Seton Hall Law Review

Volume 40
Issue 4 *Symposium Securities Regulation and the Global Economic Crisis: What Does the Future hold?*

Article 8

11-9-2011

The Right to Voice?

Erik Lillquist

Follow this and additional works at: http://erepository.law.shu.edu/shlr

Recommended Citation
Lillquist, Erik (2010) "The Right to Voice?," *Seton Hall Law Review*: Vol. 40: Iss. 4, Article 8.
Available at: http://erepository.law.shu.edu/shlr/vol40/iss4/8

This Essay is brought to you for free and open access by Seton Hall Law eRepository. It has been accepted for inclusion in Seton Hall Law Review by an authorized administrator of Seton Hall Law eRepository. For more information, please contact lawlibdigital@shu.edu.

The Right to Voice?

Erik Lillquist[*]

It is a sign of an important book that it generates a multitude of responses from members of the legal academic community. Christopher Slobogin's *Proving the Unprovable* is one such book. Without any doubt, this is the most important piece to be written on the admissibility of expert evidence on mental health issues in our generation. Like other readers of the book, I find much to admire in Professor Slobogin's exposition of his position.[1]

Nonetheless, I do find something with which to quibble. Professor Slobogin, at least as I read him, asserts in *Proving the Unprovable* that the existing Supreme Court precedent gives the criminal defendant what he labels a "right to voice."[2] I also understand Professor Slobogin to make a more normative claim: that such a right to voice for criminal defendants is a worthy policy goal. In this Essay, I dispute both points: not only is there no generalized right to voice that emanates from either the Constitution or its interpretation by the Supreme Court but also that such a generalized right would be a bad idea for American criminal justice.

I. PROFESSOR SLOBOGIN AND THE RIGHT TO VOICE

In both *Proving the Unprovable* and in his prior contribution to this Law Review,[3] Professor Slobogin considers the rules that should govern the admissibility of expert testimony on matters of mental

[*] Senior Associate Dean & Professor of Law, Seton Hall University School of Law. I would like to thank Larry Laudan and Michael Risinger for comments on a previous draft of this Essay, as well as the participants at the Cuarto Foro Sobre Epistemologia Jurídica at the Instituto De Investigaciones Filosóficas of the Universidad Nacional Autónoma de México. Finally, I would like to thank David Cramer for his research assistance.

[1] *See, e.g.*, Edward J. Imwinkelried, *Guilty v. Guiltiness: The Case Against Abandoning the Search for Substantive Accuracy*, 38 SETON HALL L. REV. 1031 (2008).

[2] CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 53 (2007).

[3] Christopher Slobogin, *Guilty v. Guiltiness: Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009 (2008).

health as they apply to two sorts of issues in criminal and quasi-criminal cases: the culpability of the defendant and the future dangerousness of the convict (or potential confinee). In general, Professor Slobogin contends that defense-proffered evidence from mental health professionals on both issues—again, the culpability of defendants and the future dangerousness of convicts—meets the minimum test of relevancy under the general rules of evidence. That is, such evidence is clearly relevant in the minimal sense required, for instance, by Rules 401 and 402 of the Federal Rules of Evidence. Such evidence, however, has often (indeed, usually) not been admitted in courts because it does not meet the heightened standards for probativeness and reliability under the test for the admission of expert evidence. Professor Slobogin argues forcefully that such evidence should be admitted, notwithstanding the usual restrictions. While that thesis is provocative in and of itself, I am not primarily concerned with it in this Essay.

Professor Slobogin acknowledges that the admission of such expert evidence would violate our generally proper normative commitment to scientific validity for expert evidence.[4] He argues, though, that our official commitment to the defendant's right to voice, among other things, should override the criterion of scientific validity and allow the admission of such evidence.[5] But what does such a "right" consist of?

On this count, *Proving the Unprovable* is not completely clear. Certainly, Professor Slobogin is not suggesting that the right to voice is an absolute right of the defendant to put on any evidence he chooses. Instead, my understanding is that the right to voice is the right of criminal defendants "to tell their story."[6] This clearly encompasses more than the right to testify recognized by the Supreme Court in *Rock v. Arkansas*.[7] In addition, the right to voice presumably is broader than its particular applications in *Proving the Unprovable*: allowing the admission of otherwise inadmissible expert evidence on behalf of a defendant on issues of culpability and future dangerous-

[4] SLOBOGIN, *supra* note 2, at 53. Michael Risinger has suggested to me, and I agree, that we might question in general how great our actual—as opposed to theoretical—commitment to scientific validity actually is. For purposes of Professor Slobigin's argument in *Proving the Unprovable*, he appears to assume that the commitment is robust. By saying that, I do not mean to suggest that he differs from Michael Risinger and myself in skepticism about our actual commitment here.

[5] *Id.*

[6] *Id.* at 54 ("defendants should be allowed to tell their story"); *see also id.* at 125 ("to tell the best story they can about their future").

[7] 483 U.S. 44 (1987).

ness.[8] Indeed, as I understand the right, it seems to suggest that it gives the defendant the right to submit any evidence on his behalf, unless "it is completely untrustworthy or so immune to the weapons of the adversarial process that its questionable nature is not likely to be exposed."[9]

In the following two Parts, I will first argue that there is no basis for this right in either the Constitution or the Supreme Court's case law. As part of this exposition, I will also argue that there is no existing constitutional right to present the sorts of evidence with which Professor Slobogin is concerned in *Proving the Unprovable*—evidence of culpability and future dangerousness. Second, I will argue that there is no good policy argument in favor of a generalized right to voice. I will not take a position on whether, as a policy matter, defendants *ought* to have the ability to proffer otherwise inadmissible evidence of culpability and future dangerousness.[10]

II. THE DESCRIPTIVE CASE AGAINST A RIGHT TO VOICE

The first question is whether there is any support for a defendant's right to voice in the Supreme Court's case law.[11] I take it that Professor Slobogin's argument is not that the Supreme Court has explicitly recognized that a defendant has a right to voice in criminal proceedings. It cannot be, for there is no evidence that the Court has ever explicitly recognized such a right. For instance, a quick search

[8] In order to support these particular applications of the right to voice, it follows that the underlying right, here the right to voice, must be more general.

[9] SLOBOGIN, *supra* note 2, at 54.

[10] As Professor Slobogin suggests in his reply to this Essay, the reality is that he and I are perhaps not all that far apart on these issues. *See* Christopher Slobogin, *The Right to Voice Reprised*, 40 SETON HALL L. REV. 1647, 1648 (2010) [hereinafter Slobogin, *The Right to Voice Reprised*]. While I remain unconvinced that there is a *constitutional right* to present the sort of evidence he is primarily discussing, I remain open-minded about whether such evidence should be admitted as a strict matter of evidentiary and criminal justice policy. Certainly his discussion of this issue in Parts I & II of his response further strengthens the case for such a change to policy. Just because it may well be good policy, however, does *not* mean that it should be constitutionally required.

In addition, we remain (somewhat) divided about the existence of a more general right to voice. Although he sets forth strong and forceful arguments for such a right (which I still do not accept!), he admits that he is "ambivalent about a robust right to present a defense that permits virtually any evidence he or she desires." *Id.* at 1662.

