland & Frankel, *supra* note 3.

12. Goldberg, *supra* note 8.

13. *Id.*

14. Edward Gondolf, *MCMI Results for Batterer Program Participants in Four Cities: Less “Pathological” than Expected*, 14 J. FAM. VIOL. 1 (1999).

15. Edward Gondolf, *Implementation of Supplemental Psychological Treatment for Batterer Program Participants*, PAPER AT INT’L. ASS’N. FOR. MENTAL HEALT SVCS., AMSTERDAM, NETHERLANDS (June 13-16, 2006).

16. Edward Gondolf & Angie Beeman, *Women’s Accounts of Violence Versus Tactics-Based Outcome Categories*, 9 VIOL. AGAINST WOMEN 278 (2003).

17. Gondolf, *supra* note 15.

The brain-based explanations for violence may also counter batterer counseling . . . that emphasize[s] the need and ability to . . . take responsibility for one's behavior.

tions, suggests the impracticality of sending men directly to mental-health treatment for evaluation. Batterer programs typically provide case supervision and violence education, which have much higher compliance rates. In our multi-site evaluation of batterer intervention, over two-thirds of the men completed a minimum of three months of weekly sessions—resulting in a 50% reduction in re-

assaults during a 15 month follow-up, according to the men's female partners.¹⁸

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.¹⁹ The reviews of intervention research, moreover, identify cognitive-behavioral approaches as the most effective in dealing with violent criminals.²⁰ According to batterer-program evaluations, cognitive-behavioral approaches produce at least equivalent, and perhaps more efficient, outcomes compared to other approaches or formats.²¹ The vast majority of men's partners endorse these programs, attribute the men's change to them, and feel safer as a result.²²

Additionally, victim advocates have raised concerns over the implications of brain-based and pathological explanations for domestic violence.²³ 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.²⁴ 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.²⁵ 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.

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).²⁶ 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.²⁷ Interestingly, several books by psychiatrists, psychologists, and researchers are now exploring the development of aggression, bullying, and violence in boys.²⁸ The consensus of these experts is that social messages, interactions, images, and roles pressed 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

18. Edward Gondolf & Alison Jones, *The Program Effect of Batterer Programs in Three Cities*, 16 VIOL. VICT. 693 (2001); Alison Jones et al., *Assessing the Effect of Batterer Program Completion on Reassault Using Propensity Scores*, 19 J. INT'L VIOL. 1002 (2004).

19. Robert White & Edward Gondolf, *Implications of Personality Profiles for Batterer Treatment: Support for the Gender-Based, Cognitive-Behavioral Approach*, 15 J. INT'L VIOL. 467 (2000).

20. Frank Pearson et al., *The Effects of Behavioral/Cognitive-Behavioral Programs on Recidivism*, 4 CRIME DELINQ. 476 (2002).

21. Edward Gondolf, *A Comparison of Reassault Rates in Four Batterer Programs: Do Court Referral, Program Length and Services Matter?*, 14 J. INT'L VIOL. 41 (1999); Daniel Saunders, *Feminist-Cognitive-Behavioral and Process-Psychodynamic Treatments for Men Who Batter: Interaction of Abuser Traits and Treatment Models*, 11 VIOL. VICT. 393 (1996).

22. Edward Gondolf & Robert White, "Consumer" Recommendations for Batterer Programs, 6 VIOL. AGAINST WOMEN 196 (2000).

23. LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002). See also Lundy Bancroft, *The Parenting of Men Who Batter*, COURT REVIEW, Summer 2002, at 44.

24. Kris Henning & Robert Holdford, *Minimization, Denial, and Victim Blaming by Batterers: How Much Does the Truth Matter*, 33 CRIM. JUS. BEHAV. 110 (2006).

25. *Id.*

26. WILLIAM POLLACK, REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD (1998); DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS (2000).

27. *Id.*

28. Cellini, *supra* note 4.

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.”²⁹ 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.³⁰ 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.



