

## The Right to Voice Reprised

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This brief response to Professor Erik Lillquist's Essay in this book focuses on the admissibility of expert psychiatric testimony in the wake of *Daubert v. Dow Chemical*,<sup>1</sup> the Supreme Court decision that attempts to "scientize" expert testimony. Most of this Essay thus reprises arguments that I made in *Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness*.<sup>2</sup> But it also contributes to a larger debate about evidence law, the Constitution, and epistemology, all of which could be captured under the rubric of the right to voice.

Testimony from mental health professionals is often based on unverified theories and speculation. Thus, a strict application of *Daubert* might prevent criminal defendants from using opinion testimony from psychiatrists and psychologists to bolster insanity arguments and related defenses.<sup>3</sup> In *Proving the Unprovable*, however, I argued that criminal defendants ought to be able to present this type of testimony if the expert has followed a routinized evaluation process that addresses the relevant legal criterion (a threshold I labeled with the cumbersome phrase "generally accepted content validity," or GACV).<sup>4</sup> I gave two reasons for this stance: necessity and voice. First, if the law permits defenses based on subjective mental states, as most jurisdictions do, it should not be able to bar opinions material to that issue on the ground that they are "unscientific" when, as is the case with much opinion testimony about past mental state, verifying the

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<sup>1</sup> 509 U.S. 579 (1993).

<sup>2</sup> CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* (2007).

<sup>3</sup> See Michael J. Gottesman, *Admissibility of Expert Testimony after Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867, 875 (1994) ("Are psychiatrists' assessments of the mental capacity of a defendant at the time of the crime 'testable' or 'falsifiable' or 'refutable'? Plainly not. Can we determine the 'error rate' of psychiatric opinion, or utilize standards to control the technique's operation? Again, plainly not.").

<sup>4</sup> SLOBOGIN, *supra* note 2, at 60–62.

validity of those opinions is a scientific impossibility.<sup>5</sup> Second, the Constitution can be read to entitle defendants to a chance at telling their exculpatory mental state stories through an expert, even if that expert's opinion is not scientifically validated.<sup>6</sup>

Professor Lillquist's Essay takes aim at this second rationale, which I called the right to voice.<sup>7</sup> He believes that the right to voice cannot be found in the Constitution or the Supreme Court's construction of the Constitution, and that, in any event, recognition of such a right would be a bad idea because it would increase the chance of inaccurate outcomes.<sup>8</sup> When I was offered an opportunity to respond to Professor Lillquist's paper (and appear in the *Seton Hall Law Review* for the third time in a seven-year period!<sup>9</sup>) I jumped at the chance to rebut his arguments and elaborate on some of the points made in *Proving the Unprovable*.

At the outset, I want to note that a close reading of Professor Lillquist's Essay suggests he does not necessarily disagree with the primary contention I made in *Proving the Unprovable*. There I confined myself to an attack on a rigid application of *Daubert* to expert psychiatric testimony. Professor Lillquist states at the end of his paper that he does "not reject out-of-hand [the] claim that the defendant's interest in telling his story may, in some cases, necessitate allowing [speculative expert psychiatric] evidence because the defendant otherwise has no way of telling a story with narrative richness."<sup>10</sup> Rather, his main target appears to be the idea that there is a more "generalized" right of defendants to submit "any evidence," including hearsay, so long as it is material to the case and not clearly untrustworthy.<sup>11</sup>

I never advanced the latter position in the book, which, again, focuses on expert psychiatric testimony. And in this very journal, in an article published two years after the book came out, I emphasized that the case for a relaxed approach to expert testimony was much weaker for defendant-proffered testimony about past acts (which is the usual focus of hearsay testimony) than it is for expert testimony

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<sup>5</sup> *Id.* at 42–53.

<sup>6</sup> *Id.* at 53–55.

<sup>7</sup> Erik Lillquist, *The Right to Voice?*, 40 SETON HALL L. REV. 1621 (2010).

<sup>8</sup> *Id.* at 1623.

<sup>9</sup> See Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009 (2008) [hereinafter Slobogin, *Mental States and Acts*]; Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 104 (2003).

<sup>10</sup> Lillquist, *supra* note 7, at 1641–42.

<sup>11</sup> *Id.* at 2, 1636–42.

about past mental states, because actions are amenable to scientific investigation while past mental states are intrinsically elusive.<sup>12</sup> Thus, I am not sure that Professor Lillquist and I are very far apart.

Nonetheless, Professor Lillquist proffers enough criticisms of statements I made in *Proving the Unprovable* to merit a response. In particular, I want to bolster the argument that there is a limited constitutional right to tell exculpatory mental-state stories through experts and allay Professor Lillquist's fears that such a right will generate "inaccurate" verdicts.<sup>13</sup> In the course of doing so, I will explain why my arguments do not require or lead to a more generalized right to present a defense; Professor Lillquist's Essay has helped me see that I need to be clearer on that point. At the same time, at the end of this Essay I depart from the psychiatric context and the focus of *Proving the Unprovable* to suggest some reasons why the notion of a more generalized right to voice at least ought to be on the table.