[11] Again, to be clear, Professor Slobogin explicitly situates the right to voice as a constitutional rule in his contribution to this Law Review: "The right to voice derives from the Constitution, which can be read to give criminal defendants a break when*ever* they want to present expert testimony." Slobogin, *Mental States and Acts*, *supra* note 3, at 1010 (emphasis original).

of Westlaw's U.S. Supreme Court database ("SCT")[12] provided only one case that contained the phrase "right to voice," which seems to have nothing to do with the right of a defendant in a criminal case to a voice.[13]

Instead, I take it that Professor Slobogin is arguing that the Court's prior decisions, when taken together, implicitly create such a right. In both *Proving the Unprovable* and in this Law Review, Professor Slobogin cites to a variety of sources: the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the Sixth Amendment's compulsory process, impartial jury, and assistance of counsel clauses.[14] Of course, nothing in these clauses themselves gives rise to a right to voice for criminal defendants. But as Professor Slobogin correctly notes, the Supreme Court in *Rock v. Arkansas*[15] recognized that the combination of these clauses could give rise to another right nowhere mentioned in the Constitution: the right of a defendant to testify.

Because so much of Professor Slobogin's argument in my view depends upon analogizing the right to voice to the right to testify, I think it is instructive to consider what the Court did and did not do in *Rock*. Vickie Lorene Rock was charged with manslaughter in connection with the death of her husband, apparently after a fight between the two of them.[16] Immediately after the shooting of her husband, Rock had difficulty remembering the details of the shooting, so at the suggestion of her attorney, she underwent hypnosis in an effort to refresh her memory.[17] After these sessions, Rock "recalled" additional details of the shooting.[18]

Prior to trial the prosecutor moved to exclude Rock's testimony as a result of the hypnosis.[19] The trial court in large part granted the

[12] WESTLAW, *U.S. Supreme Court Database*, www.westlaw.com (search last performed Sept. 19, 2010).

[13] The only case that explicitly says "right to voice" is *Connick v. Myers*, 461 U.S. 138, 168 (1983). In a search for "right to voice," *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 570 (1819), also comes up, but as David Cramer pointed out to me, the actual quote in the text is "right and voice." Of course, it is notable that neither *Connick* nor *Trustees of Dartmouth College* is a criminal case.

[14] SLOBOGIN, *supra* note 2, at 53–55, 139; Slobogin, *Mental States and Acts*, *supra* note 3, at 1017.

[15] 483 U.S. 44 (1987).

[16] *Id.* at 45.

[17] *Id.* at 46.

[18] *Id.* at 47. Of course, it is unknowable whether Rock actually remembered these details because of the hypnosis or simply invented them as a result of the hypnosis.

[19] *Id.*

motion, holding that "no hypnotically refreshed testimony would be admitted."[20] As a result the prosecutor repeatedly made objections, interrupting Rock's testimony at trial and successfully arguing that Rock could testify only to items that she recalled to the neuropsychologist *prior* to the hypnosis.[21] Rock was convicted and sentenced to ten years; the Arkansas Supreme Court subsequently affirmed her conviction.[22]

In the Supreme Court, Rock argued that the trial court's decision to exclude her post-hypnotic recollections was unconstitutional, and in a 5-4 decision, the Court agreed. Both the majority and the dissenters agreed that Rock had a constitutionally derived right to testify.[23] In some ways—as the majority noted—this was a surprising conclusion, because at the time of the framing, defendants were forbidden from testifying under oath at their own trials.[24] It is hard to imagine that the Framers would have thought that the Constitution guaranteed Rock the right to testify when, in any criminal court in the United States in the late eighteenth century, she would have been categorically forbidden from testifying.

Two factors, though, militated in favor of finding a right to testify. First, while it was true that, at the time of the framing of the Constitution, criminal defendants had been forbidden from *testifying under oath*, it had also long been understood at that time that the defendant would almost always make an *unsworn* statement of the case.[25] This was a particularly important right because, despite the right to assistance of counsel found in the Sixth Amendment, it had long been the common law rule (changing only at the end of the eighteenth century) that defendants had no right to counsel in criminal cases.[26] In the absence of counsel, a defendant needed to be able to make a statement in order to present a defense at all.[27] Thus, while the Framers would not have thought that Rock had the right to testify under oath to her post-hypnotic recollections, they might well have been surprised that she was limited in what she was allowed to tell the jury more generally.

[20] *Id.* at 47.
[21] *Rock*, 483 U.S. at 48 n.4.
[22] *Id.* at 48.
[23] *Id.* at 49; *id.* at 63 (Rehnquist, C.J., dissenting).
[24] *Id.* at 49.
[25] *Id.*
[26] *See generally* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 167–70 (2003).
[27] *Id.* at 20–21.

Second, and perhaps more importantly, the Court recognized that in the intervening 190 years, there had been a massive shift in Anglo-American law with respect to the right of a defendant to testify under oath.[28] As Justice Blackmun noted, by the end of the nineteenth century, only one state (Georgia) forbade the defendant from testifying, and other common law countries reached the same result.[29] In other words, by recognizing a *constitutional* right to testify, the Court was simply recognizing a right that had existed by statute in almost all jurisdictions in the United States for almost 100 years.[30]

What ultimately divided the Court in *Rock* was not the existence of the right to testify, but rather what sort of limitations could be placed upon that right.[31] Indeed, the majority and the dissent even agreed that *some* limitations might be placed upon that right.[32] What divided the majority and the dissent were differences over whether a state evidence rule that forbade *all* testimony about hypnotically induced memories was too great a burden on the right to testify; the majority answered that question yes, the dissent no.[33]

Of course, in finding a right to testify in the Constitution, the *Rock* Court could not simply point to the Constitution (which contains no such *explicit* right). Instead, the Court had to anchor the right to other constitutional provisions. Justice Blackmun did just that, relying upon four separate constitutional provisions: the Fourteenth Amendment's Due Process Clause, the Compulsory Process Clause of the Sixth Amendment, the right to self-representation that arises from the Sixth Amendment, and the Fifth Amendment's Privilege Against Self-Incrimination.[34]

---

[28] *See generally* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662–71 (1997).

[29] *Rock*, 483 U.S. at 50. At the same time that states had extended the right to testify to defendants, they had also abolished the right of defendants to make unsworn statements to the jury.

[30] In this regard, the Court's recognition of a right to testify in *Rock* is consistent with its tendency—noted by Michael Klarman and others—to recognize a right only when it has largely been accepted by society as a whole. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 5–7 (2004). Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1365 (2004).

[31] *Rock*, 483 U.S. at 63 (Rehnquist, C.J., dissenting). In other words, it seems clear that had Arkansas imposed a rule not allowing defendants in manslaughter cases to testify, the Court would have struck down the provision unanimously.

[32] *Id.* at 55–56 & n.11; *id.* at 64 (Rehnquist, C.J., dissenting).

[33] *Id.* at 61; *id.* at 65 (Rehnquist, C.J., dissenting). In his opinion for the Court, Justice Blackmun explicitly acknowledged that some restrictions on hypnotically-refreshed testimony would be permissible. *Id.* at 61.

[34] *Id.* at 51–53.

