Psychological Syndromes and Criminal Responsibility

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Abstract
In criminal cases, evidence about psychological syndromes is typically introduced by the defense in support of insanity, self-defense, or imperfect self-defense claims and by the prosecution to show that a criminal act occurred. The admissibility of defense-proffered testimony about phenomena such as battered woman syndrome, combat stress syndrome, or XYY syndrome depends in the first instance on how insanity, self-defense, and other defensive doctrines are defined (the materiality issue). Additionally, this type of testimony, as well as prosecution-proffered evidence about phenomena such as rape trauma syndrome and abused child syndrome, must bear indicia of reliability (the probative value issue), add to the fact finder’s knowledge (the helpfulness issue), and avoid distracting or confusing the fact finder (the prejudice issue). The ultimate admissibility decision involves consideration of the scope of the criminal law, the scientific methodology associated with the syndrome, the counter-intuitiveness of the evidence, and the role and capacities of juries.
INTRODUCTION

A syndrome is commonly said to be a constellation of psychological or behavioral signs and symptoms. So defined, the word “syndrome” could also be used to describe many diagnoses found in the American Psychiatric Association’s Diagnostic and Statistical Manual, because they too represent a constellation of symptoms. This review, however, is limited to discussion of those collections of symptoms that have been denominated syndromes in the legal literature and that have been featured in criminal cases, organized into two categories. The first category is composed of syndromes—typically presented by the defense—that focus on the criminal responsibility of a criminal defendant. This review examines three syndromes that fall in this category: the battered woman syndrome, the combat stress syndrome, and the XYY syndrome. The second category consists of those syndromes—typically presented by the prosecution—that focus on whether the alleged victim was harmed. In this category, rape trauma syndrome and abused child syndrome are examined.

The five phenomena discussed here do not, of course, exhaust the syndromes that lawyers have proffered in criminal cases. By some counts, as many as 20 syndromes have been introduced in the past three decades, although, contrary to popular perception, the proportion of criminal cases in which syndrome evidence is presented is miniscule (Slobogin 2007, pp. 21–24). The examples analyzed in this review were chosen because they are representative and raise most, if not all, the issues associated with using syndrome-type arguments to assess criminal responsibility. With respect to each syndrome, the key inquiry undertaken here is whether testimony describing the syndrome is and should be admissible under the substantive criminal law and the typical rules of evidence. Only when they are thought to be an admissible basis for expert opinion are syndromes likely to affect criminal responsibility assessments.

Under the evidence rules of every American jurisdiction, to be admissible evidence must be relevant (material and probative) and not unduly confusing, redundant, or prejudicial (see, e.g., Fed. Rules Evid. 2010, Rules 401 & 403). Furthermore, if the evidence is opinion testimony proffered by an expert, as occurs with syndrome evidence, the testimony must be based on “scientific, technical or other specialized knowledge” that will “assist” the fact finder and that is “reliable” (Fed. Rules Evid. 2010, Rule 702). Thus, admissibility analysis requires consideration of four basic issues: materiality (the logical relationship between the syndrome testimony and substantive criminal law doctrine); probative value (the reliability/validity of the syndrome evidence); helpfulness (the extent to which the evidence adds to the fact finder’s knowledge); and prejudicial impact (the extent to which the expert testimony will be misused by or distract the fact finder).

SYNDROMES TYPICALLY PROFFERED BY THE DEFENSE

Battered Woman Syndrome

Probably the best-known syndrome in legal circles is the battered woman syndrome (BWS), most often raised to support a defense against homicide charges in cases in which a woman kills a man who has been physically abusing her for some time. BWS comes in many forms. The term was invented by Lenore Walker, a psychologist, in 1979. Based on interviews with 400 battered women, she hypothesized that many women who experience these cycles exhibit “learned helplessness,” a
passivity toward their plight induced by fear, low self-esteem, and a perceived lack of options. She analogized the battered woman’s situation to the submissiveness found in dogs who have been repeatedly subjected to random shocks and who eventually remain in their cages even when provided a means of escaping from the shocks (Walker 1979).

Other research suggests, and Walker herself later admitted, that battering relationships often involve something other than three cycles, including long-term stable battering or a less acute second stage combined with an absence of or minimal contrition (Walker 1993). Mary Ann Dutton, one of the preeminent researchers in the area, has conceptualized the violence in these relationships as a “single and continuing entity” (Dutton 1992, p. 1208). Walker also later amended her learned helplessness thesis to include the idea that battered women tend to develop survival skills rather than escape skills given their inability to predict how the batterer will react to an escape attempt and the difficulty of escaping (Walker 1984, p. 87). Subsequent researchers have found a wide array of responses by battered women, including an increased, rather than a decreased, attempt to obtain help as the battering progresses, a phenomenon dubbed the “survivor hypothesis” (Gondolf & Fisher 1988). Other researchers have hypothesized that the phenomenon of “traumatic bonding” found in hostage cases may be at work in battering cases; under this theory, the person who wields less power becomes “more negative in their self-appraisal, more incapable of fending for themselves, and thus more in need of the high power person” (Dutton & Painter 1981, p. 147). Still others have hypothesized that the batterer establishes a pattern of domination that slowly leads to internalization of the batterer’s rules by the woman, to the point where violence becomes less necessary, although it always lurks in the background (Fischer et al. 1993).

Materiality. The first issue any court must address in determining whether expert testimony is admissible is whether it is material to criminal defenses recognized by the law. Most commonly, BWS is presented in support of a self-defense claim that, if successful, results in acquittal. If this is the defense theory, one materiality obstacle to BWS testimony should be immediately apparent. Even if BWS, as described above, exists in a particular case, it merely suggests why a woman would not leave a battering relationship; none of its manifestations—learned helplessness, traumatic bonding, or internalization of a dominator’s rules—explain why a woman would kill rather than continue to submit to abuse.

The usual response to this complaint is that BWS helps show why homicide becomes the only viable option for battered women. They are unable to leave the battering relationship, BWS suggests, because of psychological dependency or because they know that leaving will do no good and may even lead to an escalation of violence. Thus, if the battering is to stop, some option other than leaving the relationship is necessary for these women.

This response gives rise to a second materiality issue in those cases, of which there are more than a trivial number, where the woman kills the batterer in his sleep or when he otherwise is not threatening the woman at the time of the killing. Traditional self-defense law has required that the act of self-defense be proportionate to an imminent threat and that both proportionality and imminence be measured from a “reasonable person” perspective (LaFave 2003, p. 542). The reasonable person would not feel imminent fear of harm from a sleeping or otherwise nonthreatening individual, and thus the use of any force, much less deadly force, against him would not be justifiable.

In response to this materiality concern, some advocates have suggested that a battered woman is highly attuned to the batterer’s tendencies and thus is much better than the reasonable person at determining when the batterer’s violence will escalate to the point that serious bodily injury or death is likely (Downs 1996, p. 249). But, again, the traditional self-defense rule does not take into account special sensitivities of the defendant. Several courts have held that only if
the woman is confronted with an actual imminent threat of deadly force from the batterer is she justified in responding in kind (Norman v. State 1989, Lentz v. State 1992).

