Capital Punishment and Dangerousness
by Christopher Slobogin*

In an article entitled *A Jurisprudence of Dangerousness*¹ (since largely replicated in a book chapter²) I sketched out a set of principles that might govern the use of preventive detention based on assessments of dangerousness to others. In this chapter I apply those principles to the ultimate form of prevention, capital punishment. More specifically, this chapter addresses the following issues: (1) whether dangerousness may be considered an aggravating factor that justifies imposition of a death sentence on a person convicted of capital murder; and, if so, (2) how dangerousness should be defined in that context; and (3) how to resolve the two-edged sword problem (which arises when ostensibly mitigating mental disability is also the cause of an individual’s dangerousness).

My conclusions on these issues can be sketched out as follows. In theory, dangerousness is a legitimate aggravating factor in capital cases. In practice, however, it should virtually never form the basis for a death sentence, for two reasons: the government will seldom be able to demonstrate the level of risk it must demonstrate to justify the ultimate penalty nor will it usually be able to show that execution is the least restrictive means of achieving harm prevention in an individual case. Furthermore, on those rare occasions when the government is able to meet both of these stipulations, a death sentence might still be barred if serious mental illness contributed to the capital offense. While mental disability can cut both ways—supporting both an argument for reduced culpability and an argument for increased dangerousness—when it significantly impairs the individual’s conduct at the time of the offense retributive and deterrence considerations bar imposition of the death penalty, regardless of how dangerous the individual might be.

Part I of this chapter describes in more detail the jurisprudence of dangerousness I have developed in other work. Part II explains the implications of that jurisprudence for dangerousness as an aggravating factor in death penalty cases. Part III analyzes the two-edged sword problem. Part IV explains why serious mental disability should be an absolute bar to execution.

I. A Jurisprudence of Dangerousness

In *A Jurisprudence of Dangerousness*, I began by exploring four objections to long-term preventive detention of people considered dangerous to others: the unreliability objection; the

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²Christopher Slobogin, Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty ch. 4 (Harv. U. Press, 2006). References throughout this paper will be to this chapter rather than the article, since the chapter reflects a slightly revised version of the article.
legality objection; the punishment-in-disguise objection; and the dehumanization objection. I concluded that none of these objections, alone or combined, require a prohibition on preventive detention, but that each does impose limitations on its implementation. A synopsis of these views is provided here.

A. The Unreliability Objection

It is well-accepted that, even with recent advances in actuarial prediction and structured professional judgment instruments, we are not particularly good at identifying who will recidivate or when.3 In light of our incompetence at assessing violence risk, some have argued that preventive detention is unconscionable.4 The point is a simple one: Deprivations of liberty, especially when they also involve deprivations of life, should not be based on such suspect assessments.

There are several responses to this objection. First, when the goal is prevention of violence rather than its punishment, some relaxation in the required standard of proof is justifiable, a principle recognized in other legal contexts.5 The adage that ten murderers should go free before one innocent person is convicted, while perhaps acceptable as an illustration of our commitment to justice, is much harder to swallow when we know that a sizeable proportion of the ten guilty persons will commit another murder if all of them are let go.6 Second, while predictive judgments will always be suspect, the retrospective judgments necessary to implement the primary alternative to prevention—waiting until a criminal act has occurred and punishing it based on its relative culpability—are at least as flawed. Mens rea concepts—the primary means of grading responsibility for crime—are notoriously difficult to define and apply in a consistent

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3At one time, the violence prediction false positive rate (i.e., the rate at which predictions turned out to be wrong) was said to be stuck at about 60 or 70%. See John Monahan, The Clinical Prediction of Violent Behavior 47-49 (1981). Today, newer methodologies may have reduced those rates significantly, but they still hover around 50%, according to most studies. See John Monahan et al., An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders, 56 Psychiatric Services 810, 814 tbl.2 (2005) (49% false positive rate using modern risk assessment instrument).


