TWO-EDGED SWORDS, DANGEROUSNESS, AND EXPERT TESTIMONY IN CAPITAL SENTENCING

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I. INTRODUCTION

A series of court opinions and a related line of commentary draw attention to the need for further inquiry regarding the defensible interpretation and application of dangerousness as a consideration in capital sentencing. The court opinions raise questions regarding the manner in which sentencers should interpret and weigh dangerousness as a factor in capital sentencing. In Penry v. Lynaugh, the Supreme Court overturned the capital sentence of a mentally retarded offender under the special issue sentencing standard in force in Texas at that time. This procedure required that the sentencing jury answer two sentencing questions regarding deliberateness and dangerousness. The Court’s reasoning included reference to the possibility that the evidence of mental retardation that Penry offered as mitigating might function as a two-edged sword in that it might be seen as mitigating regarding culpability and as aggravating regarding dangerousness, but the Court’s reasoning regarding this matter was not entirely clear.

The majority opinion in Atkins v. Virginia referred to the Penry concern that proffered mitigating evidence regarding mental retardation might function as a two-edged sword. The opinion provides no reasoning that explains why such a finding would violate Eighth Amendment doctrine. Rather, the opinion simply refers back to the Penry opinion. Similarly, the Supreme Court of Missouri applied an analysis modeled on the Atkins opinion to a juvenile offender. The opinion includes reference to the Atkins opinion’s concern regarding the possibility that evidence offered as

* Professor of Law and Professor of Psychology and Philosophy at the University of Nebraska. I am grateful for thoughtful comments from my colleagues at the University of Nebraska and from participants in annual meetings of the American Psychology-Law Society and of the Western Society of Criminology.
2. Id. The holding of this case regarding capital punishment of mentally retarded offenders was overturned in Atkins v. Virginia, 536 U.S. 304 (2002). In this Article, I address the reasoning regarding evidence that can constitute a two-edged sword rather than the holding regarding capital punishment and mentally retarded offenders.
3. Id. at 322–28.
5. Id. at 321.
mitigating at sentencing could function as a two-edged sword as part of the reasoning supporting the conclusion that the Eighth Amendment categorically precludes capital punishment of offenders who commit capital crimes as juveniles. The *Simmons* opinion resembles the *Atkins* opinion, however, in that it provides no clear explanation why it would violate constitutional doctrine for a sentencer to conclude that evidence offered as mitigating regarding culpability also carries aggravating weight regarding dangerousness.\(^7\) In short, the *Penry*, *Atkins*, and *Simmons* opinions raise concerns regarding the possibility that evidence relevant to mental retardation or youth offered in mitigation might serve as a two-edged sword in that a sentencer might interpret it as aggravating regarding dangerousness, but these opinions do not clearly explain why this would raise a constitutional concern.

The related line of commentary addresses the appropriate role of expert testimony regarding dangerousness as a consideration in capital sentencing. Recent articles raise a series of questions regarding the appropriate range and content of expert testimony applying risk assessment in capital sentencing hearings. These articles address concerns including but not limited to the following: (1) the application of the Psychopathy Checklist-Revised (PCL-R) or other risk assessment instruments to risk assessment for the purpose of capital sentencing; (2) the significance of base-rates of violence for assessment of risk in prison; (3) the relevance of prior violence in the community to the risk of violence in prison; (4) the significance of altered circumstances in the form of high security prison settings such as supermax or lock down facilities for the reliability of risk assessments based on prior conduct in different circumstances.\(^8\)

The questions raised in these articles are related to the previously identified court opinions in that the appropriate range and form of expert testimony depends partially upon the most defensible interpretation of the significance of dangerousness in capital sentencing. How should sentencers and courts address proffered mitigating evidence that might reasonably be interpreted as a two-edged sword in that a reasonable sentencer could consider it mitigating because it renders the offender less culpable than other offenders who commit similar offenses but aggravating because it supports the conclusion that the offender presents a substantial threat of

\(^7\) Id. at 411-13. In *Roper v. Simmons*, the U.S. Supreme Court upheld the decision of the Missouri Supreme Court in precluding capital punishment of juvenile offenders, but the Court did not explicitly address the two-edged sword concern. 543 U.S. 551 (2005). The majority opinion mentioned the prosecutor's argument that referred to Simmons' age as "scary" (558) and characterized this argument as "overreaching" (573). The opinion provides no reasoning that explains why such argument is overreaching. Some language suggests that the majority understood this argument as suggesting that the jury should consider Simmons' age as aggravating and not as mitigating. This interpretation resembles the *Penry* opinion in that it raises the concern that the evidence was not an effective two-edged sword because it prevented the jury from applying the mitigating edge. See infra Part II.

\(^8\) See infra Part VA discussing these objections and sources.
further violence? What is the justificatory function of dangerousness in capital sentencing under current legal doctrine, and what type of psychological expert testimony regarding risk assessment falls within the range of appropriate testimony as defined by this function? This Article presents an analysis intended to advance our understanding of these questions. It does not purport to provide complete resolution, but it suggests a framework for further inquiry. As is often the case regarding capital punishment, specific questions reveal underlying concerns involving the intersection of constitutional interpretation, moral justification, empirical premises, and the relationships among these three domains. The analysis presented here pursues clarification of some aspects of this integrated inquiry.

The analysis proceeds in the following manner. Part II examines the Supreme Court opinions addressing the two-edged sword concern, and Part III discusses this concern in context of the more general doctrine requiring that punishment serve some legitimate penal purpose. Part IV raises some central questions regarding dangerousness as a sentencing factor, and Part V examines a more general legal conception of dangerousness. Part VI applies this conception of dangerousness to capital sentencing. Part VII examines the appropriate form and range of expert testimony regarding dangerousness in this context, and Part VIII concludes the analysis.

II. THE COURT OPINIONS ADDRESSING THE TWO-EDGED SWORD

The Penry opinion was the only opinion of the aforementioned three that provided any relevant reasoning regarding the two-edged sword concern. In that opinion, the Court addressed a sentencing procedure in which the sentencing jury was asked to answer two special issues, formulated as questions regarding deliberateness and dangerousness, addressing respectively the offender's culpability for the offense and the risk the offender would continue to pose. The Court recognized that reasonable jurors might have believed that Penry's retardation rendered him less culpable than other offenders who committed otherwise comparable offenses but conclude that they were precluded from giving effect to that mitigating evidence in their response to the deliberateness special issue because Penry acted deliberately as that term is ordinarily understood. The Court also recognized that reasonable jurors might conclude that the dangerousness special issue provided no opportunity to give effect to the mitigating significance of mental retardation. Furthermore, those jurors might conclude that the evidence of retardation had aggravating weight under this

9. Penry, 492 U.S. at 310 (the third special issue addressing provocation did not apply in this case).
10. Id. at 322-23.
11. Id.
special issue in that it provided reason to believe that Penry would remain
dangerous because he would not learn from experience.\textsuperscript{12}

Thus, reasonable jurors might conclude that Penry’s mental retardation rendered him less culpable but more dangerous than other offenders who commit similar crimes. They might also conclude that the dangerousness special issue would allow them to give effect to the aggravating significance of increased risk but that neither special issue provided the opportunity to give effect to the mitigating significance of reduced culpability. In short, reasonable jurors could conclude that Penry’s mental retardation was a substantive two-edged sword in that it rendered him more dangerous but less culpable. Those jurors could also conclude, however, that the special issue format allowed them to give effect to the aggravating edge of the sword that addressed increased risk but not to the mitigating edge that addressed decreased culpability.\textsuperscript{13} Thus, the critical defect in the special issue format as applied to Penry was that his mental retardation might have been a two-edged sword in substance but not in effect. Further, it was the relevant mitigating edge that the jury was not able to apply, bringing the case into conflict with precedent requiring that the sentencer be able to give effect to all relevant mitigating evidence.\textsuperscript{14}

\textit{Atkins} addressed a statute with a sentencing structure that differed significantly from the special issue format addressed in \textit{Penry}. The Virginia statute at issue in \textit{Atkins} limited capital punishment to cases in which the jury found that the offender qualified as dangerous or the offense as vile. The sentencing court also instructed the jury to consider all evidence presented in mitigation “that tended to make life imprisonment without the possibility of parole a more appropriate punishment than death.”\textsuperscript{15} The current Virginia statute explicitly identifies extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of the criminal conduct, the age of the defendant, and sub-average intellectual functioning of the defendant as mitigating factors.\textsuperscript{16} Thus, mental retardation, other forms of impairment, or youth might function as a substantive two-edged sword under this provision, but in contrast to the statute addressed in \textit{Penry}, these instructions authorize the jury to give effect to the aggravating and mitigating edges.

The sentencing provision applied in \textit{Simmons} resembles that applied in \textit{Atkins} rather than the provision applied in \textit{Penry} insofar as the Missouri capital sentencing provision directs the sentencer to sentence the offender to life in prison, rather than capital punishment, if mitigating evidence

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 323–24.
\item \textsuperscript{13} \textit{Id.} at 322–26.
\item \textsuperscript{14} \textit{Id.} at 319–21 (discussing the risk that the jury was unable to give effect to the mitigating aspect of the evidence). Aletha Claussen-Schulz, Marc W. Pearce, & Robert F. Schopp, \textit{Dangerousness, Risk Assessment, and Capital Sentencing}, 10 PSYCHOL. PUB. POL’Y & L. 471, 475–76 (2004).
\item \textsuperscript{15} \textit{Atkins v. Commonwealth}, 534 S.E.2d 312, 316 n.6 (Va. 2000).
\item \textsuperscript{16} VA. CODE ANN. § 19.2-264.4B (2004).
\end{itemize}
outweighs aggravating evidence. The Missouri sentencing provision also lists extreme mental or emotional disturbance, extreme duress, substantially impaired capacities, and the age of the defendant at the time of the crime as mitigating factors. Thus, if Missouri sentencers find that factors such as impairment or youth constitute two-edged swords that render offenders less culpable but more dangerous, they are explicitly instructed to give effect to the mitigating edges of these two-edged swords.

In summary, the *Penry* reasoning regarding the two-edged sword reflected precedent requiring that sentencers be authorized to consider and give effect to all relevant mitigating evidence. Reasonable jurors might consider mental retardation a substantive two-edged sword in that it might increase risk of further violence but decrease culpability as compared to other offenders who commit similar crimes. Those reasonable jurors might have understood the special issue instructions presented in the *Penry* case as allowing them to give effect to the aggravating edge of the sword but as precluding them from giving effect to the mitigating edge. Thus, the constitutional defect in *Penry* was not that proffered mitigating evidence regarding mental retardation could constitute a substantive two-edged sword but rather that reasonable jurors could have understood the instructions as precluding them from giving effect to the mitigating edge. In short, the instructions were defective in *Penry* because mental retardation was not an effective two-edged sword. The *Atkins* and *Simmons* opinions misapplied the reasoning grounded in *Penry* because the instructions applied in these cases allow the sentencers to give effect to the relevant mitigating effects of mental retardation and youth. Neither the *Penry*, *Atkins*, nor *Simmons* opinions provide any guidance regarding the most defensible interpretation of evidence that can reasonably be understood as a substantive two-edged sword because it provides a basis for mitigation regarding culpability and for aggravation regarding dangerousness.