#### I. THE CONSTITUTION, VOICE, AND EXPERT PSYCHIATRIC TESTIMONY

In *Rock v. Arkansas*, the Supreme Court held that criminal defendants have a constitutional right to testify unless the type of testimony presented is "always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial."<sup>14</sup> In *Proving the Unprovable*, I argued that expert testimony about the defendant's past mental state that meets the GACV test is not always untrustworthy (indeed, because of the scientific void in the area, that assessment is usually impossible) and that its speculative nature can easily be exposed to already skeptical judges and juries through rebuttal witnesses and cross-examination.<sup>15</sup> Furthermore, I contended, if defendants are prevented from presenting such experts they are, in essence, prevented from testifying and thus deprived of the constitutional right recognized in *Rock*.<sup>16</sup>

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<sup>12</sup> See Slobogin, *Mental States and Acts*, *supra* note 9, at 1012–15.

<sup>13</sup> Professor Lillquist's Essay also refers to expert *prediction* testimony proffered by the defense. Lillquist, *supra* note 7, at 1621–22. In this Essay, I focus on culpability testimony because my arguments concerning prediction testimony are aimed at Federal Rules of Evidence rule 403 concerns rather than on probative value. See SLOBOGIN, *supra* note 2, at 116–25.

<sup>14</sup> 483 U.S. 44, 61 (1987).

<sup>15</sup> SLOBOGIN, *supra* note 2, at 54, 60–66, 86.

<sup>16</sup> *Id.* at 55 (“[E]xpert testimony on past mental state presents facts, and inferences based on those facts, that not only support the defendant's story but may be the only source for it. Prohibiting such evidence would, in effect, prevent the defendant from giving ‘his own version of events in his own words.’”). Because I base my

Professor Lillquist asserts several times that criminal defendants raising insanity or diminished capacity claims do not need experts to tell stories about their diminished mental state but rather can do so on their own, assisted by their attorneys.<sup>17</sup> But that assertion is patently wrong; in fact as I mentioned above, Professor Lillquist himself backs off of this claim at the end of his Essay. The typical defendant with an alibi defense or who wants to point the finger at someone else will have no problem describing the relevant facts. But the ability of the typical defendant asserting a psychiatric defense to talk about his own past mental states is vastly circumscribed by a number of unique factors that go well beyond the universal risk of impeachment using prior crimes.<sup>18</sup>

First, defendants who want to use psychiatric experts are often barely competent to stand trial.<sup>19</sup> The same mental disorder that triggers the possibility of a psychiatric defense also often compromises the ability to communicate. Although to be triable these defendants must have the capacity to testify relevantly,<sup>20</sup> many of them will be just coherent enough to ensure that they will not sound “crazy,” the worst possible condition if the defendant wants to tell a story about aberrant past mental state.<sup>21</sup>

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argument on *Rock* and related cases, I do not address the history that Professor Lillquist cites, although the fact that defendants were allowed to tell their story through unsworn testimony at the time the Constitution was drafted, Lillquist, *supra* note 7, at 1615, at the least suggests that colonial defendants were entitled to tell their story in relatively unrestricted fashion.

<sup>17</sup> See, e.g., Lillquist, *supra* note 7, at 1632, 1634, 1639.

<sup>18</sup> Professor Lillquist correctly notes that I do not try to justify the right to present psychiatric experts on the ground that it will allow the defendant to avoid such impeachment. Lillquist, *supra* note 7, at 1639 n.93. That is because the right to voice is based on the idea that, alone, defendants are unlikely to be able to tell an adequate story about impaired past mental state, even if impeachment is not a concern.

<sup>19</sup> Up to seventy percent of those defendants referred for competency evaluations (and thus surmised to be incompetent by their attorneys) are nonetheless found to be competent. See GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 141 (3d ed. 2007).

<sup>20</sup> See, e.g., FL. R. CRIM. P. 3.211(a)(2) (2008).

<sup>21</sup> Most defendants with mental illness are competent because of medication, which can affect their communication skills. Cf. Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 SAN DIEGO L. REV. 161, 183–192 (2009) (describing side effects of medication, including cognitive impairment, memory problems, headaches, and slurred speech). At the same time, the medication eliminates the most significant symptoms, which has led many defense attorneys to argue, unsuccessfully, that their clients should be taken off medication to allow the jury to observe the defendant’s true symptoms. See, e.g., *Riggins v. Nevada*, 504 U.S. 127, 131 (1992).

Second, even if they have no trouble communicating, criminal defendants are very unlikely to understand all of the possible motivations for their crime. As I stated in *Proving the Unprovable*:

[E]ven fully competent defendants may not be aware of, or may be unwilling to admit to, crucial aspects of their past mental state. For instance, defendants may not suspect the effects of biological, childhood, and situational variables on their behavior, deny they have mental or relationship problems that in fact explain their behavior, or simply claim amnesia. The best way to obtain all the relevant facts about past mental states is to rely on mental health professionals, who have special training in and skill at eliciting information from incompetent, reluctant, or oblivious subjects.