5See, e.g., Terry v. Ohio, 392 U.S. 1, 22 (1967) (“[The] general interest . . . of effective crime prevention and detection . . . underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”); 2 Wayne R. LaFave, Substantive Criminal Law § 12.1(c) (2d ed. 2003) (noting that, despite controversy over the ease with which it can be proven, conspiracy continues to exist as a crime because it serves as a preventative means of dealing with those who have a disposition to commit crimes).

fashion, and legislatures and courts have yet to develop an objectively neutral and coherent metric for measuring blameworthiness; as a result, offenders with the same level of blameworthiness can easily receive wildly divergent sentences.

Third, again comparing the two systems, mistakes about dangerousness are, at least in theory, much easier to correct than mistakes about culpability. For reasons described below, preventive detention must continually be justified through periodic review, a requirement that can affect even the capital punishment process. In contrast, periodic review is inconsistent with the notion of punishing a person for his or her past conduct. An offender’s culpability for a completed act does not change. Furthermore, once culpability is determined at trial and affirmed on appeal, it is considered res judicata; the issue will never be revisited.

The conclusion that difficulties in measuring dangerousness do not preclude preventive detention does not mean, of course, that preventive detention is permissible upon any showing of risk. There should be both qualitative and quantitative restrictions on the government’s efforts to prove the requisite level of dangerousness. In other work, I have argued that in trying to meet its proof burden regarding dangerousness, the government may rely only on previous criminal acts and expert testimony based on empirically derived and appropriately normed probability estimates, unless the subject of the prediction opens the door to non-statistical, “clinical” prediction testimony by relying on it to prove he or she is not dangerous. This “subject-first” regime, I argued, “allows the government to prove dangerousness in the most accurate, least confounding manner, while permitting the offender-respondent to attack the state’s attempt at preventive detention on the ground that the numbers do not accurately reflect his or her violence potential.”

In addition to this evidentiary restriction, the government’s proof should have to meet the standard of proof dictated by what I have called the “proportionality principle.” That principle states that the degree of dangerousness required for preventive detention should be roughly proportionate to the degree of liberty deprivation the state seeks. For example, under the proportionality principle, greater proof of dangerousness would be required for imprisonment than for a stop and frisk designed to prevent street crime. Similarly, if incarceration occurs, the

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7See Slobogin, supra note 2, at 165-66.

8See Paul Robinson & John Darley, Justice, Liability and Blame: Community Views and the Criminal Law 226 (1995) (noting that in 20 percent of the scenarios that subjects were asked to rate in terms of culpability, the standard deviation on culpability ratings exceeded 3.50, a number suggesting extremely high disagreement).

9See infra text accompanying notes 23-25.


11Id. at 281. See generally, Christopher Slobogin, Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness chs. 6 & 7 (Oxford Univ. Press, 2006).

12Slobogin, supra note 2, at 143.
extent of proof required would increase with its duration.13

B. The Legality Objection

Even if the standard of proof for preventive detention is clearly established pursuant to
the proportionality principle, dangerousness remains a vague term. In particular, clarification is
necessary with respect to both the type of predicted harm that authorizes preventive detention
(only physical violence, or theft and minor assaults as well?), and the type of act, if any, that
triggers it (only serious crime, any antisocial act, or the presence of biological or environmental
“static” risk factors as well?). Statutes that fail to provide such clarification can give rise to an
objection based on the principle of legality: they give neither citizens or government officials
sufficient notice of the circumstances under which preventive detention can occur, and thus both
chill innocent behavior by citizens and increase the potential for abuse by officials.14

This objection might lead to two further limitations on preventive detention, one having
to do with its goal and the second having to do with its threshold. First, preventive detention
should be aimed only at preventing serious harms.15 Second, it should occur only after an
individual has committed a criminal act or engaged in obviously risky behavior.16 The legality
rationale for these two limitations, stated briefly, is that preventive detention that is aimed at
preventing minor antisocial acts, or that is based on a person’s static characteristics or on acts
that are not obviously risky, would seriously undermine the rule of law. It would give
government officials carte blanche to round up undesirables who are only trivially risky or who,
even if they pose a significant threat, have not demonstrated, and may well not be aware of, any
tendency to carry out it out.17 If intervention is permitted before that demonstration occurs, we
are sanctioning confinement based on status, not on a choice made by the individual.