18. Id. at § 565.032.3.
20. *See supra* note 7. *Roper v. Simmons*, 543 U.S. 551, 558, 573 (2005). The United States Supreme Court opinion in *Simmons* provided no explicit discussion of the two-edged sword. Insofar as some passages (558, 573) are interpreted as addressing the risk that the prosecutor's argument directed the jury to consider Simmons' age as aggravating but not as mitigating, it is consistent with the interpretation of *Penry* as addressing circumstances in which the substantive two-edged sword is not an effective two-edged sword.
21. This Article does not address the broad range of reasoning in *Atkins* and *Simmons*; the purpose of this Article is to examine the two-edged sword concern specifically as well as the related concerns regarding the appropriate form and scope of expert testimony.
III. TWO-EDGED SWORDS AND LEGITIMATE PENAL PURPOSES

As interpreted by the Supreme Court, constitutional punishment cannot consist of the gratuitous infliction of pain; it must serve some legitimate penal purpose. The Court has consistently endorsed retribution and deterrence as such purposes. Some opinions also identify incapacitation as a legitimate penal purpose. It is not entirely clear whether "deterrence" is consistently used in the strict sense to refer to prevention through fear of consequences or whether it is sometimes used in the broad sense as roughly equivalent to prevention. For the purpose of this analysis, I use "deterrence" in the strict sense and "incapacitation" as an alternative form of prevention designed to prevent crime by isolating or disabling the offender. Some early opinions rejected retribution as a legitimate purpose, but later cases emphasize it by requiring punishment as a reasoned moral response in proportion to the severity of the offense and the culpability, blameworthiness, or moral responsibility of the offender.

The most defensible interpretation of this requirement that punishment serves some legitimate penal purpose is not entirely clear. On its face, it requires only that punishment serves at least one acceptable purpose, prohibiting only punishment that serves no legitimate purpose. According to this interpretation, any punishment that served either retribution, deterrence, or incapacitation would satisfy this requirement. Some later opinions apparently require punishment in proportion to culpability or moral blameworthiness. Taken on their face, these opinions apparently require punishment according to retributive standards and leave no role for prevention as a criterion or factor in selecting the proper sentence for a particular offender, except possibly as a basis for choosing among alternative punishments that fall within the range defined by culpability. That is, because we lack a precise measure of retributive proportionality, some indefinite range of severity might qualify as proportionate for any particular offense and offender. In these circumstances, deterrence or incapacitation might provide legitimate reasons to select from among the sentences within this range.

23. See, e.g., infra notes 28-29.
24. Atkins, 536 U.S. at 350 (Scalia, J., dissenting); Gregg, 428 U.S. at 183 n.29 (plurality opinion).
27. Penry, 492 U.S. at 319; Brown, 479 U.S. at 545 (O'Connor, J., concurring).
One alternative interpretation of these latter opinions would apply prevention as a justifying purpose for maintaining an institution of criminal punishment and retribution as the justification for applying that institution to any particular individual for a particular offense. According to this formulation, deterrence, incapacitation, and retribution provide legitimate social purposes that justify society in maintaining the general institution. Individual culpability justifies society in pursuing those purposes by applying this institution to a particular offender for a particular offense.\(^{28}\) The Supreme Court's opinions and the relevant statutes do not appear consistent with this interpretation, however, because they apply the preventive function to individual sentencing. Recent Court opinions precluding the application of capital punishment to specific classes of offenders explicitly contend that such punishment can serve neither the retributive nor the deterrence purposes.\(^{29}\) Similarly, some statutory provisions require assessment of dangerousness as a sentencing consideration for the application of capital punishment to specific offenders. The special issue format, for example, requires a finding of dangerousness as a necessary condition for application of capital punishment to a specific offender.\(^{30}\) Virginia's sentencing provision requires a finding of either vileness or risk to render an offender eligible for capital punishment, apparently treating incapacitation of a dangerous offender as sufficient to render the offender eligible for capital punishment in the absence of a corresponding degree of culpability represented by a finding of vileness.\(^{31}\) Other state statutes include some formulation of risk as an aggravating factor that can render an individual offender eligible for capital punishment or provide aggravating weight for the purpose of applying capital punishment.\(^{32}\) These provisions apparently represent the judgments that capital homicides are not sufficient to justify capital punishment in the absence of some additional factors but that these homicides plus some unspecified degree of risk are sufficient. Thus, increased risk appears to provide a justification for more severe punishment of specific offenders for specific offenses independent of increased culpability. As such it appears inconsistent with a theory that separates prevention as a justification for the institution from culpability as the basis for the application of that institution to a particular offender.

\(^{28}\) H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3-13 (1968) (distinguishing general justifying aims of punishment from principles of distribution of punishments to specific offenders).


\(^{30}\) OR. REV. STAT. § 163.150(1)(b)(B), (2)(a). (2003); TEX. CRIM. PROC. CODE ANN. ART. 37-071 § 2(g) (2004-05 Supp. Pamphlet) (Both statutes require specific findings regarding deliberateness and dangerousness.).


Alternately, the legitimate penal purpose requirement might be interpreted as requiring negative retribution in that culpability sets the maximum punishment, but sentencers may select a less severe sentence than the maximum authorized by culpability if doing so would serve other legitimate sentencing considerations. Although this interpretation departs from the specific language of cases that apparently require punishment in proportion to culpability, blameworthiness, or moral responsibility, it would be consistent with the ordinary function of the Eighth Amendment in setting limits on state punishment, rather than as requiring a specific punishment.

The Court's doctrine and contemporary statutes do not appear consistent with negative retributivism, however, because they appear to address culpability and dangerousness as alternative justifications. The Atkins opinion precludes capital punishment of mentally retarded offenders on the basis of an analysis that contends that constitutional punishment must serve either deterrence or retribution and that purports to demonstrate that such punishment can serve neither of these purposes. If negative retributivism were at issue, the reasoning would be complete with the conclusion that capital punishment of mentally retarded offenders would not serve the retributive function because they are insufficiently culpable to merit capital punishment, regardless of the deterrence function.

The Virginia sentencing provision addresses vileness and dangerousness as alternative bases that render an offender eligible for capital punishment. Similarly, some state statutes that require the finding of at least one statutory aggravating condition to render an offender eligible for capital punishment include dangerousness as one of these factors. These statutes do not treat conviction of a capital offense as sufficient to qualify offenders for capital punishment, but they do accept the possibility that these offenders can become eligible for capital punishment for those offenses with findings of dangerousness that do not require additional findings of increased culpability. Thus, they appear to rest on the premise that justified capital punishment can rest upon an offense that is not in itself sufficient to justify capital punishment and an additional finding of risk, independent of any additional finding of culpability. Further, the Court's decision in Ewing v. California appears to have recognized the legitimacy of repeat offender statutes that authorize extended sentences primar-

33. THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 759 (2d ed. 1999).
36. See supra note 31 and accompanying text.
37. See supra note 32 (citing relevant statutes).
ily on the basis of incapacitation. The plurality opinion in that case apparently accepts the premise that culpability for the offense and risk of repeated offenses can justify more severe incarceration than would be justified by the offender's culpability for the immediate offense.

In summary, the Supreme Court's doctrine requires that punishment serve some legitimate penal purpose, and various opinions identify retribution, deterrence, and incapacitation as legitimate penal purposes. The opinions do not provide a clear interpretation of the appropriate relationships among these functions. The two-edged sword concern raised in Penry addressed a sentencing process in which the jurors arguably were prevented from giving mitigating effect to the relevant mitigating evidence regarding mental retardation. If this is the only concern raised by evidence that a reasonable sentencer could interpret as supporting an inference of decreased culpability and increased risk, then the two-edged sword concern is an illusion. That is, evidence that can serve as a two-edged sword raises no constitutional concern, providing that it is an effective two-edged sword in that the instructions allow the sentencer to give effect to the relevant mitigating edge—although the sentencer might legitimately conclude that the aggravating edge cuts more deeply than the mitigating edge. This interpretation appears to conflict with the cases requiring punishment in proportion to culpability, however, because those cases apparently use culpability to define the appropriate punishment, or at least to set a limit on severity of punishment. Yet, two-edged sword evidence that supports a judgment of decreased culpability and increased risk appears to authorize punishment beyond that which would be proportionate to culpability if that punishment is needed to ameliorate risk.

Can one articulate any interpretation of the two-edged sword concern that coheres with a defensible interpretation of the legitimate penal purpose doctrine and with a conception of dangerousness appropriate to criminal sentencing? Can this interpretation advance our ability to interpret the significance of evidence that supports an impression of decreased culpability but increased risk? Can such an interpretation provide guidance regarding the most defensible scope and form of expert testimony relevant to dangerousness for the purpose of capital sentencing?

39. *Id.* at 14–20.
40. *Id.*
IV. DANGEROUSNESS AS A CAPITAL SENTENCING FACTOR

A. Capital Sentencing Statutes and Expert Testimony Regarding Dangerousness

Capital sentencing statutes that explicitly identify risk as a sentencing criterion or factor do not specify a threshold of probability or severity. Rather, they address risk in terms suggesting some indeterminate degree and severity such as "a probability," "a propensity," "a continuing threat," "a substantial and continuing threat," or "likely to commit."42 One might interpret these phrases to apply to any offender who represents any probability, propensity, or threat. This interpretation renders the requirement vacuous, however, because it would be fulfilled by virtually any convicted offender. Thus, it would neither narrow the range of eligible offenders nor identify those most appropriate for capital punishment from among those who were eligible.43

Alternately, particularly when phrased as "a probability," these provisions might be understood as requiring that further violence by the offender is more likely than not.44 This interpretation is also problematic because we lack the basis to make reasonably accurate estimates of probability for individual offenders and because it would apparently exempt an offender who represented a 49% risk of further violence, regardless of severity. Insofar as prevention of further violence through incapacitation is a legitimate justification for capital punishment, it is not clear what would justify placing a substantial but less than 50% risk of severe violence on the potential innocent victims, rather than on the culpable criminal who generates the risk. This interpretation would be particularly difficult to defend as applied to provisions that treat risk as a necessary condition for capital punishment because this approach would preclude capital punishment of an offender who was extremely culpable and estimated to present a slightly less than 50% risk while authorizing capital punishment of an offender who was much less culpable but presented a slightly greater than 50% risk.45

42. See, e.g., IDAHO CODE § 19-2515(9)(h) ("a propensity to commit murder which will probably constitute a continuing threat to society"); OKLA. STAT. ANN. tit. 21 § 701.12(7) ("a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); OR. REV. STAT. § 163.150(1)(b)(B) (language identical to Oklahoma’s); TEX. CRIM. PROC. CODE, ANN. art. 37.071 Sec. 2(b)(1) (language identical to Oklahoma’s and Oregon’s); VA. CODE ANN. § 19.2-264.4.C (2004) ("a probability . . . that he would commit criminal acts of violence that would constitute a continuing threat to society"); WYO. STAT. ANN. § 6-2-102(h)(xi) (2003) ("poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence").


45. See supra note 30 and accompanying text.
In addition to raising justificatory concerns such as these, this interpretation raises empirical concerns about the ability of sentencers to make such judgments and about the available basis for expert testimony relevant to this standard. This interpretation of dangerousness as more likely than not, or some similar interpretation, appears to be implicit in recent criticism of expert testimony regarding dangerousness for the purpose of capital sentencing. Recent commentary raises a series of concerns regarding expert testimony that relies on certain indicators to offer opinions regarding the dangerousness of the offender for purposes of capital sentencing. These concerns include the following.

First, some commentators criticize expert testimony that relies on the Psychopathy Check List–Revised (PCL–R) to support the opinion that the offender would be dangerous in the prison environment. They criticize this testimony because the PCL–R has not been validated as a predictor of violence in prison, as opposed to in the community. Thus, they contend that the PCL–R does not provide a reliable indicator of violence for the purpose of a capital sentencing decision that will result in either a capital sentence or an extended prison sentence. Some articles extend this general type of criticism to other available risk assessment instruments. At least one writer combines this criticism with the observation that many studies of violence outside the prison environment by those who score above a designated score on the PCL–R reveal a violence rate at or below fifty percent. Thus, prediction of violence based on those scores should be expected to produce a false positive rate of approximately fifty percent apart from the concerns regarding different circumstances. Second, they criticize testimony that an offender would be violent or dangerous in prison because they contend that studies of general violence rates in prison

46. The PCL–R is a clinical instrument that is frequently used as part of an assessment of risk of criminal behavior. For discussion, see infra sources listed below in notes 47–49.
demonstrate that the base rates of prison violence are low, rendering such predictions vulnerable to a high rate of false positives.\(^5\)

Third, some commentators criticize expert predictions of dangerousness in prison that are based on a history of violence in the community because prison environments differ markedly from community environments, and a history of violence in the community has not been validated as predictor of violence in the prison setting.\(^5\) Fourth, they criticize expert testimony that an offender would be violent or dangerous in prison because special high-security facilities provide environments that differ substantively from community or ordinary prison environments, undermining the reliability of predictions of violence in these high security facilities on the basis of base rates or prior histories of violence in different environments such as the community or ordinary prison units.\(^5\)

Generally, these articles do not provide precise descriptions of the testimony they consider inappropriate with specific criticisms of the manner in which that testimony was presented. Although they frequently refer to predictions of violence or of dangerousness, they also phrase these criticisms in terms addressing expert opinions that the offender is dangerousness or presents a continuing threat. The general form of the critical discussion suggests that the authors object to any testimony in capital sentencing hearings that employs the indicators discussed to support a prediction of violence or an opinion that the offender presents a continuing threat. The combination of empirical concerns regarding the basis for expert testimony and the previously discussed justificatory concerns regarding the defensible interpretation of dangerousness as a sentencing criterion or factor reveals the need for clarification of the applicable conception of dangerousness and for examination of its legitimate role in capital sentencing. Consider first the following hypothetical capital defendants.