*Edward W. Gondolf, Ed.D., MPH, is research director for the Mid-Atlantic Addiction Training Institute (MAATI) and professor of sociology at the Indiana University of Pennsylvania in Indiana, Pennsylvania. He conducts grant-funded research on the response to domestic violence by the courts, mental-health practitioners, alcohol-treatment clinicians, and batterer-treatment programs. Gondolf is the author of numerous articles and books on these topics, including *Assessing Women Battering in Mental Health Services* (1998) and *Batterer Intervention Systems: Issues, Outcomes, and Recommendations* (2001).*

29. Gondolf, *supra* note 21.

30. *Id.*

Breaking News:

Miller is Distinguishable from Branzburg

Levon Q. Schlichter

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.¹ 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.² Remarkably, the outcome of Judith Miller's case could only encourage the government to subpoena reporters in droves.³ 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.⁴

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.⁵ 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.⁶ 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."⁷ Although a grand jury is constitutionally mandated, it does not have a constitutional right to a reporter's confidential information.⁸ 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*⁹ 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.¹⁰

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

1. Elizabeth Fernandez, *Reporters Handcuffed in New Era They Fear Jailing of Journalist Will Prompt Sources to Clam Up*, S.F. CHRONICLE, July 7, 2005, at A1.
2. See Reporters Comm. for Freedom of the Press, <http://www.rcfp.org/jail.html> (listing relevant information regarding reporters who have spent time in prison on contempt charges since 1984).
3. Katherine Q. Seelye, *Journalists Say Threat of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at § C.
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).
6. Zerilli v. Smith, 656 F.2d 705, 711 (D.C. App. 1981).
7. *Branzburg v. Hayes*, 408 U.S. 665, 688 n.23 (1972).
8. Karl H. Schmid, *Reporter's privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, at 39 AM. CRIM. L. REV. 1441, 1499 (2002).
9. 408 U.S. 665 (1972).
10. *Branzburg*, 408 U.S. at 707-08.

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's.

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

Justice White held that, absent a showing of bad faith or harassment . . . , the Constitution does not grant a reporter any privilege to withhold information from a grand jury investigation.

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 formalistically 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.*

Judge Tatel proposed that “reason and experience dictate a [qualified] privilege for reporters’ confidential sources.”

of Columbia Circuit heard *In re: Grand Jury Subpoena, Judith Miller*.²⁰ In actuality, the events leading up to *Miller* began when Joseph Wilson, a former ambassador of the United States, wrote a *New York Times* op-ed piece claiming that President Bush knowingly misled the American public about the presence of weapons of mass destruction in Iraq.²¹

Apparently, in an attempt to discredit Wilson, someone within the White House informed members of the press, including Miller, that Wilson’s wife, Valerie Plame, was a CIA agent.²² Thereafter, the *Chicago Sun-Times* reported Plame’s identity in an article that challenged the accuracy of Wilson’s conclusions.²³

In response, a grand jury subpoenaed Judith Miller in order to determine whether a government agent had illegally disclosed Plame’s identity as a CIA official. Interestingly, Miller had not even published the information the grand jury sought.²⁴ In any event, she refused to comply with the grand jury subpoena and, therefore, the district court held her in contempt of court. Miller challenged the grand jury’s power to compel disclosure of this information as a violation of her First Amendment rights. Significantly, Miller’s First Amendment challenge required the court to revisit *Branzburg*.

The majority began its opinion by observing that *Branzburg* controlled Judith Miller’s First Amendment claim and that, in *Branzburg*, the Supreme Court unequivocally held that the First Amendment does not provide a reporter’s privilege, absent a showing of bad faith or harassment.²⁵ Thus, the *Miller* court pressed the reporter to distinguish her case from *Branzburg*. The reporter failed to offer any distinguishing facts, and even upon independent contemplation the *Miller* court was unable to find an adequate distinction. Instead, the

reporter contended that the Constitution protected her from testifying in front of the grand jury because *Branzburg* was a plurality decision and, therefore, Justice Powell’s concurrence was binding. However, the *Miller* court adamantly rejected the reporter’s argument and concluded that Justice Powell both joined and agreed with the majority’s decision.²⁶