13Id. at 143-45. A third limitation, suggested by Robert Schopp at the conference, is that only those risk
factors that sound in retribution (e.g., a tendency to premeditate crime, prior bad acts) may be considered by the
factfinder. However, as I have argued elsewhere, there is no a priori reason why retribution should drive the
analysis when adjudication moves from the trial to the sentencing stage. See Slobogin, supra note 11, at 112-14.

14For a good treatment of the principle of legality, see John Calvin Jeffries, Jr., Legality, Vagueness, and the

15In fact, most civil commitment statutes so limit commitment on danger to other grounds. See, e.g., Fl.
Stat. § 394.467 (1) (permitting police power commitment only when “[t]here is substantial likelihood that in the near
future [the individual] will inflict serious bodily harm on himself or herself or another person, as evidenced by recent
behavior causing, attempting, or threatening such harm . . . .”).

16Cf. Lambert v. California, 355 U.S. 225 (1957) (striking down a conviction for failing to register as a
felon upon entering Los Angeles). Professor Jeffries has argued that Lambert “stands for the unacceptability in
principle of imposing criminal liability where the prototypically law-abiding individual in the actor’s situation would
have had no reason to act otherwise.” Jeffries, supra note 14, at 211-12.

17See Slobogin, supra note 2, at 119-122.
C. The Punishment-in-Disguise Objection

Long-term prevention detention based on perceived dangerousness has traditionally been confined to people with serious mental illness. A number of commentators, Justice Stevens among them, have expressed concern that allowing the government to engage in preventive detention beyond this limited sphere would lead to the “evisceration of the criminal law and its accompanying protections.” Stevens conjectured that a shadow criminal code would develop to deal with individuals thought to be prone to sexual offending, domestic violence, drunken assaults, and the like. Furthermore, because such a shadow system would not constitute a “criminal prosecution” of the type referred to in the Sixth Amendment, the constitutional rules associated with criminal trial need not be followed, thus possibly increasing the potential for malfeasance by state actors.

This objection is rightly concerned with the risk that a robust system of preventive detention could become the preferred method of liberty deprivation because of the perception that it places fewer obstacles in the government’s way. But preventive detention need not be prohibited on this ground, or even reserved solely for those with serious mental illness, if it adheres to the admonition in the Supreme Court’s decision in Jackson v. Indiana that “the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” If this due process principle is carefully followed, preventive detention of people who are not mentally ill should be permissible.

More specifically, preventive detention is constitutional under Jackson if three limitations are observed. First, the nature of the government’s intervention must bear a reasonable relation to the harm contemplated. For instance, not all individuals who pose a risk require long-term institutionalization; thus, preventive intervention more accurately describes the subject of this discussion (although I will continue to speak of preventive detention because that is the usual focus of analysis). Second, the duration of the intervention must be reasonably

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18See, e.g., Foucha v. La., 504 U.S. 71, 82 (1992) (White J., plurality) (noting that, under the “present system,” confinement can only occur after criminal conviction, with the exception of “permissible confinements for mental illness”).


20Id.

21The Sixth Amendment guarantees that in “all criminal prosecutions,” the accused shall be entitled to the rights to notice, public jury trial, confrontation of accusers, compulsory process, and the assistance of counsel. U.S. Const. amend. VI.


23The Supreme Court has indirectly recognized this principle in construing the American with Disabilities Act. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600 (1999) (noting that “unjustified institutional isolation of persons with disabilities is a form of discrimination”).
related to the harm predicted. Discharge is required when the individual no longer poses a danger, and treatment is required if it will shorten the duration of confinement. Third, to ensure these requirements are met, the individual is entitled to periodic review, at which the state must show the individual continues to pose the requisite risk (which, under the proportionality principle, should become increasingly difficult over time).

The concern that such review proceedings will be too informal to act as a brake on abuses of discretion can also be answered. It is true that the Sixth Amendment rights to notice, counsel, confrontation, compulsory process, and public jury trial do not attach at such “civil” review proceedings. But any and all of these rights might still be required under the due process clause, a constitutional provision which, the Supreme Court’s juvenile justice jurisprudence makes clear, is triggered whenever significant deprivations of liberty are contemplated.