To make an argument for his right to voice, Professor Slobogin presumably assumes that the same sort of considerations that support the finding of the right to testify in the Constitution would support the finding of a right to voice. There are several problems with this argument. The biggest is the historical distinction between the right to voice and the right to personally address the jury (either under oath or by unsworn statement). As noted above, by the time of *Rock*, almost every American jurisdiction had statutorily recognized a right to testify under oath for defendants for almost one hundred years. Professor Slobogin points to *no* American jurisdiction that has created a statutory right to voice. Beyond this, even if we limit the right to voice to the particular application Professor Slobogin creates for it in *Proving the Unprovable*—a constitutional rule that allows otherwise inadmissible expert evidence on behalf of a defendant on issues of culpability[35]—Professor Slobogin points to no jurisdiction that has adopted such an approach. Furthermore, while the trial judge's actions in *Rock* might have surprised the Framers, given the general necessity for the defendant to represent himself in Anglo-American trials in the eighteenth century, there is little reason to think they would be surprised by a restriction that applied the same rules of admissibility to evidence submitted by the prosecution and by the defense. Even though rules of evidence of any specificity were relatively new at the time of the framing, there was little reason to believe that those rules were generally meant to be less restrictive on the defendant than on the government.[36]

[35] Professor Slobogin also suggests it would permit evidence on issues of future dangerousness, at least for clinical prediction testimony, which he believes should otherwise be inadmissible. *See* SLOBOGIN, *supra* note 2, at 125.

[36] One objection raised to this point is the fact that, prior to the rise of the Right to Counsel in the eighteenth century, the defendant generally spoke directly to the jury and told his story, unrestricted by the rules of evidence (or by an oath). LANGBEIN, *supra* note 26, at 11. But as John Langbein has shown, the rules of evidence themselves did not come to play a large part in criminal litigation until counsel also played a large part in criminal litigation, starting in the eighteenth and nineteenth centuries. *Id.* at 13–15. Thus, this prior history of unrestricted statements to the jury has little to teach us about the rights that exist in a world with rules of evidence that limit what can be said to the jury. Furthermore, just as the defendant had no right to counsel prior to the mid-to-late eighteenth century, the Crown also had no counsel, meaning that generally the victim represented himself. *Id.* at 11. It is not clear to me what restrictions, if any, were put on the "storytelling" of the victim.

More importantly, in the ensuing 200 years since the rise of counsel in criminal cases (and the related decline in the making of direct statements (not under oath) to the jury), the rules of evidence have been generalizable, and have not recognized any right to voice. That history strongly suggests to me that the Framers had no intention of creating a right to voice.

The particular constitutional provisions that the *Rock* Court and Professor Slobogin rely upon also provide little support either for the recognition of a general right to voice or the particular application of it Professor Slobogin seeks here. Take first the Privilege Against Self-Incrimination. In *Rock*, the majority asserted that the "guarantee against compelled testimony" had, as a "necessary corollary," the opportunity to testify.[37] Assuming for the moment that the right not to testify necessarily carries with it the right to testify, there is nothing about the right not to testify that necessitates a right to voice. Of course, the defendant always has the option of not putting on a case by pleading guilty. But no one has ever seriously suggested that the right not to oppose the government's case has a necessary corollary that the defendant has the right to put on any case he pleases. The very existence of the rules of evidence as a limitation on what may be admitted carries with it a rejection of this possibility.

Furthermore, the Court itself has on other occasions rejected the exact same kind of "necessary corollary"[38] it refers to in *Rock*. For instance, in *Singer v. United States*,[39] the Court acknowledged that the existence of a right to a jury trial did not mean that the defendant also had a right to *non*-jury trial.[40] In other words, the guarantee that the defendant will be protected from a trial by judge does not have, as a necessary corollary, the guarantee that a defendant has the opportunity for a trial by a judge. Professor Slobogin gives us no reason why the "right" to voice should be treated any differently than the "right" to a non-jury trial.

The right to compulsory process is of little more help to Professor Slobogin's argument. In *Rock*, the Court recognized that the defendant's right to call witnesses must include the right of the defendant to call himself to the stand to testify.[41] But nothing in *Rock* suggests that the defendant's right to testify on his own behalf carries with it the right to testify outside the scope of the usual rules of evidence. Of course, it is true that the rule applied by the trial court in

[37] *Rock*, 483 U.S. at 52.

[38] *See id.*

[39] 380 U.S. 24 (1965).

[40] Chief Justice Warren's opinion explicitly noted that Singer was arguing for "a correlative right to have his case decided by a judge alone," *id.* at 25–26, and then went on to note that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right," *id.* at 34–35. As applied here, it is clear that the right not to put on a case does not mean that the defendant has a correlative right to put on whatever case he wants, irrespective of the rules of evidence.

[41] *Rock*, 483 U.S. at 52–53.

Rock—a flat prohibition on hypnotically-refreshed testimony—was characterized by the Arkansas courts as a general rule of evidence in Arkansas, and *Rock* was seeking an exception to that general rule (an exception the Supreme Court granted). But at the same time, the Court explicitly noted and reaffirmed that the general rules of procedure and evidence in no way offend the defendant's right to testify,[42] and it further reserved judgment on whether the general prohibition on hypnotically-refreshed testimony was constitutional.[43]

The Supreme Court's recent decision in *Holmes v. South Carolina*[44] provides further reason to believe that there is no right to voice. In *Holmes*, the defendant sought to put on evidence of the guilt of a third-party for the crimes with which the defendant was charged.[45] The trial court refused the evidence on the ground that there was "forensic evidence that, if believed, strongly support[ed] a guilty verdict."[46] Justice Alito, in holding for the defendant, noted that states have broad authority to create evidence rules that exclude evidence in criminal cases.[47] He noted, though (while quoting from *Rock*), that such rules will infringe the defendant's opportunity to present a defense when they "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[48] He characterized *Rock* as an example of this general principle, because it had involved the "wholesale inadmissibility of a defendant's testimony . . . in the absence of clear evidence by the State repudiating the validity of all post-hypnotic recollections."[49] Justice Alito then went on to clarify:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to 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. Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence

[42] *Id.* at 55 n.11.
[43] *Id.* at 58 n.15.
[44] 547 U.S. 319 (2006).
[45] *Id.* at 323.
[46] *Id.* at 321.
[47] *Id.* at 324.
[48] *Id.* (quotations and citations omitted).
[49] *Id.* at 326 (quotation marks omitted).