Of course, self-defense law can be redefined. For instance, the Model Penal Code recognizes a defense to any type of homicide charge when a person “in the actor’s situation” would have believed the force used was necessary to prevent death or serious bodily harm (American Law Institute 1962, §§ 3.04, 3.09). That language, applied in the BWS context, essentially asks whether a reasonable woman who has been subjected to the battering and abuses to which the defendant was subjected would have believed the killing was necessary. Several state courts have similarly modified self-defense doctrine, with some making the test even more subjective by referring to whether a “reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm” (Bechtel v. State 1992, p. 11; see also Ibn-Tamas v. United States 1979). BWS testimony is much more likely to be material to a self-defense claim in these jurisdictions, especially if the prosecution argues that self-defense is inapposite because the woman could have left the batterer.

If self-defense is not applicable, an alternative defensive theory is imperfect self-defense. If successful, this defense does not result in acquittal, as self-defense does, but rather a reduction in charge from murder to manslaughter. Traditionally, imperfect self-defense might apply when a person honestly but unreasonably believed he or she was about to be seriously harmed or killed by the victim or when the crime is objectively disproportionate to the harm but nonetheless is understandable (LaFave 2003, p. 550). A woman charged with killing her batterer might be able to use BWS testimony to support a claim that she believed the killing was necessary even though, on the objective facts, it was not. Even here, however, there often needs to be proof of some objective reason to be provoked into attack, which might be lacking in the sleeping-victim type of case.

An alternative way to reduce murder to manslaughter is through a diminished responsibility defense, which generally only applies in homicide cases. As formulated by the Model Penal Code and several states, a conviction for manslaughter rather than murder is appropriate when the homicide “is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse,” reasonableness to be determined “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be” [American Law Institute 1962, § 210.3(1)(b)]. This language once again subjectifies the inquiry in a way that might easily make BWS material in a homicide case.

BWS might also be material to two other legal defenses. Some jurisdictions have permitted evidence about BWS in cases in which a woman claims she committed an offense under duress from her batterer (Dunn v. Roberts 1992). Here as well, the materiality of the testimony might depend on whether duress is defined in the traditional manner—in terms of whether a reasonable person would believe the crime was necessary to avert more battering and that battering was a more serious harm than the crime committed—or whether instead the jurisdiction follows the more subjective Model Penal Code approach, which asks whether a person “of reasonable firmness in the [actor’s] situation would have been unable to resist the coercion” (see LaFave 2003, p. 495; American Law Institute 1962, § 2.09). Finally, BWS testimony has been offered in support of an insanity defense, which, as described in more detail below, focuses on whether a mental disease or defect substantially diminished the defendant’s ability to appreciate the wrongfulness of his or her conduct or to control it. The key materiality issue here is whether BWS is considered a “mental disease or defect,” an essential predicate for an insanity defense. Most courts have held that BWS does not meet this latter criterion and thus have rejected an insanity argument based on BWS (State v. Necaise 1985, People v. Torres 1985).
Although not nearly as common, evidence of BWS can also be proffered by the prosecution in cases brought against alleged batterers. For instance, one court allowed the prosecution to introduce BWS testimony to rebut a defendant’s assertion that he had a loving, caring relationship with his wife and thus that her death at his hands was an accident (People v. Berry 2009). Another court allowed BWS testimony to corroborate the testimony of an assault and kidnap victim (State v. Vega 2002). Several courts have allowed such evidence to be introduced by the prosecution to rebut an alleged victim’s claim (often a recantation of earlier claims) that her injuries were not caused by the defendant (see, e.g., United States v. Young 2002).

**Probative value.** Probative value, as used here, measures the extent to which material evidence can be considered valid. Evidence law has developed several rules for determining when expert evidence is sufficiently probative to be admissible. The most lenient approach is to assume that any testimony proffered by an individual with specialized knowledge meets this requirement and that such an expert may testify as long as the testimony meets the other three requirements (materiality, helpfulness, and avoidance of prejudicial impact). Most courts, however, have adopted special screening tests for expert testimony. The best known tests come from Frye v. United States (1923), which requires that the testimony be based on a theory or methodology that is generally accepted among experts in the relevant field, and Daubert v. Merrell Dow Pharmaceuticals (1993), which requires that the basis of the testimony be subjected to some sort of verification process, as evidenced by attempts to falsify it through the scientific method, the generation of error rates, subjection to peer review, general acceptance, or some combination thereof. Subsequent case law suggests that the last method of verification (which is, in essence, the Frye test) is the least favored under Daubert (see Kumbo Tire Co. v. Carmichael 1999). Congressional implementation of Daubert, enacted in 2000, requires that expert testimony be “the product of reliable principles and methods” that have been “reliably” applied to the facts of the case (Fed. Rules Evid. 2010, Rule 702).

Most professionals in the fields of psychiatry, psychology, and social work probably accept the general notion that women subjected to repeated assault are often affected in at least one of the ways described above (i.e., learned helplessness, traumatic bonding, internalization of the batterer’s rules). Thus, BWS testimony designed to show why a woman would not leave a battering situation is probably probative under Frye’s test. But it is not as clear how many mental health professionals accept the proposition, theoretically crucial in situations in which the woman kills in the absence of an imminent threat, that battered women are more sensitive to violence cues. Perhaps relevant here is the assertion made by some commentators and courts that there is a close relationship between BWS and post-traumatic stress syndrome (PTSD), given the trauma precipitated by battering and the presence of PTSD-like symptoms often reported by battered women, including, most importantly, hypervigilance (American Psychiatric Association 2000, p. 467). If there is a close relationship between BWS and PTSD, assertions about battered women’s extrasensory perceptions of impending danger could be presumed to be “generally accepted,” because PTSD appears in the official diagnostic manual.

The analysis in Daubert jurisdictions may be different to the extent that general accept ance alone is an insufficient ground for admissibility. There is considerable research on the prevalence of battering and a fair amount of research on its effects. But methodological problems (e.g., the difficulty of obtaining control groups, selection bias with respect to the samples studied, difficulty in gauging the motivation for not leaving or for attacking a batter) mean that the empirical basis for BWS, and especially its relationship to violence, is not extremely rigorous. In 2005, the leading treatise on scientific evidence asserted that “the battered woman syndrome remains little more than an unsubstantiated hypothesis that, despite
being extant for more than 25 years, has yet to be tested adequately or has failed to be corroborated when adequately tested” (Faigman et al. 2005, p. 234).

Be that as it may, well over half the states have declared, either through case law or legislation, that BWS testimony is admissible over Frye or Daubert objections (see Masson 2004). These declarations may stem more from a desire to address the prevalence of domestic violence in some way than from a rigorous assessment of validity (Mosteller 1996, pp. 488–89). But they may also be based on the belief that the helpfulness of BWS testimony outweighs concerns about its validity.

Helpfulness. Most expert testimony that is material and probative is also helpful. But not all relevant evidence adds to what a lay fact finder, be it a judge or jury, can discern for itself. For instance, if an expert on BWS merely reported that women who are repeatedly battered often fear further battering, the testimony, while material and highly probative, is probably not helpful in the sense contemplated by the rules of evidence. Lay people would easily understand this point without any assistance from an expert.