Finally, even if criminal defendants could figure out and describe, on their own or with the help of a pretrial expert, the various influences on their conduct, they would not be able to put all of this information in context. Only expert witnesses have access to and can explicate, based on their own experience and whatever real science exists, how the defendant's character and experience might add up to a mitigating mental state.<sup>23</sup> Experts are needed so that the disparate aspects of an explanation for criminal behavior—the defendant's own statements, third-party statements, psychiatric records, and psychological tests—can be woven together into a plausible whole.

The Supreme Court itself recognized all of this when it held, in *Ake v. Oklahoma*, that psychiatric evidence is so important in insanity cases that a defendant has a constitutional right to a government-provided expert if his mental state will be a significant factor at trial.<sup>24</sup>

[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about

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<sup>22</sup> SLOBOGIN, *supra* note 2, at 50.

<sup>23</sup> See Slobogin, *Mental States and Acts*, *supra* note 9, at 1024–26 (arguing, after describing a case study, that without the expert involvement in that case, “nothing would have tied all of this information together and, more importantly, nothing would have shown how it might provide a (possibly mitigating) explanation for the offense”).

<sup>24</sup> 470 U.S. 68, 83 (1985). Thus, Professor Lillquist is incorrect when he states that I “nowhere” suggest that the Court's due process cases might form the basis for a limited right to voice. Lillquist, *supra* note 7, at 1634.

how the defendant's mental condition might have affected his behavior at the time in question. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, . . . and tell the jury why their observations are relevant.<sup>25</sup>

These considerations also make clear why, contrary to Professor Lillquist's assertion, psychiatric experts are not merely lie detectors, assuring the fact finder that the defendant is (or is not) telling the truth.<sup>26</sup> Such experts do rely on the defendant's statements, but they also rely on much more, and even those who testify for the defense do not necessarily subscribe to everything the defendant says if it is not supported by other evidence. The goal of the experts in these cases is to explain behavior, not simply verify the usually meager, meandering account of past mental state the defendant is able to give.

Accordingly, Professor Lillquist is wrong to suggest that *United States v. Scheffer*,<sup>27</sup> which upheld exclusion of a polygraph taken by the defendant,<sup>28</sup> undercuts the argument for a constitutional right to voice.<sup>29</sup> Instead, as I argued in *Proving the Unprovable*, *Scheffer* is at worst irrelevant to the argument and perhaps even enhances it.<sup>30</sup> The two primary reasons that the *Scheffer* majority gave for its holding—that polygraph results will usurp the jury's role as the ultimate assessor of truth-telling and that such results do not advance the defendant's story but rather merely "bolster . . . credibility"<sup>31</sup>—do not apply to expert psychiatric evidence. The usual role of the latter type of evidence is to provide a rich narrative of the defendant's past mental state and all of its precursors, not a simple thumbs-up or thumbs-down on the defendant's account of his thought process at the time

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<sup>25</sup> *Ake*, 470 U.S. at 80.

<sup>26</sup> Lillquist, *supra* note 7, at 1633.

<sup>27</sup> 523 U.S. 303 (1998).

<sup>28</sup> *Scheffer*, 523 U.S. at 317.

<sup>29</sup> Lillquist, *supra* note 7, 1630 ("*Scheffer* seems to be a case that strongly argues against Professor Slobogin's position.>").

<sup>30</sup> SLOBOGIN, *supra* note 2, at 54–55.

<sup>31</sup> 523 U.S. at 313, 317. I also argued that a third reason the *Scheffer* Court gave for its decision—that juries might over-rely on polygraph evidence—does not apply to psychiatric evidence, which juries view with skepticism. SLOBOGIN, *supra* note 2, at 54. Professor Lillquist is right that this rationale was adopted by only a plurality of the Court, Lillquist, *supra* note 7, at 1631, but it was the *primary* justification for the Court's subsequent decision in *Clark v. Arizona*, discussed *infra* at text accompanying note 34, and cannot be dismissed as lightly as he does.

of the offense. In other words, psychiatric expert testimony marshals facts and interprets them like other forensic experts do.

