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Articles

Legal Indeterminacy in Insanity Cases: Clarifying Wrongfulness and Applying a Triadic Approach to Forensic Evaluations

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Insanity law in the United States embodies a convoluted collection of often ill-defined standards. The wrongfulness test, which is used in most U.S. jurisdictions, requires a determination of whether the accused knew or had the substantial capacity to appreciate that the acts were wrong at the time the accused committed them. To assist the trier of fact in making that determination, courts and parties commonly invoke the acumen of forensic experts. But, wrongfulness in insanity law is a word with many possible meanings. In this Article, an academic forensic psychiatrist and a legal scholar propose approaches for effectively navigating this legal indeterminacy. The authors parse and clarify key definitions of wrongfulness and provide practical guidance, including an option for a triadic evaluation, for forensic experts called upon to assist the trier of fact in analyzing the complex interface of morality, mental illness, and the law.

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INTRODUCTION

Jake suffers from schizophrenia and experiences a delusion that the Holocaust never occurred.[1] In his delusional state, he believes that to stave off a world war in which thousands will die, and to respond to tensions in the Middle East, he must demonstrate to the world that the Holocaust never occurred. Jake does not believe that the start of the world war is imminent, but believes he must take some action soon and that his action will be a legally justified one. Jake becomes fixated on, and begins stalking, a published Holocaust survivor. Jake aims to convince this survivor to recant his eyewitness account of the torture inflicted upon him during the Holocaust. Jake follows the Holocaust survivor to a venue where the survivor is scheduled to speak. Jake plans to physically force the survivor to leave the venue with Jake so that he can persuade the survivor to recant. Before the survivor has a chance to give his presentation, Jake accosts the survivor, and pulls him aside in an effort to prevent him from speaking and to force the survivor to leave with Jake. Jake understands that grabbing the survivor's arm to force the survivor to leave with Jake against the survivor's will is generally criminal,[2] although he may not know the legal term "battery" or that his behavior may qualify as "attempted kidnapping."[3] Jake also recognizes that other members of society believe both that the Holocaust did take place and that assaulting this Holocaust survivor is wrong. However, in his delusional state, Jake also believes he might prevent World War III by persuading the Holocaust survivor to recant. As a function of his delusion, Jake anticipates that once this goal is achieved, and he convinces the general public of his special knowledge, society will praise him as a hero.

In the United States today, in the majority of jurisdictions, two legal tests for insanity, or a version of them, prevail by statute or case law: the *M'Naghten* and the American Law Institute ("ALI") Model Penal Code ("MPC") tests.[4] Each test has a prong that requires ascertaining whether

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1. The Jake hypothetical is based loosely on a case in which co-author, Jeff Gould, testified. The authors have, however, 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.

2. *See, e.g.*, CAL. PENAL CODE § 242 (West 2016) ("A battery is any willful and unlawful use of force or violence upon the person of another.").

3. Kidnapping in California, for example, is defined as: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." PENAL § 207(a). For an attempted kidnapping, the prosecution would have to prove that (1) "[t]he defendant took a direct but ineffective step toward committing [kidnapping];" and (2) "[t]he defendant intended to commit [kidnapping]." *460. Attempt Other Than Attempted Murder (Pen. Code, § 21a)*, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS (2015).

4. In the 2006 Supreme Court case, *Clark v. Arizona*, the Court offered the following specifics on the approach to insanity among various U.S. jurisdictions:

> Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined

the accused either knew or had the substantial capacity to appreciate that the conduct was wrongful.[5] With respect to this prong under the *M'Naghten* legal test for insanity,[6] an individual qualifies as insane if, as a result of certain mental diseases or disorders, the individual does not know that the conduct was wrongful.[7] Under the ALI test, a "person is not

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> to yield a diversity of American standards. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests. The first two emanate from the alternatives stated in the *M'Naghten* rule. The volitional incapacity or irresistible-impulse test, which surfaced over two centuries ago (first in England, then in this country), asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870, and simply asks whether a person's action was a product of a mental disease or defect. Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components. One State has adopted only *M'Naghten*'s cognitive incapacity test, and 10 (including Arizona) have adopted the moral incapacity test alone. Fourteen jurisdictions, inspired by the MPC, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse. Three States combine a full *M'Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test. The alternatives are multiplied further by variations in the prescribed insanity verdict: a significant number of these jurisdictions supplement the traditional "not guilty by reason of insanity" verdict with an alternative of "guilty but mentally ill." Finally, four States have no affirmative insanity defense, though one provides for a "guilty and mentally ill" verdict. These four, like a number of others that recognize an affirmative insanity defense, allow consideration of evidence of mental illness directly on the element of *mens rea* defining the offense.

Clark v. Arizona, 548 U.S. 735, 749–52 (2006) (footnotes omitted); s*ee also* RITA J. SIMON & HEATHER AHN-REDDING, THE INSANITY DEFENSE, THE WORLD OVER 40 tbl.3.1 (2006) (providing a chart with a jurisdiction by jurisdiction listing in the United States of the applicable insanity test). For a discussion of the prevalence of the insanity defense in the United States, see, for example, Richard A. Pasewark & Hugh McGinley, *Insanity Plea: National Survey of Frequency and Success*, 13 J. PSYCHIATRY & L. 101, 101 (1985).

5. The *M'Naghten* test reads as follows:

> [T]hat to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 722. The relevant portion of the ALI test, titled *Mental Disease or Defect Excluding Responsibility*, reads: "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 law." MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985).

6. *M'Naghten*'s *Case*, 8 Eng. Rep. at 722.

7. *Id.* The famous English standard drawn from the *M'Naghten* case provides two means of establishing insanity: the lack of knowledge of the wrongfulness of the conduct and a lack of knowledge of the "nature and quality of the act he was doing." *Id.* The *M'Naghten* test itself along with the ALI test or versions of those tests serve as the most common standards for determining insanity in the United States. Although phrased somewhat differently, both have a "wrongfulness" prong. This Article focuses on that prong of both tests.

responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct."[8] Does Jake qualify as insane under these definitions of "wrongfulness"?[9] Did Jake's belief that his conduct could be instrumental in staving off a world war mean that Jake did not know or have the substantial capacity to appreciate that his conduct was "wrongful"? How should a forensic expert, usually a forensic psychiatrist or psychologist, evaluate whether Jake understood his acts were "wrongful"?[10]

Some courts that employ one of these tests also recognize a separate "deific decree" exception in which an accused can be found insane if the accused was under the delusion that God had commanded that the accused engage in the conduct. *See, e.g.*, State v. Applin, 67 P.3d 1152, 1154 (Wash. 2003) ("Defendant 'performs a criminal act, knowing it is morally and legally wrong, but believing, because of a mental defect, that the act is ordained by God.'" (quoting State v. Crenshaw, 659 P.2d 488 (Wash. 1983)). For at least one court, however:

> [R]ather than characterizing the deific-decree delusion as an exception to the right-wrong test for legal insanity, . . . a defendant may be judged legally insane where . . . the defendant's cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act.

People v. Serravo, 823 P.2d 128, 130 (Colo. 1992).

8. MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985). With respect to "wrongfulness," the Commentaries to the ALI Model Penal Code § 4.01 on Mental Disease or Defect Excluding Responsibility note that "[w]rongfulness is suggested as a possible alternative to criminality, though it is recognized that few cases are likely to arise in which the variation will be determinative." *Id.*

9. The distinctions between knowledge and substantial capacity to appreciate wrongfulness are the subject of scholarly discussion elsewhere. *See, e.g.*, Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1211–12 (2000).

10. The role that forensic experts should play in insanity trials has been the subject of much scholarly attention. *See, e.g.*, Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 823 (1985) ("To remedy the 'circus atmosphere' of insanity trials, experts should be prohibited from offering diagnoses, unvalidated explanations, and ultimate legal conclusions. . . . Experts should be limited to offering both full, rich, clinical descriptions of thoughts, feelings, and actions and relevant data based on sound scientific studies."). For a discussion of the role of psychiatric testimony in insanity determinations in Alabama, see Kandice Pickett, *Criminal Insanity and Mens Rea: A Discussion of Alabama Insanity Law and the Role of Psychiatrists in Determining Criminal Insanity*, 31 LAW & PSYCHOL. REV. 179, 190 (2007). In addition to scholarly attention, the American Psychiatric Association ("APA") has also provided a perspective in testimony before Congress:

> [I]t is clear that psychiatrists are experts in medicine, not the law. . . . [T]he psychiatrist's first obligation and expertise in the courtroom is to 'do psychiatry,' i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, 'ultimate issue' questions are formulated by the law . . . [the psychiatrist] no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will . . . . Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.

To decide how to evaluate whether Jake knew or had the substantial capacity to appreciate the "wrongfulness" of his acts, the expert needs to understand the meaning the law in the relevant jurisdiction assigns to the term "wrongful."[11] The American Academy of Psychiatry and Law ("AAPL") explains that "[f]orensic experts are ethically obligated to learn and apply the legal standards of the jurisdiction in which they are performing the evaluation."[12] "Wrongful," however, in the context of legal insanity, is a word of variable meaning.[13] It can mean legally wrong or

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United States v. Long, 562 F.3d 325, 333 (5th Cir. 2009) (citing S. REP. No. 98-225, at 231 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3413). In contrast, a variety of courts allow experts to opine on the ultimate question of the defendant's sanity. *See, e.g.*, Butler v. State, 891 So. 2d 1185, 1185 (Fla. Dist. Ct. App. 2005) ("At trial appellant presented the testimony of three psychologists who all testified that appellant was insane at the time of the offense."). Codes of evidence vary in their treatment of expert testimony on the ultimate issue. For example, the California Evidence Code permits expert testimony on the ultimate issue. According to section 805, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." CAL. EVID. CODE § 805 (West 2016).

For purposes of this Article, we do not attempt to resolve the question of whether forensic experts should testify to the ultimate legal conclusion. Rather, we offer an analysis to help experts address the issues that courts currently do commonly anticipate that forensic experts may discuss during their evaluation and testimony. For further discussion of the ultimate issue opinion question, see *infra* Part II.A.4.

11. The American Academy of Psychiatry and Law ("AAPL") explains the role of the psychiatrist in this context. It opines that "[t]he ability to evaluate whether defendants meet a jurisdiction's test for a finding of not criminally responsible is a core skill in forensic psychiatry." Jeffrey S. Janofsky et al., *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants*, 42 J. AM. ACAD. PSYCHIATRY & L. S3 (2014); *see also* James L. Knoll, IV & Phillip J. Resnick, *Insanity Defense Evaluations: Toward a Model for Evidence-Based Practice*, 8 BRIEF TREATMENT & CRISIS INTERVENTION 92, 95 (2008) ("[T]he psychiatrist should obtain the exact legal insanity standard utilized in the jurisdiction at the time of the crime."). Doctors Knoll and Resnick also indicate that "[t]his standard can be obtained from the court, prosecutor or defense attorney who referred the defendant for the evaluation." *Id.* The primary focus of the current Article is on those circumstances in which the standard is not readily ascertainable.

12. Janofsky et al., *supra* note 11, at S21.

13. "The definition of the term 'wrong' in the *M'Naghten* test has been considered and disputed by many legal scholars." State v. Crenshaw, 659 P.2d 488, 491 (Wash. 1983) (citations omitted). The challenge posed by the term "wrongfulness" also finds voice in the forensic science literature. *See e.g.*, Brandon A. Yakush & Melinda Wolbransky, *Insanity and the Definition of Wrongfulness in California*, 13 J. FORENSIC PSYCHOL. PRAC. 355, 357 (2013) ("[I]t is the issue of wrongfulness that causes the vast majority of confusion and frustration for the forensic evaluator, as well as complexity for the courts."). The article by Yakush and Wolbransky underscores the need for the forensic expert to know the applicable standard and offers a detailed and thoughtful analysis of the "wrongfulness" standard in California from a legal and a forensic viewpoint, including discussion of various definitions of legal and moral "wrongfulness," as well as hypothetical cases addressing subjective and objective components of the moral "wrongfulness" standard. *Id.* But the scope and focus of their article differ from those in ours. While we also emphasize the importance of the forensic expert's knowledge of the applicable standard and analyze legal permutations of "wrongfulness" in the insanity context, our aim is to assist the forensic scientist in ascertaining the standard when it is unspecified, unavailable, or indecipherable prior to the forensic evaluation or testimony. Our proposed contributions include: (1) furnishing a conceptual framework for understanding the roles of the forensic expert and the trier of fact in the insanity evaluation; (2) providing an additional perspective as well as an organizational process and schema for analyzing key permutations of "wrongfulness" in the United States today; (3) supplying

morally wrong, or both. Moral "wrongfulness" may mean the definition of "wrong" that the defendant possessed at the time of the crime. It may also or instead mean the definition that the larger society holds as morally wrong, irrespective of the defendant's individual beliefs. With a range of available options, the definition of "wrongful" may differ significantly among jurisdictions.[14] In addition, it may be difficult or impossible for a forensic expert to ascertain which meaning of "wrongful" will be applied in a particular case or jurisdiction, before the expert needs to make an insanity assessment.