Testimony is most likely to be helpful when it is counterintuitive or challenges assertions made by the opposing side. Thus, testimony explaining why battered women do not leave the battering situation or why battered women might be particularly adept at discerning pending violence is probably helpful. Testimony about the context of battering—its prevalence, the lack of shelters or other options, the fear that resistance might harm the children—might also be helpful, although it need not come from a psychiatrist or psychologist, but might be more accurately described by a social worker or criminologist. Research using mock jurors suggests that actual jurors require enlightenment about battering and its effects (Vidmar & Schuller 1989).

Some courts have held, in various contexts, that if expert evidence merely corroborates a lay witness it is not helpful because the jury is presumed to be an expert on assessing the credibility of witnesses (see, e.g., United States v. Kime 1996, State v. Hulbert 1992). Thus, one might argue that BWS testimony should not be admissible because it merely seconds the battered woman’s testimony. The line between simple corroboration and adding useful information can be hard to draw, however. For instance, testimony explaining why battered women normally do not leave the batterer could be characterized simply as corroboration of a woman’s assertion that she felt separation was not an option, or it could be seen (more plausibly) as more deeply explanatory information that is not otherwise available to the typical jury. Moreover, even mere corroboration can be helpful if it bolsters otherwise hard-to-believe testimony. In the context of BWS testimony, this conundrum often conflates with the prejudice inquiry.

Prejudice. Some evidence clears the first three hurdles but nonetheless is excluded because of fear it will confuse the jury or distract the jury from the issue toward which the evidence is directed. The usual statement of this principle provides that exclusion should not occur for this reason unless the prejudicial impact “substantially” outweighs the materiality and probative value of the evidence (Fed. Rules Evid. 2010, Rule 403). But there are many situations in which courts have found that exclusion is required on this ground. An example is the rule, adopted in every jurisdiction, that the prosecution cannot introduce evidence of prior bad acts unless the defendant opens the door to such evidence by presenting evidence tending to show his or her good character (Fed. Rules Evid. 2010, Rule 404). The basis for this “character evidence rule” is that prior bad act evidence is considered “collateral” and, more importantly, misleading because the jury may decide to convict simply in the belief that the defendant is a bad person and disregard the evidence about whether he or she committed the specific crime charged.

The most powerful argument for exclusion of BWS testimony under this criterion arises in connection with prosecution use of BWS testimony. Noted earlier was the court decision
that allowed the prosecution to introduce BWS testimony to bolster an alleged victim’s testimony that her boyfriend, the defendant, had kidnapped and assaulted her. Although this type of corroborative testimony may or may not be helpful, it also will consist predominantly of descriptions about the prior battering perpetrated by the defendant. It thus violates the usual ban on prior bad acts. Arguably, BWS testimony should be prohibited in this situation because its relevance is substantially outweighed by its prejudicial impact.

The prejudice concern could also lead to exclusion of BWS testimony presented by the defense. One concern about defense-introduced BWS testimony that is sometimes expressed by courts is that the evidence will paint such an ugly picture of the batterer and such a sympathetic picture of the woman that the jury will acquit simply because it feels sorry for the victim, even though the killing was a disproportionate response to the threat (United States v. Johnson 1992; Fletcher 1995, pp. 135–39). However, if it is material and probative, the testimony’s helpful, counterintuitive nature might also be said to outweigh its sympathy-inducing effect.

One final concern raised by some scholars who have written about BWS is its potential to paint women as weak, dependent, and lacking in self-esteem (Schneider 2002, Coughlin 1994). Although this concern does not fit neatly into the four-factor admissibility framework used here, it can be characterized as a type of prejudice pushing toward exclusion because of the possibility that BWS stigmatizes women and misleads society about their innate capacities. One author has even argued that, given the pathologizing effects of “deviance” narratives including some versions of BWS, defense attorneys should be prohibited from raising such defenses unless they can be restructured in terms of “defiance” narratives (Alfieri 1995). Although this proposal is unlikely to be adopted, advocates sensitive to this charge might opt for the survivor frame rather than the learned helplessness frame in describing BWS, given the latter’s association with research concerning motiveless canines.

Combat Stress Syndrome

At one time called Vietnam Veteran Syndrome, the label for this syndrome has been modified here to encompass the symptoms resulting from combat in any conflict. Like BWS, combat stress syndrome (CSS) is usually raised as a defense to criminal charges. It is closely related to, and arguably is a subcategory of, PTSD. As described in the draft version of DSM-5, PTSD requires (a) exposure to unnatural death, serious bodily injury, or sexual violation (which obviously can often occur during combat); (b) “intrusion symptoms that are associated with the traumatic event” [such as “dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event were recurring”]; (c) “persistent avoidance of stimuli associated with the traumatic event”; (d) “negative alterations in cognitions and mood that are associated with the traumatic event” (“such as pervasive fear, horror, anger, guilt or shame”); and (e) “alterations in arousal and reactivity that are associated with the traumatic event” (such as “reckless or self-destructive behavior” and “hypervigilance”) (American Psychiatric Association 2010, 309.81).

The paradigmatic case in which CSS is introduced in a criminal adjudication involves a veteran who commits a crime during a flashback. For instance, Charles Heads, charged with the murder of his wife’s brother-in-law in Louisiana, claimed that at the time he shot the victim he believed he was in Vietnam, clearing out an enemy hooch. Seven years earlier he had returned from fighting in Vietnam, where he killed several people, including an old woman and a child, and suffered serious injury. After he returned to the United States, Heads had continuous nightmares about the war. Two years after he returned from Vietnam, and shortly after his wife left him the first time, he vaulted to the roof of his house, assumed the assault position, and fired harmlessly for a few minutes into the treetops in the neighborhood. The killing occurred after his wife left him a second time. When he approached the victim’s house, where he thought his wife might be, he noticed ground
fog, caused by two inches of rain that had fallen that day. He stated, “It was just like Vietnam, in a way—that last patrol when we were ambushed, the way the mist hung in the trees.” Heads said he was “hit” with a “boom,” and went “on automatic,” taking guns from his car and shooting until the victim, who responded with shots of his own, was dead (State v. Heads 1980, Welborn 1982).

**Materiality.** CSS is usually offered in support of an insanity defense; Heads was acquitted by reason of insanity at his second trial after his conviction at the first trial was overturned. There are many formulations of the insanity defense, but most focus on whether, as a result of mental disease or defect, the defendant lacked a substantial capacity to appreciate the wrongfulness of his or her actions at the time of the crime. About a third of the states also permit an insanity defense if, by reason of mental disease or defect, the defendant lacked a substantial capacity to conform his or her behavior to the requirements of the law (Clark v. Arizona 2006, pp. 750–52).

As with BWS, a key materiality question in this context is whether CSS is a mental disease or defect for insanity purposes. The federal insanity statute requires that the predicate mental disability for insanity be severe, and many states prohibit insanity defenses based on personality disorders; as a result, the typical insanity acquittee suffers from a psychosis such as schizophrenia (Insanity Defense Reform Act 1984; Melton et al. 2007, pp. 211, 233). On the other hand, a leading treatise states that “any mental abnormality...will suffice if it has caused the consequences described in the second part of the test” (i.e., an inability to appreciate or conform) (LaFave 2003, p. 377).

