PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS. By Christopher Slobogin. Oxford University Press, New York, 2007. 193 pp. $57.50 (cloth).

This book deals with two of the most complex and controversial issues facing the criminal courts. The first is, once a criminal offense has been alleged how are the courts to determine the accused's state of mind at the time of its commission. In short, what types of expert help should they look to when assessing issues of culpability? The second, and perhaps even more difficult, is following the culpability issue, how should it be decided what risk of future harm the defendant poses? Both questions have fundamental

ramifications. The first may result in punishment while the second may aggravate such punishment or result in psychiatric hospitalisation. It is clear that when asked to answer these questions it is the expertise of mental health professionals to which the courts are increasingly turning for help. In doing so this has led to much criticism and debate but little systematic analysis of how best to identify those who should be punished and detained. Professor Christopher Slobogin's book seeks to remedy this analytical gap, and although it does so within the context of the law of the United States it has much to offer readers from other jurisdictions.

Let us first look at culpability. Our criminal justice system is based on a responsibility model which as Slobogin cogently points out favors the prosecution. So when the prosecution is required to introduce expert testimony to support its case this will probably be based "on observance of physical facts" (143) such a fingerprint or DNA evidence. By way of contrast the defense is much more likely to wish to introduce evidence as to the defendant's past mental state and in doing so will often bear the burden of proof. In English law this is particularly true of the defenses of insanity and diminished responsibility. In respect of both of these defenses the presumption which favors the prosecution is one of normal mental capacity which must be displaced by the defense "on a balance of probabilities." This can only be done by introducing expert clinical testimony seeking to explain the impact which the accused's abnormal mental state had upon the behavior which gave rise to the criminal offense. But as Slobogin makes clear, "mental states such as insanity [and diminished responsibility] . . . are closer to social constructions than to objective facts; a scientist or technician can tell us the extent to which fingerprints match . . . , but only juries can tell us whether a defendant . . . appreciated the wrongfulness of his or her actions" (135). In his compelling analysis Slobogin concludes that "that the law addressing the admissibility of clinical testimony is in chaos" (38) and that neither the test in *Daubert v Merrell Dow Pharmaceuticals,* 509 U.S 579 (1993), nor Rule 702 of the Federal Rules of Evidence, both of which establish a scientific validity test, are fit for purpose when it comes to "clinical testimony on culpability when the testimony focuses on past mental state, as opposed to past conduct" (57). His solution is to advocate that very few limitations should be placed on such defense experts providing the evidence is material, probative, and helpful. The Supreme Court's decisions in *Daubert* and *Kumho Tire Co. v Carmichael,* 526 U.S. 137 (1999), sought to make adjudication more reliable, but in

doing so, Slobogin, argues, they create an imbalance in favor of the state, and it is not hard to see why when we compare the prosecution's focus on expertise which relies on observance of physical facts to that of the defense whose claims will often be of a socially constructed nature. The attraction of Slobogin's solution, which has much to commend it, is that it would permit more defense-based expert culpability testimony, and providing it is subject to proper scrutiny this in turn would reduce unfairness and unreliable results.

The second part of Slobogin's book deals with the prediction of dangerousness. There is little doubt that society is becoming almost obsessed with risk. For an example of this trend one only has to look at the recent debate surrounding the reform of England's mental health laws and in particular the problem of how best to deal with the personality disordered. With regard to the latter the government has created as a special group the "dangerous and severely personality disordered" (DSPD) to cover people who "present a significant risk of causing serious harm" to others and whose risk "appears to be functionally linked to the personality disorder" (The Stationery Office, Reforming the Mental Health Act, Part II, 2000, Cm. 5016-II, at 13). In essence, therefore, here we have a group the creation of which is political and is based on risk rather than on clinical judgment. Even accepting that DSPD is a legitimate entity there remains the problem of how such a significant risk is to be proved. Here Slobogin has much of interest to say. First he gives us an excellent review of the present state of the science of prediction and in doing so echoes the recent conclusion of John Monahan that "structured violence risk assessment—of whatever form—is demonstrably superior to unstructured violence risk assessment" (Tarasoff at Thirty: How Developments in Science and Policy Shape the Common Law, 75 U. Cin. L. Rev. 497, 513 (2007)). In short what this means is that actuarial and structured judgment prediction techniques outperform those made by mental health professionals relying on clinical judgments. So where does this leave the latter? In Slobogin's view, virtually all prediction methodologies, including the clinical; produce results well above chance levels (114). This is just as well as Monahan also informs us that "at the current time, only a minority—perhaps only a small minority—of practising mental health professionals employ structured violence risk assessment when predicting violence." This is more than likely to be true also of England, but until research is carried out to assess the level and accuracy of such predictions we cannot be sure. Slobogin's solution

would be only to permit the state to introduce clinical prediction evidence of dangerousness once "the subject opens the door to its use" (126). In doing so he draws a useful analogy with the character evidence rule.

A short review such as this cannot do full justice to the sophisticated arguments developed by Slobogin in this book. Some will of course take issue with his underlying theme that the law of evidence currently ensures that the odds are stacked up against both the defense in culpability proceedings and the subject in relation to risk assessment hearings. But to this reviewer there is much to favor this line of argument, and this book presents a clear and compelling critique in its support together with a rigorous analysis favoring the conclusion that "very few limitations should be placed on defence expertise in criminal and commitment cases" (143). Such an approach could lead to a fairer and more balanced approach to what Slobogin refers to as "proving the unprovable," and as such has much to commend it.

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