Another rationale for *Scheffer*, advanced by Professor Richard Nagareda (although not by the Court), is that exclusionary evidence rules that apply equally to the prosecution and the defense—such as the ban on polygraph evidence at issue in *Scheffer*—do not violate the Constitution.<sup>32</sup> Contrary to Professor Lillquist's suggestion,<sup>33</sup> my approach is not inconsistent with that rationale, despite my reliance on *Rock* (which struck down a statute that applied to both prosecution and defense evidence<sup>34</sup>). It is true that I am arguing for an exemption from a rigid interpretation of *Daubert* in the special case of past mental state evidence. But I would not limit the exemption to defense testimony; I would be quite willing to extend it to prosecution use of evidence about past mental state. As I pointed out in *Proving the Unprovable*, my approach does not favor the defense over the prosecution.<sup>35</sup>

Another Supreme Court case, surprisingly not emphasized by Professor Lillquist, more forthrightly challenges the right to voice in psychiatric cases. In *Clark v. Arizona*, decided after *Proving the Unprovable* was published, the Supreme Court held that the Constitution does not prevent the state from barring opinion testimony to the effect that the defendant lacked the mens rea for the offense.<sup>36</sup> The primary justification for this holding was the Court's perception that psychiatric opinion testimony might confuse or mislead juries.<sup>37</sup>

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<sup>32</sup> Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1069 (1999) (arguing for a reconception of the right to present witnesses as a "right . . . of equal treatment").

<sup>33</sup> See, e.g., Lillquist, *supra* note 7, at 1622, 1627, 1630, 1634 (stating that my approach to expert psychiatric testimony allows "otherwise inadmissible" evidence to be introduced, thus implying that I seek to allow the defense to introduce evidence that the prosecution would not be permitted to use).

<sup>34</sup> Nagareda, *supra* note 32, at 1141 (noting that the equality rationale would require reversal of *Rock*).

<sup>35</sup> SLOBOGIN, *PROVING THE UNPROVABLE*, *supra* note 2, at 134–35. Of course, the prosecution virtually never has occasion to present such evidence except to rebut defendants' claims of insanity or lack of mens rea. There is, however, one situation where the prosecution might want to present speculative expert evidence of past mental state in its case-in-chief: testimony about rape trauma syndrome designed to show lack of consent on the part of an alleged rape victim. I have suggested such testimony might be admissible on right to voice grounds, although this time because of the (clearly unconstitutional) victim's right to voice. See Slobogin, *Mental States and Acts*, *supra* note 9, at 1029.

<sup>36</sup> 548 U.S. 734 (2006).

<sup>37</sup> *Id.* at 774.

Based on this case, one might argue that it is not *Daubert* but rather universal Federal Rule 403 concerns—related to jury misuse of the evidence—that justify limitations on defense use of psychiatric evidence and defeat a broad right to voice.

*Clark*, however, is internally inconsistent on this ground. *Clark* permits the exclusion of opinion testimony about mens rea (e.g., whether, as in *Clark*, the defendant knew he was shooting a human being<sup>38</sup>) while simultaneously suggesting that states may not bar opinion testimony about insanity (e.g., whether, as in *Clark*, the defendant believed his victim was a space alien trying to kill him<sup>39</sup>). Yet as *Clark* itself illustrates, testimony supporting an insanity defense will often either be identical to or even more far-ranging and speculative than testimony about lack of mens rea.<sup>40</sup> If the distinction that *Clark* makes can be justified, it is not on the ground that mens rea testimony is more confusing than insanity testimony. Rather, the distinction is based on the assertion that opinion testimony suggesting the defendant lacked intent is more likely to cause inaccurate (defense-oriented) verdicts, given the fact that the burden of proof is always on the prosecution on the mens rea issue (because the Constitution requires it) while the burden on the insanity issue can be (and was in Arizona) placed on the defendant.<sup>41</sup> This concern about accuracy also permeates Professor Lillquist's critique and is worth investigating in some detail because it seems to be his primary reason for rejecting a right to voice.

## II. INACCURACY

Professor Lillquist's main problem with the right to voice as applied to psychiatric evidence appears to be that it will allow defendants to hoodwink fact finders, which he believes are easily fooled by

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Are there, then, characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion? We think there are: in the controversial character of some categories of mental disease, in the potential of mental-disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it.

*Id.*

<sup>38</sup> *Id.* at 745.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 773 (“[T]he same evidence that affirmatively shows he was not guilty by reason of insanity . . . also shows it was at least doubtful that he could form *mens rea*.”).

<sup>41</sup> See *supra* note 37 and accompanying text.

psychiatric testimony, or at least unable to assess its true worth.<sup>42</sup> The majority in *Clark* also seemed to be very concerned about the possibility that opinion testimony from defense-oriented mental health professionals will produce erroneous verdicts.<sup>43</sup> Like the claim that defendants can adequately tell their story about past mental state without expert help, this assumption is off-base.

The main reason “erroneous” results are unlikely in these cases is that, barring malingering (which is very difficult to pull off<sup>44</sup>), an opinion about past mental state is not provably inaccurate if it meets the GACV test and thus avoids quackery. As I have already noted, we cannot know whether such testimony is right or wrong. Accordingly, it should come under the umbrella of *Rock*’s constitutional protection.

