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Kate E. Bloch

Jeffrey Gould

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***Criminal Law:***  
*Clarifying “Wrongfulness” in Insanity Cases*

Kate E. Bloch & Jeffrey Gould<sup>1</sup>

The “wrongfulness” test is a key approach to assessing legal insanity in most U.S. jurisdictions. It generally requires determining, *inter alia*, whether the accused knew or had the substantial capacity to appreciate that the acts were “wrongful” when the accused committed them.<sup>2</sup> To assist the trier of fact in making that determination, courts and parties commonly invoke the acumen of forensic experts. To decide how to evaluate whether the accused met the requisite standard, the expert needs to understand the meaning that the law in the relevant jurisdiction assigns to the term “wrongful.”

*“Wrongfulness”: Range & Impact of Definitional Choices*

“Wrongfulness” has multiple meanings in insanity law. Over time, scholars and jurists have commonly identified three definitional categories: (1) “legal wrongfulness,” (2) “personal moral wrongfulness,” and (3) “societal moral wrongfulness.”<sup>3</sup> “Legal wrongfulness” refers to whether the accused knew or had the substantial capacity to appreciate that the conduct in question

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1. Summarized and excerpted from Kate E. Bloch & Jeffrey Gould, *Legal Indeterminacy in Insanity Cases: Clarifying Wrongfulness and Applying a Triadic Approach to Forensic Evaluations*, 67 HASTINGS L.J. 913 (2016). Please consult the original article for more detailed analysis, as well as footnotes and citations, most of which have been omitted for purposes of this summary.

2. M’Naghten’s Case, 8 Eng. Rep. 718, 722 (H.L. 1943); MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985).

3. Definitions within the “legal wrongfulness” and “societal moral wrongfulness” categories are commonly applied in insanity law today. While issues related to “personal moral wrongfulness” may arise with some frequency for forensic experts during their assessments, and it is essential for professionals involved in determining, interpreting, and explaining the insanity standard to juries to understand this category and how it may differ from the others, it is not clear if “personal moral wrongfulness” continues to apply as a legally adopted insanity category in the U.S. today.

violated the law or was wrong in the sense of being criminal, although the accused does not need to know the name of the law or title of the crime. “Personal moral wrongfulness” refers to whether the accused knew or had the substantial capacity to appreciate that the conduct violated the accused’s own moral code. “Societal moral wrongfulness” refers to whether the accused knew or had the substantial capacity to appreciate that the conduct violated the moral code of society at large.

Within two of these broad rubrics, “legal wrongfulness” and “societal moral wrongfulness,” there are several more nuanced permutations. With this range of available options, the definition may differ significantly among jurisdictions<sup>4</sup> or perhaps not even be fully delineated within a jurisdiction. As a result, the expert may struggle to ascertain or decipher the meaning of “wrongful” that applies in a particular case or jurisdiction.

Applying the legally incorrect definition of “wrongful” for that jurisdiction may produce insanity-evaluation results with verdict-changing consequences. Imagine, for example, an individual, whom we will call “Jake,” who suffers from schizophrenia and experiences a delusion that the Holocaust never occurred.<sup>5</sup> In his delusional state, he believes that, to avoid a world war in which thousands will die, he must demonstrate to the world that the Holocaust never occurred. Jake becomes fixated on a particular Holocaust survivor and attempts to prevent the survivor from giving a public presentation about the survivor’s traumatic Holocaust experience by accosting and attempting to kidnap the survivor. Because of his delusion, Jake wants to try to persuade the Holocaust survivor to recant the survivor’s account of the Holocaust. Jake understands that battery and attempted kidnapping are criminal. He also recognizes that other members of society believe both that the Holocaust did take place and that assaulting this Holocaust survivor is morally wrong. Nonetheless, as a function of his delusion, Jake believes that he is engaged in meritorious moral conduct and anticipates that, if he can convince the world that the Holocaust did not occur, he will prevent the next world war and be recognized as a hero.

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4. Clark v. Arizona, 548 U.S. 735 (2006).

5. This hypothetical draws generally from a case in which co-author Jeffrey Gould testified as a forensic expert, but the authors have modified the facts from that case to highlight salient issues in the “wrongfulness” context. The defendant’s name has also been changed to protect his privacy.

Using the example of Jake's case can highlight how applying different meanings of "wrongfulness" could lead to different results. With respect to one approach to the "legal wrongfulness" standard, because Jake understood that his conduct was generally unlawful, an expert could reasonably opine that Jake knew or had the substantial capacity to appreciate that his acts were "legally wrongful," implying that he qualifies as sane.

In contrast, applying an approach to "societal moral wrongfulness," in which we assess whether Jake believed that society would approve of his conduct, could lead to the opposite result. From within Jake's delusion (internalized view of the facts) and his corresponding belief that he was preventing the next world war and society would applaud his actions as heroic (internalized understanding of societal morality), an expert could conclude that Jake did not know or have the substantial capacity to appreciate that his acts were "wrongful" in contravention of society's morals, thus implying that Jake qualifies as insane.