D. The Dehumanization Objection

The dehumanization objection is that, even if all of the other objections are met, preventive detention shows insufficient respect for the individual because it signals either that the person detained does not possess the capacity to choose the good or that, having such capacity, the person will not do so. Put in terms several moral philosophers have used, the dehumanization objection posits that people who have committed a criminal or obviously risky act (which the principle of legality requires even for preventive detention), have a right to be punished for that act, as a method of honoring their autonomous personhood. Subjecting them instead to preventive detention insults their humanity because it ignores the fact that they have made a choice to do harm and, as Hegel put it, regards them not as “rational actor[s]” but “simply as . . . harmful animal[s] which must be rendered harmless.”

These types of concerns are difficult to evaluate because they are so abstract. In *A Jurisprudence of Dangerousness*, I argued that they are most potent when the government creates two systems of liberty deprivation for those who commit antisocial conduct—one designed to punish and the second designed to preventively detain individuals—and then chooses

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24Christopher Slobogin et al., A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children, 1999 Wis. L. Rev. 185, 213 (arguing that the Court’s decision in Youngberg v. Romeo “could easily be parlayed into a robust right to treatment necessary to reduce prolonged confinement”).

25In Kansas v. Hendricks, the Court emphasized the periodic review feature of the sex predator statute at issue in coming to the conclusion that commitment under that statute is not punishment. 521 U.S. 346, 363-64 (1997).


27See generally Leo Katz et al., Foundations of Criminal Law 83-96 (1999) (concluding that “retributivists like Kant, Morris and Moore . . . believe that criminals have a right to be punished.”).

the latter option.\textsuperscript{29} In this “two-track” situation, preventive detention palpably signals that the person is different, a “harmful animal” rather than a rational actor who has chosen to commit culpable harm.\textsuperscript{30} A good example of this de-humanizing two-track regime is found in states that have adopted the so-called “sexual predator” scheme—note the use of the animalistic word “predator”—which shunts the individual into a separate system either at the charging stage or after sentence is completed.\textsuperscript{31}

The dehumanization objection is less powerful, however, when preventive detention is incorporated into the criminal justice system, as occurs with indeterminate sentencing. In such a setting, all offenders are evaluated along a continuum of dangerousness, thereby avoiding the explicit and stigmatizing “dangerous being” label that characterizes the separate sexual predator regime. Moreover, in contrast to the latter regime, detention based on dangerousness in a single-track criminal justice system occurs immediately after a conviction representing that the individual autonomously chose to cause harm, and thus is closely associated with punishment based on desert. At the least, a “weak” version of the right to punishment is maintained in this latter scenario.\textsuperscript{32}

Even a two-track system does not violate the right to punishment envisioned by Hegel and others when it is applied to an individual who should not be considered a “rational actor.” This exception explains why people with serious mental illness can be subject to long-term preventive detention, either through civil commitment or after an acquittal by reason of insanity.\textsuperscript{33} In \textit{A Jurisprudence of Dangerousness}, I argued that the irrational actor exception also justifies detention of enemy combatants under orders to kill, terrorists, and extremely impulsive individuals, including sex offenders, who might colloquially be described as people who would commit their crimes even with a policeman at their elbow.\textsuperscript{34} Unlike people with serious mental illness, these latter individuals can be considered autonomous individuals. But they do not deserve the right to punishment because they exercise their autonomy in the wrong direction

\textsuperscript{29}Slobogin, supra note 2, at 125-26.


\textsuperscript{31}See, e.g., Kan. Stat. Ann. §§ 59-29a01, 59-29a02(a) (1994) (establishing “a civil commitment procedure for the long-term care and treatment of the sexually violent predator,” defined as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”).

\textsuperscript{32}Slobogin, supra 2, at 127-28 (contrasting weak and strong views of the right to punishment, with the latter concept prohibiting all forms of preventive detention based on Hegel’s views).