### B. Hypothetical Capital Defendants

A mail carrier disappears while delivering mail in a residential neighborhood. Anderson shoots a police officer who comes to his house searching for the missing mail carrier. More police arrive and arrest Anderson. They discover the body of the missing carrier in Anderson's basement. Anderson suffers a psychotic disorder involving severe delusions that all people in uniforms are agents of Satan who have been sent to

\(^{50}\) Cunningham & Reidy (1999), supra note 47, at 23–25; Dorland & Krauss, supra note 48, at 88–89, 92 n.190, 96; Edens et al. (2005), supra note 47, at 58–62; Edens et al. (2001), supra note 47, at 452–53.

\(^{51}\) Cunningham & Reidy (2002), supra note 47, at 525, 528; Dorland & Krauss, supra note 48, at 92–102 (conviction for murder does not provide a reliable indicator of violence in prison); Edens et al. (2005), supra note 47, at 60, 79.

\(^{52}\) Cunningham & Reidy (2002), supra note 47, at 529; Cunningham & Reidy (1999), supra note 47, at 32–33; Edens et al. (2001), supra note 47, at 453–54; Edens, supra note 47, at 1086.
earth to enslave humanity and to kill Anderson because only he has the divine powers needed to defeat Satan. He is found not guilty by reason of insanity (NGRI) for the homicides of the mail carrier and the police officer and committed to a secure facility for treatment. Unfortunately, he is not susceptible to treatment expected to render him less delusional or less dangerous because he also suffers neuroleptic malignant syndrome (NMS) which precludes treatment with antipsychotic drugs.\textsuperscript{53} He remains severely psychotic and extremely aggressive, frequently attacking and seriously injuring staff. Due to NMS, there is no prospect of significantly ameliorating his condition. The only choices are isolation and restraint or ongoing violence. Constant isolation and restraint prevent violence against other residents of the facility, but it does not eliminate serious violence toward staff who must approach him to provide food and health care.

Should Anderson receive capital punishment? He is not eligible for capital punishment or for any alternative form of punishment because he has been acquitted by reason of insanity and therefore exempted from any form of punishment. If culpability and dangerousness are alternative grounds for punishment pursuant to alternative legitimate penal purposes of retribution or prevention, however, why would capital punishment not be appropriate for Anderson who poses a severe ongoing threat in a secure facility? Perhaps one might respond that a threshold level of culpability is necessary to render an individual eligible for any criminal punishment but that culpability and dangerousness then provide alternative grounds for an enhanced severity of punishment.

Consider Brown, who is convicted of murder and receives a sentence of life in prison. The sentencer concludes that he is not eligible for capital punishment because no statutory aggravating factors apply in a jurisdiction that requires a determination that at least one statutory aggravating factor applies to render an offender eligible for capital punishment.\textsuperscript{54} Approximately eight years later, he deteriorates into a condition similar to Anderson in which he manifests severe psychosis with persecutory delusions and episodes of violent ‘self-defense.’ Like Anderson, he suffers NMS which prevents active treatment to ameliorate psychosis, and he presents an ongoing severe risk to staff. Should Brown receive capital punishment? Unlike Anderson, he was convicted of the original capital crime and thus meets the threshold level of culpability necessary to render one eligible for criminal punishment. Furthermore, the conclusion that no statutory aggravating factors applied was apparently erroneous because the sentencing

\textsuperscript{53}. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 795–98 (4th ed. Text Revision 2000) (briefly discussing neuroleptic malignant syndrome as a pattern of severe pathological and sometimes fatal symptoms that occur in some individuals in response to neuroleptic medication and that preclude the use of this medication by these individuals).

\textsuperscript{54}. See supra note 32 (statutes including dangerousness among the statutory aggravating factors that can render an offender eligible for capital punishment).
statute listed dangerousness as an aggravating factor but the risk he presented was not accurately estimated due to his unanticipated deterioration and NMS. Set aside the double jeopardy issue, and ask whether capital punishment would now be justified by the recognition that the risk he presents due to severe deterioration was unanticipated at sentencing. If culpability and dangerousness provide alternative grounds that render an individual eligible for more severe punishment, should the elevated risk presented by Brown justify capital punishment for Brown, although he was not sufficiently culpable to receive capital punishment for the original offense, and he is not responsible for the risk or injuries he currently inflicts on others?

Compare Brown with Cook, whose condition is identical to Brown’s with one exception. Due to recent developments in diagnostic technology, it is predictable with a high degree of confidence at the time of sentencing that Cook will deteriorate to a severely psychotic and assaultive condition in the future and that he will not be susceptible to treatment at that time due to NMS. If reasonable sentencers would not consider Cook appropriate for capital punishment without that information because no statutory aggravating factors applied, should the additional reliable evidence that he will deteriorate in this manner render him appropriate for capital punishment for his initial offense? This condition was not active at the time of his crime. Thus, it does not influence his culpability for the offense, and by ordinary standards of culpability, he was guilty of the crime in circumstances that provided no statutory aggravating circumstances that would render him eligible for capital punishment. Should the awareness that he would reliably be expected to deteriorate to a condition that would render him dangerous but not responsible in the future provide a sufficient reason to justify a sentence of capital punishment in order to prevent the risk he would present in the future? If culpability and dangerousness are two independent legitimate bases for selecting the more severe punishment, why would reliable information of future dangerousness due to severe deterioration of psychological capacities not provide a legitimate basis for capital punishment?

Compare these offenders with Davis, who has been convicted of multiple offenses including a recent murder committed in prison while serving a life sentence as a repeat offender with a history of violent felonies. He demonstrates no remorse or regret and threatens to kill others if given the opportunity. Davis suffers no impairment of his capacities for comprehension or reasoning. He is callous, manipulative, and remorseless. He engages in instrumental violence in order to force others to fulfill his wishes and to avoid consequences for his crimes.

55. U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").
In contrast to Anderson, Davis was fully culpable for the murder for which he is to be sentenced. Thus, the question of capital sentencing arises for Davis, but it does not for Anderson. Brown is similar to Davis insofar as both were convicted of capital crimes, but they differ in that Brown was considered insufficiently culpable to deserve capital punishment for the homicide for which he was convicted, while Davis was considered sufficiently culpable to deserve capital punishment for the homicide for which he was convicted. Thus, Brown differs from Davis in at least two ways. First, his level of culpability for the predicate offenses was evaluated as insufficient for capital punishment at the time of sentencing, and second, the determination that he presented an ongoing threat occurred after sentencing when his condition deteriorated. Cook resembles Brown and differs from Davis insofar as his level of culpability for the instant offense was evaluated as insufficient to justify capital punishment, but he differs from Brown and resembles Davis in that the future risk he presents is identifiable at the time of sentencing. Thus, insofar as the critical difference between Brown and Davis involves the ability to identify the risk prior to sentencing, Cook resembles Davis rather than Brown. Cook and Davis differ in that Davis but not Cook was evaluated as highly culpable at the time of sentencing, but they resemble each other insofar as both present a threat of further violence in prison. The risk presented by each differs, however, in that Davis is reasonably expected to engage in further violence for which he will be fully culpable, but Cook is reasonably expected to engage in violence after experiencing deterioration that will undermine his culpability.

Insofar as dangerousness is understood as an aggravating factor for sentencing independent of culpability, the risk presented by Cook and Davis provides equally good reason to apply capital punishment to each, and both might reasonably be understood as appropriate candidates for capital punishment. If it seems, however, that Cook's risk of future violence does not provide justification for a capital sentence comparable to that provided by Davis's risk, this suggests that the aggravating significance of the ongoing risk of future violence should not be understood as independent of culpability. That is, Davis presents a risk of further violence in circumstances that suggest that he would be fully culpable for that violence, but Cook presents a risk of future violence in circumstances that suggest that he would not be culpable for that violence. If this difference seems significant for capital sentencing, we need further inquiry into the defensible relationship between culpability and dangerousness for the purpose of capital sentencing.
V. A LEGAL CONCEPTION OF DANGEROUSNESS

A. Expert Testimony Regarding Dangerousness

Expert testimony that is relevant to some matter at issue and presented by an expert who is qualified by knowledge, skill, experience, training or education is admissible unless the risk of prejudicial effect substantially outweighs the probative value. In a capital sentencing hearing, testimony regarding dangerousness can be relevant because constitutional capital punishment must serve some legitimate penal purpose, and prevention through incapacitation represents one such legitimate penal purpose to which a determination of dangerousness is directly relevant. Thus, expert testimony regarding dangerousness for the purpose of capital sentencing should take a form that renders it relevant to incapacitation as a legitimate consideration in selecting the degree and type of punishment. In ordinary usage, a person or activity is dangerous if it generates peril or risk of harm. The same basic notion of peril or risk applies in legal contexts. If dangerousness required only that one present a risk of harm, virtually everyone would qualify as dangerous. Risk can vary in probability and in severity. Those who present an elevated probability of harm, a risk of harm of a more severe type, or some combination of the two might qualify as dangerous for the purpose of justifying a specified legal intervention or liability. Thus, decisionmakers need some guidance regarding the properties of risk that qualify the risk presented by a particular individual or activity as dangerousness for a specified legal purpose.

B. A Legal Conception of Dangerousness for Civil Commitment

The applicable conception of dangerousness has received relatively careful attention in the area of civil commitment. Although dangerousness is often discussed in terms of prediction, a determination of dangerousness for a specific legal purpose, such as civil commitment, is not a prediction of dangerousness or of harmful behavior. I have discussed the distinction between predictions of harm and determinations of dangerousness elsewhere. Consider a brief illustration of the distinction between a judgment of dangerousness and a prediction of harm. A ten-year-old child comes home and tells her parents that she has heard about an exciting new game she wants to try just once. That game is Russian roulette.
ents respond, "No! That's dangerous!" The child responds, "But daddy, you can't say that Russian roulette is dangerous; five of every six of your predictions would be false positives." The child is correct in her assertion that a prediction of harm would result in a false positive in five out of every six incidents. The parents are also correct, however, in their contention that Russian roulette is dangerous. Both parties are correct precisely because a determination of dangerousness is not a prediction of harm. When the parents reject Russian roulette as dangerous, they do not predict that any particular incident of the game will cause harm. Rather, they recognize that a single incident creates one chance in six of severe harm and five chances in six of no harm. By prohibiting the game as dangerous, they express the judgment that this level of risk for no purpose of comparable value is sufficient to justify prohibiting the activity.

According to ordinary language and civil commitment statutes, dangerousness is a current property of a person in the circumstances relevant to the decision to be made. A person is dangerous for a particular purpose, including legal purposes, when that person presents risk sufficient in probability and severity for the purpose for which the determination is made. Although civil commitment statutes ordinarily identify dangerousness or some similar condition as a criterion of commitment, they ordinarily provide only broad general guidance regarding the degree or severity of risk that qualifies as dangerousness for that purpose. Some statutes provide some guidance regarding the type of risk that qualifies in that they frame the criterion as addressing risk of bodily harm, serious bodily harm, physical injury, or some alternative formulation. Although they do not specify the probability or severity of risk, that risk must be sufficient to justify a severe intrusion into individual liberty.