If the CSS testimony describes flashbacks akin to those purportedly experienced by Heads, then a defense argument that the offender suffered from a mental disease and lacked appreciation of the wrongfulness of his conduct would be plausible because the offender believed he was in battle. Less plausible is the argument that CSS supports an insanity defense based on the volitional impairment prong. Although, as noted above, reckless behavior may be a symptom of PTSD, nothing in the diagnosis suggests a greater inability to control behavior than might be the case with other impulsive actors.

However, another legal doctrine that focuses on volitional control may come into play in CSS cases if the offender suffered from a dissociative state of the type sometimes associated with PTSD. Most states recognize a complete defense to crime for an “involuntary act” or “automatism” that occurs in situations in which there is little or no physiological link between mind and body (LaFave 2003, p. 466). The classic example of an involuntary act occurs when a person harms another as a result of a convulsive epileptic seizure. If, as Heads claimed occurred in his case, the defendant was “on automatic” at the time of the crime and an expert verifies that he was in a dissociative or fugue-like state, an automatism defense might be recognized (see People v. Lisnow 1978). The advantage of an automatism defense for the defendant is that, in contrast to the usual outcome of an insanity defense, commitment does not automatically follow acquittal.

**Probative value.** As noted above, PTSD, on which CSS is based, is in the DSM, so Frye’s general acceptance test might be met with respect to the mental disease or defect predicate of the insanity defense. But the assertion that crimes can be committed during a dissociative flashback that is the result of past trauma and that essentially reenacts it—an assertion that is arguably crucial to any plausible assertion of insanity or automatism in these cases—is less well accepted. Certainly in an individual case the evaluator must carefully assess for malingering and look for evidence of other alleged flashbacks of the type that allegedly occurred in the Heads case. Daubert’s demand for some sort of testing requires a closer look at the science behind CSS. According to one review, to date there is a “paucity of studies examining the relationship of PTSD to criminal behavior or to
impairment in cognitive and emotional function of a type that might be relevant to mental state defenses for criminal defendants” (Poythress et al. 2005, p. 52). This dearth of research is due to several factors: the small number of allegedly PTSD-driven crimes; the difficulty of reconstructing both the initial stressor (which usually occurs in a foreign country) and the defendant’s mental state at the time of the offense (especially because defendants often claim amnesia, consistent with the PTSD diagnosis); and the need to tease out commonly co-occurring personality disorders and substance abuse, the latter of which may result from the war experience. One study did find that veterans with PTSD who received an infusion of a stress-inducing chemical were almost twice as likely as nonveterans to report some sort of flashback experience (albeit nothing involving violence) (Higgins 1991). Other studies suggest a greater rate of violence among veterans with PTSD but do not directly address the cognitive or volitional impairment issue raised by the insanity defense (Poythress et al. 2005, pp. 54–56).

Helpfulness and prejudicial impact. As with any testimony supporting an insanity defense, CSS testimony can overcome the lay assumption, and the legal presumption, of sanity. The prosecutor in the Heads case argued that the killing was due to a fit of jealous rage, which the CSS testimony was meant to rebut. It might be argued that Heads’s own testimony (briefly recounted above) could, by itself or with other lay testimony about his wartime experience, adequately counteract that assertion. But it seems much more likely that, without expert testimony, the fact finder would be unwilling to consider the possible impact of war-induced trauma in such cases. The only question then becomes the prejudice inquiry—whether the sympathy created by hearing about the war-induced suffering will lead the fact finder to acquit when the impairment needed for insanity does not exist. The fact that most CSS arguments are relegated to sentencing, presumably because proponents either were not successful at trial or do not think they could be, suggests this danger is not significant (see Caine 2009).

XYY (Neurobiological) Syndrome
At one time relatively popular, the XYY syndrome is rarely raised in criminal cases today, but it provides a useful example of a syndrome that is based on a neurobiological phenomenon. Essentially, the XYY syndrome argument is that a criminal defendant should receive leniency because the extra male gene predisposes him to crime (see LaFave 2003, pp. 461–64). Similar predisposition arguments have been made for defendants with lesions in the brain, low serotonin levels, and addictive personalities.

Probative value and helpfulness. These kinds of arguments are usually based on scientific investigation of the type demanded by Daubert. For instance, numerous studies have found that the incidence of people with an extra Y chromosome is much higher in prison and mental institution populations than in the general population, sometimes by a factor of 15 or 20 (Melton et al. 2007, pp. 241–42). Similarly, a well-known study by Caspi Avshalom and colleagues (2002) found that 85% of a cohort of individuals with low serotonin levels who experienced significant abuse as a child committed a violent act before age 26, presumably a much higher level of violence than most other cohorts. In short, error rates are available or can be obtained for many types of biological markers. This type of testimony can be probative on the issue of why some people commit crimes and provides information a jury is not likely to discern for itself, making it helpful.

Materiality and prejudicial impact. Even if they are associated with a high degree of probative value and helpfulness, however, the XYY syndrome and other syndromes based on biology are not admissible unless they are relevant to an established criminal law doctrine. The XYY syndrome foundered as a defense strategy largely because it failed to overcome this hurdle (see, e.g., People v. Tanner 1970). People with
an extra Y chromosome who commit crime still generally intend to commit the crime, appreciate the wrongfulness of doing so, and harbor no (mis)perceptions that they are endangered (as with battered women) or that they are re-living a trauma (as with veterans suffering from PTSD). Thus, in most jurisdictions, testimony about this syndrome is immaterial.

Such testimony might be material in a jurisdiction that permits an insanity defense to be based on volitional impairment. But in addition to having to show that a chromosomal abnormality is a mental disease or defect, the defendant making this argument would have to show a serious impairment in the capacity to control behavior. People with pedophilia and pathological gambling routinely fail at making this showing, so people with an extra Y chromosome probably should as well. Perhaps this type of testimony would influence a judge to be more lenient at sentencing. But to the extent that dangerousness can be considered at that stage of the proceeding, XYY syndrome and similar testimony about predispositions might actually end up harming the defense’s case.

SYNDROMES TYPICALLY PROFFERED BY THE PROSECUTION

Rape Trauma Syndrome

Unlike the syndromes discussed to this point, rape trauma syndrome (RTS) focuses on the alleged victim of the offense rather than the defendant. It is similar to BWS and CSS, however, in the sense that it relies on alleged post-trauma symptoms. First named by Burgess & Holstrom (1974), RTS is a constellation of symptoms such as anxiety, depression, hypervigilance, and fear of men said to be consistent with (although not congruent with) having been raped and also with reluctance to think about the rape or report that it has occurred. It is especially pertinent when a defendant charged with rape admits having intercourse with the complainant but contends, contrary to her claim, that she consented. RTS testimony is therefore generally more useful to the prosecution than the defense.