But even if one insists, against the evidence, that psychiatric testimony presented by the defense is more often “wrong” than “right,” such testimony is unlikely to cause erroneous verdicts. Juries and judges are naturally skeptical of mental health professionals proffered by criminal defendants in an attempt to mitigate their crimes. In *Proving the Unprovable*, I described the research overwhelmingly showing that fact finders tend to discount expert psychiatric testimo-

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<sup>42</sup> Lillquist, *supra* note 7, at 1630 (stating that the right to voice would “admit otherwise inadmissible evidence: evidence that I believe, if admitted, would frustrate the goals of an accurate and orderly outcome.”); *id.* at 1644 (suggesting that *Daubert* is meant to shield juries from expert testimony when “it is simply beyond the reasoning power of people generally, in the limited context of trial, to fully inform themselves of all of the limitations of the evidence.”).

<sup>43</sup> 548 U.S. at 779 (“Arizona’s rule serves to preserve the State’s chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors.”). Ironically, the Court has no difficulty believing that juries are capable of dealing with speculative or prejudicial testimony when the *prosecution* proffers it. See *Barefoot v. Estelle*, 463 U.S. 880, 901 n.7 (1983) (The argument that psychiatric prediction testimony by state witnesses should be barred because it is unreliable “is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.”); *Old Chief v. United States*, 519 U.S. 172 (1997) (allowing detailed proof of defendant’s prior crimes despite defense willingness to stipulate to them on the ground the prosecution “needs evidentiary depth to tell a continuous story”). Note also that Arizona—whose law prohibiting expert opinion testimony about mens rea was upheld in *Clark*—permits the prosecution to introduce rape trauma syndrome testimony. See *State v. Huey*, 699 P.2d 1290 (Ariz. 1985).

<sup>44</sup> See Michael L. Perlin, “*The Borderline Which Separates You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1410 (1997) (“Recent carefully-crafted empirical studies have clearly demonstrated that malingering among insanity defendants is, and traditionally has been, statistically low. Even where it is attempted, it is fairly easy to discover (if sophisticated diagnostic tools are used).”). See also Slobogin, *Mental States and Acts*, *supra* note 9, at 1022–24.

ny presented by the defendant.<sup>45</sup> Indeed, judges and juries are *encouraged* to do so by the law, with its presumption of sanity and its permissive inference that a person intends the natural consequences of his actions.<sup>46</sup> Empirical study, involving cases in which psychiatric opinion testimony was almost unlimited,<sup>47</sup> indicates that juries virtually never find for defendants who raise mens rea issues and agree with insanity claims in fewer than half the cases in which they are raised.<sup>48</sup>

If anything, unreliable verdicts are more likely to occur when fact finders are prevented from hearing articulate evidence countering their preconceptions and the law's assumptions.<sup>49</sup> Probably the strongest argument against *Clark* is that, in effect, the decision eliminates the state's burden of proving mens rea in psychiatric cases.<sup>50</sup> Without opinion testimony rebutting the natural and legal assumption that people intend the consequences of their actions and are sane, the defense is left with very little means of challenging the state's case other than the defendant's own self-serving and easily dismissed statements.

In *Proving the Unprovable* I also noted that, if the defendant and his experts are somehow able to put one over on the fact finder, very little damage is done. Most defendants found insane spend more time in a mental hospital than they would spend in prison had they

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<sup>45</sup> For instance, I described a meta-review that found that expert social science testimony "is scrutinized as intensively as the testimony of any other witness and even viewed somewhat cynically." SLOBOGIN, *supra* note 2, at 86.

<sup>46</sup> See WAYNE LAFAVE, CRIMINAL LAW 426 (4th ed. 2003) (describing universal presumption of sanity); see also *Sandstrom v. Montana*, 442 U.S. 510, 522–23 (1979) (allowing permissive inference instruction).

<sup>47</sup> The studies were all conducted pre-*Daubert*. But as I point out in *Proving the Unprovable* (and contrary to Professor Lillquist's assertion, Lillquist, *supra* note 7, at 1), even post-*Daubert* very few courts have limited psychiatric opinion testimony on past mental state. See SLOBOGIN, *supra* note 2, at 27–28 (describing studies indicating that *Daubert* has had little impact on the admissibility of such testimony).

<sup>48</sup> Contested insanity cases succeed about twenty-five percent of the time. See MELTON ET AL., *supra* note 19, at 203. Lack-of-mens-rea cases are successful much less often. See Slobogin, *Mental States and Acts*, *supra* note 9, at 1018 n.36.

<sup>49</sup> Several commentators have documented the hostility that courts and juries have toward insanity pleas even in cases of serious mental disorder at the time of the offense. See generally Michael Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 700 (1989–90) ("Where a defendant does not show 'flagrant psychotic symptomatology,' does not behave like a 'wild beast,' or where his behavior does not have apparent organic roots, 'pervasive judicial hostility' toward the use of the defense constantly surfaces.").