> that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'[50]

The question for the right to voice, therefore, is whether the unwillingness of states to recognize such a right either serves no legitimate purpose or is disproportionate to the ends that the refusal seeks to promote. The answer is no on all counts. Allowing a defendant an open opportunity to present whatever evidence he wishes under the rubric of a right to voice would obviously run contrary to the desire for orderly trials in which one of the most important, if not the most important, goals is achieving an accurate outcome. After all, what a right to voice seeks to do—under Professor Slobogin's description—is to admit otherwise inadmissible evidence: evidence that I believe, if admitted, would frustrate the goals of an accurate and orderly outcome. As Justice Alito recognizes in *Holmes*, such goals are clearly permitted.[51]

The same reasoning clearly applies to the narrow application of the right to voice Professor Slobogin seeks to implement in *Proving the Unprovable*: the right to present otherwise inadmissible expert evidence on the defendant's culpability. The rule serves a legitimate purpose: it seeks to keep evidence from the jury that cannot meet the widely applied requirements for the admission of expert evidence. The state would seemingly have a very legitimate purpose in ensuring that the same standards of reliability are applied across-the-board to all kinds of evidence introduced at a criminal trial.[52]

Of course, Professor Slobogin might seek to assert that the rule is disproportionate to the end it seeks to serve. Indeed, I take it that he reads *United States v. Scheffer*[53] in precisely this manner.[54] *Scheffer* involved the admissibility of polygraph evidence in criminal cases.[55] Justice Thomas, writing for the Court, found that the Constitution did not require the admissibility of such evidence.[56] Described this way, *Scheffer* seems to be a case that strongly argues *against* Professor Slobogin's position.

---

[50] *Holmes*, 547 U.S. at 326–27 (citations omitted).

[51] *Id.* at 326–27.

[52] Again, I am not suggesting that the state *ought* to exclude such evidence, just that a decision to exclude such evidence would be supported by a legitimate purpose, even if it is one that might be outweighed by other concerns.

[53] 523 U.S. 303 (1998).

[54] SLOBOGIN, *supra* note 2, at 54–55.

[55] *Scheffer*, 523 U.S. at 305.

[56] *Id.*

Professor Slobogin, though, suggests three reasons to read *Scheffer* as finding a right to voice. First, one of Justice Thomas's justifications for his decision was that jurors viewed polygraph evidence as nearly infallible, such that they would defer to the polygraph expert and fail to make their own determination about the veracity of the defendant's statement.[57] Professor Slobogin argues that in the case of expert evidence about culpability, we need not worry about such over-reliance.[58] Second, according to Professor Slobogin, Justice Thomas's worry in *Scheffer* was that expert evidence about polygraph examinations did not bring additional facts to the jury but instead only served to replace the jury's role in determining the credibility of witnesses.[59] Because culpability experts are not testifying to credibility, they do not pose the same concern.[60] Finally, Justice Thomas noted the prohibition in *Scheffer*, unlike that in *Rock*, did not prevent the defendant from telling his story.[61] According to Professor Slobogin, expert evidence about culpability is more like the defendant's testimony in *Rock* than it is like the polygraph expert in *Scheffer* and, therefore, does prohibit "the defendant from giving his own version of events in his own words."[62]

Not one of these arguments holds water. First, Professor Slobogin overstates the importance of the over-reliance argument in *Scheffer*. On this point, a majority of the Court did not join Justice Thomas. Indeed, four justices in the majority and the dissenting justice specifically did not agree with Justice Thomas.[63] Because over-reliance on polygraph evidence was not a concern to a majority of the justices in *Scheffer*, it is a bit odd to assume that a distinction on this front would make any doctrinal difference.

Second, the distinction between extrinsic facts (or what my colleague Michael Risinger refers to as brute facts of guilt and innocence) and issues of credibility actually cuts against Professor Slobogin's argument.[64] After all, the expert evidence Professor Slobogin seeks to introduce is about the mental state of the defendant. Just as

[57] SLOBOGIN, *supra* note 2, at 54.
[58] *Id.*
[59] *See Scheffer*, 523 U.S. at 313.
[60] SLOBOGIN, *supra* note 2, at 54–55.
[61] *Scheffer*, 523 U.S. at 317.
[62] SLOBOGIN, *supra* note 2, at 55 (quotation marks omitted).
[63] *See Scheffer*, 523 U.S. at 318–19 (Kennedy, J., concurring in part); *id.* at 336–38 (Stevens, J., dissenting).
[64] As with the argument about over-reliance, a majority of the Court did not join this part of Justice Thomas's opinion. *See id.* at 312–15.

with evidence of credibility, the testimony of mental health professionals that Professor Slobogin seeks to introduce at trial "can supply the jury only with another opinion, in addition to its own, about whether the" defendant had the requisite mental state.[65] In other words, testimony about culpability seems a lot more like testimony about credibility than like testimony about "the analysis of fingerprints, ballistics, or DNA found at a crime scene."[66] On this factor as well, it seems clear that *Scheffer* supports exclusion, not admission.

Finally, Professor Slobogin's assertion that the prohibition on expert testimony stops the defendant from giving his story is simply wrong—the defendant is always available to testify. Indeed, it seems somewhat incongruous to suggest that a mental health expert may be the only source of information about the defendant's past mental states. Professor Slobogin, I believe, would respond that the defendant himself often does not know what his mental state was at the time of the offense: that not only might there be no objective truth about such states but that, even if there were such an objective truth, the defendant would have a hard time describing the complexity of his actual mental state in testimony.[67] Thus, a mental health expert is necessary to present this information to the jury, or the defendant will never be able to tell his story about his mental state. The problem here is that, in truth, almost all evidence is contingent in some sense, and it is necessary to draw inferences with all evidence in order to point to the defendant's guilt (or innocence). The "fact" of a match between one fingerprint and another requires some form of inference and interpretation about which similarities matter and which do not, and to testify to this, the expert must satisfy the *Daubert* criteria (or whatever other test the particular jurisdiction uses). I do not take it that Professor Slobogin would suggest that the right to voice goes so far as to require the admission of an unqualified expert merely so that the defendant can have his story heard on this point: the defendant's testimony, along with his lawyer's arguments in closing, are deemed a sufficient protection. Professor Slobogin gives us no reason to believe a generalized exception—the right to voice—is necessary.[68]

---

[65] *Id.* at 313.

[66] *Id.*

[67] *See* SLOBOGIN, *supra* note 2, at 43–44 (citing Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1 (1998)); *see also* Slobogin, *The Right to Voice Reprised*, *supra* note 10, 1651.

[68] In his reply to this Essay, Professor Slobogin suggests that the testimony of mental health experts is uniquely necessary because they are "needed so that the disparate aspects of an explanation for criminal behavior . . . can be woven together in-

Indeed, in a part of the opinion joined by seven other members of the Court, Justice Thomas distinguished *Scheffer* from *Rock*, noting that *Rock* involved a case where the jury had been deprived "of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts."[69] Thus, when expert evidence about mental states is excluded, much like when polygraph evidence is excluded, the jury still "hear[s] all the relevant details of the charged offense from the perspective of the accused, and the [exclusion does] not preclude him from introducing any factual evidence"—at least as the Court defined that term in *Scheffer*.[70] Stated simply, it is implausible to read *Scheffer* as supporting the right to voice.

Similarly, there is no reason to believe that the right to self-representation found by the Court in *Faretta v. California*[71] supports a right to voice. In *Rock*, the Court noted that "an accused's right to present his own version of events in his own words" was "[e]ven more fundamental to a personal defense than the right of self-

to a plausible whole" and because 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." Slobogin, *The Right to Voice Reprised*, *supra* note 10, 1651, 1652. Here, I believe that Professor Slobogin could be making one or both of two points. First, he might be suggesting that mental health experts are uniquely necessary because they are the only ones who can take various brute facts—"the defendant's own statements, third party statements, psychiatric records, psychological tests"—and make a compelling argument to the jury about the defendant's mental state. If this is his argument, my response is that this is what lawyers do for their clients all the time: they take seeming unrelated brute facts and weave them into a story about why certain inferences should or should not be made. (Furthermore, if this is his argument, it seems to run afoul of precisely the "bolstering" limitation in *Scheffer*.) In my view, Professor Slobogin still fails to demonstrate why mental health experts who are otherwise unqualified to testify are so uniquely situated to make arguments about the defendant's mental state that we should, as a *constitutional* matter, require such testimony to be admitted. Again, it may well be that courts and legislatures should, as a matter of policy, admit such explanatory evidence (as they do in other contexts); but that is a different issue than what is constitutionally required.