Applying the incorrect definition of "wrongful" may produce insanity evaluation results with verdict changing consequences.[15] Under one common definition, because Jake understood that his conduct was generally criminal, an expert is likely to believe that Jake understands his acts as legally "wrongful," thus implying that Jake qualifies as sane. While, under a second definition, an expert could reasonably believe that Jake understands his acts as morally right. Under this approach, an expert could opine that Jake lacks an understanding of the moral "wrongfulness" of his conduct, thus implying that he would qualify as insane.[16] Because applying different meanings of "wrongfulness" can result in opposite conclusions on the issue of insanity, an expert's failure to apply the appropriate definition can undermine plea bargaining in the

approaches that the expert might pursue to ascertain the applicable standard; and (4) offering practical guidance, by proposing the use of a triadic analysis, in those cases in which the expert cannot ascertain the applicable definition of "wrongfulness" in advance of the evaluation or testimony.

14. *See, e.g.*, *infra* notes 27–28 and accompanying text.

15. "The precise meaning of wrong in this [insanity] context can literally be a matter of life and death." Robert Lloyd Goldstein & Merrill Rotter, *The Psychiatrist's Guide to Right and Wrong: Judicial Standards of Wrongfulness Since* M'Naghten, 16 BULL. AM. ACAD. PSYCHIATRY L. 359, 359 (1988). *But see American Psychiatric Association Statement on the Insanity Defense, in* ISSUES IN FORENSIC PSYCHIATRY 7, 15–16 (1984) [hereinafter *APA Statement*] ("While the American Psychiatric Association is not opposed to state legislatures (or the U.S. Congress) making statutory changes in the language of insanity, we also note that the exact wording of the insanity defense has never, through scientific studies or the case approach, been shown to be the major determinant of whether a defendant is acquitted by reason of insanity. . . . Many psychiatrists, however, believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior." (footnote omitted)). For a discussion of empirical research on the impact of different insanity standards more generally, including research that suggests that differences in standards may not correlate to differences in results, see RICHARD ROGERS & DANIEL W. SHUMAN, CONDUCTING INSANITY EVALUATIONS 87–88 (2d ed. 2000).

16. One challenge before a forensic expert involves the passage of time since the event, where the expert might be trying to ascertain the defendant's understanding or knowledge of wrongfulness at the time of the act from a vantage point of days, weeks, months, and sometimes years after the event occurred.

case. It can also lead to inaccurate trial testimony upon which the jury might rely in reaching its verdict about the defendant's sanity.[17]

This Article aims to assist the evaluating expert when the applicable definition of "wrongfulness" has not been made available to the expert at the time of the expert's entry into the case.[18] To assist the expert in garnering necessary information about the appropriate "wrongfulness" standard for that jurisdiction,[19] we parse the convoluted options in the field of insanity law that define "wrongfulness" and shed light on various permutations and their implications for insanity cases. We then suggest approaches for the forensic expert to pursue so that the appropriate definition can inform the expert's evaluation. If, after pursuing all or an appropriate subset of these approaches, the meaning of "wrongful" remains unavailable or indiscernible, we offer a default resolution in which the forensic expert analyzes "wrongfulness" under three legal definitions of the term.

Part I of the Article introduces the three definitions of "wrongfulness" upon which legal scholars and courts have focused in recent decades. Two of these represent the most commonly applied definitions of "wrongfulness" in insanity cases in the United States.[20] Because a critical component of the forensic expert's role is explaining to the trier of fact how the expert assessed the defendant's insanity claim and how the information in the expert's report or testimony is useful for the purpose of evaluating an insanity claim, Part I offers a framework for conceptualizing the roles of the forensic expert and the trier of fact in assessing legal insanity. The Article uses that framework for analyzing how a forensic expert or trier of fact could apply each of the three legal standards to Jake's situation as described above. Part II then proposes

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17. Some commentators, like the drafters of the Model Penal Code, suggest that "few cases are likely to arise in which [a variation between wrongfulness and criminality] will be determinative." MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985). But, courts continue to debate the definition and the problem of different definitions does arise in practice and can produce opposite conclusions on the question of the accused's sanity. *See e.g.*, *infra* notes 61–69 and accompanying text.

18. For one psychiatrist's view on psychiatric testimony in insanity cases, see George Seiden, *Psychiatric Testimony and the Insanity Defense: One Psychiatrist's Perspective*, 45 LA. B.J. 258, 258 (1997) ("I have at times been appalled as I have listened to psychiatrists provide testimony about a defendant's sanity when they were not even aware of the standard for sanity in their jurisdiction. . . . I also have had the opportunity to listen to psychiatric experts provide competent and thoughtful explanations of a defendant's mental status, thereby allowing courts and juries to make well informed decisions about a defendant's sanity.").

19. Not all jurists necessarily anticipate that providing guidance on the legal definition of wrongful will be helpful to experts in terms of the larger issues at stake in an insanity plea. Albert A. Ehrenzweig, *A Psychoanalysis of the Insanity Plea: Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425, 429 (1964) ("But the psychiatrist would not be satisfied even if we could give him a definition of the 'wrongness' in *M'Naghten*. For, he will ask, what does that wrongness have to do with his expert knowledge of mental disease?").

20. *See* United States v. Ewing, 494 F.3d 607, 616 (7th Cir. 2007).

and explores options for the forensic expert in circumstances where the jurisdictional precedent, trial court, or retaining attorney has not or cannot make the legal definition available or clear for the expert's assessment before the evaluation.

I. Assessing, Defining, and Applying "Wrongfulness"

Legal standards for insanity vary across the United States.[21] However, most of the current U.S. standards derive directly or indirectly, at least in part, from the famous English case of *M'Naghten*.[22] This 1843 standard has two disjunctive prongs. If, in addition to two preliminary criteria,[23] the defendant satisfies either prong, the defendant can qualify as insane. In the language of the English lords, the second prong, and the one on which this Article focuses, requires that the accused suffer from an "unsoundness of mind, [which] . . . should be such as it rendered [the accused] incapable of knowing right from wrong."[24] Like the *M'Naghten* test, the ALI test also has two disjunctive prongs, either of which could serve as the basis for an insanity finding. This Article focuses on the one that asks the trier of fact to assess whether the accused "lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of [the

21. *See* Clark v. Arizona, 548 U.S. 735 (2006). The American Psychiatric Association ("APA") takes the following position with respect to the various standards: "The APA does not favor any particular legal standard for the insanity defense over another, so long as the standard is broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability." Am. Psychiatric Ass'n, Position Statement on the Insanity Defense (2007). In addition to the variety of standards, there exists a robust scholarly literature on insanity in criminal cases. *See, e.g.*, Comment, *Regulation of Expert Testimony as to Insanity in Criminal Cases*, 38 Yale L.J. 368 (1929) (discussing legislation addressing expert testimony in insanity cases); Gregory Dolin, *A Healer or an Executioner? The Proper Role of a Psychiatrist in a Criminal Justice System*, 17 J.L. & Health 169, 171 (2002–2003) (arguing "that despite the benefits of ridding the criminal justice system of some uncertainty and ignorance with respect to mental health issues, the very close involvement of psychiatrists in the criminal justice system as practiced in the United States is not only illogical and bad policy, but also unethical from the viewpoint of medical ethics"); Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 Tex. Tech L. Rev. 247, 257–58 (2009) (advocating adoption of Judge Bazelon's "justly responsible" test); Frank R. Freemon, *The Origin of the Medical Expert Witness*, 22 J. Legal Med. 349 (2001) (offering history of medical experts in early court cases with insanity issues); Donald F. Paine, *Expert Opinion and the Insanity Defense*, 49 Tenn. B.J. 27 (2013) (opining on the insanity defense and on whether an expert can testify to the ultimate issue); Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375 (1997) (examining a variety of important issues related to the insanity defense); Laura Reider, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. Rev. 289 (1998) (proposing an expanded approach to the legal defense of insanity); Slobogin, *supra* note 9; J. Thomas Sullivan, *Psychiatric Defenses in Arkansas Criminal Trials*, 48 Ark. L. Rev. 439 (1995) (discussing the use of expert testimony in a variety of defense contexts in criminal law).

22. M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 722.

23. For a discussion of these two criteria, see *infra* notes 30–32 and accompanying text.

24. *M'Naghten's Case*, 8 Eng. Rep. at 722. The first prong requires the trier of fact to determine whether the accused knew the "nature and quality of the act he was doing." *Id.*

accused's] conduct."[25] Thus, both the *M'Naghten* and ALI tests can call upon the evaluator to assess whether the defendant knew or had the substantial capacity to appreciate that the conduct at issue was "wrongful."[26] Under these tests, if the accused failed to know or lacked the substantial capacity to appreciate that the conduct was "wrongful," and such failure was due to a qualifying mental disease or defect existing at the time of the conduct, the accused can be found insane.

For the better part of two centuries, since the promulgation of the earlier *M'Naghten* standard, and continuing after the advent of the 1962 ALI test, legal decisionmakers have struggled to understand and define the term "wrong."[27] As explained by the Seventh Circuit in 2007,

> In the context of the insanity defense, courts and scholars have generally proposed three alternative definitions for the term [wrongfulness]: (1) legal wrongfulness, as in "contrary to law"; (2) moral wrongfulness, as in "contrary to public morality," determined objectively by reference to society's condemnation of the act as morally wrong;" or (3) moral wrongfulness, as in "contrary to *personal* morality," determined subjectively by reference to the defendant's belief that his action was morally justified (even if he appreciated that it was illegal or contrary to public morality).[28]

Before we turn to consider what each of these definitions of "wrongfulness" means and under which, if any, Jake might qualify as insane, we offer a framework for conceptualizing the forensic expert's role in helping the trier of fact assess insanity. We then use that framework to apply the three definitions of "wrongfulness" to Jake's case.[29]

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25. MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985). The brackets around [wrongfulness] are in the original. A common distinction drawn between the term "criminality" and the term "wrongfulness" in the Model Penal Code definition is illustrated in the opinion in State v. Uyesugi, 60 P.3d 843, 854 (Haw. 2002) ("[T]he term 'wrongfulness' reflects our legislature's attempt to distinguish between pure 'criminality,' in which the determining factor is whether the defendant knew his action was criminal, and 'wrongfulness,' in which the defendant knew his conduct was criminal 'but because of a delusion believe[d] it to be morally justified.'"). The other prong of the ALI test asks the trier of fact to determine if the accused, "as a result of mental disease or defect [lacked] substantial capacity . . . to conform his conduct to the requirements of the law." MODEL PENAL CODE AND COMMENTARIES § 4.01 (AM. LAW INST., Official Draft and Revised Comments 1985).

26. With respect to the terms "know" and "appreciate," see *APA Statement*, *supra* note 15, at 16 ("[W]hile some legal scholars and practitioners believe that using the word 'appreciate' (rather than 'knowing' or 'understanding') expands the insanity dialogue to include a broader and more comprehensive view of human behavior and thinking, this may not be necessarily so.").

27. *See* State v. Crenshaw, 98 Wash. 2d 789, 794 (1983) ("The definition of the term 'wrong' in the *M'Naghten* test has been considered and disputed by many legal scholars.").