<sup>50</sup> See Peter Westen, *The Supreme Court's Bout with Insanity: Clark v. Arizona*, 4 OHIO ST. J. CRIM. L. 143 (2006). Professor Westen argues that *Clark* is *only* about burdens of persuasion, not evidentiary admissibility. *Id.* at 156–61. But I think he is wrong for reasons given by Professor Alan Michaels. See *id.* at 163–65.

been convicted.<sup>51</sup> The very few defendants who succeed with a lack-of-mens rea or diminished responsibility defense are still convicted, albeit of a lesser crime.<sup>52</sup> The specter of hundreds or thousands of defendants walking free because they are able to fool both their own experts and a judge and jury is simply not realistic. Indeed, many defendants with serious mental illness actively resist psychiatric defenses because of the consequences and the associated stigma.<sup>53</sup>

Finally, contrary to Professor Lillquist's apparent position, accuracy is not necessarily the dominant goal of the criminal justice system.<sup>54</sup> The right to testify announced in *Rock* exists in part because preventing a defendant from telling a plausible story about past mental state would be unjust and unfair, regardless of its speculative nature.<sup>55</sup> The right to voice, allowing a defendant to tell his story through an expert, should exist for the same reason, even if inaccuracy occasionally occurs as a result. Defendants and society at large would seriously question a process that forced defendants asserting mental state defenses to rely solely on their own descriptions of their past mental states, bereft of expert opinion interpreting how and why those mental states occurred.<sup>56</sup>

### III. A GENERAL RIGHT TO PRESENT A DEFENSE

Stemming as it does from the right to testify, the right to voice I advanced in *Proving the Unprovable* was meant to be limited to those situations where an expert is testifying in lieu of, or as an interpreter of, the defendant's testimony. So construed, the right would not justify allowing defendants to present hearsay testimony of the type Pro-

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<sup>51</sup> SLOBOGIN, *supra* note 2, at 142.

<sup>52</sup> *Id.*

<sup>53</sup> Perlin, *supra* note 44, at 1412 (“[I]t is much more likely that seriously mentally disabled criminal defendants will feign sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases.”); Xavier F. Amador & Andrew A. Shiva, *Insight into Schizophrenia: Anosognosia, Competency, and Civil Liberties*, 11 GEO. MASON U. CIV. RTS. L.J. 25, 26–39 (2000) (discussing prevalence of “lack of insight” among people with psychosis).

<sup>54</sup> Lillquist, *supra* note 7, at 1636 (“The primary aim of the law of evidence and procedure is to reach accurate outcomes.”).

<sup>55</sup> *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (“A person's right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence”) (emphasis in original) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

<sup>56</sup> See SLOBOGIN, *supra* note 2, at 55–56. Professor Lillquist states that my approach “certainly will give the public the impression that the trial process favors the defendant.” Lillquist, *supra* note 7, at 1642. My guess is that his approach, which would bar speculative psychiatric testimony, will look pro-prosecution to a much greater extent than my approach looks pro-defendant.

fessor Lillquist critiques, including the specific example he hypothesizes involving testimony describing the alleged confession of a now-deceased individual, to the effect that he committed the crime with which the defendant is charged.<sup>57</sup> Aside from one passage meant to set the stage for its arguments about psychiatric testimony,<sup>58</sup> *Proving the Unprovable* did not address the general right to present relevant defense evidence that is the primary target of Professor Lillquist's Essay. But in this response to Professor Lillquist, I want to go forthrightly down that road, albeit only for a brief spell, by cataloguing some of the reasons courts and commentators have given for what has been variously called the right "to present witnesses," the right "to present a defense," or the right "to free proof."<sup>59</sup> In contrast to the circumscribed right to voice that I advanced in *Proving the Unprovable*, this broader right presumptively allows the defense to introduce otherwise inadmissible evidence beyond the defendant's own thoughts and statements or interpretations thereof.

The first broad category of justifications for such a right relies on history and precedent relating to the right to compulsory process and the right to confront the state's evidence, both guaranteed by the Sixth Amendment. As Peter Westen, Jancy Hoeffel, and others have argued, Supreme Court precedent construing these clauses could provide a solid basis for entitling criminal defendants to present any material evidence on their behalf.<sup>60</sup> For instance, in *Chambers v. Mississippi*, the Court bluntly declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own de-

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<sup>57</sup> Lillquist, *supra* note 7, at 1640.

<sup>58</sup> SLOBOGIN, *supra* note 2, at 139.

<sup>59</sup> See generally David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1 (discussing developments in the constitutional law of proof).