Second, Professor Slobogin might also be arguing that mental health experts are bringing otherwise unavailable information to the jury, in the form of scientific information about the defendant's mental state. My reply here is in the same vein: if the "scientific" evidence otherwise does not meet the existing standards for admissibility, I simply do not think the existing law supports admission under the Constitution. As noted above, the state would seemingly have a legitimate purpose in excluding such evidence. Of course, Professor Slobogin thinks (and I might agree) that there is a more important purpose served by admitting such evidence. But what the Supreme Court has required is that the government have no legitimate purpose in seeking exclusion, and here I fail to see how we can characterize the government's position as lacking any legitimate purpose.

[69] *Scheffer*, 523 U.S. at 315.

[70] *Id.* at 317; *see also id.* at 317 n.13.

[71] 422 U.S. 806, 819 (1975).

representation."[72] Assuming for these purposes that Justice Blackmun's observation is true, it does nothing for the creation of a right to voice. After all, as noted in the previous paragraph, a right to voice, when conceived as a right to put on otherwise inadmissible evidence, does not further the goal of allowing the defendant to present events "in his own words."[73] Instead, what the defendant is being denied is the words of *others*. Although there might be *normative* reasons to want the defendant to be able to present the words of others—a topic taken up in the next Part—the right to *self*-representation cannot be taken to provide doctrinal support for such a right.

Finally, the Due Process Right discussed in *Rock* does not supply doctrinal support for Professor Slobogin's proposed right. Justice Blackmun stated in *Rock* that "[t]he necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony."[74] Justice Blackmun then pointed to two instances in which the Court had previously noted the importance of a defendant testifying on his own behalf: *In re Oliver*[75] and *Ferguson v. Georgia*.[76] Professor Slobogin, though, nowhere suggests that the Court has similarly suggested that it is a necessary ingredient of due process that the defendant be able to present otherwise inadmissible evidence so that he can "tell his story." Indeed, given what the Court has said on other occasions, such a statement would be somewhat startling. Justice Alito in *Holmes* noted that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors."[77] The Court in *Scheffer* agreed that the application of the expert evidence rules in that case was "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence."[78] There is simply nothing in the Court's Due Process jurisprudence that suggests the existence of the right to voice.

III. THE NORMATIVE CASE AGAINST THE RIGHT TO VOICE

Simply because the case law does not currently support the existence of a right to voice does not necessarily mean that such a right

[72] *Rock*, 483 U.S. at 52.
[73] *See id.*
[74] *Id.* at 51.
[75] 333 U.S. 257 (1948).
[76] 365 U.S. 570 (1961).
[77] 547 U.S. 319, 326 (2006).
[78] 523 U.S. 311, 312 (1998).

should not be created. Professor Slobogin could be understood to be making a normative rather than a descriptive argument: that given the competing concerns at issue, courts should create a right for defendants to present any evidence they choose to tell their stories so long as the evidence is not so "completely untrustworthy or so immune to the weapons of the adversarial process that its questionable nature is not likely to be exposed."[79] I believe there are good reasons to reject a normative argument for such a right.

The effect of such a constitutional rule, I take it, is that it overrules non-constitutional rules of exclusion of evidence proffered by the defendant (except under the conditions noted above). Putting aside for the moment the particular case Professor Slobogin is discussing—the admission of defense-proffered culpability and dangerousness evidence—this articulation of the right to voice would seem to overrule some standard rules of evidence and admit evidence that is routinely excluded. One example is hearsay evidence. Imagine, for instance, that a defendant is charged with murder. The defendant wants his cousin, Matthews, to testify that Matthews's cellmate, Smith, told Matthews that Jones had confessed to the murder in a previous conversation with Smith. Assume Smith has since died and Jones invokes his privilege against self-incrimination. Under the Federal Rules of Evidence, Matthews may not testify to Smith's recollection of Jones's statements: the evidence is hearsay, and no available exception applies.[80] Under Professor Slobogin's right to voice—at least as I have conceptualized it above—the evidence may nonetheless be admissible. Assuming that the defendant's defense is that "I did not do it; Jones did it," evidence that Jones confessed to the murder would seem to be part of the defendant's story. Furthermore, it seems that to the extent that the evidence is suspect—there is good reason to think that the defendant is simply taking advantage of the fact that Smith died to induce the defendant's cousin, Matthews, to

[79] *See Rock*, 483 U.S. at 61. In his discussion on the right to voice, Professor Slobogin, in *Proving the Unprovable,* seems to be primarily making a doctrinal argument, asserting that such a right does exist under Supreme Court precedent. *See* SLOBOGIN, *supra* note 2, at 53–55. In his prior contribution to this law review, however, he affirmatively states that he is making a normative argument. *See* Slobogin, *Mental States and Acts*, *supra* note 3, at 1016–18.

[80] In fact, the testimony is classic "double hearsay," at least at common law: Jones's confession to Smith and Smith's statement to Matthews fit the definition of hearsay in Rule 801(c) of the Federal Rules of Evidence. None of the exceptions found in Rule 803 fit the situation. Furthermore, while Smith is unavailable within the meaning of Rule 804(a)(4), his statement to Matthews does not fit any of the available exceptions: in particular, it is not a statement against *Smith's* interest. FED. R. EVID. 804(b)(3).

make-up the conversation between Mathews and Smith—the suspicion can be laid out in the form of vigorous cross-examination of Matthews.[81]

Professor Slobogin's right to voice appears to be a call for "free proof" or at least free proof for the defendant's "story": any evidence should be admitted, so long as it is neither untrustworthy nor immune to adversarial testing. The general merits of a system of free proof, as opposed to the more limited system of admissibility adopted in modern common law systems, are beyond the scope of this short Essay. Even if Professor Slobogin believes we should move to such a general system, he gives no defense of that position in either his book or his Essay. Instead, he seems to limit such a system only to evidence in support of the defendant's story.

The true normative question, therefore, is whether it would be good policy to liberalize the admissibility of evidence for the defendant in criminal cases while requiring the government to abide by the "traditional" rules of evidence. In other words, should the scales of admissibility be tipped in the defendant's favor? The answer is no.