Strong evidence of serious risk might fulfill the dangerousness criterion for civil commitment, but risk as such does not provide a sufficient basis for commitment. Commitment also requires mental illness because dangerousness cannot render an individual appropriate for commitment to a mental health facility unless that dangerousness is appropriately related to the intrusion into liberty at issue. That is, the elevated risk must be appropriately related to the purpose and justification of the legal institution in order to qualify an individual for intervention through that institution. Thus, dangerousness for the purpose of commitment to a mental health facility must be appropriately related to mental illness.

Commitment criteria of mental illness and dangerousness might be understood as simply requiring that both criteria are met or as requiring that

61. See supra text accompanying notes 42-425.
62. See SCHOPP, supra note 58, at 216–17; Schopp, supra note 60, at 49–52.
63. BRUCE J. WINICK, CIVIL COMMITMENT 81-86 (2005).
64. SCHOPP, supra note 58, at 219-20.
65. Id. at 223–28.
the individual be dangerous due to mental illness. Some commitment statutes explicitly require the causal connection, but others require only that the individual meets both criteria.\textsuperscript{66} Courts, lawyers, and experts may or may not recognize the difference between these two types of statutes in any particular case. Insofar as they do, the distinction might have no impact on outcome in many circumstances, but it can affect the outcome of the commitment hearing and the role of the expert under certain circumstances. Consider, for example, the cases of X, Y, and Z.

X has engaged in a series of assaults on others that support the determination that he is dangerous in the broad, ordinary sense of that term, but that dangerousness does not qualify him for civil commitment under either type of statute because X manifests no evidence of psychological impairment, and civil commitment ordinarily requires mental illness or some similar formulation of a criterion involving impairment.\textsuperscript{67} Thus, X's assaults justify criminal sentences but not civil commitment. At some future parole hearing, these assaults may serve as evidence of dangerousness for the purpose of refusing parole.

Y has engaged in a series of assaults on others, and these have been associated with a chronic schizophrenic disorder involving persecutory delusions. When his disorder exacerbates, he assaults others in delusional "self-defense." Y currently manifests an exacerbation of persecutory delusions and of the accompanying fear of others in ordinarily innocuous interactions. Y is dangerous in the ordinary sense of the term, and he qualifies for commitment, regardless of whether the applicable criteria require mental illness and dangerousness or dangerousness due to mental illness.

Z has engaged in a life-long pattern of criminal behavior, including a series of assaults on others. He has been convicted and jailed for some of these assaults. He is dangerous in the broad ordinary sense because he had demonstrated his willingness to assault others who anger or frustrate him, revealing his lack of empathy or concern for others. Recently, he has developed serious impairment of reality testing, judgment, and reasoning as a result of his long-term pattern of alcohol and drug abuse. He continues to assault others who fail to comply with his wishes, and he continues to lack empathy and concern for others. There is no evidence, however, to suggest that these assaults are the product of his deteriorating psychological functioning. Rather, these assaults reveal the same pattern of callous, instrumental aggression that characterized his earlier offenses. Thus, he remains dangerous, and he is mentally ill in the form of signifi-

\textsuperscript{66} For examples of statutes that explicitly require the causal connection, see TENN. CODE ANN. §§ 33–6–401, 403, TEX. HEALTH & SAFETY CODE ANN. § 574.034(a) (Vernon 2003). For an example that explicitly requires only the conjunction of mental illness and dangerousness, see WIS. STAT. ANN. § 51.20 (1) (West 2004 Cumulative Annual Pocket Part).

\textsuperscript{67} WINICK, supra note 63, at 75–81.
cant impairment of his cognitive capacities, but there is no apparent reason to think that his dangerousness is a product of his mental illness. Z’s impairment fulfills the mental illness criterion for civil commitment, and his pattern of conduct fulfills the dangerousness criterion. His impairment and pattern of conduct together fulfill the combined commitment criteria under a statute requiring mental illness and dangerousness, but this combination of mental illness and dangerousness does not fulfill the commitment criteria for a statute requiring dangerousness due to mental illness. In any particular case, the legal actors and clinicians may or may not recognize this distinction, but insofar as the criteria are applied as written, this distinction is important in cases such as those presented by Z.

A determination that X, Y, or Z is or is not dangerous in a manner that fulfills the criteria for civil commitment requires an estimate of the risk that individual presents and a determination that this risk is sufficient in magnitude and associated with mental illness in the manner required by the applicable statute. Expert testimony might provide information regarding the degree and severity of the risk and explanation regarding the manner in which each individual generates this risk. The court must determine that the risk is sufficient for the purpose of commitment and that it stands in the relationship to the mental illness required by the statute. In order to ascertain whether a commitment statute should be written to require mental illness and dangerousness or dangerousness due to mental illness, one needs an analysis of the purpose and justification of commitment. I do not purport to provide that analysis here.68 The central point for the current project is that the determination that a person qualifies as dangerous for the purpose of commitment requires an assessment of the probability and severity of the risk and an assessment of the relationship between the risk and mental illness as required by the relevant commitment criteria. Those criteria should articulate a conception of dangerousness appropriate to the purpose of and justification for civil commitment. Well-formulated criteria of dangerousness or risk for other legal purposes would also be appropriately related to the purposes and justifications of the institutions involved. Statutes and court decisions vary markedly in the degree to which they fulfill this function. Several areas of law address this function, although terminology varies.

C. Negligence Liability

Negligence liability in tort depends partially on risk. Negligence liability requires “conduct which involves an unreasonably great risk of causing damage” or fails to protect others from “unreasonable risk of

68. See SCHOPP, supra note 58, at 81–108, 137–57.
harm.” When dangerousness is understood as risk sufficient for a particular purpose, risk that qualifies as unreasonable constitutes dangerousness for the purpose of negligence liability. The risk necessary to qualify as unreasonable risk for the purpose of establishing liability in negligence depends partially on the probability and gravity of the harm risked. The evaluation of risk is not limited to probability and gravity, however, because these parameters must be evaluated in light of the social value of the type of conduct in question. To avoid negligence liability, an individual must exercise the care and prudence of the reasonable person in the circumstances. The reasonable person standard is not an empirical estimate of care that the average person would exercise. Rather, it represents a community ideal of a reasonable person as one who exercises the care and prudence appropriate to the risk of harm created by the activity in question and the social value of that activity. Thus, the judgment that behavior creates risk sufficient to ground negligence liability reflects the judgment that the behavior violates social standards of reasonableness and prudence because it creates risk disproportionate to its social value. Risk that is disproportionate in this sense qualifies as unreasonable risk for the purpose of negligence liability. Thus, it constitutes dangerousness in the sense of risk sufficient to justify legal liability for negligence.

Consider, for example, a private individual, A, who drives along city streets at a speed that exceeds the legal speed limit by ten miles per hour in order to arrive at a theater before the movie is scheduled to begin. Because he is driving ten miles above the speed limit, A is unable to stop when a traffic light turns yellow and then red. A proceeds into the intersection and causes a collision with another car entering the intersection from another direction with a green light. Shattered glass caused by the accident severs the artery of a child in the other car. A third driver, B, witnesses the accident sees the child bleeding profusely, places the child in his undamaged car, and drives toward the hospital at speeds exceeding the legal limits by 30 miles per hour. As B speeds along the city streets, another vehicle swerves to avoid B’s car and hits a pole, damaging the vehicle.

A court might appropriately find that A was negligent in causing the unreasonable risk by driving ten miles per hour above the speed limit but that B was not negligent in exceeding the legal limit by thirty miles per hour. In so finding, the court would appropriately find that B generated a higher degree of risk than that generated by A but that B, in contrast to A, did not create unreasonable risk because he acted in the interest of a greater social value. Thus, B’s conduct and the risk created by that conduct was reasonable in the circumstances, but A’s conduct and the risk

70. Id. at 171.
71. Id. at 174-75.
created by that conduct was unreasonable in the circumstances. When dangerousness is understood as risk sufficient to justify a particular type of legal liability or intervention, A's conduct was dangerous for the purpose of imposing negligence liability while B's was not, although B's conduct generated greater risk than A's conduct generated. This conclusion reflects the judgments that B's conduct was in pursuit of social interests that justified the risk created and that A's conduct was in pursuit of interests that did not justify the risk created. Thus, the determination that speeding did or did not create risk sufficient to qualify as dangerous for the purpose of establishing negligence liability requires estimates of the probability and severity of the risk and justificatory evaluation of the social value of the activity at issue.

D. Reckless Endangerment

Criminal liability for reckless endangerment attaches to an offender who "recklessly engages in conduct which places or may place another in danger of death or serious bodily injury." Criminal liability for reckless endangerment attaches to an offender who "recklessly engages in conduct which places or may place another in danger of death or serious bodily injury." Consider two individuals who place others in danger of death or serious bodily injury. C is a police officer who arrives on the scene of a bank robbery in progress. C fires his gun at the robber D in the crowded bank in order to prevent D from killing a teller who has not produced money sufficient to satisfy D's demand. E is a hunter sighting in his rifle in a field in preparation for hunting season. As a freight train passes the edge of the field, E decides to get some practice with a moving target. E fires his rifle at the lettering on the side of a box car as the train passes the field. E misses the train and his bullet falls harmlessly in the field.

Witnesses observe both events. E is charged with reckless endangerment and convicted of that offense, but C is not charged with any offense. Both created risk of serious bodily harm to others, and C created much more severe risk because he fired at chest level in a bank crowded with customers and employees, while E fired at a box car passing an open field. Recklessness requires conscious disregard of substantial and unjustifiable risk, however, and C's conduct, including the risk generated by that conduct, was justified by the socially valuable function of preventing the murder of the teller. E's conduct, in contrast, created much less risk in that the probability of harming an innocent individual was quite low, but it served no socially valuable purpose. In order to qualify as reckless endangerment, the conduct must create risk that is substantial in quantity and severity, and the actor must generate that risk in circumstances that render it unjustifiable by social standards. Although E created risk of relatively

73. Id. at § 2.02(2)(c) (recklessness).
low probability, the potential severity and the lack of social justification renders the risk substantial and unjustified. Thus, C consciously created risk of comparable severity and of much greater probability than the risk created by E, but E’s conduct constituted reckless endangerment for the purpose of establishing criminal liability while C’s did not because C created a justified risk while E created an unjustified risk. Determining dangerousness for this purpose requires an evaluation of the probability and severity of risk and a qualitative evaluation of the social justification for the conduct creating the risk.

**E. A Legal Conception of Dangerousness**

The examples of civil commitment, civil negligence, and reckless endangerment reveal a common pattern. A determination that a person or action qualifies as dangerous in a manner that renders that person or action appropriate for a particular type of legal intervention or liability requires an empirical assessment of the risk, including the probability, severity, and circumstances of harm, and a justificatory judgment that this risk is sufficient to justify a specified legal intervention or a specific type of legal liability. The empirical assessment of the risk includes an estimate of the probability and severity of the risk generated by the person in the circumstances. When relevant information is available, it could also explain the manner in which the individual generates the risk and potential risk management strategies.74

The justificatory judgment that the risk is sufficient to constitute dangerousness for a particular legal purpose includes quantitative and qualitative components. Many types of human conduct involve some risk of harm. To qualify as dangerous for a specified legal purpose, a person or activity must generate risk sufficient in magnitude to justify the intervention or liability at issue, where magnitude includes both probability and severity. For the purpose of civil commitment, the risk must be sufficient to justify the massive intrusion into individual liberty.75 For negligence liability, the risk must exceed that which a reasonable person would create in the circumstances, where a reasonable person is understood as one who exercises the care appropriate to the social value of the conduct in question and of the risk generated.76 For criminal liability for reckless endangerment, the risk must be substantial and unjustified; that is, it must be more than the circumstances justify according to social standards embodied in law.77

74. SCHOPP, supra note 58, at 220–23.
75. See supra Part VB.
76. See supra Part VC.
77. See supra Part VD.
In addition to generating risk that is sufficient in quantity for a particular legal purpose, the person or activity must generate that risk in a manner that justifies the type of legal intervention or liability at issue. That is, the risk must provide an appropriate basis for application of the specific legal intervention or liability. Civil commitment predicated upon dangerousness, for example, requires some association with mental illness. It may require mental illness and dangerousness, or it may require dangerousness due to mental illness. The former type of provision requires only that the individual creating the risk suffer the appropriate type of mental illness, but the latter formulation requires that the appropriate type of mental illness produces the risk. The dispute regarding the more appropriate formulation depends partially upon the justification of civil commitment. In either case, the risk must be associated with mental illness in order to render the state intervention in the form of commitment reasonably related to the state purpose that justifies the intervention, but the type of association required varies with the formulation and the justification represented by that formulation.