<sup>60</sup> Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 203 (1975) ("[T]he defendant has a constitutional right to produce any witnesses whose ability to give reliable evidence is something about which reasonable people can differ."); Jancy Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1276 (2002) (The compulsory process clause entitles the criminal defendant to present all material evidence.); Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom about Excluding Defense Evidence*, 86 GEO. L.J. 621, 639 (1998) (Reliability-based exclusionary rules impair the right to jury because jurors are more likely to "give meaningful consideration to . . . the unusual, unexpected, or even implausible stories criminal defendants sometimes bring to court."); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 808-09 (1976) ("[T]he admission of hearsay evidence with no extrinsic indicia of reliability might be constitutionally compelled if the evidence is of critical importance to the accused.").

fense.”<sup>61</sup> That language suggests that the state needs a compelling reason to abrogate the right. At the least, as *Rock* stated with respect to the right to testify, it would not be stretching constitutional doctrine to conclude that limitations on the right to present a defense should not be “arbitrary or disproportionate.”<sup>62</sup> Thus, even Justice Rehnquist, who was no fan of defendants’ rights, wrote an opinion that requires the state to produce witnesses under the compulsory process clause when the defendant provides “some showing that the evidence lost [is] both favorable and material.”<sup>63</sup>

Professor Lillquist’s real concern, however, is not defense presentation of declarants in court, but rather defense presentation of hearsay statements described by a witness other than the declarant (in Professor Lillquist’s hypothetical, incriminating statements by a deceased person described by the defendant’s cousin).<sup>64</sup> Even here the Court’s cases are not particularly supportive of his point of view, at least as applied to the confessing-declarant scenario that he hypothesizes. In *Chambers*, for instance, the Court held that the prosecution could not rely on the state hearsay ban to exclude “critical” hearsay statements exculpating Chambers and incriminating the declarant, at least when the declarant is available for cross-examination by the prosecution.<sup>65</sup> And in *Holmes v. South Carolina*, the Court reversed a conviction because the state excluded statements against penal interest by a declarant who was *not* available for cross-examination.<sup>66</sup> It is true, as Professor Lillquist notes, that *Holmes* also emphasized trial courts’ authority to implement “well-established rules of evidence [that] exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.”<sup>67</sup> But *Holmes* itself illustrates that even when the weight of the evidence indicates that the

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<sup>61</sup> 410 U.S. 284, 302 (1973).

<sup>62</sup> *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (“[R]estrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.”).

<sup>63</sup> *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

<sup>64</sup> Lillquist, *supra* note 7, at 1640.

<sup>65</sup> 410 U.S. at 302 (noting, as an additional reason for the holding, that the state did not allow *Chambers* to cross-examine the declarant).

<sup>66</sup> 547 U.S. 319 (2006). The declarant had been cross-examined at a pretrial hearing. *Id.* at 323.

<sup>67</sup> *Id.* at 326.

defense's hearsay is unreliable, the Constitution requires that it be admitted.<sup>68</sup>

At least in *Holmes* the defendant was able to produce some evidence corroborating the hearsay.<sup>69</sup> In Professor Lillquist's example, the defendant's only proffer is the testimony of his cousin, who will state that the cousin's cellmate confessed to the murder that the prosecution says the defendant committed. Perhaps here we finally have a situation where exclusion would not be "arbitrary and disproportionate." But why assume, as Professor Lillquist apparently does, that the cousin's testimony will lead to inaccuracy? What if he is not lying? And why shouldn't we allow the defendant to put the cousin on the stand (whether or not the declarant is dead or otherwise unavailable) with confidence that the prosecution will point to the obvious reasons why the cousin should be disbelieved and with knowledge that the jury will be extremely skeptical of any story the cousin tells?<sup>70</sup>

Two authors have recently argued that exclusion in this situation may be immoral, if not unconstitutional. Relying on Kant, Scanlon, and other philosophers, as well as First Amendment principles, Professor Todd E. Pettys argues that "honoring jurors' deliberative autonomy is an important moral value" that ought to be considered in constructing rules of evidence.<sup>71</sup> Just as the speech guarantee reflects a moral judgment that the government offends its citizens' deliberative autonomy when it restricts speech on the basis of fears about what that speech might cause citizens to believe, the rules of evidence should allow juries, which are also a vital part of self-government, to hear evidence that is relevant, even if its reliability is in doubt.<sup>72</sup> With

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<sup>68</sup> *Id.* at 328–29 (noting lower courts' finding that there was "strong evidence of guilt").

<sup>69</sup> *Id.* at 322–23 (noting defendant's evidence that the forensic evidence proffered by the state was contaminated because of flawed procedures and that police tried to frame him).

<sup>70</sup> I am focusing here, as Professor Lillquist does, on accuracy. There may be reasons to avoid a broad right to present a defense that are not related to accuracy per se. *See, e.g.,* Nagareda, *supra* note 32, at 1098–1108 (noting "floodgates" problem—that a right to present a defense could do away with all hearsay, impeachment, and privilege limitations); *id.* at 1137–41 (noting why defendants might prefer a symmetrical approach to evidence rules); *see also* Taylor v. Illinois, 484 U.S. 400, 417–18 (1988) (permitting exclusion of a defense witness as a sanction for non-compliance with discovery rules).

<sup>71</sup> Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 468 (2008).