28. United States v. Ewing, 494 F.3d 607, 616 (7th Cir. 2007).

29. In contrast to the approaches here in the United States, where the law of some jurisdictions explicitly permits "wrongfulness" to be defined in moral terms, in the law of England and Wales, the *M'Naghten* "wrongfulness" prong is limited to legal "wrongfulness." *See* R.D. Mackay, *Righting the Wrong?—Some Observations on the Second Limb of the M'Naghten Rules*, CRIM. L. REV. 80, 81–82 (2009). Despite this de jure limitation, empirical work on forensic evaluations in England and Wales

A. Through the Microscope: Conceptualizing the Roles of the Forensic Expert and the Trier of Fact

Under most variations of the *M'Naghten* and ALI legal standards for insanity, a forensic expert makes two preliminary assessments. First, does the defendant suffer from a "disease of the mind?"[30] In today's terminology, this often means a mental disease or defect that qualifies as a major mental disorder under the *Diagnostic and Statistical Manual V*.[31] Second, if the individual does suffer from a qualifying mental disease or defect, what is the link between the symptoms of that disorder and the person's behavior at the time of the offense?[32] If the expert diagnoses such a disorder and determines that it caused or could have caused the behavior, then the assessment turns, in most jurisdictions, to the relevant prongs of the *M'Naghten* standard or the ALI test.

In the everyday life of most judges and jurors, perceptions of reality and moral assessments generally happen so automatically that it may be hard to focus on the complex process involved in these assessments and where they can go astray. To help triers of fact understand the process in which they must engage to evaluate sanity, we might analogize the process of evaluating sanity to that of viewing the defendant's behavior through a microscope. The defendant's behavior itself is the subject on the slide. When we look at Jake's behavior through a consensus or sane person's microscope, we see an unprovoked battery and attempted kidnapping of a Holocaust survivor. The challenge of the forensic expert is to enable the trier of fact to look through the defendant's microscope and understand what might be a completely different set of perceptions and interpretations of internal or external events.[33] If enough information is

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suggests that forensic experts often employ moral wrongfulness in their application of the test. *Id.* at 83–84.

30. M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 722.

31. For a discussion of the conditions that may qualify as a mental disease or disorder for the insanity defense in the United States, see Janofsky et al., *supra* note 11, at S4, S9–S18. Individual jurisdictions may also specify limits on the mental diseases or disorders that qualify. For example, California describes excluded disorders as follows:

> In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances. . . .

Cal. Penal Code § 29.8 (West 2016).

32. See, for example, the language of the ALI test noting the preliminary criteria of mental disease or defect and the causal link between such a disease and responsibility as necessary for an insanity determination: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect . . . ." Model Penal Code and Commentaries § 4.01 (Am. Law Inst., Official Draft and Revised Comments 1985).

33. Michael Welner, *Moral vs. Legal "Wrong" in the Insanity Defense*, 68 N.Y. St. B.J. 28 (1996) ("Determining what the mentally ill defendant perceived as wrong at the time of the offense, filtered through the distorted but parallel reality, usually presents a significant challenge to the jury.").

available for the forensic expert to understand the defendant's mental state, then this first step of adjusting the expert's viewpoint to that of someone suffering from a mental disorder is usually second nature to the expert. However, this process of viewing the situation through an accused's mental disorder might be a very unfamiliar shift in viewpoint for the trier of fact, who might rely on the expert's help in making this shift.

In the microscope analogy, the lens of the eyepiece embodies the defendant's delusion. Looking through the eyepiece enables the trier of fact to see the world as the defendant did. This microscope analogy can help the trier of fact to acknowledge the defendant's delusion as reality for that individual. As the *M'Naghten* Court explained:

> [W]e think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment.[34]

Although this effort at mental gymnastics may seem familiar to a forensic clinician, for many jurors and judges (not to mention attorneys) this can be a challenging and disconcerting feat. In this analogy, the microscope enables us to see what might not have been (clearly) visible to the lay observer without the microscope's lenses.[35]

Assuming that the lens of the eyepiece embodies the defendant's delusion, and the evaluator believes the defendant's account of the events to be a credible representation of what the defendant actually believed at the time of the event, the evaluator can then attempt to assess whether the defendant knew or had the substantial capacity to appreciate the "wrongfulness" of the act, as the defendant understood the situation at the time of the act. Here, different jurisdictions might require different, and sometimes highly inconsistent, standards for the definition of "wrongful."[36]

In addition to the lens in the eyepiece, which embodies the defendant's delusion or disorder, below the eyepiece, microscopes often have several objective lenses. These are commonly arranged on a wheel and can be rotated into place to see the subject on the slide in a variety of ways, including with different levels of magnification. Thus, let us consider each of the three "wrongfulness" standards as available objective lenses. The job of the expert and the trier of fact is to look through the lens of the eyepiece containing the defendant's delusion to the objective lens or lenses of the microscope that define "wrongfulness" in the jurisdiction in

34. M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 723.

35. The microscope does not, however, in this analogy, serve to actually magnify the information on the slide.

36. *See, e.g.*, *supra* notes 27–28 and accompanying text.

which the defendant committed the act. The evaluator and decisionmaker then need to try to understand the act on the slide as the defendant saw it pursuant to the relevant definition(s) of "wrongfulness." In this way, the microscope analogy offers a vehicle for understanding the impact of varying definitions of "wrongfulness" on the sanity determination.[37] We turn now to study the three objective lenses and the results they might produce in Jake's case.

B. Looking Through the Microscope to Apply Definitions of "Wrongfulness" to the Defendant's Behavior

1. Violates the Law

The "violates the law" or "legal wrongfulness" standard qualifies as one of the two definitions of "wrongfulness" most frequently adopted by courts in the United States.[38] Under this standard, depending on the specific language used by the jurisdiction, a defendant should be found sane when the defendant knows or has the substantial capacity to

37. The microscope analogy can also be used for evaluating the prong of insanity tests that assesses whether the defendant knew or had the substantial capacity to appreciate the nature and quality of the act the defendant was performing. Employing a commonly used example of an extreme delusion illustrates the concept of placing the defendant's delusion in the microscope's eyepiece and its impact on the first prong: the nature and quality of the act standard. In this example, the defendant stabs an unarmed nephew repeatedly in the heart with a butcher knife. To the outside observer, the defendant has committed murder. But, the defendant, in a delusional state, believes that the slaying is, not of a nephew or a human being at all, but of the devil who has consumed the nephew's soul and taken over the nephew's body. Here, the defendant believes that, by slaying the devil, the defendant will free the nephew's soul and prevent the devil from taking over the world. In our analogy, we place the defendant's delusion as the eyepiece and have the trier of fact look through the microscope's eyepiece to see the events, the defendant's conduct, on the slide. The defendant's delusion distorts reality to such an extent, in this example, that it prevents the defendant from knowing or having the substantial capacity to appreciate the nature and quality of the act at issue. In virtually all jurisdictions applying this prong of the *M'Naghten* test, one would anticipate that a person suffering from this delusion and genuinely believing that the slaying was of the devil and not a human being, assuming the delusion is caused by a qualifying mental disease or defect, could be judged insane.

In this sad but straightforward case of the individual who believes the stabbing to be of Satan and that the act is saving the world from annihilation by the devil, our analogy might be that the defendant's microscope has a faulty eyepiece, one whose distortion is extreme. In this example, a finding of insanity is likely under the common prong of the insanity test of not knowing or appreciating the nature and quality of the act, without jurors necessarily reaching a "wrongfulness" evaluation at all. Given the gross nature of the distortion, one wonders how often cases involving this first prong pass through competency determinations and reach the jury trial phase. Of course, if medication or other remedial interventions alleviate the mental disease between the time of the act and the trial, these cases could reach litigation before a trier of fact on the underlying charge. There, the forensic expert may have use for an analogy, particularly one that anticipates the trier of fact entering into the perception of the accused. In many cases, the delusion is not so extreme and does not distort reality to such an extent that the defendant fails to understand the nature and quality of the act. In those cases in particular, the definition of "wrongful" might be pivotal in the analysis of the defendant's sanity.

38. *See* United States v. Ewing, 494 F.3d 607, 607 (7th Cir. 2007).

appreciate that the conduct violated the law or, as is sometimes said, was criminal.[39] As a rule, a defendant need not know the chapter and section number of the criminal code or even the name of the crime; the defendant need only appreciate that the behavior violates the law or is wrong in the sense of being criminal.[40]

a. Standard Evaluation: No Mistake Defense

If we look through Jake's eyepiece of the microscope, we see the situation through Jake's delusion.[41] For purposes of this Article, we can assume the credibility of Jake's account of his perceptions. In the real world, insanity evaluations at almost every stage of applying the standards include credibility and evidentiary evaluations. Therefore, forensic scientists and triers of fact must assess the evidence that relates to the defendant's perceptions and beliefs. Sometimes there is collateral information available—such as other percipient witness accounts, relevant medical records, or other forensic evidence—which supplements the report of delusions described by the defendant, and sometimes there are only the beliefs as self-reported. For our analysis, taking Jake's description of his delusion as genuine, Jake believed he was physically accosting someone and forcing that person to accompany him to leave the location against that person's will, albeit in Jake's mind to prevent a world war. If we then adjust the objective lens to the legal "wrongful" position, we ask whether, with the facts as Jake perceived them, Jake knew that battering and attempting to physically force someone, against that person's will, to leave was a violation of the law. Pursuant to the description given at the start of the Article, Jake understands that battery and attempted kidnapping are criminal.[42] If one concludes that Jake knew his conduct violated the law or was a crime, even if he could not name the crime or specify the violation, a forensic clinician could reasonably conclude that Jake knew or had the substantial capacity to appreciate that his conduct was legally "wrongful." This implies that Jake should be found sane.

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39. *Id.*

40. *See, e.g.*, State v. Hamann, 285 N.W.2d 180, 183 (Iowa 1979) ("This is not to say, as has sometimes been suggested, that sanity would thereby be measured by legal knowledge. The test is not how much law a person claiming an insanity defense actually knows. The determination is to be made on the basis of a person's ability to understand it when something is prohibited by law.").

41. Jake's delusion does not so distort reality that he fails to understand or appreciate that he is assaulting a human being. Thus, Jake is highly unlikely to qualify as insane under a nature and quality of the act prong. To assess whether Jake qualifies as insane in those many jurisdictions that offer a "wrongfulness" prong, the evaluation can proceed under that prong.

42. Indicia of awareness might include efforts to evade detection such as fleeing the scene, hiding one's identity, or concealing evidence. Someone's ability to follow other legal standards, such as obeying driving or pedestrian laws, may also indicate an overall awareness of legal standards.

b. Impact on Insanity Claim of Jake's Belief That His Actions Were Legally Justified

An interesting question arises here, however, if Jake genuinely believed that battering someone and attempting to kidnap the person under these circumstances was justified under the law. Jake might opine, for example, that he was justified under an extension of a necessity or choice of evils defense. Might he then qualify as insane? In the necessity or choice of evils context, generally the actor engages in a "necessary" lesser harm to prevent a greater one.[43] Here, within Jake's delusion, he could argue that he engaged in the battery of pulling on the Holocaust survivor's arm and the attempted kidnapping in his efforts to prevent World War III. With Jake's delusion that this behavior would save many lives, could a forensic expert opine and a trier of fact conclude that Jake did not understand or appreciate the legal "wrongfulness" of his conduct if he believed that his conduct was justified by the legal defense of necessity or choice of evils? Whether legal necessity enables Jake to avail himself of an insanity defense under a legal "wrongfulness" approach generally depends upon the interpretation of the approach to legal "wrongfulness" taken in the jurisdiction. We explore two possible interpretations in the following Subparts.