Risk for the purpose of civil negligence liability must be associated with activity that lacks sufficient social value to justify the risk because negligence liability is intended partially to channel behavior away from conduct that creates risk absent commensurate social value. Similarly, in order to justify criminal conviction and punishment, the type and circumstances of risk must be consistent with the social functions of criminal punishment. An individual who created a serious risk of death or bodily harm but was unaware of that risk due to lack of careful attention, for example, would have engaged in conduct that could qualify as dangerous for the purpose of civil negligence liability but not for the purpose of criminal liability for reckless endangerment because criminal recklessness requires conscious disregard but civil negligence liability does not. This would be the case despite the risk qualifying as sufficient in quantity for both forms of liability. Risk absent conscious disregard satisfies the requirements for civil negligence liability but not for criminal liability as reckless endangerment because the latter but not the former requires culpability justifying the condemnation inherent in criminal punishment.

In short, a determination that a person or action qualifies as dangerous in a manner that renders that person or action appropriate to a particular form of legal intervention or liability requires (1) an empirical assessment of the probability and severity of risk in the relevant circumstances, including any available explanation of the manner in which that person gen-

78. See supra note 66 and accompanying text.
81. See supra Part VD.
82. JOEL FEINBERG, DOING AND DESERVING 95–118 (1970); SCHOPP, supra note 58, at 144–48.
erates the risk and any available information regarding risk management strategies likely to ameliorate that risk; 2) a justificatory judgment that this risk is quantitatively sufficient in probability and severity to justify the legal intervention or liability at issue; and 3) a justificatory judgment that the person or activity generates this risk in a manner that is qualitatively sufficient to justify the type of legal intervention or liability at issue.

VI. DANGEROUSNESS AS A JUSTIFYING CONDITION FOR CAPITAL PUNISHMENT

A. Eligibility for Condemnation: Anderson and Davis

Anderson's dangerousness provides no basis for any punishment because he lacks culpability for killing the mail carrier. Anderson, the insanity defense, and the broader requirements of culpability contained in the voluntary act requirement and culpability elements reflect the function of the criminal law as an institution of coercive behavior control that is specifically appropriate to those who possess the capacities for responsible agency.\textsuperscript{83} Theorists might advance different formulations of the appropriate requirements of responsible agency, but in general terms, criminal responsibility requires the abilities to comprehend the prohibitions contained in criminal offense definitions and the circumstances relevant to those prohibitions, as well as the ability to direct one's behavior relevant to those prohibitions and circumstances through a minimally adequate process of practical reasoning.\textsuperscript{84} Those who possess these minimal capacities have the ability to function as responsible agents in the public jurisdiction of a society governed by an institution of criminal law. They exercise the liberty to direct their own conduct through the application of these capacities within the bounds defined by the criminal law. If they transgress those boundaries, they are subject to coercive behavior control through the institution of criminal punishment that is uniquely appropriate to those who possess these capacities. Those who lack these minimal capacities are subject to alternative institutions of coercive behavior control, such as civil commitment, designed for those who lack the capacities of responsible agency.\textsuperscript{85}

Criminal punishment through incarceration and post-acquittal commitment of offenders such as Anderson share some common purposes including crime prevention through incapacitation. In certain cases, specific individuals may find either form of confinement more averse than the other, and other individuals might not subjectively experience any signifi-

\textsuperscript{83} MODEL PENAL CODE §§ 2.01 (voluntary act), 2.02 (culpability requirement), 4.01 (insanity defense) (Proposed Official Draft 1962).
\textsuperscript{84} SCHOPP, supra note 58, at 146-48.
\textsuperscript{85} Id. at 148-51.
cant differences between these two forms of incapacitation. From the societal perspective, however, criminal punishment differs from alternative forms of coercive behavior control in that punishment carries an inherent expression of condemnation, including reprobation and resentment, of the offender as a responsible agent who culpably committed a criminal offense.\textsuperscript{86} Insofar as criminal punishment expresses condemnation of the criminal conduct and of the culpable offender for engaging in that conduct, justified punishment must fit the crime in the sense that it must express condemnation appropriate to the wrongfulness of the offense and the culpability of the offender.\textsuperscript{87} As discussed previously, the most defensible interpretation of the Supreme Court opinions that require punishment in proportion to culpability, blameworthiness, or moral responsibility is not entirely clear.\textsuperscript{88} Insofar as these opinions are reasonably interpreted as limiting the severity of punishment to that which is proportionate to culpability, however, they are consistent with this expressive function of punishment that limits the expression of reprobation and resentment to that which is justified by the offender's culpable wrongdoing.

Anderson is not eligible for criminal punishment for his offenses because he lacks the capacities that would render him an appropriate subject of condemnation. Further, the risk of further violence he presents is associated with the impairment that renders him not criminally responsible for his prior criminal conduct and undermines his standing as a responsible agent regarding his future behavior. Thus, criminal punishment does not provide an appropriate intervention for the amelioration of that risk. Societal safety might require extended confinement and physical restraint. Anderson might not recognize or care about the distinction between police power commitment and criminal punishment. Anderson might even prefer imprisonment or execution to permanent commitment and restraint.\textsuperscript{89} Societal integrity and self-discipline require, however, that the criminal justice system restrict punishment to those who culpably commit crimes that justify the expression of condemnation inherent in criminal punishment. Only by restricting the application of criminal punishment in this manner can society discharge the responsibility to exercise coercive behavior control through institutions that respect the standing of responsible agents.\textsuperscript{90}

Davis, in contrast, is fully culpable for his criminal offenses because he suffers no impairment of the capacities of comprehension and practical reasoning that enable him to function as a responsible agent in the public domain. The estimate that he presents a severe risk of future criminal

\textsuperscript{86} FEINBERG, supra note 82, at 98-101; SCHOPP, supra note 58, at 145-46.
\textsuperscript{87} FEINBERG, supra note 82, at 118.
\textsuperscript{88} See supra Part III.
\textsuperscript{90} SCHOPP, supra note 58, at 146-48.
conduct is based on his past pattern of culpable criminal behavior, his threats, and his demonstrated inclination to engage in conduct manifesting personality traits such as viciousness, cold bloodedness, and lack of remorse or empathy that we infer from a variety of sources, including his prior criminal behavior. Davis and Anderson are similar insofar as the judgments that each represents elevated risk of future harm reflect inferences drawn from their past criminal behavior and current personality traits, some of which are inferred from that past criminal behavior. They differ in that Anderson’s past criminal behavior and personality traits undermine an ascription of criminal responsibility for that past criminal behavior and for the expected future crimes, but Davis’s do not. Thus, neither Anderson’s past criminal behavior nor his anticipated future behavior provides a basis for the condemnation inherent in criminal punishment.91

B. Dangerousness and Culpability as Aggravating Factors

Several state capital sentencing statutes discussed previously include dangerousness as a necessary or sufficient condition to render an offender eligible for capital punishment.92 Under these provisions, offenders who are found guilty of capital murder must fulfill some additional condition or conditions to become eligible for capital punishment, and some formulation of dangerousness can fulfill this function. Dangerousness is sufficient to render a capital offender eligible for capital punishment in all of these states except Oregon, in which it is one of two jointly sufficient conditions.93 In all of these states, mitigating factors can override the aggravating factors, resulting in a sentence less than capital punishment.94 At first glance, it appears that dangerousness provides an independent basis for increasing the severity of punishment and that dangerousness and mitigating factors are distinct matters to be decided separately and then weighed or balanced against each other in determining the sentence. Consider, however, the requirements of qualitative sufficiency as applied to dangerousness as a criminal sentencing factor.

91. The precise relationship between psychopathy and criminal responsibility remains a matter of contention. Some writers contend that psychopathy undermines criminal responsibility, but others deny this. Compare, e.g., Cordelia Fine & Jeanette Kennett, Mental Impairment, Moral Understanding, and Criminal Responsibility: Psychopathy and the Purposes of Punishment, 27 INT’L J.L. & PSYCHIATRY 425 (2004) with Robert F. Schopp & Andrew J. Slain, Psychopathy, Criminal Responsibility, and Civil Commitment as a Sexual Predator, 18 BEHAV. SCI. & L. 247 (2000). This ongoing debate reflects the more general point that the relevance of traits to the degree of punishment depends upon the underlying theory of criminal responsibility and the application of that theory to a particular offender or class of offenders.
92. See supra Part III.
94. See statutes cited supra notes 30-32.
C. Dangerousness, Culpability, and Sentencing

Recall that although Anderson presents ongoing danger to others, that danger is not weighed against mitigating factors. Rather, his impairment precludes any consideration of criminal sentencing because it is sufficiently severe to justify an insanity acquittal. Although the severity of the crime or the risk of future criminal behavior might influence some jurors’ evaluation of the offender’s impairment as sufficient for an insanity acquittal, insanity provisions are written to articulate a threshold criterion that identifies those who are not responsible for their criminal behavior, regardless of the ongoing threat they might represent. Such standards are written to draw a dichotomous distinction between those who fulfill the minimal requirements of criminal responsibility and those who do not. The capacities of responsible agency, such as comprehension and reasoning, can vary along a continuum, however, with some of those who meet the threshold requirement for criminal responsibility manifesting various degrees of impairment relative to the ordinary or fully responsible level. Some capital sentencing provisions recognize this variability by listing as mitigating factors impairment that reduces the offender’s culpability but does not meet the threshold for acquittal under an insanity defense. These mitigating factors can address conditions such as psychological impairment, distress, or age that reduce the offenders’ culpability for their offenses but are not sufficient to exculpate. These mitigating factors provide good reasons to subject the offenders to less severe punishment, representing less severe condemnation, than would be appropriate to offenders who committed similar offenses in the absence of comparable mitigation.

Insanity and capital sentencing provisions of the type discussed here apparently contemplate a two stage analysis of the relationship between culpability and dangerousness. First, offenders must meet some threshold level of culpability in order to qualify as criminally responsible. Offenders such as Anderson, who manifest impairment sufficient to render them not responsible under the applicable insanity standard, are not eligible for criminal punishment regardless of the severity of risk they present. Capital offenders who meet this threshold are then subject to a second stage in which circumstances relevant to culpability or risk are assessed independently and weighed as aggravating and mitigating circumstances. If this is the justified approach, however, it seems that Cook should be eligible for capital punishment. Recall that Cook committed a capital offense in circumstances in which he did not fulfill any aggravating circumstance in-
volving culpability for that offense. If the sentencing statute lists danger-
ousness as an aggravating factor and the hypothesized technical advances
in diagnosis and prognosis occur, however, it seems that Cook would be-
come eligible for capital punishment because the dangerousness aggrava-
ing factor would apply, and the severity of the risk would provide good
reason to apply capital punishment. Thus, his reliably expected deteriora-
tion into a condition that would render him no longer culpable for his con-
duct would justify a more severe sentence for the current offense.