<sup>72</sup> *Id.* at 467–68, 496 ("The voting booth and the jury box are the two central forums in which American citizens exercise their right to govern themselves.").

respect to hearsay in particular, Professor Pettys concludes that rather than “ban hearsay unless it falls within an exception . . . we should generally permit hearsay and focus our exception-drafting energies on identifying those circumstances in which the risk of irrational overreliance is particularly great.”<sup>73</sup>

Note further that Professor Pettys’s jury-autonomy rationale would support use of hearsay by any party to a dispute, defense or prosecution. Unfortunately for those interested in an even playing field, however, the Court’s current expansive interpretation of the Confrontation Clause poses a serious counterweight to prosecution use of hearsay.<sup>74</sup> Unless that case law is modified (which is unlikely, given its recency), implementation of Professor Pettys’ approach would create significant asymmetry between prosecution and defense ability to use hearsay.

Based on the work of Thomas Hobbes, Professor Alice Ristroph, one of Professor Lillquist’s colleagues, has proffered an elegant new argument as to why such asymmetry is permissible and perhaps even required.<sup>75</sup> Hobbes believed that every accused individual, even one who is clearly guilty, has a right to resist punishment.<sup>76</sup> Professor Ristroph explains that, to Hobbes, the right of self-defense exists not only in a state of nature but also once humans submit to government authority, and it is not forfeited simply because one has committed a crime.<sup>77</sup> To Hobbes, punishment is a “bit dirty,”<sup>78</sup> an act of violence that every individual—innocent or guilty—has a right to resist.<sup>79</sup>

If one agrees with these conclusions, Professor Ristroph suggests, they point toward a rationale for various criminal procedure rights that typically help the guilty as much as or more than the innocent, and assuredly do not help the prosecution. As she puts it, “[i]n addition to whatever truth-seeking function the right to silence, the right

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<sup>73</sup> *Id.* at 508. Professor Lillquist states that a juror’s right should not be transmuted into a defendant’s right. Lillquist, *supra* note 7, at 1644. Of course, that is precisely what the Court did in *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding that African-American members of the jury pool have the right to prevent discriminatory exclusion from the jury, exercisable by the defendant).

<sup>74</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004) (prohibiting prosecution use of out-of-court statements made in anticipation of criminal prosecution unless the declarant is available at trial or has been cross-examined by the defendant).

<sup>75</sup> Alice Ristroph, *Respect and Resistance*, 97 CAL. L. REV. 601 (2009).

<sup>76</sup> *Id.* at 616 (“This right to resist belongs to the guilty as well as the innocent.”).

<sup>77</sup> *Id.* at 614–15.

<sup>78</sup> *Id.* at 622.

<sup>79</sup> *Id.* at 619 (“[T]he sovereign and the criminal each have a ‘blameless liberty’ to use violence for self-preservation . . .”).

to present a defense, and other rights of the accused may serve, they are also mechanisms of self-preservation.”<sup>80</sup> She singles out the right to present a defense—the “right to try to exculpate” oneself—as particularly “within the Hobbesian view that there is no duty to submit to punishment.”<sup>81</sup> This right to resist, of course, is only the defendant’s, and thus would justify asymmetrical evidentiary rules.

#### IV. CONCLUSION

Despite the immediately preceding commentary, I am ambivalent about a robust right to present a defense that permits the defendant to present virtually any evidence he or she desires.<sup>82</sup> As the name implies, *Proving the Unprovable* dealt only with a particular type of defense argument—past mental state—that creates unique and serious epistemological difficulties. Unlike defense contentions using hearsay or other evidence that focuses on physical conditions, credible defense claims of insanity or lack of mens rea generally cannot rely on the defendant or lay witnesses alone, nor are they easily susceptible to scientific proof. Given the latter fact, expert opinions about past mental state are, as far as we know, just as likely to be reliable as not, at least if they are based on accepted evaluation procedures and address the relevant legal and clinical criteria. Nor does relaxation of the usual evidentiary requirements—in this case *Daubert*—to permit this type of testimony give the defense an asymmetric advantage, given the fact that the prosecution usually only needs expertise on past mental state when the defense decides to use it first. For all of these reasons, Professor Lillquist is off-base when he asserts that the right to voice I espouse “presumably is broader than its particular applications in *Proving the Unprovable*” and supports a “generalized” right of defendants to present evidence.<sup>83</sup> However, I do insist that, in telling stories about past mental states, criminal defendants’ voices need to be heard through experts, who should not be silenced simply because they cannot demonstrate a solid scientific basis for their opinions.

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<sup>80</sup> *Id.* at 630.

<sup>81</sup> Ristroph, *supra* note 75, at 630.

<sup>82</sup> I find much to admire in a symmetrical approach to the rules of evidence. See generally Nagareda, *supra* note 32. Further, Professor Ristroph suggests that Hobbes’ right to resist might be confined to defendants’ choice “to speak (or have others speak on their behalf).” Ristroph, *supra* note 75, at 629. Both of these considerations argue for a right to voice limited to the types of situations discussed in *Proving the Unprovable*.

<sup>83</sup> Lillquist, *supra* note 7, at 1622.