(i) Legal "Wrongfulness" Hybrid Evaluation: Defendant's Internalized Facts with Externalized Evaluation of Legal Defense

Although the elements can vary by jurisdiction, a necessity defense often demands that "[a] reasonable person in the defendant's situation would be compelled to engage in the conduct; *and* [t]he defendant had no reasonable alternative to avoid imminent public or private injury."[44] Under the first possible interpretation, the expert takes the facts as presented by Jake, but otherwise applies a version of a traditional "reasonable person" legal analysis of the necessity defense.[45] This hybrid approach thus combines an internalized view of the facts with a relatively externalized view of the reasonable person in Jake's situation. Arguably,

43. MODEL PENAL CODE § 3.02 (AM. LAW INST. 2015). Jurisdictions vary in the elements required to fulfill and the possible exceptions to a necessity defense.

44. *4.17 Necessity Defense*, ARIZONA PATTERN JURY INSTRUCTIONS—CRIMINAL (2014).

45. This basic approach to legal justifications is arguably the one adopted by the *M'Naghten* court: "[T]he English common-law judges then concluded that M'Naghten was not legally insane because, even if his delusion were true and the prime minister was conspiring to kill M'Naghten, this would not entitle M'Naghten to take the law into his own hands and hunt down the prime minister." Finger v. State, 27 P.3d 66 (Nev. 2001). With this first approach, the availability of a necessity claim may depend upon whether the jurisdiction offers a necessity defense and, if so, what elements compose the defense. Similarly, the analysis of the necessity defense may also be dependent on the extent to which the jurisdiction allows the defendant's circumstances and beliefs to modify any hypothetical reasonable person in the necessity standard.

this would mean assessing whether, under the circumstances of Jake's delusion and therefore the facts as he understood them, the injury (WWIII) was imminent and whether a reasonable person in Jake's circumstances would have had no reasonable alternative to battering and attempting to kidnap the Holocaust survivor to avoid that injury. Using this hybrid approach, we proceed from Jake's own internal perceptions of the facts and then apply an external evaluation from the perspective of a reasonable person in Jake's circumstances. Based on the facts given in the first paragraph of the Article, Jake did not believe WWIII was imminent, and viewing the situation from the perspective of a reasonable person in Jake's situation, the likely result is a perception that WWIII was not imminent. Because Jake's necessity claim does not meet this imminence requirement, it is unlikely that he would be able to successfully invoke this necessity defense, even if the requirements of the rest of the standard were met.

With respect to the question of whether there were reasonable alternatives to the attempted kidnapping, we proceed from Jake's understanding of the circumstances. From there, under a hybrid necessity approach, we consider whether a reasonable person with Jake's beliefs about the facts would have perceived no reasonable alternative to the attempted kidnapping.[46] This is a somewhat more speculative analysis. Our initial facts indicate that Jake believes he must take some action soon, but not that this specific action—kidnapping a Holocaust survivor and trying to force the survivor to recant—is the sole available action. Given the facts, from an external perspective, a juror would likely conclude that a reasonable person, even one with Jake's beliefs about an eventual WWIII, would have had reasonable alternatives to battering and attempting to kidnap the Holocaust survivor to try to persuade him to recant.[47] Thus, under this hybrid approach, Jake is unlikely to be able

46. The modification here of the reasonable person prong of analysis in the necessity context, to situate the reasonable person as one who captures characteristics or experiences of the defendant, resembles such modifications made, for example, in the context of the reasonable person in cases involving battered women and self-defense. *See, e.g.*, Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 409–13 (1991) ("The choice of the reasonableness standard determines the content of what the jury is told about assessing the necessity of a defendant's action. In objective jurisdictions, the jury is told to measure the defendant's belief in the necessity of using defensive deadly force against a generic standard of reasonableness. In all other jurisdictions, which constitute the majority, the jury is instructed to use a standard that includes—to degrees that vary little among these combination subjective-and-objective jurisdictions—the defendant's individual subjective point of view." (footnotes omitted)).

47. As an alternative, consider an analysis under the Model Penal Code. The Model Penal Code defines necessity as follows:

> § 3.02. Justification Generally: Choice of Evils.
>
> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

to avail himself of a legal "wrongfulness" claim based upon a necessity defense.[48]

(ii) Internalized Evaluation: Defendant's Facts and Defendant's Evaluation of the Law

A second possible interpretation takes a more expansive view of the internalization of the legal "wrongfulness" doctrine. Under this second approach, a forensic clinician not only takes the facts from Jake's perspective, but also explores with Jake whether he believed that a necessity defense prevented his conduct from constituting a legal wrong. Under this second approach, if an expert ascertained that Jake, based on his delusion, personally believed that such a defense would be applicable, then the expert could opine that Jake did not know or lacked the substantial capacity to appreciate that his conduct was legally wrong.

For purposes of the analysis here, if the insanity definition in the jurisdiction takes the first view, the hybrid view, of the definition of legal "wrongfulness" in insanity, and one that takes the facts as Jake believes they exist but applies a relatively externalized justification analysis to those facts, then a jury could reasonably conclude that Jake should be found sane for his battery and attempted kidnapping of the Holocaust survivor under the legal "wrongfulness" standard. Of course, if the "wrongfulness" approach were a broad and encompassing *internalized* one, and if Jake could meet it, then a jury might accept his insanity claim here. Because there are several permutations of legal "wrongfulness," we offer Figure 1 as a visual metric to enhance clarity:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

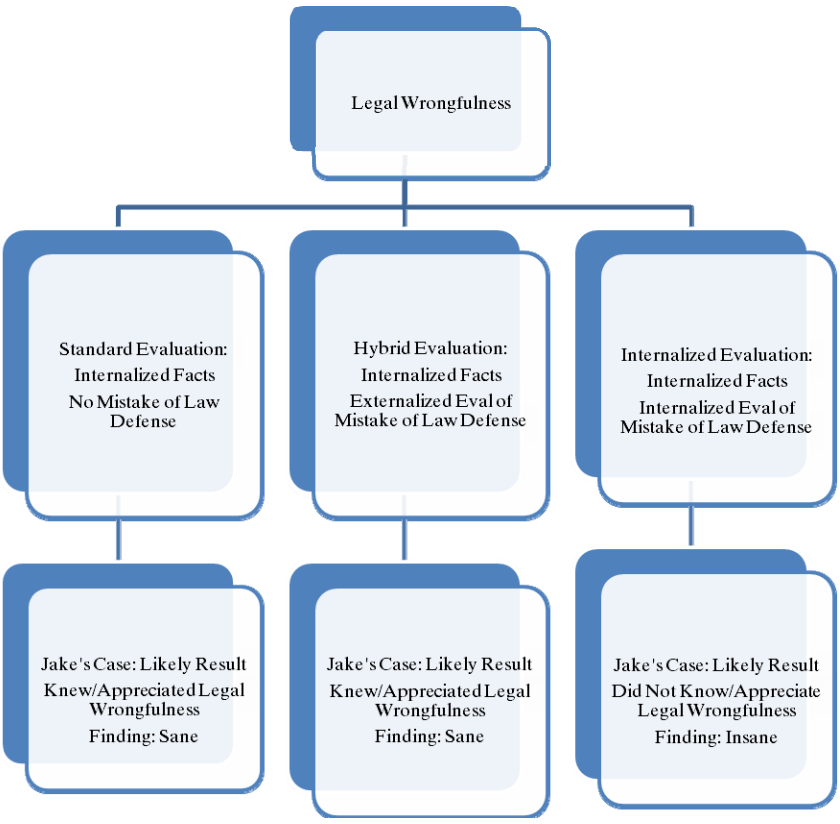
(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 (AM. LAW INST. 2015).

48. For a discussion of evaluating legal justifications in the insanity context with respect to mistakes or ignorance of law, see Slobogin, *supra* note 9, at 1240–42.

FIGURE 1



Without the microscope though, a juror might be tempted to conclude that the unprovoked battering and attempted kidnapping of a Holocaust survivor under these circumstances violates the law, and thus Jake is sane. Looking through the microscope reminds the trier of fact to evaluate whether Jake had the substantial capacity to appreciate or knew that the battery and the attempted kidnapping violated the law with Jake's delusion providing the relevant factual frame. What looking through the microscope reveals likely depends, at least in part, upon the particular jurisdiction's definitions of legal "wrongfulness" and necessity.

2. *Violates Society's Morals*

We now rotate the objective lens of the microscope from "violates the law" to "violates society's morals." With "violates the law" as the first, the societal morality standard serves as the second of the two most

frequently adopted definitions of "wrongfulness" in U.S. courts.[49] Under this definition, depending on the jurisdiction's approach, a defendant should be found sane if the defendant knows or has the substantial capacity to appreciate that the behavior at issue violated society's moral norms. This definition might substantially overlap the field of view furnished by the "violates the law" definition as society's norms are often tied to or embodied in the criminal law.[50] Nonetheless, society's morals might be more or less restrictive than legal prohibitions. Similarly, a society's morals might be more amorphous and harder to ascertain than a society's legal pronouncements. Or, society might be divided on the moral rectitude of certain actions, with the defendant in accord with one view and in violation of a competing view.

Applying the "violates society's morals" standard to Jake's situation would entail looking through the microscope, through Jake's delusion in the eyepiece lens, but this time with the moral "wrongfulness" objective lens in place. Under this standard, we assess whether Jake understood that the battery and attempted kidnapping, regardless of whether that behavior violated the law, would violate society's code of appropriate moral conduct. Here, it is generally imperative to understand "why" the individual performed the act. Questioning a defendant regarding not just the defendant's own beliefs about the morality of that conduct, but also the accused's understanding of the perception that other members of society may or would have of the defendant's beliefs and actions might be essential. Claims of implementing a higher good and societal acceptance, encouragement, or validation of the accused's conduct would also prove relevant to the "wrongfulness" assessment here.

a. Standard Evaluation: No Claim of Special Knowledge and Internalized Evaluaton of Facts and Societal View

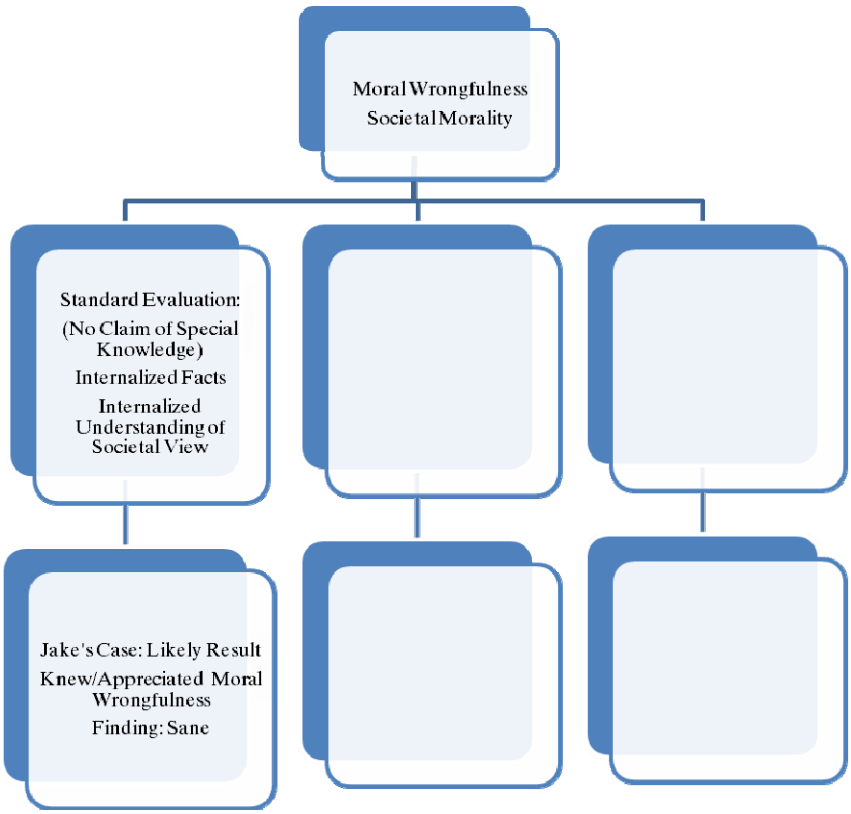
Applied to Jake's situation, Jake, whose delusions appear to be the product of a major mental illness, readily acknowledges that other people in society believe that the Holocaust occurred. Jake has taken it upon himself to forcefully seek a confession from a Holocaust survivor in order to persuade other members of society of Jake's belief that the Holocaust never occurred. This would imply that Jake knew that society would likely see an assault and attempted kidnapping of someone whom society viewed as a Holocaust survivor as morally wrong. This recognition by Jake that society would likely perceive his actions as

49. *See* United States v. Ewing, 494 F.3d 607, 607 (7th Cir. 2007).