Under an alternative approach to "societal moral wrongfulness," the expert might opine that, because Jake understood that other members of society believed both that the Holocaust did occur and believed that assaulting and attempting to kidnap a Holocaust survivor was morally wrong, Jake did or could appreciate that the prevailing societal moral standard would not condone his behavior. The expert might view Jake's belief about the morality of his conduct as reflecting only Jake's idiosyncratic personal moral standard. Under these circumstances, the expert might conclude that Jake did know or had the substantial capacity to appreciate that society viewed his conduct as morally wrong, implying that Jake was sane.

Because applying different meanings of "wrongfulness" can result in opposing conclusions on the issue of insanity, an expert's failure to apply the appropriate definition can undermine plea bargaining in the case or lead to inaccurate trial testimony upon which the jury might rely in reaching its verdict on the defendant's sanity. For forensic evaluators to conduct an insanity evaluation that will effectively aid the trier of fact, definitions of the term "wrongfulness" should be clear and accessible, and the evaluator should know which definition(s) will be applied in a given case.

*Clarifying Definitions of “Wrongfulness”*

All three categories of “wrongfulness” begin with the forensic evaluator and trier of fact working to understand the situation confronting the accused at the time of the offense through the accused’s eyes—in other words, using a lens incorporating any existing delusion or disorder as part of that perspective. This initial process uses the accused’s internalized view of the facts.

For the “personal moral wrongfulness” category, this internalized view of the facts is paired, as the label suggests, with the accused’s internalized, personal view of morality. Applied to Jake’s case, as a result of his delusion, Jake personally believed his conduct was morally appropriate, suggesting that, under the “personal moral wrongfulness” standard, Jake did not know and did not have the substantial capacity to appreciate that his conduct was “wrongful,” implying he should be found insane. This internal-internal pairing produces a single homogenous category.

In contrast, several embedded definitional variations lie within each of the “legal wrongfulness” and “societal moral wrongfulness” categories. These depend upon whether and to what extent there is a claim of “special knowledge,” a belief about reality that is not shared by society generally (in Jake’s case, his “special knowledge” was the delusion that the Holocaust had not occurred), and whether and to what extent the definitional variation views the law and morality from an internalized (the accused’s) or an externalized (society’s) perspective.

Definitional clarity about “wrongfulness” in each of its various permutations is a critical first step in assisting forensic evaluators and triers of fact in their respective responsibilities in assessing an insanity claim.

*Options in the Face of Legal Indeterminacy*

Definitional clarity is key. But, whether the definitions are themselves clear, opaque, or something in between, forensic evaluators also need to know which definition(s) will apply in the case. When the applicable definition is not provided or is otherwise unknown to the evaluator, the forensic expert should consider the following options and tools.

As an initial matter, the evaluator, directly or through counsel, as appropriate, could seek guidance from the trial judge. A binding

ruling from the trial judge defining “wrongfulness” in the case can supply the forensic expert a substantial measure of confidence that the expert’s preparation and assessment for the trial using that standard will prove valuable to the trier of fact. Sometimes, however, whether due to the procedural posture of the case or other obstacles, such a ruling is unavailable at the point in time that the forensic evaluator either prepares the report or testifies at trial.

In the absence of judicial guidance, the forensic scientist could seek guidance from a retaining attorney. If the attorney knows the applicable standard or legal research can reasonably produce it, guidance from the retaining attorney can provide the necessary anchor for the assessment.

When the above options are unavailable, an intrepid forensic expert might consult the pattern jury instructions in the jurisdiction, which sometimes offer accessible and comprehensive guidance on the issue of “wrongfulness.” Some such instructions, however, may not offer adequate guidance. Moreover, if the forensic expert does not have the requisite legal research skills and training, there are risks to relying on legal research, particularly in terms of its potential failure to reflect the most recent legislative or judicial pronouncements on insanity definitions and their applicability.

If no definitive guidance is available from the options above, or, in an abundance of caution, in a jurisdiction that has a “wrongfulness” prong to its insanity standard but does not clearly define the type of “wrongfulness” involved, the expert should consider evaluating “wrongfulness” pursuant to all three of the primary definitions. In other words, the expert can prepare a report with separate sanity analyses and relevant conclusion sections for “legal wrongfulness,” “personal moral wrongfulness,” and “societal moral wrongfulness.” Both the “legal wrongfulness” and “societal moral wrongfulness” categories should include a discussion of any relevant permutations within them. In these circumstances, this *triadic* analysis may most effectively provide a foundation for a negotiated settlement or an expert’s later testimony in the case and for informing the jury about the relevant insanity analysis. Although this triadic approach has some potential drawbacks, it can enhance the forensic expert’s ability to furnish an evaluation that will be of service to the court, the parties, and the trier of fact when the applicable definition of insanity is not ascertainable before the expert must complete an assessment in a criminal case.

*Conclusion*

With a systematic analysis clarifying the primary permutations of “wrongfulness” in the insanity context, an exploration of options for ascertaining the applicable definition(s) for a given criminal case, and a proposal for a triadic analysis when the expert cannot decipher the applicable standard, forensic scientists should be better equipped to guide the trier of fact in evaluating “wrongfulness” in insanity claims.