\textsuperscript{34}Slobogin, supra note 2, at 136-38.
even when faced with death or a significant punishment.35

The dehumanization objection, then, might lead to a prohibition on preventive detention as an alternative to, rather than an enhancement of, punishment, except when it is directed at individuals who are unaware they are engaging in criminal conduct (the seriously mentally ill) or who are extremely reckless with respect to the prospect of serious loss of liberty or death resulting from the criminal conduct (e.g., terrorists). Those in the first group are irrational in the classic sense captured by the typical insanity defense formulation.36 Those in the second group are irrational in the sense that they choose to disregard society’s most significant prohibitions. Another way to characterize these two groups is that they comprise the universe of individuals who are “undeterrable,” i.e., those who are unaffected by the prospect of criminal punishment or significant harm.37 An alternative regime of liberty deprivation is justifiable for these individuals because the dictates of the criminal justice system have little or no impact on them.38

E. Summary

Liberty deprivation based on dangerousness is permissible under five conditions, organized here somewhat differently than in the discussion above. The state must show: (1) that the level of risk is proportionate to the liberty deprivation contemplated, using methods of prediction that minimize inaccuracy; (2) that the harm predicted is substantial; (3) that the preventive intervention sought is no more restrictive than necessary to prevent the harm contemplated (a determination that should be subject to periodic review); and, when the preventive intervention is not part of a criminal sentence following conviction, (4) that the individual has engaged in obviously risky conduct; and (5) that the individual is undeterrable, either due to serious mental illness or to a preference for crime over freedom. The next section discusses the implications of these conditions for capital sentencing.

II. Dangerousness as an Aggravating Circumstance in Capital Cases

35At the same time, when government is entitled to exercise either the punishment or the preventive detention option, I argued that the punishment route must be taken initially. Given the right to punishment, “it is sensible to presume that . . . everyone is deterrable” because this presumption “fits better with our legal system’s preference for autonomy, and prevents unnecessarily unleashing the repugnant labeling effects associated with the preventive detention option.” Id. at 139.

36See, e.g., Model Penal Code § 4.01 (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”).

37Slobogin, supra note 2, at 134-35.

38Note, Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1201, 1233 (1974) (arguing that commitment is justified when it is limited to preventively detaining those who are “unaffected by the prospect of punishment”).
Approximately six states explicitly designate dangerousness as a “statutory” aggravating circumstance in capital cases, and another twenty or so make it a non-statutory aggravator (meaning that it can justify the death penalty if at least one statutory aggravator is also proven). In these states, the prosecution is permitted to present testimony that a person who has been convicted of capital murder should be given a death sentence because he or she is dangerous, typically defined as “a probability that the individual will commit criminal acts of violence that constitute a continuing threat to society.” In Jurek v. Texas the Supreme Court upheld the constitutionality of death sentences based on this finding (which I will therefore call the Jurek formulation).

If one subscribes to the five conditions under which dangerousness assessments may affect deprivations of liberty described at the end of Part I, the Jurek formulation is deeply suspect. This is not to say dangerousness can under no circumstances constitute a ground for a death sentence. Unless one adopts Hegel’s view that any type of preventive detention violates the right to punishment, death penalty statutes that make dangerousness an aggravating factor do not trigger the dehumanization objection, because the prevention implemented through execution is part of a sentence demarcated by retributive principles and comes after a conviction. This latter fact also partially overcomes the legality objection, because it limits the potential for official abuse. In other words, conditions (4) and (5) are rendered moot in capital cases by the fact that the dangerousness finding follows conviction and is meant to enhance a criminal sentence.

However, the other three conditions, to varying degrees, pose significant problems for the Jurek formulation. First, as condition (2) recognizes, another consequence of the principle of legality is that government intervention may not occur simply to prevent prevent minor harms. To the extent the phrase “criminal acts of violence” in the Jurek formulation is construed broadly to include simple assaults and similar types of antisocial acts, this condition is violated.

More significantly, in the usual case, condition (1) (requiring proof of dangerousness commensurate with the nature of the government intervention) and condition (3) (requiring that the intervention be limited to that necessary to achieve the government’s aim) will be impossible.