50. *See, e.g.*, State v. Cole, 755 A.2d 202, 210 (Conn. 2000) ("[M]ost cases in which the insanity defense is raised involve crimes sufficiently serious such that society's moral judgment regarding the accused's conduct will be identical to the legal standard reflected in the applicable criminal statute.").

morally wrong suggests sanity under a moral "wrongfulness" (society's values) approach.

FIGURE 2

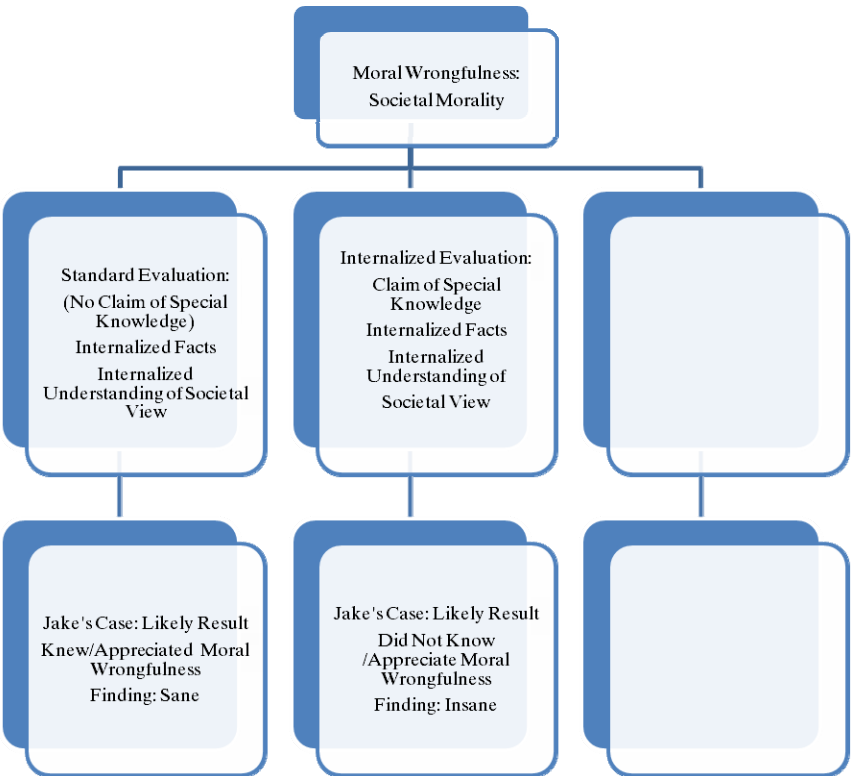


b. Internalized Evaluation: Claim of Special Knowledge and Defendant's Facts and Defendant's Evaluation of Society's Morals

Jake, however, also believes that if other people in society had his "special knowledge," meaning they shared his delusional belief that the Holocaust did not occur, persuading the Holocaust survivor to recant and thus preventing the next world war would be lauded by society. Because of Jake's belief in his delusion, his "special knowledge," and his belief that society—once it shared his "special knowledge"—would applaud his actions, an expert or juror could understand that Jake did not perceive his conduct as a violation of society's generally accepted

moral codes. Thus, assuming Jake's conduct was due to a qualifying mental disease or defect, if Jake did not know or lacked the substantial capacity to appreciate that his conduct violated society's morals, a trier of fact could reasonably find Jake insane under this "violates society's morals" approach to "wrongfulness."[51]

FIGURE 3



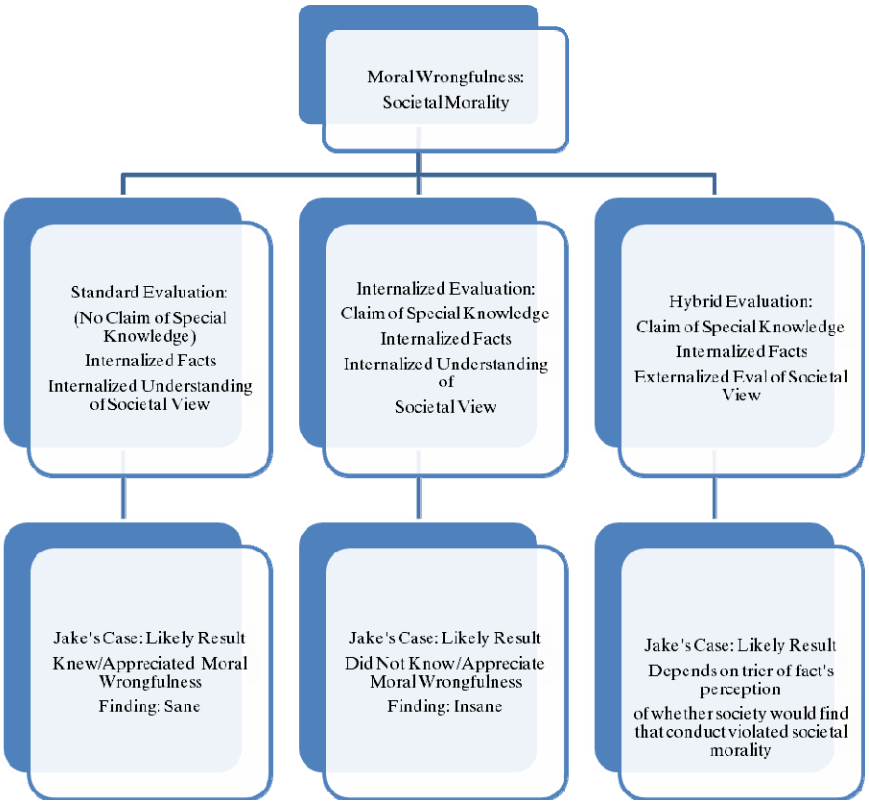
51. The question of what constitutes and how to characterize generally accepted societal morals as opposed to individual or personal morals remains subject to discussion. Courts and commentators continue to engage in efforts to develop appropriate formulations to capture the crux of the distinctions. For example, after reviewing a series of court cases in California, both published and unpublished, Yakush and Wolbransky offer one such formulation as follows: "the question is not whether the defendant believed that *if* society agreed with his subjective, idiosyncratic view of morality, his actions would be condoned as moral but, instead, whether he believed that society would view his actions as moral under the currently held, generally accepted standards of morality." Yakush & Wolbransky, *supra* note 13, at 364. See also, for example, the formulations in People v. Coddington, 2 P.3d 1081, 1143–45 (Cal. 2000).

c. Hybrid Approach: Claim of Special Knowledge and Defendant's Internalized Facts with Externalized Evaluation of Society's Morals

There is also a possible variation to the above approach to "violates society's morals," one that involves a partly internalized and partly externalized evaluation of moral "wrongfulness." Under this hybrid approach, the trier of fact would still look through the microscope to see the event through the defendant's delusion, but in evaluating whether the event violated society's morals, the trier of fact would apply society's view of the conduct. The trier of fact would not be evaluating whether the defendant believed that society would condone his behavior. In Jake's case, that would mean understanding that Jake believed his actions were necessary to prevent WWIII and save thousands of lives, but disregarding Jake's belief that society would approve of his conduct. Instead, the trier of fact would presumably apply some reasonable person, or more generalized societal vantage point, or the principles of the criminal code itself, to assess whether society would find Jake's conduct morally wrong.[52]

52. This is arguably the position espoused by the prosecution in State v. Wilson, 700 A.2d 633, 642 (Conn. 1997) ("Under the state's test, however, moral wrongfulness would be measured strictly in terms of society's objective disapproval; to the extent that this objective disapproval is embodied in the criminal code, the state's test renders morality and criminality virtually synonymous.); *see also* David L. Faigman et al., 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 12–14 (2013) (citing *Wilson*, 700 A.2d at 642) ("The court found that the state's view of wrongfulness was tantamount to reading 'wrongfulness' as 'criminality,' since society's moral standards are codified into law.").

FIGURE 4



For the expert, this latter hybrid approach can truncate the necessary evaluation. Here, the expert would still need to help the trier of fact understand the defendant's perceptions of the event, the view through the eyepiece lens. But in this approach, the moral "wrongfulness" evaluation would largely be a function of an assessment of whether society would have condoned the defendant's conduct under the factual circumstances as the defendant believed them to be. As triers of fact are generally tasked with this type of assessment, an expert might not need to evaluate whether society would have approved of Jake's conduct.

Under the standard evaluation, the sanity assessment takes the facts as Jake understood them, an internalized understanding, but includes no claim of "special knowledge." In contrast, the internalized evaluation approach takes an internalized view of the facts and also includes Jake's "special knowledge" derived from his delusion. Additionally, it focuses on Jake's internalized understanding of society's views of his behavior, rather than an externalized evaluation of Jake's behavior from a societal

vantage point. This internalized approach to societal "wrongfulness" is the one arguably adopted, for example, by the Connecticut Supreme Court in *State v. Wilson*.[53] In choosing between the prosecution's proposed approach, one that seems consistent with the hybrid option, and an internalized approach, the court explained:

> The state, on the other hand, contends that morality must be defined by societal standards . . . . Although we agree with the state that the proper test must incorporate principles of societal morality, we conclude that the state's interpretation of the cognitive prong of § 53a–13(a) does not sufficiently account for a delusional defendant's own distorted perception of society's moral standards. Accordingly, we conclude that a defendant may establish that he lacked substantial capacity to appreciate the "wrongfulness" of his conduct if he can prove that, at the time of his criminal act, as a result of mental disease or defect, he substantially misperceived reality and harbored a delusional belief that society, *under the circumstances as the defendant honestly but mistakenly understood them,* would not have morally condemned his actions.[54]

Within the "violates society's morals" rubric, an expert might encounter a standard approach or an internalized or a hybrid approach to the "wrongfulness" evaluation for insanity.[55] Consequently, the expert might find it appropriate to specify those portions of the report that relate to each version of the "violates society's morals" standard.

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53. 700 A.2d at 639–40. In that case, the court also rejected the defendant's proposal of a personal morals standard. *Id.* at 640 ("We conclude that the defendant's efforts to define morality in purely personal terms are inconsistent with the Model Penal Code, judicial precedent, and the assumptions underlying our criminal law." (footnote omitted)).

54. *Id.* at 639–40. The court analyzed materials accompanying the Model Penal Code in determining the meaning that should be assigned in the moral "wrongfulness" context:

> The text accompanying § 4.01 of the Model Penal Code, upon which § 53a–13 is modeled, suggests that its drafters intended that the moral element of "wrongfulness" be measured by a defendant's capacity to understand society's moral standards. In his model jury charge, for example, Professor Wechsler suggests the following language: "[A] person may have knowledge of the facts about his conduct and of the immediate surrounding circumstances and still be rendered quite incapable of grasping the idea that it is wrong, in the sense that it is condemned by the law and *commonly accepted moral standards.*" (Emphasis added.) Similarly, the commentary on the insanity test of the Model Penal Code emphasizes a defendant's capacity to appreciate "society's moral disapproval of his conduct," noting that "[a]ppreciating 'wrongfulness' may be taken to mean appreciating that the *community* regards the behavior as wrongful." (Emphasis added.)

Id. at 640 (citations and footnote omitted). For an analysis of the case arguing that "the *Wilson* decision continues the legal journey down an indeterminate path, leaving no clear direction for those who follow," see Bageshree V. Ranade, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1393 (1998).