A comparison of Anderson and Cook raises the following question. If
Anderson's dangerousness does not provide good reason to apply capital
punishment for his crime, why would Cook's dangerousness justify eligi-
bility for capital punishment when he was not sufficiently culpable to qual-
ify absent the dangerousness, and he would not be expected to be respon-
sible for the anticipated future harmful conduct? Why does dangerousness
unrelated to culpability provide good reason to apply more severe punish-
ment and condemnation to Cook but not to Anderson? It might seem rea-
sonable to respond that Cook differs from Anderson in that he is culpable
for his crime and thus eligible for punishment in proportion to any legiti-
mate sentencing factor. If, however, more severe punishment expresses
more severe condemnation in proportion to culpability, how can increased
risk for which the individual is not culpable justify more severe punish-
ment? Alternately, if culpability or risk provide alternative bases for in-
creasing the severity of punishment, why does Anderson's lack of suffi-
cient culpability preclude capital punishment regardless of the severity of
risk?

Davis is fully culpable for his offense and subject to a severe sentence
because he manifests no disorder of comprehension, reasoning, or other
capacities that are required to direct his behavior through the exercise of
responsible agency within the boundaries set by law. The judgment that
he is dangerous by virtue of his tendency to commit crimes of violence
provides an aggravating factor in sentencing with no mitigating effect be-
cause the characteristics that render him likely to engage in further vio-
ence, such as callousness and remorselessness, do not interfere with his
capacity to direct his behavior through the exercise of responsible agency.
These characteristics might reflect a lack of motivation to refrain from
criminal behavior, but they do not impair the ability to direct his behavior
through the exercise of responsible agency.

Anderson qualifies for the insanity defense because his impairment
prevented him from directing the conduct constituting the offense with
which he was charged through the application of minimally adequate ca-
pacities of responsible agency. Similarly, that impairment provides the
basis for the judgments that he remains likely to engage in further criminal

violence and that he will engage in that violence in a state of impairment that will prevent him from applying the capacities of responsible agency to the decisions to engage in that violence. Thus, he lacks the capacities needed to fulfill the requirements of criminal responsibility for the instant offense, for anticipated future offenses, and for inflicting the elevated risk of such offenses on the public.

Cook resembles Davis, rather than Anderson, insofar as both Cook and Davis committed their predicate crimes while possessing the capacities of criminal responsibility. Cook resembles Anderson and differs from Davis, however, insofar as the basis for the judgment of elevated risk reflects the prognosis of severe impairment expected to render Cook prone to engage in violence for which he will not be criminally responsible. Thus, Cook is criminally responsible for the immediate crime because he was able to bring the capacities of responsible agency to bear on the behavior constituting that offense, but the characteristics that support the expectation of future violence suggest that such conduct would not justify criminal punishment and condensation for that conduct. To the extent that risk provides the basis for sentencing, Cook resembles Anderson rather than Davis because he represents the risk of future harmful conduct for which he will be neither criminally responsible nor an appropriate subject of condensation. Insofar as Cook’s culpability for the immediate crime is not sufficient to justify the condensation inherent in capital punishment, the risk of future criminal behavior for which he would not be responsible cannot justify that condensation.

One can imagine circumstances in which the elevated risk of criminal violence for which Cook would not be responsible might provide the basis for the increased condensation inherent in increased punishment. Suppose, for example, that Cook engaged in drug abuse with a substance that generates a high probability of psychological deterioration into a state of delusional fear and violence. Suppose also that Cook was fully aware that this substance had this effect. If he continued to abuse the drug, experienced the expected pattern of deterioration, and engaged in violence driven by delusional fear, he would be unable to exercise the capacities of responsible agency at the time of the violent conduct, but he would remain subject to condensation for knowingly creating the circumstances that generated the risk and the resultant violence. A less extreme example of a similar process may occur relatively frequently when individuals commit crimes of violence when intoxicated with substances such as alcohol or methamphetamine which may make it more difficult for them to moderate their anger, impulsiveness, or other inclinations toward violence. Some empirical evidence suggests that research participants do not grant

100. People v. Decina, 138 N.E. 2d 799 (1956). The specific facts of Decina differ from those discussed here, but the underlying principle is similar in that the offender is culpable for prior behavior that culpably created the risk, rather than for the immediate harmful behavior.
mitigating weight to impairment induced by substance abuse. This refusal to grant mitigating force may reflect the judgment that intoxicated offenders remain fully culpable for their conduct because they knowingly generated the impairment of their own capacities and thus are responsible for creating the risk that they would be less able to rationally direct their violent inclinations.

The examples of Anderson, Cook, and Davis suggest that dangerousness is qualitatively sufficient as an aggravating factor in criminal sentencing when the offender is responsible for the predicate crime and for the elevated risk of further criminal violence he inflicts upon the public. He is responsible for inflicting that risk on the public if the characteristics that render him dangerous are such that he would be responsible for the further violence reflecting those characteristics or if he is responsible for generating the circumstances that would render him not responsible or less responsible for that violence reflecting those characteristics.

D. Applying the Framework

Cook represents a relatively unrealistic example of an offender who can reasonably be understood to be less culpable but more dangerous than other offenders who commit similar offenses. Consider the alternative case of East as an offender who presents the sentencer with a two-edged sword. East was arrested and convicted for a murder committed during an armed robbery of a convenience store. East entered the store with a knife, gave the cashier a bag and told her to give him all of the money. The cashier became frightened and began screaming just as a car pulled into the parking area. East stabbed the cashier "to shut her up" and ran from the store as the driver of the car approached the door. The police arrested him shortly thereafter attempting to hide in an alley.

East was nineteen years old at the time of the offense. He dropped out of high school after a history of failing classes and doing poorly in special education programs. He has consistently achieved intelligence scores in the high seventies that place him just above the range of mental retardation. He has been evaluated as suffering learning and behavioral disorders associated with impulsivity, hyperactivity, and failure to direct or sustain attention. He has a history of juvenile offenses involving impulsive violence, including violence in juvenile detention that resulted in extended duration of detention. He was recently released from the county jail after serving six months for assault. He would have been eligible for release after three months, but he served the full six months due to discri-

102. AMERICAN PSYCHIATRIC ASSOCIATION, supra note 53, at 41–49 (Mental Retardation).
103. Id. at 85–93 (Attention Deficit/ Hyperactivity Disorder).
plenary violations, including a fight with another inmate and an assault against a corrections officer who intervened in that fight with the other inmate. Psychological consultation completed prior to trial for the current offense resulted in a diagnosis of antisocial personality disorder with impulsive and explosive features.¹⁰⁴

East is eligible for capital punishment because he fulfills at least one statutory aggravating factor, but mitigating factors also apply.¹⁰⁵ Arguably, East's limited intelligence, impulsiveness, and labile emotional responsiveness render him less culpable than an unimpaired offender who commits similar offenses because his impairment interferes with his ability to direct his behavior through the application of practical reasoning. Arguably, however, these same characteristics render him more dangerous than an unimpaired offender in that they render him less able to anticipate consequences, learn from experience, or respond to situational contingencies, including those he would encounter when incarcerated. If dangerousness is an independent justification for increased punishment, including capital punishment, then East is a reasonable candidate for capital punishment because his impairment renders him likely to engage in continued violence, including violence committed while incarcerated. If dangerousness that justifies increased punishment must be associated with conduct for which the actor is criminally responsible, East qualifies as dangerous because he is criminally responsible for the predicate offense and he would be expected to be criminally responsible for any future injurious behavior.

As discussed previously, however, criminal sentencing differs from the insanity defense in that criminal responsibility for the purpose of the insanity defense constitutes a threshold standard. In contrast, criminal punishment that expresses condemnation appropriate to the offender and offense requires assessment of the degree to which the considerations at issue affect the offender's ability to bring the capacities of responsible agency to bear on his decision to engage in criminal conduct. Thus, the assessment of dangerousness for the purpose of criminal sentencing requires evaluation of the manner and degree to which the characteristics that render the individual dangerous limit that individual's ability to bring the capacities of responsibility to bear on the decision to engage in the anticipated violence.

Davis is dangerous due to demonstrated propensities and characteristics that render him likely to engage in further violence for which he would remain fully responsible because those characteristics do not interfere with his ability to exercise the capacities of responsible agency in the decision to engage in that violent conduct. Cook is dangerous due to the anticipated deterioration, for which he will not be responsible, to a state of

¹⁰⁴. *Id.* at 701–06 (Antisocial Personality Disorder).
severe impairment that will prevent him from directing his conduct through the exercise of those capacities. Thus, Davis’s dangerousness is qualitatively sufficient for the purpose of justifying enhanced punishment, but Cook’s is not. A reasonable sentencer might plausibly conclude that East’s history of impulsive aggression is partially due to impairment that interferes with his ability to apply the capacities of responsible agency to his violent conduct, although not to the degree that it precludes criminal responsibility. This sentencer must evaluate the manner and degree to which East’s impairment affects attribution of responsibility for the instant crime, for the anticipated future violence, and for inflicting the ongoing threat of harm upon the public.

East’s impairment constitutes a two-edged sword in that it provides a reasonable basis for the judgment that East’s disorder renders him less culpable but more dangerous than an unimpaired offender who commits similar offenses. His impairment qualifies for the aggravating factor of dangerousness insofar as it supports the inference that he presents an elevated risk of further culpable criminal conduct. His impairment also provides a reasonable basis for the judgment that East qualifies for mitigation insofar as that impairment renders him less culpable than an unimpaired offender for his past violence and for inflicting the threat of further violence upon the public. In the absence of additional evidence suggesting that East has culpably contributed to his own impairment through substance abuse or some alternative form of behavior, there is no evidence that he has culpably contributed to the conditions that impair his ability to direct his conduct through the capacities of responsible agency.106

As with many other judgments of culpability and of the quantitative sufficiency of risk to qualify as dangerousness for a particular legal purpose, we have no formula that provides the basis for a precise measurement. Consider, for example, the reasonable inference that East’s impairment reduces his ability to accurately recognize situational contingencies and direct his conduct to avoid unwanted consequences. Some court opinions apparently interpret the deterrence function of punishment to apply only to those who engage in cold calculation regarding their crimes. These opinions suggest that deterrence cannot serve as a legitimate penal purpose for punishment of impaired offenders because deterrence requires that offenders engage in premeditation, deliberation, or cost–benefit analysis before committing their crimes.107 The opinions also reveal, however, that Penry, Atkins, and Simmons all consciously considered the risk of being caught and punished in their decisions to commit their capital of-

106. See supra notes 99-101 and text accompanying.
fenses. Impairment may decrease an individual’s ability to accurately estimate the probability of being apprehended and punished under various circumstances, but it is not at all clear that such impairment, in contrast to impairment that renders an individual less able to recognize the gravity of his crime or less able to direct his behavior through reasoning, should be understood as having a mitigating effect. As ordinarily understood, mitigation attaches to characteristics or circumstances that render an offender less culpable for his offense but not to circumstances that merely render the offender a less efficient criminal.

Reasonable sentencers might conclude that East’s combination of low intelligence and susceptibility to sudden anger and impulsiveness mitigates his culpability for the instant offense or for the ongoing threat he represents. These sentencers might conclude that this combination of factors renders it particularly difficult for him to bring his limited abilities of practical reasoning to bear on his decision to engage in aggressive conduct in circumstances that elicit anger. Thus, they might conclude that he is less blameworthy for the failure to do so. Other reasonable sentencers might conclude that this impairment is not mitigating, or not sufficiently mitigating to preclude capital punishment, because his behavior was so clearly wrongful that it required no complex or subtle comprehension or reasoning to recognize that he should refrain from such action. The lack of precise guidance regarding these questions reflects the more general lack of precise formulas for the evaluation of culpability or of dangerousness generally. Sentencers must consider the aggravating and mitigating evidence in deciding whether East qualifies for the condemnation inherent in capital punishment or in some lesser punishment.

One important component of this sentencing process requires assessment of the qualitative sufficiency of the risk. The sentencer must decide whether the characteristics that render East likely to engage in violence justify the elevated condemnation inherent in increased punishment. Insofar as the sentencer concludes that these characteristics interfere with East’s ability to direct his conduct through the capacities of responsible agency, that conclusion provides good reason to conclude that East is less culpable for the initial offense and for inflicting ongoing risk on the public than would be an unimpaired offender who committed similar crimes. Thus, the sentencer must make a judgment regarding whether and to what degree the risk presented by East is qualitatively sufficient to justify increased punishment.