Materiality and prejudicial impact. RTS testimony would seem to be directly relevant to whether a rape, as opposed to consensual intercourse, occurred. But many courts have held that RTS testimony is not admissible to prove either this fact or that the complainant is telling the truth about the rape (see State v. Batangan 1990, Townsend v. State 1987, People v. Bledsoe 1984). The first issue is considered an ultimate one that is entirely the province of the jury. Likewise, the credibility of witnesses is, as noted earlier, thought to be an issue for the jury. In essence, these courts are saying that RTS testimony is either immaterial on the issue of whether a rape occurred or (more plausibly) that it is likely to distract the jury from its proper role and thus is unfairly prejudicial.

However, some courts have held that RTS testimony may be introduced to show that a complainant’s symptoms are “consistent with” nonconsensual intercourse (Simmons v. State 1987, Kruse v. State 1986). The difference between saying a rape occurred and that the complainant exhibits symptoms consistent with rape is a subtle one. Indeed, at least one court has concluded that there is “no logical difference” between this type of testimony and testimony that a rape occurred. It then permitted both types of testimony, although it went on to hold that the expert could neither testify that the complainant was telling the truth about the rape (because that trespasses on the jury’s job) nor testify that the defendant was the perpetrator of the rape (State v. Alberico 1993).

The courts’ concern that juries will abdicate their role as arbiters of witness credibility if an expert supports (or does not support) the complainant’s testimony is understandable. Research indicates that mock jurors exposed to RTS testimony spend more time talking about complainant credibility and are more likely to return verdicts of guilty than are mock jurors who do not hear such testimony, especially when the expert ties the syndrome testimony directly to the facts of the case (Brekke & Borgida 1988). However, when the defense presents a rebuttal expert, the effect of the prosecution expert is essentially negated (Brekke 1985). As a
compromise, courts concerned about this issue could limit the expert to testimony about post-traumatic stress, which avoids use of the word “rape” (see State v. Martens 1993).

A final prosecution use of RTS testimony is to explain why the complainant did not immediately file a complaint with police (see People v. Bledsoe 1984). Presumably this situation arises only after the defense has argued that the failure to file a complaint in a timely fashion suggests that the claim is manufactured. Although use of RTS for this rebuttal purpose also comes close to asserting that a rape occurred, it is at least backed by the common rule of evidence that a witness’s credibility may be bolstered with extrinsic evidence once it has been attacked [Fed. Rules Evid. 2010, Rule 608(b)].

At bottom, the materiality/prejudicial impact issue in this setting is virtually identical to one that is also raised in BWS and CSS cases—to wit, may expert witnesses give testimony that parallels a witness’s account? But when the prosecution is the party proffering the expert, as is the case with RTS testimony, one additional constraint on expert testimony must also be considered. The accused’s right to confront the witnesses against him, guaranteed by the Sixth Amendment to the U.S. Constitution, has been reinvigorated by the U.S. Supreme Court in recent years (Crawford v. Washington 2004). If the expert testimony about RTS relies, as it probably will, on the complainant’s statements, the complainant must also testify or the expert testimony is likely to be excluded because the complainant is not available to be cross-examined.

A final materiality/prejudicial impact issue occurs when a complainant does not exhibit symptoms associated with RTS and the defense wants to prove that fact to support its claim of consensual intercourse. Some courts have allowed testimony about RTS in this situation on the theory that the defense cannot be denied expertise that the prosecution is permitted to use (see, e.g., Henson v. State 1989). But if showing an absence of RTS symptoms involves proving facts about a complainant’s sexual activities, it might run afoul of rape shield laws. These laws generally limit evidence of a victim’s sexual history, in part to encourage reporting of rape and in part because such history is only marginally relevant to the issue of whether the complainant was raped (see, e.g., Fed. Rules Evid. 2010, Rule 412). One method for resolving this tension between the right of confrontation and the policy underlying rape shield laws is to make the admissibility of defense-proffered RTS testimony dependent on whether the prosecution relies on proof of RTS. If the prosecution presents only the complainant and other lay witnesses, then expert testimony from the defense is arguably surplusage. If instead the prosecution relies on RTS testimony, then the complainant’s sexual history, at least after the time of the alleged rape, becomes more relevant.

**Probative value and helpfulness.** As with several other syndromes discussed here, RTS is closely related to PTSD. Indeed, much of the research on the effects of rape focuses on the presence or absence of PTSD. The proposed criteria for PTSD in the fifth edition of the *Diagnostic and Statistical Manual* specifically state that the precipitating trauma may consist of “actual or threatened sexual violation” (American Psychiatric Association 2010, 309.81). If so, the Frye test would seem to be satisfied with respect to RTS testimony.

Viewed through the Daubert prism, the facts that RTS-type symptoms can stem from many different types of trauma besides rape and that the studies reporting such symptoms are based largely on self-descriptions from individuals who chose to seek help undermine confidence about RTS. But enough studies using nonvictimized control groups have been conducted to lead to the robust conclusion that “[v]ictims report more psychological distress than do nonvictims, particularly the first year following the assault,” when a rape charge is likely to be filed (Frazier 2005, p. 340). Furthermore, “[v]ictims report more symptoms of PTSD, depression, fear, and anxiety; more social adjustment and health problems; and more substance abuse than do nonvictims,
and more symptoms of PTSD than victims of other traumatic events” (Frazier 2005, p. 340).

RTS testimony is most helpful when used to rebut a defense assertion that the complainant was not raped because she delayed reporting the crime, behaved calmly rather than hysterically after the incident, or in some other way acted differently than the “typical” rape victim would (Emrich 2009). But it probably also is counterintuitive in those situations in which physical or eyewitness evidence of coercion is absent. Several studies confirm that the information provided by a prosecution RTS expert adds considerably to the average juror’s knowledge about acquaintance rape (Vidmar & Schuller 1989, pp. 155–57). Conversely, testimony about the absence of RTS symptoms is probably most helpful to the defense when the prosecution uses its own expert. As noted above, when the prosecution does not present evidence of RTS, defense reliance on the testimony may be prejudicial because it will be asymmetric.

Abused Child Syndrome

The abused child syndrome (ACS) is similar to RTS because it is meant to help identify children who have been abused, sexually or otherwise, by reference to psychological characteristics. It is to be distinguished from battered child syndrome, which is analogous to BWS and, like BWS, is used to support a defense to parricide on behalf of children who kill parents who have abused them (see State v. Janes 1993). It is also to be distinguished from the medical, as opposed to psychological, symptoms associated with child abuse, which are sometimes described by experts for the purpose of showing that abuse has occurred (see State v. Dumlao 1985). Finally, it should be distinguished from child sexual abuse accommodation syndrome, which was first described by Summit (1983) as a way of explaining why children might delay reporting abuse.

Materiality and prejudicial impact. Courts are more hostile to the psychological variant of ACS than they are to RTS, despite their similarities (see, e.g., State v. Nemeth 1998). Perhaps this resistance derives from the fact that ACS is focused entirely on whether sexual contact took place, without the inquiry into the alleged victim’s mental state at the time of the contact that is the usual objective of RTS testimony designed to show lack of consent. As noted above, courts are generally reluctant to permit expert witnesses to address whether an act took place or a particular defendant committed it, on the ground that such testimony usurps the jury’s role. However, a growing number of courts are willing to permit experts to testify that a child is experiencing psychological symptoms consistent with abuse, despite the fact that this language is trivially different from an assertion that abuse has occurred (Williams v. State 2007, State v. Douglas 2009).