55. Consider the approach of the Hawai'i Supreme Court in State v. Uyesugi, 60 P.3d 843, 856 (Haw. 2002). There, the court explained: "A subjective/objective rule would determine whether the defendant appreciated the wrongfulness of his conduct from the point of view of a reasonable person in the defendant's position under the circumstances as he believed them to be." *Id.*

It is worth noting both similarities and differences between the legal and moral "wrongfulness" approaches examined thus far in terms of their acceptance or rejection of the defendant's evaluation of "wrongfulness." Although all of the evaluations take the facts as the defendant perceived them, they differ in their view of whether to allow the defendant's own perception of the law or society's morals to govern the analysis. The *hybrid* approach to legal "wrongfulness" adopts an internalized view of the facts and an externalized view of the evaluation of "wrongfulness," potentially preventing a defendant's mistake of law from excusing the behavior. The *internalized* approach to legal "wrongfulness" adopts an internalized view of the facts and an internalized view of the evaluation of "wrongfulness," potentially allowing a mistake of law to excuse the behavior. Similarly, the *internalized* approach to societal moral "wrongfulness" adopts an internalized view of the facts and of the evaluation of societal "wrongfulness," potentially allowing a mistake of fact about societal "wrongfulness" to excuse. The *hybrid* approach to societal moral "wrongfulness" adopts an internalized view of the facts and an externalized view of the evaluation of "wrongfulness," potentially preventing a defendant's mistake of fact about society's view of the defendant's conduct from excusing the defendant. This comparison suggests that, because of its externalized component, the *hybrid* approach in both legal and moral "wrongfulness" might provide a narrower scope for insanity defense claims. Correspondingly, the defendant-oriented metrics of the *internalized* approach may offer greater breadth for an insanity defense claim.

3. Violates Defendant's Personal Morals: A Fully Internalized Approach

Rotating the objective lenses to the final lens on the wheel, we arrive at the "violates defendant's personal morals" definition. This definition represents a commonly occurring scenario in forensic expert assessments, but an uncommon and perhaps no longer officially approved insanity definition in the United States today.[56] This definition did operate as an

56. United States v. Ewing, 494 F.3d 607, 616 (7th Cir. 2007) ("Ewing relies primarily on *United States v. Segna*, 555 F.2d 226 (9th Cir. 1977), a decision by the Ninth Circuit, the only court to have adopted a subjective definition of wrongfulness like the one in Ewing's proposed instruction."). In explaining why a personal morality internalized definition of wrongfulness was not being adopted by the court, the Ewing decision opined that:

> There is nothing in the IDRA [Insanity Defense Reform Act of 1984] to suggest that wrongfulness should be interpreted more broadly than or contrary to the traditional understanding of the *M'Naghten* test. We conclude that wrongfulness for purposes of the federal insanity defense statute is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant's subjective personal standards of moral wrongfulness.

Id. at 621.

available definition in decades past, for example in the Ninth Circuit,[57] and might still play a role in some insanity evaluations.[58] Under this standard,[59] with respect to "wrongfulness," a defendant should be found insane if the defendant believes that the behavior at issue is consistent with the defendant's own moral standards, regardless of whether the defendant believes that the law or society's morals would condemn the actions. In forensic assessments, individuals suffering from delusions often act for reasons consistent with their own personal moral and delusional beliefs at the time of the crime. Consequently, employing this definition could result in insanity findings for these persons accused of crime.

Like the evaluation to determine whether the actor believes the conduct violates society's morality, this evaluation requires an understanding, through the perspective or delusion in an individual's mind, as to "why" the defendant performed the act. Forensic and clinical experts have frequently encountered particularly psychotic individuals engaged in behavior that resulted directly from a delusional belief and who might fall within this definition of insanity. For example, a woman who commits maternal filicide under the delusional belief that she is saving her child from being tortured and possessed by the devil may be acting according to her personal moral code, even though she knows that murder is against the law and societal morals would not condone the killing of a child. This fully

57. United States v. Segna, 555 F.2d 226, 232–33 (1977) ("One of the classic debates in criminal law has centered on the meaning of the words wrong and wrongfulness as they are used in the various definitions of criminal responsibility. In this context, the word wrong has three possible definitions. First, the word may mean legally wrong, or 'contrary to law.' Thus a person is criminally responsible if he has substantial capacity to appreciate that his act violates the law. Second, the word may mean 'contrary to public morality.' Here a person is criminally responsible, regardless of his appreciation of his act's legal wrongfulness, if he is aware at the time of the offending act that society morally condemns such acts. Third, the word may mean 'contrary to one's own conscience.' Under this 'subjective' approach, the accused is not criminally responsible for his offending act if, because of mental disease or defect, he believes that he is morally justified in his conduct even though he may appreciate either that his act is criminal or that it is contrary to public morality. In *Wade*, we adopted the third definition by choosing the alternate word wrongfulness in the American Law Institute's test of legal insanity, rather than the Institute's initially accepted word criminality, and by then defining wrongfulness in subjective terms. In our view, use of the word wrongfulness in the test of legal insanity would 'exclude from the criminally responsible category those who, knowing an act to be criminal, committed it because of a delusion that the act was morally justified.'" (citations omitted)).

The ALI test, upon which the *Segna* decision was based, was superseded as the applicable federal insanity standard in the Federal Insanity Defense Reform Act. *See* United States v. Garcia, 94 F.3d 57, 61 (2d Cir. 1996) ("Congress enacted the IDRA, the first federal legislation on the insanity defense, largely in response to public concern over the acquittal of John W. Hinckley, Jr. for the attempted assassination of President Ronald Reagan. In enacting the IDRA, Congress made two substantial changes to the federal insanity defense. First, it narrowed the definition of insanity that had evolved from the case law. Second, it shifted to the defendant the burden of proving the insanity defense by clear and convincing evidence." (citation omitted)).

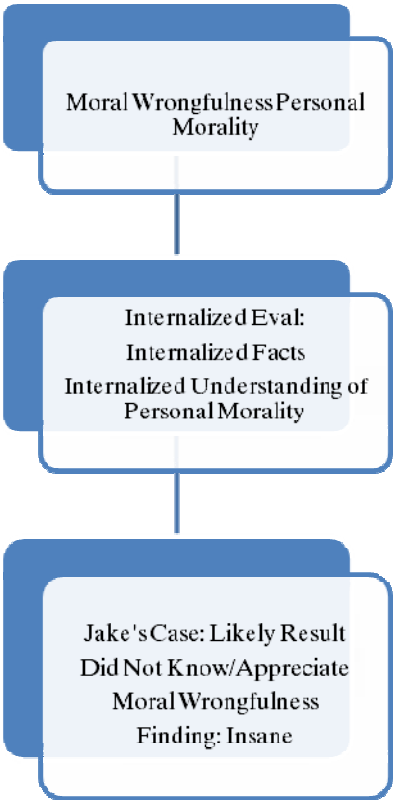
58. See the trial court's approach in People v. Serravo, 823 P.2d 128, 131–32 (Colo. 1992).

59. Assuming the preliminary qualifying conditions are met, including that the defendant suffers from the requisite mental disease or disorder.

internalized approach not only takes the facts as the defendant perceived them, but also uses the defendant's own morality as the metric, without application of an external "wrongfulness" standard, like society's morals. Under a personal morality standard, assuming other elements are met, a trier of fact could conclude that the mother in this hypothetical is insane.

The evaluation of Jake's circumstances under this definition begins like the analysis under the previous ones by peering through the eyepiece distortion of Jake's delusion and then adjusting the wheel to the lens of personal morality to focus on the conduct on the slide. Applying the "violates defendant's personal morals" standard to Jake's situation entails assessing whether Jake believed that battery and attempted kidnapping under these circumstances violated his personal moral code. Under the facts as given, Jake's delusion leads him to believe that his efforts to persuade the Holocaust survivor to recant will be instrumental in preventing World War III, and he will be hailed as a hero for his actions. If a trier of fact finds that Jake genuinely entertained this belief, it is unlikely that Jake believed his actions violated his own moral code. To the contrary, as a consequence of Jake's delusion, he believed that he engaged in at least necessary, if not admirable, conduct. Applying this personal morality "wrongfulness" standard could lead a court or jury to find Jake insane.

FIGURE 5



In sum, the same factual situation could produce polar opposite results depending on which definition or definitions of "wrongfulness" a jurisdiction adopts. Imagine for instance that the actor understands the conduct is against the law, but believes that society would find the actions morally acceptable, and the conduct otherwise meets the requisites of the insanity defense. If the actor is in a jurisdiction that only excuses persons when they do not know or have the substantial capacity to appreciate that their conduct violates the law, the actor should, according to the applicable standard, be found sane. If, instead, the actor is in a jurisdiction that applies an internalized societal moral "wrongfulness" standard, then, because the actor does not know or have the substantial capacity to appreciate that society would disapprove of the conduct, the actor should be found insane. Thus, it could be of substantial significance to the interests of justice and to the accused that the forensic expert provide evidence relevant to the appropriate standard of "wrongfulness" in each case.[60]

II. When an Expert Does Not Know Which Definition of "Wrongfulness" Will Be Applied

Apart from the larger philosophical complexities of the existence of three standards and their various permutations, experts commonly confront uncertainty about which standard applies in a given case. For example, the Colorado case, *People v. Serravo*,[61] appears to have presented this challenge. There, six forensic experts testified in the insanity phase of the case.[62] The Colorado Supreme Court summarized their testimony, including the following: The first expert testified that "Serravo['s] . . . delusions caused him to believe that his act was morally justified. [The expert], however, was of the view that Serravo, because he was aware that the act of stabbing was contrary to law, was sane at the time of the stabbing."[63] The second testified that Serravo's delusion caused him to believe "he was morally justified . . . . [and] that Serravo's mental illness made it impossible for him to distinguish right from wrong even though Serravo was probably aware that such conduct was legally wrong."[64] The third testified that "that Serravo believed that the stabbing was the right thing to do, and . . . was unable to distinguish right from wrong with respect to the stabbing."[65] The fourth and fifth testified that Serravo was "incapable of distinguishing right from wrong as normal

60. But see *supra* note 15 for a discussion of research suggesting the standard may not be determinative.

61. *Serravo*, 823 P.2d 128.

62. *Id.* at 131–32.

63. *Id.* at 131.

64. *Id.*

65. *Id.* at 131–32.

people would be able to do in accordance with societal standards of morality."[66] The sixth testified that Serravo was "incapable of distinguishing right from wrong at the time of the stabbing."[67]

Thus, as drawn from the court's opinion, the six evaluators appear to have applied a range of "wrongfulness" definitions. One expert applied a legal "wrongfulness" standard to opine that the defendant was sane, although the expert did consider a morality evaluation. Four appear to have applied a moral "wrongfulness" standard to determine that the defendant was not capable of distinguishing right from wrong, implying the defendant qualified as insane. Two of these experts, at least from the Colorado Supreme Court opinion, did not specify whether their determination relied upon a societal morality or a personal morality standard. The remaining two specifically related their determination on the "wrongfulness" question to societal morality. The final expert, according to the court report of the testimony, did not specify the type of "wrongfulness" used in the evaluation.

The applicable legal definition of "wrongfulness" in Colorado, as ultimately clarified by the Colorado Supreme Court in *Serravo*, "refers to moral wrong . . . [and] should be measured by existing societal standards of morality rather than by a defendant's personal and subjective understanding of the legality or illegality of the act in question."[68] Although the court's opinion does not address what the experts were told about the legal definition of "wrongfulness," the experts' varied emphases and results suggest that the applicable legal standard might not have been clearly identified to the experts in advance of their testimony. In addition, the opposing results reached by the first expert, who applied a legal "wrongfulness" standard to reach the opinion that the defendant was sane, and the remaining experts, four of whom appear to have applied a moral "wrongfulness" standard and one who applied an unspecified standard to find that the defendant was unable to distinguish right from wrong (implying insanity) illustrate the importance, and perhaps challenge,

66. *Id.* at 132.

67. *Id.* All the experts found the preliminary two criteria met, namely that the defendant suffered from some mental disorder or disability that caused or could have caused the conduct at issue. *Id.* at 131–32. The facts of the case led the intermediate appellate court to characterize the circumstances as raising a "deific decree" situation. *Id.* at 139.