42 If one follows Hegel’s view that any type of preventive detention denigrates the individual’s status as a rational actor, then execution would be a permissible form of prevention only for those who are undeterrable—people with serious mental illness and people who prefer crime over freedom. All members of the former group and perhaps some of those in the latter group should still be exempt from execution, however, for reasons developed further in Part IV.

to satisfy. Execution is obviously the most invasive form of prevention the state can impose on an individual, and thus, under proportionality reasoning, requires the strongest proof of dangerousness.\textsuperscript{44} If, as the Supreme Court has held,\textsuperscript{45} involuntary hospitalization through civil commitment requires clear and convincing evidence of dangerousness, capital punishment requires proof of dangerousness beyond a reasonable doubt. Thus, the \textit{Jurek} formulation, which permits execution based on a mere “probability” that the offender will commit violent acts, may be inadequate on its face. While most state death penalty statutes require that this probability be proven beyond a reasonable doubt,\textsuperscript{46} this standard of proof, combined with the definition of dangerousness, still permits execution based on a less than one-in-two chance the person will commit a violent act.\textsuperscript{47} That result is inconsistent with the fact that a mere arrest requires roughly the same degree of certainty.\textsuperscript{48} Proportionality reasoning mandates that when dangerousness is the justification for imposing the ultimate penalty, it ought to be manifest, meaning that the state should have to show a very high potential for recidivism (perhaps as high as 90-95\%). Given current prediction science,\textsuperscript{49} that type of showing will be possible only in the rarest of cases.\textsuperscript{50} Furthermore, given the periodic review requirement, such a showing must be made not only at the time of sentencing, but at the time of execution, which can sometimes occur years later.

Just as difficult will be the showing required by condition (3), which the \textit{Jurek} formulation fails to reference. Even if the state can demonstrate beyond a reasonable doubt that a given individual represents a serious threat of harm, some intervention short of execution can usually prevent that harm from occurring. Isolation is the most obvious example of a less restrictive yet equally efficacious intervention, although other dispositions, including some type

\textsuperscript{44}See Slobogin, supra note 2, at 145.
\textsuperscript{48}When asked to quantify the degree of certainty represented by the phrase “probable cause,” 166 federal judges gave, as an average response, 45.78\%. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 Vand. L. Rev. 1293, 1325 (1982).
\textsuperscript{49}See supra note 3.
\textsuperscript{50}If the government is limited to empirically derived probability estimates, as I propose, see supra text accompanying notes 10-11, such proof will extremely difficult because, even with well validated instruments, a risk level of over 75\% is unusual. See Eric S. Janus & Paul E. Meehl, Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings, 3 Psychol., Pub’l Pol’y & L. 33, 49, 58-59 (1997) (describing the “upper limits” of prediction science); Grant T. Harris et al., Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 L. & Hum. Behav. 377, 385 (2002).
of treatment, might be feasible (and would be required if they might reduce risk).\textsuperscript{51} The periodic review requirement, while typically a protection for the individual, would also enable the government to monitor the individual’s progress in this regard. In the unlikely event the state could show at such a hearing both the heightened degree of danger demanded by the proportionality principle and that alternatives to execution have not achieved its preventive aim, execution could take place.

III. The Two-Edged Sword Problem

Every capital sentencing scheme recognizes mental disability as a mitigating circumstance,\textsuperscript{52} a stance that is almost certainly required by the Constitution.\textsuperscript{53} Formulations of the various mental state mitigators differ, but most are patterned on the Model Penal Code’s capital sentencing provision, which recognizes the following conditions as mitigating: extreme mental or emotional disturbance at the time of the offense; an impaired capacity to appreciate the wrongfulness of the crime or to conform conduct at the time of the crime to the requirements of the law, and circumstances that led the offender to believe the crime was morally justified or extenuated.\textsuperscript{54} The scope of mental disability’s potential mitigating impact is probably much broader, however, since the Supreme Court has emphasized that “the Eighth and Fourteenth Amendments require that the sentence, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character . . . .”\textsuperscript{55}

The two-edged sword problem arises when mental disability is associated not only with a mitigating factor but also with an aggravating circumstance. Dangerousness is one aggravating factor that could be linked with mental disability.\textsuperscript{56} Another is the heinousness of the capital crime, which permits a death sentence to be imposed if the capital murder was committed in a

\textsuperscript{51}Even psychopathy, traditionally considered incorrigible, might be susceptible to treatment. See Psychopathy: Antisocial, Criminal and Violent Behavior 359-462 (Theodore Millon et al., eds. 1998).