The primary aim of the law of evidence and procedure is to reach accurate outcomes.[82] In a world of no constraints—economic, behavioral or temporal—the best way to reach accurate outcomes would be to collect all the possible information and then sort through it. The modern American law of criminal evidence and pro-

[81] Another interesting question posed by the right to voice is whether it would provide a check on heretofore constitutionally permitted rules of exclusion for discovery failures by the defendant. For instance, in *Taylor v. Illinois*, the Supreme Court allowed the trial court in Illinois to exclude evidence of Taylor's alibi in the wake of the failure of his attorney to give proper notice of the evidence to the prosecution. 484 U.S. 400, 402 (1988). The Supreme Court held that the exclusion of such evidence was permissible under the Compulsory Process Clause. *Id.* Because the rule of exclusion of the defendant's testimony was not constitutionally mandated but merely constitutionally permitted, one could easily ask whether such a rule would violate the right to voice. To the extent that the trial court's exclusion of the alibi evidence did not allow the defendant to tell his story, it would seem that the right was violated. Furthermore, because the evidence was excluded only on the ground that it was untimely under the law of discovery in the state of Illinois, *id.* at 433–34, it would appear that the evidence was neither completely untrustworthy nor immune to meaningful adversarial testing.

[82] Professor Slobogin suggests in his reply that I insinuate that accuracy is the only goal of the criminal justice system. Slobogin, *The Right to Voice Reprised*, *supra* note 10, at 1657. Not so. As my use of the word primary suggests, I do think accuracy is the most important goal of the law of evidence and procedure. No one could seriously study either the rules of evidence or criminal procedure and think that accuracy is the *only* goal. I do, however, think it is fair to say that Professor Slobogin and I part ways on how often such alternative goals ought to displace the role of accuracy, and I am happy to come down strongly in favor of accuracy.

cedure, however, is not designed to collect all possible information and instead is a hodgepodge of rules and exceptions. There are good reasons for this. We live in a world of limitations: there are real economic and time constraints on our ability to collect information, and there are real constraints on the abilities of human beings as decision makers to process all the information. The crucial question then, for any real-world system of evidence and procedure, is whether a change in that system will improve or impair the ability of the system to achieve accurate outcomes.

Liberalizing the ability of defendants to tell "their story"—at least against the background of modern American law—is unlikely to lead to more accurate outcomes. Any change in the rules of evidence and procedure will generally affect the mix of accurate and inaccurate verdicts (both guilty and not guilty verdicts) in the criminal justice system.[83] A change in the rules of evidence or procedure will improve the accuracy of the criminal justice system when the change improves the epistemic functioning of the overall system. As I have explained elsewhere, there are some rule changes that almost certainly fall into this category.[84] For instance, requiring that the government tape record interrogations of suspects will likely make the results of such interrogations on the whole more accurate.[85] The net result should be both fewer false convictions and fewer false acquittals.

Other changes to the rules of evidence and procedure, though, are not improvements to the epistemic functioning of the system and instead simply have the effect of trading one form of erroneous verdict for another form of erroneous verdict. Change to the standard of proof in criminal cases is the classic example of this: increasing the amount of evidence that the government needs to prove the defendant guilty of the crime simply shifts errors—it is a change that decreases erroneous guilty verdicts but, at the same time, increases the number of erroneous not guilty verdicts. Indeed, given some standard assumptions about the make-up of the persons subject to the

[83] I use the term verdicts here, but of course what really matters is not so much the verdicts reached at trial but the overall accuracy of outcomes achieved by the system: how many guilty defendants are ultimately convicted (be it by guilty verdict or guilty plea) and how many innocent defendants are ultimately released (be it by acquittal or by dismissal of charges). Another question, of course, is whether and how to count guilty defendants who are never charged, but I will place that issue outside the bounds of my discussion in this Essay.

[84] Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 923–26 (2007).

[85] *Id.*

criminal justice system, I have shown elsewhere that it is quite likely that such a change generally decreases the overall accuracy of the criminal justice system rather dramatically.[86]

The key question, then, with the right to voice is which example it is more like: is it something that would improve the overall epistemic functioning of the system, like a requirement of taping, or does it just make it harder for the government to prove its case, like raising the standard of proof? Another way to view the question is this: would the right to voice help all defendants equally, or would it be likely to help innocent defendants more than it does guilty defendants?[87]

One key reason to suspect that the right to voice would not enhance the epistemic functioning of the system is that it would only admit evidence that was otherwise inadmissible under the usual rules of evidence. Professor Slobogin himself seems to acknowledge this when he states that the right to voice is a principle that is being used to overcome a general commitment to scientific validity. If we assume that scientific validity is a commitment because it increases accuracy, it appears at least implicit in Professor Slobogin's argument that the right to voice is not accuracy-enhancing.[88]

Of course, it is possible that the right to voice is accuracy-enhancing after all. For instance, Professor Slobogin's description of the right to voice as enabling the defendant to tell his story has echoes in the Supreme Court's decision in *Old Chief v. United States*.[89] In that case, the government had sought and won the admission of the full record of the defendant's prior convictions in a case in which the defendant was charged with being a felon in possession of a weapon.[90] Although the Court found that the full record should not have

[86] Erik Lillquist, *Balancing Errors in the Criminal Justice System*, 41 TEX. TECH L. REV. 175, 175–77 (2008).

[87] As Fred Schauer reminded me, the mere fact that the number of accurate convictions is reduced does not mean that the right to voice is a bad idea. After all, the decrease in the number of inaccurate convictions (and increase number of accurate acquittals) could be a benefit that outweighs that cost. *See generally* Erik Lillquist, *Recasting Reasonable Doubt: The Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002). This, though, would require us to believe that the system as it presently stands is presently balanced to convict too many innocent defendants. Perhaps. But I think there is just as good reason to believe that the system convicts too few guilty defendants, and, in any event, Professor Slobogin nowhere (to my knowledge) suggests that the general problem with the criminal justice system is that it is too balanced in favor of conviction.

[88] *See* SLOBOGIN, *supra* note 2, at 53.

[89] 519 U.S. 172 (1997).

[90] *Id.* at 177.

been admitted and that instead the defendant should have been allowed to stipulate to the prior conviction element of the "felon-in-possession" offense, the Supreme Court recognized that the evidence was relevant and that the government generally had an interest in telling its "story"—"the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story."[91] Justice Souter's opinion for the Court seemed to recognize that a piece of evidence might have more probative value for the decision maker than we might believe in the abstract because it adds to the narrative richness of the trial.[92] In a case where the defense offers to stipulate to certain points, often the government will be allowed to put on alternative evidence because the ultimate decision makers—usually the jury—will be better able to process the totality of the information when it is presented in the form of a complete narrative, rather than as a set of disconnected abstract stipulations combined with snippets of testimonial and documentary evidence.

As applied to the right to voice, *Old Chief* can be understood to support the idea that the defendant needs to be able to present the evidence of others to tell his story. At the level of the general right, I believe the answer to be clearly no. Recall from the last section the right to testify arising out of *Rock*. In light of the Court's decision in that case, it is fair to say—and I think Professor Slobogin would agree—that the defendant himself generally has the right to testify on most matters, subject of course to the other rules of evidence. In other words, the defendant will generally be able to present almost any facts he has observed that are in any way relevant to the matter at hand.[93]

---

[91] *Id.* at 190.

[92] *Id.* at 188–89.