68. *Id.* at 137–38. The court explained, "we affirm that part of the court of appeals' decision which holds that the phrase 'incapable of distinguishing right from wrong' refers to a cognitive inability to distinguish right from wrong under existing societal standards of morality rather than, as implied by the trial court's instruction, under a purely subjective and personal standard of morality." *Id.* at 130. The court also noted that, "[a]ny such instruction should also expressly inform the jury that the phrase 'incapable of distinguishing right from wrong' does not refer to a purely personal and subjective standard of morality." *Id.* at 139. The court arrived at its conclusions only after an extended analysis, suggesting that interpretation of the statutory language of "incapable of distinguishing right from wrong" was not self-evident. *Id.* at 133–40.

of ascertaining and applying the legally correct standard in giving expert testimony to aid the trier of fact in assessing "wrongfulness" and sanity.[69]

A. Options for the Forensic Expert

In response to the risk that an expert will confront a lack of clarity about the applicable standard, in this Subpart, we investigate several potential avenues of recourse to enable the forensic expert to discern the applicable standard as early as is reasonably possible in the mental health evaluation process. We also propose and explore an available option if the standards are not discernible at the time of the required assessment.[70]

To begin, available avenues of recourse for a forensic expert to ascertain the applicable standard include: (1) requesting that the judge provide the definition of "wrongfulness" to be applied in the case; (2) requesting guidance from the retaining attorney on the applicable standard; (3) reviewing pattern jury instructions for guidance on the definition or reviewing case precedent or statutes in the jurisdiction; and (4) preparing a report that evaluates "wrongfulness" under more than one definition.

1. Seeking a Ruling from the Trial Judge

The available options in a given case might depend on its procedural status. For example, if, when the forensic expert enters the case, the case already reposes in the department in which the trial will take place, it might be practical to request a ruling from the judge (through the referring party) regarding the definition of "wrongfulness" that the trier of fact will use. For many reasons, obtaining such a ruling directly from the trial judge is a preferable route. First, requesting such a ruling alerts

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69. The focus of the Colorado Supreme Court in the *Serravo* appeal was on the interpretation of the statutory definition of "wrongfulness" and a supplemental instruction given by the trial court on the definition of "wrongfulness." After providing the statutory definition that relates to being "incapable of distinguishing right from wrong," the judge augmented the definition with the following:

> As used in the context of the statutory definition of insanity as a criminal defense, the phrase "incapable of distinguishing right from wrong" includes within its meaning the case where a person appreciates that his conduct is criminal, but, because of a mental disease or defect, believes it to be morally right.

Id. at 132 (referencing jury instruction No. 5). The Colorado Supreme Court held that the augmentation incorrectly suggested a personal morality standard. *Id.*

70. Whether the apparent disparities and/or lack of clarity in the standard applied by the experts in *Serravo* would have been remediable prior to the forensic evaluations and testimony is not clear. The primary focus of the appeal in that case involved interpreting the statutory phrase "incapable of distinguishing right from wrong" and an augmented jury instruction on "wrongfulness" provided by the judge. *Id.* at 129–30. The Colorado Supreme Court determined that the augmentation implied to jurors that they could apply a personal morality evaluation of moral "wrongfulness." *Id.* at 130. According to the court, this was not an available standard in Colorado and the jury had, therefore, been improperly instructed. *Id.* Because of double jeopardy considerations, however, the court precluded a retrial from the original jury verdict of not guilty by reason of insanity. *Id.*

the judge that the definition of "wrongfulness" is significant in that case. As a result, the judge is more likely to focus on the definition early in the case.[71] Such a ruling also informs the forensic expert of the standard the judge anticipates applying in the case and might represent the standard that the judge will read to the jury during the instructional phase(s) of the case. A ruling from the trial judge 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. Of course, attorneys in a particular case might have strategic reasons why they do not wish to seek an early ruling on an insanity issue. Alternatively, the judge might wish to wait to hear attorneys' legal arguments after evidence has been presented. Consequently, even if the case is in the correct procedural posture, a ruling from the trial judge might not be available to the expert prior to the evaluation process.

Moreover, forensic experts may enter the case before it has reached a trial department or before it is procedurally appropriate for arguments regarding the definition of "wrongful" to be made and ruled on by the judge. Under these circumstances, no such ruling from the trial judge can pragmatically be sought. It might be possible to seek a ruling from the judge in whose pretrial department the case sits, but such a ruling might not prove binding on the trial judge and might therefore not be worth seeking.

2. *Guidance from the Retaining Attorney*

Absent a binding ruling from a judge in the case on the standard, if the expert is not appointed by the court, the expert might ask for guidance from the attorney with whom the expert is working. If the standard emerges with clarity from available legal resources, like a statute, case law, or applicable pattern jury instructions, the attorney should be able to supply the expert with the requisite information.

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71. The definition of "wrongfulness" that the judge will actually articulate to a jury in a case can be the subject of substantial controversy. *See, e.g.*, United States v. Polizzi, 545 F. Supp. 2d 270, 272 (E.D.N.Y. 2008) ("The definition of legal insanity was critical. The parties' proposed jury instructions, and in particular their definitions of 'wrongfulness,' were sharply contrasting. The government requested that the court, based on a recent Seventh Circuit Court of Appeals decision, *United States v. Ewing*, 494 F.3d 607, 618 (7th Cir. 2007), issue a jury charge defining 'wrongfulness' under the IDRA to be '*contrary to public morality*, as well as contrary to law.' Defendant opposed, arguing for a standard jury instruction based on 1 Leonard Sand, et al., Modern Federal Jury Instructions—Criminal § 8.09 (2007), which does not specifically define 'wrongfulness.' The court denied both requests and issued its own instruction, defining 'wrongfulness' as 'unlawfulness' . . . . No objection was taken to the court's formulation." (citations omitted)). The defendant in this case appealed from a subsequent ruling. United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008), *vacated and remanded*, United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009). On appeal, the defendant argued "that the district court erred by defining wrongfulness as unlawfulness." 564 F.3d at 153. Because there had been no objection to the instruction in the trial court, the Second Circuit found that the issue had been waived. *Id.*

However, if opposing arguments have not been heard yet and more than one definition of "wrongful" may apply in a particular jurisdiction, and if the retaining attorney is less familiar with defenses involving mental health in that jurisdiction, then the attorney might not be able to provide a definition, or the definition might not be consistent with the one that the judge ultimately determines is applicable in that case.[72]

3. Consulting Pattern Jury Instructions

If the expert has exhausted the means of obtaining guidance from the court and the retaining attorney and must proceed in the absence of such guidance, for purposes only of engaging in the insanity evaluation for that case,[73] some experts might feel comfortable consulting the standard pattern jury instructions applicable in the relevant jurisdiction. Judges typically rely on these pattern instructions as the heart of their legal guidance to the jury on the substantive law of the case. Pattern instructions often derive from the work of a group or committee of judges, practicing counsel, and other legal scholars, who draft instructions on crimes, defenses, courtroom process, and related topics for use in criminal trials throughout a jurisdiction. Some pattern jury instructions offer a relatively clear and accessible legal definition of "wrong" or "wrongful." For example, the Connecticut instructions provide substantial guidance to jurors (and to forensic experts) about the meaning of "wrongfulness":

> A defendant may establish that (he/she) lacked substantial capacity to appreciate the "wrongfulness" of (his/her) conduct if (he/she) proves that, at the time (he/she) committed the criminal acts, due to mental disease or defect (he/she) suffered from a misperception of reality and, in acting on the basis of that misperception, (he/she) did not have the substantial capacity to appreciate that (his/her) actions were contrary to societal morality, even though (he/she) may have been aware that the conduct in question was criminal.
>
> In deciding whether the defendant had substantial capacity to appreciate that (his/her) conduct was contrary to societal morality, you must not limit your inquiry merely to the defendant's appreciation that society, objectively speaking, condemned (his/her) actions. Rather, you must determine whether the defendant maintained a sincere belief that

72. It is also possible that, where legal indeterminacy governs, there is a particular opportunity or incentive for an attorney to choose a definition supportive of the client's position. Whether this is probable or prudent might relate to whether that choice is likely to be tested by cross-examination or through argument before the judge.

73. If the forensic expert does engage in legal research, the expert will probably want to be careful not to engage in the unauthorized practice of law by giving legal advice based on that research or otherwise.

> society would condone (his/her) actions under the circumstances as the defendant honestly perceived them.[74]

This Connecticut instruction alerts the expert that the "wrongfulness" standard contemplates that the accused have had a substantial capacity to appreciate that the actions violated societal morality. The expert could also reasonably conclude that the defendant's personal morality is not at issue. Nevertheless, the trier of fact must engage in the mental gymnastics to understand the defendant's personal perception of society's view of the defendant's actions because the Connecticut instruction indicates that the evaluator should apply a standard or an internalized view of "violates society's morals" when assessing insanity under that prong of the definition. Moreover, the instruction clarifies for the expert (and jury) that awareness by the defendant that the conduct was criminal or contrary to law does not preclude a finding of legal insanity under the moral "wrongfulness" definition. The Connecticut instruction embodies the moral "wrongfulness" societal morality standard evaluation from the moral "wrongfulness" societal morality Figure 4 above if there is no claim of "special knowledge," and the moral "wrongfulness" societal morality internalized evaluation approach from the same chart if there is a claim of "special knowledge."

In some jurisdictions, however, while supplying general guidance on insanity, the pattern instructions do not, or only partially, tackle the question of the definition of "wrongfulness." For example, the federal statute on insanity, the Federal Insanity Defense Reform Act, which applies to all insanity defenses raised in federal criminal cases, "does not define 'wrongfulness.'"[75] The federal instruction on insanity as articulated by the Seventh Circuit reads: "If, at the time of the commission of the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the 'wrongfulness' of his/her acts, then the defendant is not guilty by reason of insanity."[76] Neither that instruction nor the Committee Comments to the instruction

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74. *2.9-2 Lack of Capacity—§ 53a-13*, STATE OF CONNECTICUT JUDICIAL BRANCH CRIMINAL JURY INSTRUCTIONS (2007).

75. *Polizzi*, 545 F. Supp. 2d at 274.

76. *6.02 Insanity*, PATTERN FEDERAL JURY INSTRUCTION FOR THE SEVENTH CIRCUIT (1998). The instruction repeats the pertinent text of the U.S. Code section defining insanity, which reads in relevant part:

> §17. Insanity defense. (a) Affirmative Defense—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

18 U.S.C. § 17 (2014).

provides any further clarification of the meaning of "wrongfulness."[77] If the definition is at issue in the case, litigation before the trial judge is likely to be necessary before an expert can know what definition a jury will hear.

The federal district court case of *United States v. Polizzi* provides a relevant example.[78] In that case, the prosecution argued for a definition of "wrongfulness" in which the "term 'wrongfulness' as used in these instructions means contrary to public morality, as well as contrary to law."[79] The defense argued for an instruction that "did not include any definition of 'wrongfulness.'"[80] The judge ultimately gave an instruction that defined "wrongfulness" as follows:

> "Wrongfulness" means in this context "unlawfulness." The definition becomes somewhat subtle because a defendant does not have to know an act is illegal to be guilty of doing the act which constitutes the crime as defined by law. The specific intents charged here are essentially to download and to possess. Thus, when the statute says "unable to appreciate" the "wrongfulness" of his acts, you are, in effect, being asked to determine, "If he were told that the act was illegal, would he be able to understand, i.e., 'appreciate,' that he would be breaking the law by downloading or by possessing?["] Ask yourselves, for example, could he understand and appreciate that what he was doing was unlawful?[81]

A case like *Polizzi*, in which the judge fashions an instruction with a different definitional approach than the one proposed by either party, underscores the importance of pursuing the definitional question on insanity with the trial judge promptly.[82]

Consider also the California CALCRIM instruction on insanity.[83] The instruction in CALCRIM 3450 explains the second prong of the insanity test as follows: "[The actor] was incapable of knowing or

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77. *6.02 Insanity*, *supra* note 76. Guidance on the applicable definition of wrongfulness is available through case law in the Seventh Circuit. *See* United States v. Ewing, 494 F.3d 607, 609–10 (7th Cir. 2007) ("A defendant's ability to appreciate the wrongfulness of his acts is a concept adopted from the common-law *M'Naghten* rule for legally exculpatory insanity. *M'Naghten's Case* and American case law applying it establish that a defendant's ability to appreciate right and wrong has consistently been determined by reference to societal, not personal, standards of morality.").