\textsuperscript{52}Ellen Fels Berkman, Mental Illness as an Aggravating Circumstance in Capital Sentencing, 89 Colum. L. Rev. 291, 296-98 (1989).


\textsuperscript{54}Model Penal Code § 210.6(4).

\textsuperscript{55}Lockett, 438 U.S. at 604 (emphasis added).

\textsuperscript{56}Mental illness is not a major predictor of crime, see James Bonta et al., The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta Analysis, 123 Psychological Bull. 123 (1998). But a large body of evidence suggests that, compared to the general population, individuals suffering form schizophrenia are from 4 to 8 times more likely to commit homicide. Taina Laajasaol & Helena Hakkanen, Offence and Offender Characteristics Among Two Groups of Homicide Offenders with Schizophrenia: Comparison of Early- and Late-Start Offenders, 16 J. For. Psychiatry & Psychology 41 (2005) (summarizing research).
heinous, vile or wanton manner.\footnote{See, e.g., Tenn. § 39-13-204(i)(5) (listing as an aggravating factor that the murder was “especially heinous, atrocious, or cruel in that it involved serious physical abuse beyond that necessary to produce death”).} If a sentencer finds that an offender was substantially impaired in his ability to appreciate the wrongfulness of his act, but that this same lack of appreciation also makes him dangerous or contributed to the vileness of the crime, how is the sentencer to analyze the offender’s eligibility for a death sentence? Is it appropriate to consider both the mitigators and the aggravators that result from mental disability, or may only the mitigators be considered?

The Supreme Court has yet to answer these questions, despite appearances to the contrary. In Zant v. Stephens, the Court stated that giving aggravating effect to factors such as “race, religion or political affiliation or . . . conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant’s mental illness,” is constitutionally impermissible.\footnote{462 U.S. 862, 885 (1983).} And just this past term the Court insisted that the sentencing jury “must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.”\footnote{Abdul-Kabir v. Quarterman, 127 S.Ct. 1654, 1664 (2007).} These pronouncements do not settle the matter, however. The quotation from \textit{Zant} is dictum and is cautious in any event, and the language just quoted was simply aimed at ensuring that the jury is not given instructions that lead it to ignore mitigating evidence in jurisdictions where dangerousness is an aggravating circumstance.\footnote{In \textit{Quarterman}, the trial judge refused to give instructions that would have told the jury to consider the offender’s mitigating evidence as a rebuttal to the state’s claim that he was dangerous. Had the instructions been given, the Court probably would have found no error. Id. at *15.} Thus, these cases do not tell us whether a death sentence can be based on a finding of dangerousness caused by a mental condition that would otherwise be mitigating.

To begin to address this issue, consider how it might be analyzed if the aggravating circumstance in question were heinousness rather than dangerousness. Heinousness is relevant to assessing the culpability of the offender. Mental illness, when it is considered a mitigator, also addresses culpability. Thus, when the wanton nature of a murder is due to mental disability significant enough to be a mitigating circumstance (as could be the case, for instance, where the offender, due to psychosis, stabs the victim multiple times), permitting a jury to sentence the individual to death based on the heinousness aggravator would be illogical. For that result would mean the jury must have concluded that the mental disability simultaneously rendered the individual more culpable and less culpable.\footnote{In Huckaby v. State, 343 So.2d 29 (Fl. S. Ct. 1977), the Florida Supreme Court so held. Id. at 34.}
The dangerousness aggravator, in contrast, is not focused on a backward-looking culpability assessment; rather it measures future risk. A jury could logically conclude that an individual’s mental disability both diminishes personal responsibility for the capital murder and increases the risk of a subsequent violent act. Thus, the jury can find both factors present and then decide which effect of mental disability merits more weight in the death penalty decision-making process.62

Certain types of mental disability, however, might be so significant in their mitigating effect that they trump any degree of aggravation, whether based on dangerousness or some other factor. This possibility is briefly addressed in the next section.