E. Conclusion

As interpreted here, a determination that a particular individual or act is dangerous for a particular legal purpose requires judgments of quantitative and qualitative sufficiency. These judgments are inherently justificatory in that dangerousness requires risk sufficient in quantity and quality to justify the legal liability or intervention at issue. For the purpose of justifying criminal punishment, the increased risk must be associated with culpability in a manner that justifies the condemnation inherent in the type and severity of punishment at issue. The degree and circumstances of risk that qualify as quantitatively and qualitatively sufficient may vary from case to case, partially because the condemnation that is justified by culpability independent of dangerousness can vary. In cases of extreme culpability, reasonable sentencers might conclude that a relatively low degree of risk is sufficient to qualify as dangerousness in a jurisdiction that requires a finding of dangerousness as a necessary condition for capital punishment or for some other level of punishment. ¹¹⁰

The risk presented by Cook, for example, arguably is insufficient to justify the condemnation inherent in capital punishment. This risk is insufficient for this purpose because Cook’s culpability for his crime is not sufficient to justify capital punishment, and the ongoing risk he presents is not qualitatively sufficient to justify increased condemnation. An offender who was fully culpable for vicious murders of children, in contrast, might present a relatively low risk of future harm in prison because he would lack access to children. ¹¹¹ A reasonable sentencer in a jurisdiction that required a finding of dangerousness as a condition necessary to render an offender eligible for capital punishment might conclude, however, that even the minimal risk that such an offender would escape or redirect his violence toward other prisoners or prison staff would be sufficient to justify capital punishment. The sentencer might reach this conclusion because this offender’s culpability for the offenses for which he had been convicted justifies the condemnation inherent in capital punishment. Thus, the sentencer might conclude that any risk of further violence is quantitatively and qualitatively sufficient to constitute dangerousness for this purpose because the offender’s culpability for the crime justifies the condemnation inherent in capital punishment. The sentencer might conclude, therefore, that the offender should bear the full cost of any remaining risk.

As previously discussed, some Supreme Court opinions apparently require that punishment serves some legitimate penal purpose, but others apparently require punishment in proportion to culpability. It remains

¹¹⁰ See supra note 42 and accompanying text (discussing statutes that address dangerousness but provide no clear threshold of risk that qualifies as sufficient).
unclear whether the latter opinions require punishment in proportion to culpability or set proportionality to culpability as a limit on the severity of punishment.\textsuperscript{112} Sentencing provisions that address dangerousness as a distinct criterion for capital punishment or as a sentencing factor appear to conflict with these opinions because they apparently authorize increased severity of punishment in response to dangerousness, independent of increased culpability. The analysis presented in this section advances an interpretation of dangerousness as qualitatively sufficient for the purpose of criminal sentencing that resolves this apparent conflict because it limits such dangerousness to risk that the offender is criminally responsible for inflicting on others. Thus, dangerousness increases the severity of punishment only insofar as the offender is legitimately subject to the increased condemnation inherent in more severe punishment because he is responsible for inflicting that risk on the public. I make no claim that this analysis resolves the ambiguity regarding the interpretation of the opinions requiring punishment in proportion to culpability. Neither does it resolve the ongoing debate regarding the moral justification, or lack thereof, for capital punishment. I claim only that this interpretation of qualitative sufficiency renders coherent the statutes and Court opinions that require sentencing in proportion to culpability and accept dangerousness as a sentencing factor.

VII. EXPERT TESTIMONY, DANGEROUSNESS, AND CAPITAL SENTENCING

A. Expert Testimony Relevant to Dangerousness Generally

The previously discussed criticisms of expert testimony regarding dangerousness for the purpose of capital sentencing often frame that testimony as predictions of future violence or of future dangerousness or as expert opinions that an individual is dangerous.\textsuperscript{113} I have previously argued that a determination of dangerousness for a specific legal purpose is not a prediction of harm but rather an estimate of risk and a judgment that this risk is sufficient to justify a particular decision. Opinions that individuals are, or are not, dangerous always exceed the expertise of expert witnesses because these decisions require justificatory judgments.\textsuperscript{114} Those arguments reflect the finding of quantitative sufficiency required for a determination of dangerousness. That is, the judgment that a person is or is not dangerous for a specified legal purpose requires an estimate of the risk presented by that person and a judgment that this risk is sufficient to justify the legal intervention or liability at issue.\textsuperscript{115} Expert witnesses legitimately testify

\textsuperscript{112.} See supra Part III.
\textsuperscript{113.} See supra Part IVA.
\textsuperscript{114.} SCHOPP, supra note 58, at 215–23; see supra Part VE.
\textsuperscript{115.} See supra Part VE.
within their range of expertise as defined by the knowledge, skill, experience, training, or education that qualifies them as expert witnesses.\textsuperscript{116} Appropriately educated and experienced clinicians or social scientists may have expertise relevant to the empirical aspects of risk assessment and management. Insofar as the relevant information is available, that expertise can include risk assessment involving the likelihood that the individual will cause harm in the circumstances and the severity of the harm that is likely. It might also include testimony addressing protective factors and risk management strategies that might reduce risk in specified circumstances.

In the context of a judicial hearing, however, the judgment that this risk is sufficient to justify the intervention or liability at issue requires justificatory reasoning involving such factors as the degree and type of risk required to justify intrusion into liberty and the most defensible distribution of risk and error. These justificatory components of the analysis extend beyond the range of expertise that qualifies clinicians or social scientists as expert witnesses regarding risk assessment and management. These judgments fall within the responsibility of the judge or jury. Experts can legitimately provide descriptive and explanatory testimony relevant to a determination that these individuals are or are not dangerous, but their expertise does not extend to these justificatory judgments. Thus, putatively expert opinions that these individuals are or are not dangerous necessarily extend beyond the range of professional expertise. For this reason, attorneys should not ask experts for opinions that individuals are or are not dangerous; judges should not allow such questions or testimony; and experts should not offer such opinions.\textsuperscript{117}

In some circumstances, clinicians might make professional judgments that include justificatory components. Those providing treatment and case management on an inpatient ward, for example, must decide whether a committed individual has experienced treatment effects that reduce the risk of violence to a degree that justifies home visits. These decisions require risk assessment and management through the application of the knowledge and skills that are intrinsic to the profession. They also require justificatory judgments that the treatment effects have reduced risk to a degree that justifies accepting the risk involved in the visits at issue. These latter justificatory judgments are delegated in that they require social judgment that does not fall within the expertise of the profession. Rather, society delegates these judgments to the members of certain professions in certain circumstances.\textsuperscript{118} The role of expert witness differs from the treatment role, however, in that the expert witness is called to testify within the range of specialized expertise, and those justificatory judgments are prop-

\textsuperscript{116} Federal Rule of Evidence 702 (expert testimony).

\textsuperscript{117} Schopp, supra note 58, at 220–23.

\textsuperscript{118} Id. at 253–57.
erly reserved for the court or jury rather than delegated to the expert witness.119

Qualitative sufficiency resembles quantitative sufficiency in that determinations of each extend beyond the expertise of an expert witness. Qualitative sufficiency also resembles quantitative sufficiency in that an expert may have relevant information that falls within the range of expertise. A determination of qualitative sufficiency requires more than an estimate of the probability and severity of risk. It requires that the judge or jury make a determination that the individual generates that risk in a manner that fulfills the requirements of the specific legal liability or intervention at issue.120 In order to make this determination, they need explanation regarding the manner in which the individual generates the risk at issue. Testimony that informs this determination would provide as much explanation as possible regarding the properties of the person and circumstances that generate the risk and the manner in which these properties generate that risk insofar as information is available to the expert that can assist the decisionmaker in understanding how the individual’s psychological impairment contributes to the risk generated. For example, testimony that explains this causal influence can assist the decisionmaker in deciding whether the individual qualifies for civil commitment under a provision that limits commitment to those who are dangerous due to mental illness.121

Recall C and E, who fired guns in circumstances that endangered others but who elicited different conclusions regarding reckless endangerment because E but not C fired in circumstances that involved an unjustified risk.122 Consider a third individual, F, who finds a gun in an alley, takes it to an empty lot, and fires it at a wooden fence that separates the lot from the back yards of the houses that border the lot. F is also charged with reckless endangerment for firing the gun in circumstances that endanger the people living behind the fence. A psychologist who evaluates the defendant finds that he suffers moderate mental retardation.123 An evaluation of his cognitive impairment might support the interpretation that he is unable to recognize risks associated with his conduct that any person of ordinary intelligence would almost certainly recognize. Thus, a description of his cognitive impairment and an explanation regarding the manner in which it limits his ability to recognize the likely but removed consequences of his conduct might support an inference that although F created an unreasonable risk, he did not consciously disregard that risk. Rather, F never recognized the risk to those who lived behind the fence because he

119. FED. R. EVID. 702 (expert testimony); SCHOPP, supra note 58, at 257–61.
120. See supra Part VE.
121. See supra Part VB.
122. See supra Part VD.
123. AMERICAN PSYCHIATRIC ASSOCIATION, supra note 53, at 43 (moderate mental retardation).
could not see them. Due to his impairment, F does not draw inferences that would be readily apparent to an individual of ordinary intellectual functioning.

Such testimony describing and explaining the manner in which F's impairment affects the process through which he generates the risk could provide the judge or jury with important information relevant to their determination whether he generated the unreasonable risk in a manner that justifies criminal liability for reckless endangerment. Here, as in the contexts of civil commitment or civil negligence discussed previously, a determination that the individual is dangerous for the specific legal purpose at issue requires not only an estimate of the probability and severity of the risk and a judgment that this risk is sufficient in quantity for this legal purpose, but also a determination that it is qualitatively sufficient by the standards appropriate to this legal purpose.\textsuperscript{124}

Psychological experts can provide expert testimony that is relevant to the matter at issue and within their range of expertise. When appropriate information is available, this can include testimony regarding risk assessment, including the probability and severity of the risk and explanations regarding the manner in which the person generates that risk. This testimony might legitimately address risk assessment and management in various circumstances. In a particular case, for example, an expert might have access to an individual’s history that allows the expert to offer an opinion that this individual represents an elevated risk in circumstances in which his compliance with treatment is not monitored and a reduced risk in circumstances in which he is subject to a monitored treatment program. However, expert testimony cannot legitimately extend to an opinion that this individual is or is not dangerous in general or in any particular circumstances. Judges or juries must make these determinations because the justificatory judgments regarding quantitative and qualitative sufficiency necessarily fall beyond the range of psychological expertise.

\textit{B. Capital Sentencing}

As written, capital sentencing provisions that address dangerousness as a sentencing criterion or factor provide no formula for the sentencer to apply in deciding whether the offender satisfies these criteria or factors.\textsuperscript{125} According to the conception of dangerousness presented here, sentencers should explicitly recognize that in making the determinations that specific offenders are or are not dangerous, they are making the judgments that these offenders represent risk that is or is not sufficient to justify capital sentences. Understood in this manner, these provisions charge sentencers

\textsuperscript{124} See supra Part V.

\textsuperscript{125} See supra Part IVA.
with estimating the risk of further criminal violence by the offenders to be sentenced, and with deciding whether that risk is quantitatively and qualitatively sufficient to provide good justificatory reasons to bring capital sentences.

As discussed in Part VID, these sentencers must make difficult decisions on the basis of a broad range of information with sentencing instructions that provide general guidelines and sentencing factors rather than clear rules or criteria. Sentencers must estimate risk and culpability, and they must make justificatory judgments regarding the significance of each. In some cases, the evidence might support the inference that certain characteristics render the offender less culpable but higher risk than other offenders who commit similar offenses. Sentencers who evaluate such information have a legal obligation to consider and give effect to all relevant mitigating evidence, but they have no formula to apply to sentencing decisions. Thus, these decisions must reflect to a substantial degree the sentencers' intuitive and experiential judgment regarding the justification provided by all relevant evidence. Expert testimony that provides as much relevant description and explanation as possible can assist these sentencers. Insofar as information regarding base rates, risk factors, protective factors, behavioral history, or other relevant considerations is available and within the expertise of the expert witness, descriptive and explanatory testimony regarding that information, its significance for risk assessment and management, and empirical inferences supported by it would fall within the range of legitimate expert testimony.