In a concurring opinion, Judge Tatel concluded that *Branzburg* merely foreclosed the reporter’s privilege pursuant to the First Amendment. However, he quoted language in *Branzburg* that recognized Congress’s power to enact a qualified statutory reporter’s privilege.²⁷ Thus, he concluded that *Branzburg* did not intend to absolutely foreclose a reporter’s protection from compelled disclosure, absent a showing of bad faith or harassment. Furthermore, Tatel stated that after *Branzburg*, Congress enacted Rule 501 of the Federal Rules of Evidence, which created a qualified reporter’s privilege.²⁸

Judge Tatel proposed that “reason and experience dictate a [qualified] privilege for reporters’ confidential sources.”²⁹ First, he noted that “reporters ‘depend upon an atmosphere of confidence and trust.’”³⁰ Therefore, denying a qualified privilege would create a chilling effect. Second, Tatel contended that the resulting benefit of denying any qualified privilege would be modest. Lastly, he stated that legal developments since *Branzburg*, including the trend among the states towards recognizing a reporter’s privilege, provided a basis to depart from *Branzburg*.

Notably, Tatel recognized the fact that the information sought by the grand jury related to an illegal “leak of information” rather than the commission of an extrinsic crime.³¹ Moreover, Tatel concluded that there are circumstances where a reporter’s ability to obtain illegally disclosed information would be in the public’s interest. Thus, for public policy reasons, where a qualified reporter’s privilege is at issue, it is necessary for courts to balance the interests between the reporter and the government. According to Tatel, where the subject of the grand jury investigation concerns illegally disclosed information, the harm and news value of the leak are the dispositive factors. In conclusion, Tatel stated that “were the leak at

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).

21. Joseph C. Wilson, Op-Ed, *What I Didn’t Find In Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.
22. Nancy Gibbs, *The Rove Problem*, TIME, July 25, 2005, at 22.
23. Robert Novak, *The Mission to Niger*, CHI SUN-TIMES, July 14, 2003, at 31.
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.

[A] narrow reporter's privilege will not significantly impede on a grand jury's function of prosecuting extrinsic crimes

issue in [Miller] less harmful to national security or more vital to public debate, or had the grand jury's special counsel failed to demonstrate its need for the reporter's evidence" he might have felt compelled to grant Miller's motion to quash the subpoena.³²

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.³³ 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.³⁴ 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.³⁵ 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.³⁶ 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.³⁷ 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.'"³⁸ 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.³⁹ The text of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or, of the press."⁴⁰ 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."⁴¹ 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."⁴² 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.

38. Langley & Levine, *supra* note 33, at 34 (quoting *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966)).

39. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (1961).

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.⁴³ 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.”⁴⁴

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.”⁴⁵ 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.⁴⁶ 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 dis-

closure was related to possible government misconduct⁴⁷ 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*.⁴⁸ 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.”⁴⁹ 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.⁵⁰

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 cases⁵¹ as well as in other areas of law.⁵² 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

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 . . . information from a government agent.

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”).

45. James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 N.W. L. REV. 18, 30 (1969).

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 sus-

pect. 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. *Nixon*, 418 U.S. at 707. Considering that the press has been recognized as the fourth branch of government, the same reasoning should apply to the scope of a reporter’s privilege. See *Ridenhour*, 520 So. 2d at 376 n.14 (explaining that the press’s role of watching the government is analogous to the function of a fourth branch of government).

51. See e.g. *New York Times v. United States*, 403 U.S. 713 (1971).

52. *Hamdi v. Rumsfeld*, 524 U.S. 507 (2005); *Nixon*, 418 U.S. at 706.

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."⁵³ 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 . . ."⁵⁴ However, this proposed rule applies only to "illegal disclosures of information."⁵⁵ 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.⁵⁶ 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, "[if] . . . *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."⁵⁷ 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.⁵⁸ 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*."⁵⁹ 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,"⁶⁰ 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."⁶¹ 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.⁶² 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:⁶³ (1) reporters rely on informants for news;⁶⁴ (2) many informants will not provide a reporter with information unless the reporter promises to keep their identity confidential;⁶⁵ (3) the use of unbridled subpoena

[T]he proposed scope of this reporter's privilege is not controlled by the classification of the underlying crime . . . , but rather . . . by the public value of the illegal disclosure.