[93] One possible objection at this stage to my argument—initially made to me by Michael Risinger—is this: while it is true that defendants *might* present such evidence on their own behalf, many do not, in large part because, if they do, they open up the possibility of admitting evidence of their past crimes under Federal Rule of Evidence 609. So while the defendant may have this right in theory, in practice he often does not, because he will be unwilling to testify and allow in evidence of his prior misdeeds. The right to voice, then, might be a way for defendants to effectuate the promise of the right to testify in a way that does not expose them to otherwise admissible evidence.

While such an argument is plausible, I give it little weight. First, Professor Slobogin himself does not mention it as a justification for the right to voice, and has now specifically rejected it. *See* Slobogin, *The Right to Voice Reprised*, *supra* note 10, at 1650 n.18. Second, in many contexts it is probable that the defendants' past bad acts are likely also to come to light as part of the evidence. In Professor Slobogin's particular applications—evidence of culpability and evidence of future dangerousness—the mental health professional may be required to testify to the information upon

As conceptualized by Professor Slobogin, the right to voice allows for the admission of the testimony of others, even though that testimony violates other rules of evidence. But given that the defendant himself is already permitted to give a tale of narrative richness to the jury, it is hard to see how allowing others to engage in such "story telling"[94] would add narrative richness in any significant sense. It is hard to see how, in general terms, allowing the defendant to bypass the limitations of the rules of evidence and procedure would generally improve the accuracy of the system.

Consider again the example I gave above: the defendant's proffer of the testimony of Matthews that Smith (now deceased) told Matthews that Jones confessed to committing a murder to Smith. As I noted, the law of evidence would generally forbid this testimony. Why? Because there are many reasons to be suspicious of both the alleged conversations between Smith and Jones and between Smith and Matthews. As I suggested above, though, under a right to voice, such evidence might be admissible because Matthews testimony could be subject to adversarial testing: the prosecutor could point out both that Matthews really has no idea what Jones told Smith and that Matthews might be lying or misunderstood what Smith was telling Matthews. But such a result, I posit, would generally decrease accuracy (or at least not increase accuracy).[95] After all, admission of the evidence can only help increase the chances that the defendant will be acquitted. Otherwise, why would the defendant offer the evidence? Given the ease with which such evidence can be fabricated, there is no particular reason to think that innocent defendants would be more aided by this adjustment in the rules of admissibility than guilty defendants.[96] Assuming that there are more guilty than innocent defendants who go to trial, this would mean that more guilty defendants would in fact be able to take advantage of the rule than innocent defendants, which translates into more, not less, false verdicts.[97]

which she based her opinion by the other party (here, the government). *See* FED. R. EVID. 703. As part of this process, it seems quite likely that the defendants' other crimes will come up, so such evidence seems to pose much the same problem that the defendant's own testimony would.

[94] I intend the use of the phrase "story telling" here to be non-pejorative.

[95] Professor Slobogin suggests that I am unjustified in assuming that the cousin's testimony will lead to inaccuracy. *See* Slobogin, *The Right to Voice Reprised, supra* note 10, at 1660. Of course, in some cases allowing the cousin's testimony will result in more accurate verdicts. My point is just that, on average, such testimony will undermine accuracy, not enhance it.

[96] Or, more precisely, that they would be *significantly* more aided.

[97] Dale Nance suggested to me that one complication with this example is that it represents a present asymmetry between the government and the defendant, because

Thus, while allowing defendants to tell their story through the testimony of others might increase the narrative richness of the trial, when this idea is used to expand the defendant's right to present evidence, it seems ripe to be exploited to decrease the accuracy of verdicts in criminal cases. Furthermore, such an approach would radically expand the views of Justice Souter in *Old Chief*. After all, in that case, the argument for narrative richness was simply that the interest in such richness would often—but not always—overcome the objection by the defendant that there was an alternative and less prejudicial way of presenting the evidence.[98] Justice Souter did not suggest, however, that the interest in narrative richness would make a piece of evidence that was otherwise inadmissible suddenly admissible.

Despite my general objection to the right to voice, I take no position here, as a normative matter, on the particular issue that Professor Slobogin discusses: whether evidence about culpability and dangerousness should be subject to the same admissibility constraints as other forms of evidence.[99] I also do not reject out-of-hand Professor

the government, if it favored the testimony, could always grant Jones use immunity, which would overcome his invocation of the privilege against self-incrimination. While Professor Nance is right about this, the further nuance is that even if the government granted use immunity to Jones, Jones will almost assuredly deny the killing. As a result, the best that the defendant will be able to do is ask Jones whether he told Smith that Jones had killed the victim, which again Jones will presumably deny. Since Smith is unavailable to provide extrinsic evidence of the statement, there will be no evidence that Jones made the statement.

[98] Old Chief v. United States, 519 U.S. 169, 189 (1997).

[99] In Part II of his response, Professor Slobogin suggests that I am unduly concerned about the accuracy-defeating aspects of the right to voice as applied to defense mental health expert testimony. Slobogin, *The Right to Voice Reprised, supra* note 10, at 1654–55. He then forcefully argues that such evidence is "unlikely to cause erroneous verdicts." *Id.* at 1655. Let me be clear: I do not have a firm view whether such evidence will enhance or detract from accuracy. Thus, as a policy matter, I remain at least agnostic about the admission of such evidence. However, what I do maintain is that a generalized right to voice will generally undermine accuracy and that as a result a generalized right to voice is a bad idea.

Additionally and more specifically, the accuracy-enhancing effects of the admission of defense mental health expert testimony are sufficiently questionable that a state would have a legitimate purpose under existing law in excluding such evidence, such that the refusal to admit it does not violate the Constitution. As Professor Slobogin notes, the Court's decision in *Arizona v. Clark*, 548 U.S. 735 (2006), suggests that the Supreme Court agrees that, at a minimum, it is not clear that such evidence is accuracy enhancing. Of course, as he also rightfully points out, the Court's decision in *Clark* is almost hopelessly confused, and I am in general agreement with him that the Court's rationale for upholding the exclusion of (otherwise admissible) mental health evidence as to *mens rea* does not hold water. *See* Slobogin, *The Right to Voice Reprised, supra* note 10, at 1653–54. Against this background, though, I continue to believe that there is, at present, no good argument to believe that otherwise inadmissible defense mental health testimony is constitutionally required to be admitted.

Slobogin's claim that the defendant's interest in telling his story may, in some cases, necessitate allowing such evidence because the defendant otherwise has no way of telling a story with narrative richness. What I do reject is the concept that, as a normative matter, the defendant has some generalized right to voice that voids all rules of evidence and procedure unless the evidence "is completely untrustworthy or so immune to the weapons of the adversarial process that its questionable nature is not likely to be exposed."[100]

There is one alternative way that the right to voice might be justified, as a normative matter. In *Proving the Unprovable*, Professor Slobogin also appeals for "flexible evidentiary standards"[101] for expert evidence so that the system will appear fair. Although Professor Slobogin himself restricts this argument to the particular case of defense evidence, it is plausible to extend it to the right to voice in general. That is, one might argue that the defendant has a right to voice not because it increases accuracy in any way but because a right to voice is necessary so that the system will appear fair or legitimate.