Expert testimony that takes a misleading form of prediction or of putatively expert opinions that the offenders are or are not dangerous can undermine the ability of sentencers to discharge their responsibilities by misleading them about the justificatory judgments they make. Expert testimony in the form of putatively expert opinions that offenders would or would not be dangerous or present continuing threats to others in prison for the purpose of capital sentencing would extend beyond the range of psychological expertise. Such opinions would require judgments that the risk presented by the offenders to be sentenced was or was not quantitatively and qualitatively sufficient to justify the sentence at issue. Such testimony raises at least two concerns beyond the problem of violating the limits of expertise. First, some sentencers may misunderstand such testimony as dispositive regarding the dangerousness issue, thus failing to recognize or discharge their responsibility to make justificatory judgments of quantitative and qualitative sufficiency. Second, if sentencers understand that testimony as dispositive regarding dangerousness, that error may distort their evaluation of culpability by rendering it less likely that they will

126. *See supra* Part II.
127. *See supra* Part IVE.
recognize the need to ask to what degree the offenders are responsible for the risk they inflict on others. Finally, insofar as the expert testimony regarding dangerousness rests upon actuarial risk assessment, it raises serious questions about the legitimacy of making criminal sentencing decisions on the basis of population data, rather than upon individualized assessment of the specific offender.  

Consider, for example, the concerns raised by the articles discussed in Section IVA. The first concern involves expert testimony that relies on risk assessment instruments that have not been validated as predictors of violence in prison. Understood as the claim that experts cannot predict dangerousness or offer an opinion that the individual will or will not be dangerous or engage in violence, these articles are correct for reasons that apply to expert testimony regarding dangerousness generally. That is, a determination of dangerousness is not a prediction, and any determination that an individual is or is not dangerous requires justificatory judgments of quantitative and qualitative sufficiency that fall beyond the range of psychological expertise. Insofar as experts offer accurate descriptive and explanatory testimony, however, they can testify that this individual scores in a range that has been associated with elevated levels of violence in the community. Such testimony should include discussion of a variety of qualifying considerations. These could include, for example, explanation of the levels and severity of the violence found in the research, the distinction between detected violence and actual violence, the differences in population and circumstances between the community samples and the prison samples, and other relevant considerations. Such testimony would also include discussion of the concerns raised by the application of population data to individuals who share some but not all properties with the population. The weight the sentencer grants the testimony and the degree of risk and certainty the sentencer considers appropriate for sentencing are determinations for the sentencer that extend beyond the expertise of the witness.

At least one article explicitly raises concerns regarding the prejudicial effect of the term “psychopath.” This raises an important and relevant consideration for the judge regarding admissibility. The offer of proof should include a description of the evidence that supports the expectation of prejudicial effect as well as any available evidence regarding the effectiveness of explanatory testimony to correct for this effect. The judge must make a determination regarding the relative weight of the relevance

129. See supra Part IVA text accompanying notes 46-50.
131. FED. R. EVID. § 403 (addressing the balance of probative and prejudicial effect).
and of the prejudicial effects of the evidence presented in various formats, including those that do or do not use the term "psychopath."

The second concern addresses base rates of violence in prison that suggest that any prediction of violence in prison will produce high rates of false positives. Once again, the appropriate question addresses assessment of risk, rather than prediction of violence. Testimony regarding risk in prison can include explanations of base rates and false positives. Recognizing that the appropriate form of expert testimony involves description and explanation, rather than predictions of violence or expert opinions that the offenders are or are not dangerous, recasts the concern as one regarding accurate communication of the relevant information, rather than as one of false positives or negatives in dichotomous predictions or categorizations. The third concern addresses expert testimony based on a history of violence in the community because such violence has not been validated as a predictor of violence in the prison environment. As above, appropriate testimony would discuss the differences in the two environments and any evidence available regarding the correlation or lack of correlation between detected violence in the community and detected violence in prison. Insofar as available information allows explanation regarding differences in correlation for particular types of violence, circumstances, or offenders, that explanation would be appropriate.

The fourth concern involves testimony regarding dangerousness of offenders who could be housed in special high-security facilities. This concern resembles the third in that both address the reliability of behavior in one set of circumstances as indicators of risk in different circumstances. Insofar as relevant information is available, experts can explain the differences in rates and types of violence in the different circumstances. Insofar as such information is not available, experts can explain that the correlation between prior behavior in other circumstances and likely behavior in these circumstances is unknown.

These responses to these objections reveal a general pattern. Recognizing that expert testimony regarding risk appropriately involves description and explanation of relevant risk, protective, and management considerations in the circumstances, rather than predictions of violence or putatively expert opinions that individuals are or are not dangerous, alters the focus of evaluation of proposed testimony. When expert testimony is framed as predictions or as expert opinions that individuals are, or are not, dangerous, the ratio of accurate predictions and opinions as compared to false positives or negatives can seem critical. When expert testimony takes the form of description and explanation of relevant factors, in contrast, the emphasis shifts to the availability of relevant information and to...

132. See supra Part IVA at note 50.
133. See supra Part IVA at note 51.
134. See supra Part IVA at note 52.
the ability to accurately communicate that information. The ability of sen-
tencers to comprehend and apply complex testimony and the potential for
prejudicial effects are relevant considerations. Insofar as experts have
information relevant to those considerations, that information is relevant to
the admissibility question. Expert opinions that individuals are or are not
dangerous in specified circumstances remain beyond the range of expertise
due to the quantitative and qualitative sufficiency components of such de-
terminations.

C. The Framework Applied

Insofar as capital sentencers rest their decisions to apply capital pun-
ishment on determinations of dangerousness, they must estimate the risk
presented by the offenders and make justificatory judgments that the char-
acteristics of these offenders that generate risk render them appropriate for
intervention through criminal punishment. That is, insofar as risk pro-
vides a basis for more severe punishment than the offender would qualify
for on the basis of culpability assessed without consideration of risk, it
must be risk generated in a manner that justifies the increased condemna-
tion inherent in more severe punishment. Thus, relevant expert testimony
might include estimates of risk in various circumstances, descriptions of
the characteristics of the offender and the circumstances that generate risk,
explanation of the manner in which those factors increase the probability
or severity of risk, and explanation of the manner in which the offender
developed those factors. Such testimony can enhance the ability of the
sentencer to make the justificatory judgment that the offender does or does
not merit increased condemnation for inflicting that risk upon the public.
Insofar as relevant information is available, descriptive and explanatory
testimony of this type might enhance the ability of conscientious sen-
tencers to make justifiable sentencing decisions for offenders such as those
previously discussed. Such testimony might enable sentencers to conclude
that Anderson, Baker, and Cook present risk due to characteristics that
preclude responsibility for the elevated risk or for developing those char-
acteristics. Thus, the increased risk they present does not justify condem-
nation and punishment beyond that which is justified by their culpability,
or lack thereof, for their crimes.

Davis, in contrast, presents risk due to characteristics that do not im-
pair his capacities for responsible agency either for the predicate offense
or for the ongoing risk he inflicts upon the public. Reasonable sentencers
might conclude that he remains subject to condemnation for his culpable
crime and for the risk of further criminal conduct that he culpably injects
into the public domain. Alternately, these sentencers might conclude that
he resembles the child murderer discussed previously in that his crime
provides sufficient culpability to justify the maximum sentence, and there-
fore, any risk is sufficient to meet the statutory requirement of dangerous-
ness because no further basis for condemnation is needed. 3 Finally, some sentencers who are persuaded by the argument that the failure to experience moral emotions precludes or reduces culpability might interpret this testimony as mitigating. 136 The critical point is that descriptive and explanatory testimony falls within the expertise of psychological experts and enhances the ability of the sentencers to fulfill their responsibilities without distorting the boundary between the legitimate functions of witnesses and sentencers.

East presents a difficult case because his predicate crime and the increased risk he presents reflect impairment of his ability to apply the capacities of responsible agency. This impairment does not preclude culpability and condemnation but may justify lesser condemnation than would be appropriate for an unimpaired offender who commits similar crimes. The sentencer must weigh the significance of this impairment in the absence of any clear formula or decision rule. At least part of this process involves understanding of the impairment and its effects on East's ability to apply comprehension and reasoning in the circumstances. Thus, expert testimony that provides thorough explanation of the impairment and of the manner in which it can affect decision making in various circumstances can provide relevant assistance to the sentencer. The sentencer's task remains difficult, and the most defensible resolution to that task may remain legally and morally controversial. A sentencer who concludes that East's impairment constitutes a two-edged sword must be able to consider and give effect to the mitigating edge. Supreme Court doctrine provides no clear direction for the sentencer who must make a sentencing decision regarding the ultimate significance of this evidence for East's sentence. By presenting testimony that falls within the domain of expertise, however, the expert can provide any assistance that is legitimately available and avoid distorting the boundary between the responsibilities of the expert and the sentencer.

VIII. CONCLUSION

The contemporary debate regarding capital punishment raises a complex series of legal, moral, and empirical questions. Many of these questions are relevant to the criminal justice system generally, but they draw intense reaction in the context of capital punishment. Courts and commentators tend to focus on either the legal, moral, or empirical concerns, but serious attempts to address these questions often require careful attention to the complex relationships among these concerns. The Supreme Court's opinions addressing the legitimate penal purposes of punishment appar-

135. See supra text accompanying note 111.
136. See supra note 91 and accompanying text.
ently import the moral inquiry into the legal doctrine. As discussed in Section III, however, the interpretation of and justification for this doctrine remain unclear. It is difficult to articulate the most defensible approach to evidence that can function as a two-edged sword partially because we lack a clear interpretation of and justification for this doctrine. Thus, we are unable to clearly articulate the approach to two-edged sword evidence that would most accurately apply to this legal doctrine or to the moral justification for this doctrine.

Similarly, attempts to define the limits of expert testimony regarding dangerousness for the purpose of capital sentencing tend to direct attention toward the available empirical data. Although the empirical research provides an important component in a comprehensive analysis of the most defensible form and limits of expert testimony, a fully satisfactory analysis must integrate this research with the applicable legal conception of dangerousness that reflects the justification for criminal punishment generally and for capital punishment specifically. The analysis presented in this article contends that one cannot identify the appropriate range and form of expert testimony for this purpose unless one addresses a complex set of considerations including at least the available empirical research regarding risk assessment and management, the form and range of the proposed testimony, the legal conception of dangerousness applicable to this specific legal purpose, the applicable legal doctrine, and the justifiable role that doctrine fulfills in defining the legitimate purpose and limits of capital punishment. This analysis represents one step in an ongoing effort to pursue the integration of these moral, legal, and empirical domains of inquiry regarding capital punishment.

This analysis supports the conclusion that expert witnesses should not make predictions of dangerousness for the purpose of capital sentencing for the same reason that they should not make such predictions for other legal purposes and for the same reason that courts and juries should not make such predictions. Judgments of dangerousness for specific legal purposes are not predictions. Rather, they are estimates of the risk in the circumstances and judgments that this risk is quantitatively and qualitatively sufficient to justify the legal liability or intervention at issue. Similarly, expert witnesses should not offer putatively expert opinions that offenders are or are not dangerous for the purpose of capital sentencing because judgments that individuals are or are not dangerous for this or any other legal purpose require justificatory judgments of quantitative and qualitative sufficiency that extend beyond the expert’s range of expertise.

Recognizing that determinations of dangerousness involve empirical and justificatory components enables expert witnesses to provide a range of relevant descriptive and explanatory testimony that falls within their scope of expertise and provides important information to sentencers who must combine the empirical estimate of risk with the necessary justificatory judgments. The precise range and form of that testimony can vary
with the circumstances, the available information, the specific legal purpose at issue, and the judge’s evaluation of the probative and prejudicial potential of that testimony.