53. *Branzburg*, 408 U.S. at 705-6.

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.

57. *The New York Times Co. v. Gonzales*, 382 F.Supp.2d 457, 491 (S.D.N.Y. 2005).

58. See *Newsman's Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 144 n.37 (1972) [hereinafter *Newsman'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. Langley & Levine, *supra* note 33, at 20.

61. *Branzburg*, 408 U.S. at 691-92.

62. *Id.* at 695.

63. Joan Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. 57, 64-65 (1985).

64. *Branzburg*, 408 U.S. at 693-94.

65. See *e.g.* *Newsman's Privilege*, *supra* note 58, at 147 (noting that there is significant evidence which shows that reporters extensively rely on confidential informants).

[T]he 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;⁶⁶ and (4) the use of unbridled subpoena power will deter reporters from publishing confidential information.⁶⁷ 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.⁶⁸ Consequently, *Branzburg's* decision to compel the reporters to disclose their confidential information does burden the press's ability to gather news.⁶⁹

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.⁷⁰ 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."⁷¹ 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.⁷² This evidence demonstrates that the deterrent effect manifests itself most prominently between reporters and government-agent informants.⁷³ 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.⁷⁴ 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.⁷⁵ Second, secrecy within the government has steadily increased since *Branzburg*.⁷⁶ Third, government misconduct is unlikely to be disclosed to reporters without the reporters' legitimate ability to promise confidentiality.⁷⁷

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."⁷⁸ 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).

69. See Erik W. Laursen, *Putting Journalists on Thin Ice*: McKevitt v. Pallasch, 73 U. CIN. L. REV. 293, 316 (2004) (noting that empirical data shows that subpoenas are burden to newsgathering).

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 Jailings*, 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).

73. *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 332 (1970) (citing affidavit of *Newsweek* reporter Jon Lowell).

74. Schmid, *supra* note 8, at 1463.

75. Laurence B. Alexander, *Looking Out For the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 106 (2002).

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.

press because the informants are “members of a minority political or cultural group that relies heavily on the media to propagate its views”⁷⁹ 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.⁸⁰ In addition, the leak may well have put Plame’s life in jeopardy, as well as the lives of her friends and associates.⁸¹ 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.⁸² 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.⁸³ 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.⁸⁴ In response, the CIA formally referred the matter to the Justice Department, suggest-

ing that a government agent may have illegally disclosed classified information to the reporter.⁸⁵

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.⁸⁶ 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.⁸⁷ 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.⁸⁸

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.⁸⁹ 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.”⁹⁰ 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

Although Miller’s case is unique, there are several recent developments where a pure application of the proposed rule helps to demonstrate its propriety.

79. *Branzburg*, 408 U.S. at 694-95 (emphasis added).

80. Nancy Gibbs, *The Rove Problem*, TIME MAGAZINE, July 25, 2005, at 25, 34.

81. *Miller*, 438 F.3d at 1178-79 (Tatel, J., concurring).

82. Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 234 (1971). In fact, it is quite likely that the Plame leak was an example of this practice. Gibbs, *supra* note 78, at 24, 25-32.

83. *Miller*, 397 F.3d at 1000 (Tatel, J., concurring).

84. DANA PRIEST, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

85. Wolf Blitzer, (CNN television broadcast Nov. 8, 2005) available at <http://transcripts.cnn.com/TRANSCRIPTS/0511/08/sitroom.04.ht>

ml. This is the same preliminary action that the CIA took before Judith Miller was eventually subpoenaed by a grand jury. *Id.*

86. *Id.*

87. *Id.*

88. The information relates to possible government misconduct because if the allegations are true then the government’s action may have violated United States law. Furthermore, disclosing this information does not appear to injure the public’s security because the location of the prisons was not revealed.