Probative value and helpfulness. With respect to probative value, the same points made above in connection with RTS apply to ACS, except that the research base on ACS is skimpier. It should also be noted that the symptoms supposedly associated with ACS can arise when a child observes any sort of significant traumatizing event, including the abuse of another child (Myers 2010, p. 26). Thus, the reliability of this diagnosis is more suspect than an RTS diagnosis.

Nonetheless, it can be argued that if children known to have been abused are more likely to experience a particular symptom complex than children known not to have been abused, then a description of those symptoms, combined with testimony that the alleged child victim experiences them, could be probative and helpful. If, for instance, 60% of abused children have symptoms X, Y, and Z and only 20% of nonabused children have such symptoms, testimony that a particular child has symptoms X, Y, and Z could be considered probative on the issue of whether abuse has occurred (Lyon & Koehler 1996).

However, it should also be noted that the base rate for abuse is likely to be relatively low. Assume that this base rate is somewhere in the 5% range nationwide. On this assumption and
the further assumption that the data hypothesized above about ACS symptoms are accurate, in any group of 100 children approximately 3 abused children (60% of 5) will have symptoms X, Y, and Z but as many as 19 nonabused children (20% of 95) will have those symptoms, or over six times as many. Unless there is another reason to believe a child with such symptoms is abused (a reason that, in Bayesian terms, would change the prior probability of abuse), the statistical information described in the previous paragraph may not be particularly helpful.

In other words, before such testimony is permitted, some other evidence—testimony by the child asserting that abuse has occurred, physical evidence, or some sort of circumstantial evidence of abuse—might need to be forthcoming.

Indeed, in a Daubert jurisdiction, such testimony might be admissible only when such statistically based information is available. In contrast to expertise on past mental states, which can rarely be based on such information given methodological difficulties, ACS researchers can identify definitively the criterion variable (abuse) and more easily discern the related psychological symptoms (present indications of trauma). Where error rates can be provided, Daubert arguably requires that they be produced before testimony meant to show that an act occurred is introduced (Slobogin 2008).

**TWO APPROACHES TO SYNDROME TESTIMONY**

The syndromes canvassed here are representative of numerous other syndromes and psychiatric-sounding arguments that have found their way into court, many of them based on even weaker science. Like the BWS, the battered child syndrome and the battered person syndrome can be raised in support of a self-defense or imperfect self-defense claim. Along the same lines are so-called “abuse excuse” and “urban survival syndrome” arguments meant to support claims that the defendant felt threatened at the time of the crime. Similar to testimony about CSS are numerous claims that environmental causes have drastically changed one’s perception of reality. Among these are the television intoxication defense, the brainwashing defense (sometimes framed in terms of duress), and the black rage defense. Analogous to the XYY chromosome argument are other contentions that one’s actions are compelled by biological phenomena such as brain deficits, physiological addiction, premenstrual syndrome, unusual plasma androgen levels, hypoglycemia, and fetal alcohol syndrome. Analogues to RTS and ACS can also easily be imagined in cases involving violent or personal crime.

As applied to criminal responsibility issues, testimony about these syndromes will probably always be somewhat speculative. Especially when the issue is the extent to which, at the time of the crime, a particular defendant believed a particular harm occurred or was about to occur or a particular defendant felt an urge to commit a crime, behavioral scientists can only provide educated guesses. Most useful to the law would be controlled studies about the extent to which trauma or biological symptoms produce perceptions of threat or aggressive motivations that, in turn, cause criminal actions. Yet such studies are difficult to carry out, for obvious ethical and methodological reasons.

One response to this dilemma is to limit experts to what has been called social framework evidence (Walker & Monahan 1987), sometimes also called testimony about general causation (as opposed to specific causation) (Faigman 2001). Social framework evidence in this context would consist of descriptions of studies that report the prevalence of different constellations of symptoms when a person has been subjected to trauma or has a particular neurobiological trait, preferably together with control group data indicating the prevalence of the same symptoms among those who have not been traumatized or do not share the neurobiological trait. Then other witnesses could describe the defendant/complainant’s symptoms. Responsive to the concern about pathologizing certain classes of defendants, none of these witnesses would need to use the word syndrome or diagnosis. Cogent arguments have been made
that testimony limited to hard data and rich description of symptoms devoid of diagnostic language is the most probative and least prejudicial type of information (Morse 1978; Faigman 1989, pp. 96–97). Supporting this position is the U.S. Supreme Court’s decision in Clark v. Arizona (2006), which held that, at least when presented on an issue other than insanity, expert testimony about a defendant’s diagnosis or how it affected behavior at the time of the offense may be excluded without violating the Constitution because of its potential to confuse or mislead the jury.

The advantage of this approach is that the expert testimony would have relatively high probative value and would not trench directly on the jury’s role of evaluating credibility. The downside is that the testimony would often lack good “fit,” a term used in Daubert to refer to the degree of testimony’s materiality (Daubert v. Merrell Dow Pharmaceuticals 1993, p. 591). Social framework evidence normally will not provide information about the relevant mental state at the time of the crime. Furthermore, most people who have experienced the relevant trauma or possess the relevant biological deficit are not involved with crime, and thus research about them does not say much about the causes of a particular crime. For instance, BWS testimony at the general causation level, offered on behalf of the defense, might tell the jury that many battered women do not leave the batterer and the circumstances under which they are most likely to stay. But the expert would not be able to explain the nuances of why this particular woman stayed in the relationship or address the specific defendant’s motivations at the time of the killing (for instance, whether the woman acted out of fear rather than anger). Furthermore, the smart prosecutor will elicit from the expert the fact that few battered women kill their batterer, and limited to generalized social framework evidence, the expert will not be able to explain why he or she thinks this defendant did. As a result of these limitations, several courts have prohibited social framework testimony on BWS precisely because it does not directly address the defendant’s specific case (State v. Allery 1984, State v. Thomas 1981, People v. White 1980).

Another option is to permit the expert to infer from the data and examination of the individual in question the effects of the trauma or neurobiological trait at the time of the crime. This type of testimony is clearly more speculative than social framework evidence. But it also helps tell the particular defendant’s version of his or her mental state at the time of the offense, is similar in nature to testimony routinely proffered in cases involving standard diagnoses such as schizophrenia, and can of course be subject to cross-examination pointing out its speculative nature. Supporting this position is Rock v. Arkansas (1987), where the Supreme Court held that criminal defendants have a constitutional right to testify unless the type of testimony presented is “always so untrustworthy or 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” (p. 61). Although Rock dealt only with the defendant’s right to testify, an argument can be made that in cases involving psychological functioning an expert who knows the relevant literature, has followed accepted protocols for the type of case in question, and avoids the ultimate legal issue (as in “the defendant acted in self-defense”) is needed to interpret the defendant’s statements in a manner that provides a coherent story (Slobogin 2007, Taslitz 1993). Note that this type of testimony need not refer to a syndrome or disability either, but rather can focus on why this person did what he or she did, against the backdrop of how people in similar situations or with similar biological makeups behave.