Again, here I do not quibble with Professor Slobogin's assertion that the admission of defense mental health expert evidence is necessary for the appearance of fairness: I leave that for each reader to decide. I do, however, reject any suggestion that a generalized right to voice is necessary for the appearance of fairness. Creating additional rights of admissibility of evidence for the defendant certainly will give the public the impression that the trial process favors the defendant. But it does not follow that society will believe that the result is a more fair or more legitimate system. To the contrary, I am inclined to think that the criminal justice system's legitimacy and fairness are more likely to be undermined by rules that are more pro-defendant than those rules that favor the government.

Similarly, I reject Professor Slobogin's arguments in his response to this Essay that there are good moral reasons to recognize a right to voice.[102] First, while we both admire my colleague Alice Ristroph's argument about the applicability of the work of Thomas Hobbes to modern criminal law and procedure, I believe he stretches Professor Ristroph's argument too far. As she notes, the right to resist, in the thinking of Hobbes, was a blameless liberty, not a "legally enforceable claim."[103] In her Essay, Professor Ristroph suggests that two legally enforceable rights of defendants—the privilege against self-

[100] Rock v. Arkansas, 483 U.S. 44, 61 (1987).
[101] SLOBOGIN, *supra* note 2, at 55.
[102] *See* Slobogin, *The Right to Voice Reprised*, *supra* note 10, at 1660–62.
[103] *Id.* at 618; *see also id.* at 628.

incrimination and the right to speak in one's own defense—might be understood as forms of resistance that society has legitimized.[104] But as Professor Ristroph acknowledges, these rights are both more and less potent than Hobbes' own conception of the right to resist: "less potent, because they do not permit actual violent resistance . . . more potent, because they are [legally] enforceable."[105] Obviously, not all forms of non-violent resistance would be legitimized and made legally enforceable on this account.[106] Professor Ristroph nowhere suggests, nor do I believe that Professor Slobogin thinks that the right to resist would allow a defendant to put on whatever evidence he wanted, including evidence that would suggest that the jury should nullify the law. So the question would be how to decide which procedural rights on this account are morally required by the greater right to resist. Professor Ristroph in her short Essay, which is not in any event primarily concerned with evidentiary and criminal procedure rights, does not attempt to provide such a framework, and, to my reading, neither does Professor Slobogin. Given, however, the lengthy pedigree of allowing defendants to speak on their behalf and to resist self-incrimination, compared to the complete failure of any court or legislature to acknowledge the existence of a right to voice, I remain highly skeptical that the right to voice could be made a moral requirement on a Hobbesian or even neo-Hobbesian approach.

Second, I believe Professor Slobogin also overreaches in his reading of Todd Pettys's article.[107] First, one might wonder how strong the moral claim that Professor Pettys has identified—honoring jurors' deliberative autonomy through a complete body of relevant evidence—really is, given, as he acknowledges, "that modern courts and commentators have not even contemplated the possibility that such a moral claim might exist."[108] But even if we temporarily accept

[104] *Id.* at 629–30.

[105] *Id.* at 630.

[106] It is not even clear to me that Professor Ristroph is correct in asserting that Socrates would have been privileged to escape from his execution with Crito, even if that escape involved no violence. *Id.* at 628. An interesting counter-example from the actual behavior of the founding generation is that of Henry Laurens, the Congressionally-appointed minister to Holland who was captured by the British en route to Holland in 1780. Even though Laurens was held for treason and not as a prisoner of war, he declined the opportunity to escape, asserting that it was inconsistent with his moral duties. *See* JACK RAKOVE, REVOLUTIONARIES 242–43 (2010). I am therefore not convinced that it is clear that one has a moral privilege to escape from punishment under any circumstances.

[107] Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463 (2008).

[108] *Id.* at 468.

the existence of such a moral obligation, it is far from clear that it would require a right to voice. As Professor Slobogin notes, Professor Pettys's approach would seem to advocate the wholesale destruction of the hearsay rules, and that would also mean doing away with the Supreme Court's present interpretation of the Confrontation Clause.[109] But so long as we are stuck with both the Confrontation Clause and the hearsay rules, it is difficult to see how a *defendant's* right to voice can be an adequate substitute for the recognition of a *juror's* right to evidence.

Furthermore, when we look at the specific application of the right to voice in which Professor Slobogin is interested in *Proving the Unprovable*—admitting defense mental health evidence—the jurors' right to evidence would not seem to support the admission of such evidence. Professor Pettys's primary focus is on rules that are premised on distrust of jurors' rational capacities.[110] But I do not believe that the resistance to defense mental health expert testimony is premised on the notion that we do not trust jurors to make rational decisions nor that the failure to recognize one suggests that "we [are] withhold[ing] some of the readily available informational tools that an autonomous, rational person would use to do the job."[111] While certainly the strictures of the *Daubert* trilogy evolve from a concern that jurors will be unable to evaluate competing expertise at trial, the concern is of a different sort than the concern that underlies our exclusion of hearsay, character evidence, and unfairly prejudicial evidence. The primary concern with such evidence is that jurors are simply irrational: they are incapable of evaluating the evidence in a rational manner and are likely to ignore the rational limitations of the evidence.[112] The *Daubert* trilogy, however, is aimed at a slightly different concern: the idea that some evidence should be shielded from the jury because it is simply beyond the reasoning power of people generally, in the limited context of a trial, to fully inform themselves of all of the limitations of the evidence. In other words, the driving force behind *Daubert* is not that jurors *cannot* rationally comprehend the limitations of the evidence, but rather that in the time frame of a trial, they cannot be sufficiently educated in a timely

[109] Slobogin, *The Right to Voice Reprised, supra* note 10, at 1660–61. As to the Confrontation Clause, I suspect that Professor Slobogin and I are on the same page.
[110] Pettys, *supra* note 107, at 469.
[111] *Id.* at 492.
[112] *Id.* at 497–98.

fashion to do so.[113] If I am right that *Daubert* can be understood this way, then it differs in kind from the rules that Professor Pettys is critiquing, because it is far from clear that the evidence sought to be admitted is the kind that an autonomous rational person would want under the circumstances.

* * *

Criminal trials require speech—by the agents of both the government and the defendant. A criminal system that afforded a defendant no opportunity at all to respond to the allegations of the government would violate any sensible person's view of what is required by due process. Recognizing the need to allow a defendant to respond to the government's charges, though, does not require that the courts must allow the defendant to submit any evidence that he wants. It has long been recognized that courts may put limits on what the defendant (and also what the government) may submit to the trier of fact. As I have attempted to show above, those permissible limits are greater than merely excluding evidence which is untrustworthy or whose questionable nature cannot be exposed through the adversarial process.

Instead, the Constitution, at least as presently understood, permits courts and legislatures to develop broad, generally applicable rules of evidentiary exclusion. In particular contexts, the Court has recognized particularized exceptions: for instance, the right to testify created in *Rock* and the right to put on evidence of third-party guilt noted in *Holmes*. These particularized examples, however, give little support for finding a generalized right to voice.

Recognizing a right to voice would also do nothing to increase the accuracy of criminal trials in the United States, and perhaps would undermine it. Furthermore, giving the defendant a right that enables him to admit evidence in a manner that is not open to the prosecution—in other words, gaming the rules of evidence in favor of the defendant—will do nothing to add to the legitimacy or the appearance of fairness of the system within our society.

[113] *See, e.g.*, RONALD ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 654–57 (4th ed. 2006).