89. David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at § 1.

90. *Id.* (quoting President Bush).

our nation because it “alert[ed] our enemies and endanger[ed] our country.”⁹¹ 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.



Levon Q. Schlichter submitted the winning essay in the American Judges Association’s annual contest for law students while he was attending the Temple University’s Beasley School of Law in Philadelphia. Schlichter graduated from law school in 2007, serving during law school as a staff member and research editor for the Temple Law Review. After law school, he became a Presidential Management Fellow, working as a regulatory analyst for the Occupational Safety and Health Administration (OSHA). At OSHA, he works in the Office of Construction Standards and Guidance, primarily writing and interpreting construction safety standards. Schlichter is presently on detail with the Federal Transit Administration’s Chief Counsel’s Office, where he works on regulatory matters.

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.’”).

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.



The Resource Page



WEBSITES

NCSC/NHTSA WEBSITE ON HANDLING DWI CASES

www.courtsanddwi.org

With the support of the National Highway Traffic Safety Administration (NHTSA), the National Center for State Courts has created a website for judges to help in handling those who drive drunk or impaired. The site is also intended to provide educational materials that may be used in public-education efforts about reducing drunk driving and the role courts may play in that effort. The site was developed by the National Center for State Courts with assistance from a group of judges and judicial educators.

The website includes several self-contained modules, allowing visitors to move directly to material of interest. Those modules are:

- Effects on the Community, which includes PowerPoint slides, a self-awareness quiz, and links to other resources;
- The Court's Role, which uses a "frequently asked questions" format to guide visitors to video clips from judges on the role of the courts, as well as an overview about applying problem-solving-court principles to DUI cases;
- Adjudication Process, which provides video clips from experienced judges about handling these cases, as well as links to additional resources for judges and an educator's guide;
- Sentencing Options, which discusses ways to achieve goals of rehabilitation, incapacitation, and sanction, how to factor high-BAC levels into sentencing decisions, and what some have recommended as "best practices" for DUI sentencing;
- Community Impact, which is intended to show that the use of some of these methods may result in better results and an improved community.

Self-assessment tests on the effects of drunk driving may be taken online or printed out. Thus, they could be used in a public-education setting with students or the general public.

THE SUPREME COURT AND PUBLIC OPINION

"The next president may have the opportunity to make several nominations to the Supreme Court. How important is the appointment of Supreme Court justices in your vote for president next year: very important, somewhat important, or not important at all?"

	Very Important	Somewhat Important	Not at All Important	Unsure
8/7-13/07	52%	36%	11%	2%

"Do you approve or disapprove of the way the United States Supreme Court is handling its job?"

	Approve	Disapprove	Unsure
8/7-13/07	45%	37%	17%
4/25 - 5/1/07	58%	27%	15%
11/28 - 12/4/05	50%	32%	17%
7/21-25/05	50%	39%	11%
5/18-23/05	44%	39%	17%
12/7-12/04	50%	33%	17%
2/26 - 3/3/03	56%	27%	16%

"Do you think the United States Supreme Court is moving in the right direction or the wrong direction?"

	Right Direction	Wrong Direction	Unsure
8/7-13/07	39%	37%	25%

"Do you think the Supreme Court is too liberal, too conservative, or about right?"

	Too Liberal	Too Conservative	About Right	Unsure
8/7-13/07	20%	29%	37%	13%

"Is your opinion of Supreme Court Chief Justice John Roberts favorable, unfavorable, mixed or haven't you heard enough about him?"

	Favorable	Unfavorable	Mixed	Haven't Heard
8/7-13/07	21%	9%	21%	49%

"Which comes closer to your point of view? (A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the constitution. (B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution."

	Original Intentions	Current Realities	Unsure
8/7-13/07	43%	48%	9%
7/21-25/05	44%	50%	6%
5/18-23/05	42%	51%	8%
2/26 - 3/3/03 Adults	39%	54%	7%

Source: Quinnipiac University Poll. N=1,545 registered voters nationwide for survey of Aug. 7-13, 2007; margin of error \pm 2.5%, as reported at The Polling Report (www.pollingreport.com/Court.htm).