Of course, expert testimony must also be material, a point this review has emphasized. Testimony about BWS is not material in those jurisdictions that take an objective approach to self-defense and provocation and that do not recognize a nonpsychotic disorder as a mental disease or defect for insanity purposes. Testimony about XYY and many other neurobiological traits is not material in jurisdictions that do not recognize a volitional prong to the insanity
defense, and even in the latter jurisdictions such testimony verges on irrelevance.

CONCLUSION

In analyzing the admissibility of syndrome evidence, courts seldom examine closely all four of the evidentiary components described here (materiality, probative value, helpfulness, and prejudice). For instance, some courts have admitted biological syndrome evidence without sufficient attention to the materiality issue (People v. Weinstein 1992). Studies of the effect of Daubert and Kumho Tire, cases that would seem to require close judicial scrutiny of expert testimony’s probativeness, indicate that most courts have abdicated that role when examining the admissibility of syndrome evidence (Dahir et al. 2005, Fradella 2003, Groscup et al. 2002). Helpfulness is rarely treated as a separate component of the analysis, even though it can alter the balancing process. The prejudice inquiry, if it takes place at all, often focuses on whether the evidence will usurp the jury rather than mislead it, despite the fact that syndrome testimony rarely directly evaluates a defendant’s or victim’s truth-telling capacity but rather, like most expert testimony, merely corroborates or undermines it.

This judicial nonchalance toward syndrome testimony, whether it results in admission or exclusion, is unfortunate, and not just because evidence law is being disregarded. The materiality, probative value, helpfulness, and prejudice inquiries are not simply elements of admissibility analysis. They also raise important issues about criminal responsibility, the nature of knowledge, and the ability of courts to answer questions that may ultimately be unanswerable.

First, the materiality and helpfulness inquiries require careful thought about the scope of criminal liability. Arguments based on syndromes tend to push the envelope of criminal law doctrine. More specifically, they try to subjectify the blameworthiness inquiry by individualizing it. Thus, BWS testimony is material and helpful in a self-defense case only if self-defense doctrine moves from a reasonable person standard to a “reasonable battered person” standard or, better yet from the defense point of view, a “reasonable battered person in the actor’s situation” standard. Is this subjectification of the criminal law wise? Criminal law theorists differ on this point, with some arguing that fair culpability assessments must be based on the precise mental state and circumstances of each defendant and others arguing instead that criminal law is primarily a means of sending broad messages meant to reinforce appropriate behavior and deter inappropriate behavior, a position that favors more objective standards (Lee 2003). This debate is ultimately one for legislatures to decide, but judges’ evidentiary decisions and juries’ verdicts in syndrome cases can sometimes force the issue, as has happened with BWS.

Second, the materiality and prejudice inquiries require the courts to analyze, under the rubric of fit, the extent to which nomothetic data can help courts resolve individual disputes. In a sense, all expert testimony, even when focused on specific rather than general causation, is based on stereotypes and experience with other individuals. But social framework testimony explicitly presents a description of other people’s behavior rather than the defendant’s or the complainant’s, thus forcing courts to think through whether the information is so attenuated from the case at hand that it is more likely to mislead than aid the jury (Denbeaux & Risinger 2003).

Third, the probative value, helpfulness, and prejudice inquiries, applied in the syndrome context, require courts to determine whether defendants ought to be able to present any plausible defense or instead can be limited in their arguments by concerns about accuracy. On the one hand, cases like Rock, the compulsory process clause of the Sixth Amendment (which guarantees the defendant the right to present material evidence), and the general principle that juries, not judges, should decide whether reasonable doubt exists push toward a relaxed evidentiary threshold (Slobogin 2010, Hoeffel 2002, Goldwasser 1998). On the other hand, cases like Daubert and Clark, together
with case law suggesting that even plausible defense arguments can be limited by evidentiary rules that are not arbitrary, counsel for an approach that favors proof of scientific validity (Lillquist 2010). Factors relevant to resolving this issue are the extent to which (a) accurate determinations of hard-to-reconstruct past mental states are scientifically possible; (b) experts follow standardized evaluation procedures; (c) defendants can tell their stories—i.e., testify—without the aid of expert interpreters; and (d) juries (or judges) can reach reasonable conclusions without social framework or specific causation evidence. Even under a relaxed standard, some types of syndrome testimony (e.g., urban survival syndrome) might be excluded on the ground that they are pure conjecture, unsupported by a consensus of professionals in the field, and thus not evidence on which a reasonable juror would rely. But other types of syndrome testimony (e.g., specific causation testimony about BWS) might be permitted in the absence of a scientific basis if the speculation is informed by the experience of the testifying experts and other professionals.

Finally, the materiality and prejudice inquiries might involve the courts in considering the impact of syndrome testimony on society at large. Some have argued that syndrome testimony and related arguments feed the view that defendants are blameless victims of their biology or environment (Dershowitz 1994), and, as noted above, others have been bothered by syndrome evidence’s potential to pathologize various groups in society. These concerns are related to questions about the proper scope of criminal liability. But even if syndrome evidence is seen as material in a general sense, more fine-tuned materiality analysis, influenced by concerns about the message syndrome testimony sends, might limit how the evidence is framed (in terms of defiance rather than deviance narratives, for instance).

New types of syndrome testimony will undoubtedly continue to be proffered, limited only by the imagination of attorneys and the willingness of mental health professionals to testify. Rules of evidence should be construed to keep quackery out. But the difficulty of reconstructing mental states might also mean that the rules should be construed to avoid excluding material, helpful, and nonmisleading testimony about past mental state testimony simply because its probative value cannot be demonstrated with scientifically produced error rates (see Slobogin 2007).

**DISCLOSURE STATEMENT**

The author is not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

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The Right to Voice Reprised

Christopher Slobogin*

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*,¹ 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.*² 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.³ 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).⁴ 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 validity of those opinions is a scientific impossibility.⁵ Second, the Constitution can be read to entitle defendants to a chance at telling their exculpatory

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² *Christopher Slobogin, Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness* (2007).
³ 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.”).
⁴ Slobogin, supra note 2, at 60–62.
⁵ Id. at 42–53.
mental state stories through an expert, even if that expert’s opinion is not scientifically validated.\(^6\)

Professor Lillquist’s Essay takes aim at this second rationale, which I called the right to voice.\(^7\) 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.\(^8\) When I was offered an opportunity to respond to Professor Lillquist’s paper (and appear in the \textit{Seton Hall Law Review} for the third time in a seven-year period!\(^9\)) I jumped at the chance to rebut his arguments and elaborate on some of the points made in \textit{Proving the Unprovable}.

At the outset, I want to note that a close reading of Professor Lillquist’s article suggests he does not necessarily disagree with the primary contention I made in \textit{Proving the Unprovable}. There I confined myself to an attack on a rigid application of \textit{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.”\(^10\) 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.\(^11\)

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 about past mental states, because actions are amenable to scientific investigation while past mental states are intrinsically elusive.\(^12\) 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 \textit{Proving the Unprovable} to merit a response. In particular,

\(^6\) \textit{Id.} at 53–55.
\(^8\) \textit{Id.} at 2.
\(^10\) \textit{Lillquist, supran} note 7, at 15–16.
\(^11\) \textit{Id.} at 2, 11–18.
\(^12\) See Slobogin, \textit{Mental States and Acts}, \textit{supra} note 9, at 1012–15.
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. 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 article 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.” 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. 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.