IV. Mental Disability as a Bar to Execution

In Atkins v. Virginia,63 the Supreme Court held that offenders with mental retardation may not be executed. A significant part of the holding was the Court’s assessment that execution of people with retardation would not serve the state’s retributive and deterrence goals in the death penalty context. According to the Court, “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”64 Furthermore, “the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—. . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”65

Elsewhere I have argued that mental illness that contributes to the offense should likewise lead to exemption from the death penalty.66 More specifically, I proposed that offenders who, at the time of the offense, “had a mental disorder that significantly impaired their capacity to appreciate the nature, consequences, or wrongfulness of their conduct or to exercise rational judgment in relation to the conduct” should not be eligible for the death penalty.67 This language would exempt any individual who would be excused under the broadest formulations of the insanity defense that focus on cognitive impairment, as well as any offenders who do not meet

62For an elaboration of this argument, see Slobogin, supra note 2, at 90-92.


64Id. at 319.

65Id. at 320.

66Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 New Mex. L. Rev. 293 (2003). See also, Slobogin, supra note 2, at 64-87.

67Id. at 82.
those tests but were psychotic at the time of the offense.\textsuperscript{68} Although one might expect that most of these offenders would be excused at trial on insanity grounds, in fact several death penalty states do not have an insanity defense, and many others have adopted very narrow versions of that defense.\textsuperscript{69} Thus, an exemption to the death penalty based on the formulation described above would have concrete impact.

Just as in \textit{Atkins} itself, the rationale for this proposal is based on retributive and deterrence concerns, not incapacitative ones. Offenders who meet the proposed definition of mental disorder at the time of the offense are at least as impaired as offenders with mental retardation (or adolescent offenders who were exempted from the death penalty in \textit{Roper v. Simmons}\textsuperscript{70}) and thus are no more culpable and similarly difficult to deter. Potential differences between mental retardation and serious mental illness—such as difficulties in determining who is disabled, the extent of the offender’s responsibility for his or her condition, and the probability of recidivism—upon close examination either do not exist or are so insignificant they do not justify different treatment in the death penalty context.\textsuperscript{71}

If that is so, a person with serious mental illness may not be executed even if the state can prove he or she is sufficiently dangerous to justify a death sentence and that execution is the only way to prevent further harm, and even though basing a dangerousness finding on mental illness is not per se impermissible. At the same time, dangerousness based on mental disability that falls short of the serious level of impairment described above may form the basis for a death sentence. In practice, this approach would mean that offenders with psychosis at the time of the offense may not be executed even if extremely dangerous, while offenders with most types of personality disorders may be,\textsuperscript{72} assuming the other conditions noted above are met.

Conclusion

This chapter has argued that dangerousness may not form the basis of a death sentence unless the state proves beyond a reasonable doubt that the offender will commit serious acts of violence if not executed, and additionally effectively rebuts any claim that the offender was

\begin{itemize}
  \item Id. at 82-83.
  \item 543 U.S. 551 (2005).
  \item Slobogin, supra note 2, at 75-80.
  \item A tough question is whether psychopathy fits in the first or the second group. There is good evidence to suggest that at least some people with psychopathy literally cannot “appreciate” the wrongfulness of their actions, which would make them ineligible for the death penalty under my formulation. See Robert D. Hare, \textit{Without Conscience: The Disturbing World of the Psychopaths Among Us} 34, 44 (1993) (stating that psychopaths “seem unable to ’get into the skin’ or ’walk in the shoes’ of others, except in a truly intellectual sense . . . . [They] are glib and superficial, lack remorse or guilt, lack empathy, have shallow emotions and lack responsibility.”).
\end{itemize}

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seriously mentally ill at the time of the offense. If these rules are made mandatory, they should effectively end death sentences based on dangerousness in those jurisdictions that recognize it as an aggravating circumstance. Ironically, however, in states that do not recognize dangerousness as an aggravator, that factor will probably still play a significant role; research strongly suggests that juries routinely consider an offender’s violence proneness in deciding whether to impose the death penalty even when they are legally prohibited from doing so. If that is so, either dangerousness should be made an explicit aggravating factor, with the assumption that the rules described here will make reliance on it both transparent and de minimis, or the death penalty should be abolished on the ground it is impossible to implement fairly.