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. But that assertion is patently wrong; in fact as I mentioned above, Professor Lillquist himself backs off of this claim at the

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13 Professor Lillquist’s Essay also refers to expert prediction testimony proffered by the defense. Lillquist, supra note 7, at 1. 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.


15 Slobogin, supra note 2, at 54, 60–66, 86.

16 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 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 4–5, at the least suggests that colonial defendants were entitled to tell their story in relatively unrestricted fashion.

17 Lillquist, supra note 7, at 9, 10, 14.
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.\footnote{18}

First, defendants who want to use psychiatric experts are often barely competent to stand trial.\footnote{19} 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,\footnote{20} 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.\footnote{21}

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 \textit{Proving the Unprovable}:

\begin{quote}
[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.\footnote{22}
\end{quote}

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

\footnote{18} 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, \textit{supra} note 7, at 14 n.74. 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.

\footnote{19} 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 \textsc{Gary Melton et al.}, \textsc{Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers} 141 (3d ed. 2007).

\footnote{20} See, \textit{e.g.}, \textsc{Fl. R. Crim. P. 3.211(a)(2)} (2008).

\footnote{21} Most defendants with mental illness are competent because of medication, which can affect their communication skills. \textit{Cf.} Dora W. Klein, \textit{Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment}, 46 \textsc{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. \textit{See, e.g.}, Riggins \textit{v.} Nevada, 504 U.S. 127, 131 (1992).

\footnote{22} \textsc{Slobogin, supra} note 2, at 50.
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.25 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.24

[When 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 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.25

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.26 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.

23 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”).
24 470 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 10.
25 Ake, 470 U.S. at 80.
26 Lillquist, supra note 7, at 9.
Accordingly, Professor Lillquist is wrong to suggest that United States v. Scheffer, which upheld exclusion of a polygraph taken by the defendant, undercuts the argument for a constitutional right to voice. Instead, as I argued in Proving the Unprovable, Scheffer is at worst irrelevant to the argument and perhaps even enhances it. 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”—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 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. Contrary to Professor Lillquist’s suggestion, 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). 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 Prov-
ing the Unprovable, my approach does not favor the defense over the prosecution.35

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.36 The primary justification for this holding was the Court’s perception that psychiatric opinion testimony might confuse or mislead juries.37 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 being38) 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 him39). 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.40 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

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35 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 subconstitutional) victim’s right to voice. See Slobogin, Mental States and Acts, supra note 9, at 1029.


37 Id. at 774.

38 Id. at 745.

39 Id.

40 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.”).
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. 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 psychiatric testimony, or at least unable to assess its true worth. 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. 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), an opinion about

41 See supra note 37 and accompanying text.

42 Lillquist, supra note 7, at 7 (stating that the right to voice would “admit otherwise inadmissible evidence—evidence that we believe, if admitted, would frustrate the goals of an accurate and orderly outcome.”); id. at 18 (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.”).

43 548 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).

44 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.
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 testimony presented by the defendant. 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. Empirical study, involving cases in which psychiatric opinion testimony was almost unlimited, 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.

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. Probably the strongest argument against Clark is that, in effect, the decision eliminates the state’s burden of proving mens rea in psychiatric cases. Without opinion testimony rebut-

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45 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.
47 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).
48 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.
49 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.”).
50 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.
ting 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 been convicted.\textsuperscript{51} The very few defendants who succeed with a lack-of mens rea or diminished responsibility defense are still convicted, albeit of a lesser crime.\textsuperscript{52} 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.\textsuperscript{53}

Finally, contrary to Professor Lillquist’s apparent position, accuracy is not necessarily the dominant goal of the criminal justice system.\textsuperscript{54} 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.\textsuperscript{55} 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.\textsuperscript{56}

\textsuperscript{51} Slobogin, supra note 2, at 142.
\textsuperscript{52} Id.
\textsuperscript{53} 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).
\textsuperscript{54} Lillquist, supra note 7, at 12 (“The primary aim of the law of evidence and procedure is to reach accurate outcomes.”).
\textsuperscript{55} 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”) (quoting In re Oliver, 335 U.S. 257, 273 (1948)).
\textsuperscript{56} 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 16. 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.
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 Professor 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.\(^57\)

Aside from one passage meant to set the stage for its arguments about psychiatric testimony,\(^58\) Proving the Unprovable did not address the general right to present relevant defense evidence that is the primary target of Professor Lillquist’s article. 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.”\(^59\)

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.\(^60\)

\(^{57}\) Lillquist, supra note 7, at 14–15.

\(^{58}\) Slobogin, supra note 2, at 139.

\(^{59}\) See generally David Alan Sklansky, Hearsay’s Last Hurrah, 2009 SUP. CT. REV. 1 (discussing developments in the constitutional law of proof).

\(^{60}\) 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.”).
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 defense.”\(^61\) 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.”\(^62\) 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.”\(^63\)

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).\(^64\) 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.\(^65\) 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.\(^66\) 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.”\(^67\) But *Holmes* itself illustrates that even when the weight of the evidence indicates that the defense’s hearsay is unreliable, the Constitution requires that it be admitted.\(^68\)


\(^{62}\) *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.”).


\(^{64}\) Lillquist, *supra* note 7, at 14–15.

\(^{65}\) 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).

\(^{66}\) 547 U.S. 319 (2006). The declarant had been cross-examined at a pretrial hearing. *Id.* at 323.

\(^{67}\) *Id.* at 326.

\(^{68}\) *Id.* at 328–29 (noting lower courts’ finding that there was “strong evidence of guilt”).
At least in *Holmes* the defendant was able to produce some evidence corroborating the hearsay. 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?70

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.71 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.72 With 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 over-reliance is particularly great.”73

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69 *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).

70 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).


72 *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.”).

73 *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 17. Of course, that is precisely what the Court did in *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding that African-American members of
Note further that Professor Pettys’ 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. 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. Hobbes believed that every accused individual, even one who is clearly guilty, has a right to resist punishment. 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. To Hobbes, punishment is a “bit dirty,” an act of violence that every individual—in­nocent or guilty—has a right to resist.

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 to present a defense, and other rights of the accused may serve, they are also mechanisms of self-preservation.” 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.” This right to resist, of course, is only the defendant’s, and thus would justify asymmetrical evidentiary rules.

the jury pool have the right to prevent discriminatory exclusion from the jury, exercisable by the defendant).

74 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).


76 Id. at 616 (“This right to resist belongs to the guilty as well as the innocent.”).

77 Id. at 614–15.

78 Id. at 622.

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

80 Id. at 630.

81 Ristroph, supra note 75, at 630.
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. 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 “presumably is broader than its particular applications in Proving the Unprovable” and supports a “generalized” right of defendants to present evidence. 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.

82 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.

83 Lillquist, supra note 7, at 2.