78. *Polizzi*, 545 F. Supp. 2d at 273–81.

79. *Id.* at 274.

80. *Id.* at 275–76.

81. *Id.* at 277.

82. In *Polizzi*, the federal trial court judge did develop and distribute his proposed instruction on insanity before the trial. 564 F.3d 142, 148 (2d Cir. 2009).

83. California Criminal Jury Instructions ("CALCRIM") is a collection of jury instructions adopted by the California Judicial Council for use in California courts. *See Criminal Jury Instructions Resource Center*, CAL. JURY INSTRUCTIONS, http://www.courts.ca.gov/partners/312.htm (last visited Apr. 8, 2016). One of the co-authors of this Article, Kate E. Bloch, had the privilege of serving on the Judicial Council Task Force on Jury Instructions, Criminal Instructions Subcommittee, which drafted the original CALCRIM instructions.

understanding that [the] act was morally or legally wrong."[84] The instruction does furnish guidance. The instruction indicates first that California law makes an insanity claim viable if the defendant was not capable of knowing or understanding that the act violated the law. The instruction's invocation of the "legally wrong" definition answers some questions about the "wrongfulness" standard in California. Here, if the expert finds that, using the defendant's understanding of the situation, the defendant still knew or was capable of knowing or understanding that the conduct was legally wrong or violated the law, the defendant should qualify as sane under the legally wrong option.[85]

In addition, the CALCRIM instruction's disjunctive structure on "wrongfulness" clarifies that the absence of an understanding of some type of moral "wrongfulness" can also qualify for an insanity claim. But, the text of the instruction does not distinguish between society's or the defendant's personal morality or among the permutations of societal "wrongfulness." In the explanatory bench notes that accompany the instruction, the drafters write: "If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane."[86] But here too, the language does not address or provide explicit guidance on the two types of moral wrong (individual wrong or societal wrong), nor does it indicate which should be the focus of evaluation.

To determine to which type of moral wrong the instruction refers, one must look outside of the CALCRIM jury instructions and read one of the underlying California court precedents cited in the instruction's bench notes, like *People v. Stress*.[87] Only by looking to resources outside the instruction does one find a discussion of the type of moral wrong that can exculpate the accused under the insanity doctrine in California. The *Stress* court concluded that "in California 'wrong,' in the sanity context, means the violation of generally accepted standards of moral

84. *3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 29.8)*, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS (2016). For a detailed analysis of the "wrongfulness" standard in California, see Yakush & Wolbransky, *supra* note 13.

85. Assuming the other conditions of the standard are met.

86. The relevant bench note reads:

> Legal and Moral Wrong
>
> The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane.

3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 29.8), JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS (2016) (citing People v. Skinner 704 P.2d 752, 759–64 (Cal. 1985); People v. Stress 252 Cal. Rptr. 913, 920–23, (Ct. App. 1988)).

87. 252 Cal. Rptr. 913 (Ct. App. 1988). For materials on the insanity defense generally, including the legal and moral wrong doctrines, the deific decree doctrine, and the evolution of California's treatment of insanity in case law, see KATE E. BLOCH & KEVIN C. MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH: CASES, STATUTES, AND PROBLEMS 553–78 (2005).

obligation."[88] Because the specifics of the type of wrong that can exculpate are not part of the existing pattern instructions, inclusion of that clarifying information must be approved by the judge in order for it to be included in the instructions to the jury. This is likely to transpire later in the litigation process, and the clarifying language may or may not be adopted by the judge.

Returning to our original hypothetical involving Jake, we consider how a forensic expert might proceed in the face of uncertainty about the prevailing definition of "wrongfulness" using pattern jury instructions as a resource guide. Let us imagine how that expert might act in a state court, like Connecticut, and in a federal court on a federal criminal case.

a. Evaluating Jake's Case in Connecticut

Connecticut's pattern instruction furnishes relatively straightforward guidance on which types of "wrongfulness" the jurisdiction considers pivotal in the evaluation of insanity and how those are defined for purposes of Jake's case. Assuming the other conditions are met, Connecticut permits a finding of insanity if Jake "maintained a sincere belief that society would condone (his/her) actions under the circumstances as the defendant honestly perceived them,"[89] even if he understood that his conduct was a crime.[90] Under the hypothetical,[91] using the Connecticut definition, and applying a moral "wrongfulness" societal morality internalized evaluation approach, because Jake believed that once society learned what Jake's delusion told him about reality, society would approve of his actions, an expert could reasonably ascertain that Jake did not have the substantial capacity to appreciate the "wrongfulness" of his behavior. Assuming that no subsequent law undermined the language of the pattern instruction, an expert evaluating a defendant's insanity claim in Connecticut would benefit from access to the pattern instruction, and,

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88. *Stress*, 252 Cal. Rptr. at 923. In examining previous decisions on "wrongfulness," the court discussed two primary types of morality at issue in a moral wrongfulness assessment:

> Although seldom addressed by the courts, which have generally left the word "wrong" undefined in jury instructions, the question is whether moral wrong is to be judged by society's generally accepted standards of moral obligation or whether the subjective moral precepts of the accused are to be employed. While the inherent "slipperiness" of the terminology in this area may leave some doubt, it appears most courts mean that the defendant is sane if he knows his act violates generally accepted standards of moral obligation whatever his own moral evaluation may be. . . . Again, while not entirely clear, it appears California follows the rule that moral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused.

Id. at 923 (citations omitted).

89. *See supra* note 74.

90. *Id.*

91. This assumes a qualifying mental disease or defect caused Jake's conduct.

in most cases, would probably be able to gather enough guidance from it to base the evaluation on it.

b. Evaluating Jake's Case in the Federal Courts

The governing federal statute on the insanity defense does not define "wrongfulness."[92] Unless the expert is in a federal court in which the district or appellate circuit court has defined "wrongfulness" in a prior case law decision,[93] there is unlikely to be controlling case precedent to answer the expert's inquiry regarding the applicable definition of "wrongful." Without case precedent or statutory specification, pattern jury instructions are unlikely to specify the type of "wrongfulness" involved. The federal pattern instruction from the Sixth Circuit illustrates this lack of guidance. The insanity instruction there provides in relevant part:

> (2) For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following by clear and convincing evidence:
>
> (A) First, that he had a severe mental disease or defect when he committed the crime; and
>
> (B) Second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.[94]

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92. United States v. Polizzi, 545 F. Supp. 2d 270, 274 (E.D.N.Y. 2008).

93. *See, e.g.*, United States v. Ewing, 494 F.3d 607, 616 (7th Cir. 2007). Other federal jurisdictions might defer to and adopt the *Ewing* standard, but that is likely to require some court action, which may or may not precede the expert's evaluation.

94. *6.04 Insanity*, SIXTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS, http://www.ca6.uscourts.gov/internet/crim_jury_insts.htm (last visited Apr. 8, 2016). The full text of the instruction follows:

> 6.04 INSANITY
>
> (1) One of the questions in this case is whether the defendant was legally insane when the crime was committed. Here, unlike the other matters I have discussed with you, the defendant has the burden of proving this defense, and he must prove it by clear and convincing evidence. This does not require proof beyond a reasonable doubt; what the defendant must prove is that it is highly probable that he was insane.
>
> (2) A mental disease or defect by itself is not a defense. For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following by clear and convincing evidence:
>
> (A) First, that he had a severe mental disease or defect when he committed the crime; and
>
> (B) Second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.
>
> (3) Insanity may be temporary or permanent. You may consider evidence of the defendant's mental condition before, during and after the crime in deciding whether he was legally insane when the crime was committed.
>
> (4) In making your decision, you are not bound by what any of the witnesses testified. You should consider all the evidence, not just the opinions of the experts.
>
> (5) So, you have three possible verdicts—guilty; not guilty; or not guilty only by reason of insanity. Keep in mind that even though the defendant has raised this defense, the government still has the burden of proving all the elements of the crime charged beyond a reasonable doubt.

Here, resorting to the pattern instructions is unlikely to provide adequate guidance.

Pattern instructions can provide guidance on important insanity issues, as illustrated particularly by the Connecticut instructions. But, their usefulness remains contingent upon an instruction's inclusion of a comprehensible and perhaps thorough enough treatment of "wrongfulness." Moreover, even explicit and accessible pattern instructions that define "wrongfulness" may not reflect court decisions or legislative developments on the issue, such as in California, where the language of the CALCRIM instruction does not include the clarifying information from the *Stress* case. Revisions to the pattern instructions may also lag behind the publication of a new court ruling or legislative enactment. Consequently, even if a pattern instruction is explicit and accessible, an expert should endeavor to confirm the current applicability of the instruction with the retaining attorney as well as be specific in the evaluative report if the expert conducts research about the source of any legal definitions that the expert uses.[95]

When an instruction does not offer explicit guidance, understanding the standard may require resorting to reading case law or statutes. Sometimes additional legal research beyond the pattern instructions can produce a working answer for the expert. But, unless a forensic expert has adequate training in performing legal research, this may prove to be an unproductive, confusing or unwise endeavor.

Moreover, as exemplified in *Polizzi*, sometimes ascertaining the applicable standard requires arguments by counsel and a ruling by the judge.[96] As this process might take place after an expert has performed the evaluation, even if the expert has read the pattern instructions and done additional legal research, the expert may not be able to ascertain the applicable definition before the evaluation and perhaps not even before testifying.

4. A Triadic Analysis

It might be that no definitive guidance is forthcoming from the court, from attorneys, or from legal authorities at the time of an insanity evaluation. In that case, or, in an abundance of caution, in a jurisdiction that has a "wrongfulness" prong to its insanity standard that does not clearly specify the type of "wrongfulness" involved, the expert might consider preparing a report with a triadic analysis. This triadic approach

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Id. The Committee Commentary noted that the instruction is current through April 1, 2015, and that "[t]he Sixth Circuit has not discussed this instruction specifically." *Id.*

95. For example, research might reveal a judge's prior practice with respect to insanity instructions.

96. *See supra* notes 78–82 and accompanying text.

would include a separate sanity analysis and conclusions section under all three definitions (and appropriate permutations within them) of "wrongfulness." In this way, the expert can offer the court, and, if appropriate, the trier of fact the benefit of the expert's analysis under the most likely standards to be applied by the court.[97] In these circumstances, a triadic analysis may most effectively provide a foundation for an expert's later testimony in the case and for informing the jury about the relevant insanity analysis.[98]

The need to ascertain the applicable legal standard is fundamental to a forensic evaluation of insanity.[99] As the *2014 AAPL Practice Guideline for Forensic Evaluation of Defendants* indicates, "[t]he exact language of the not criminally responsible test should be addressed in the report."[100] The standard frames the specifics of the inquiries and the types of evidence the forensic psychiatrist will need to investigate and on which the expert will base the evaluation and report. If the standard involves a question of knowledge or appreciation of legal wrong, then the forensic scientist would aim to ascertain the defendant's understanding of the legal context generally and that understanding with respect to the act at issue. If the standard involves awareness of societal morals, then inquiries would need to be directed to that.

Whether the forensic scientist's testimony includes an opinion applying the legal standards to the evidence generated during the evaluation poses a second-level question. While federal courts may

97. Whether the expert will actually testify to the analysis under all three definitions depends upon a number of factors, in particular, whether the court has articulated the standard to be applied after the evaluation concludes but prior to the expert's testimony. Having access to a report that furnishes careful analysis under each standard might encourage the judge to select the applicable standard(s) before the expert's testimony. Even if the expert is called upon to testify to the analysis under all three definitions, and, before the close of the case, the judge determines that fewer than all of those are applicable, the judge and the attorneys can inform and help guide jurors during argument and the instructional phase of the case about the limitations on considering only the relevant portion of the analysis.

98. A triadic analysis may result in alternative opinions depending on the legal definition of "wrongfulness." Alternative opinions are not new to forensic reports on insanity. They also arise when there are competing factual narratives of the event. In the case of alternative factual narratives, the *AAPL Practice Guideline* advises forensic psychiatrists that they may need to "offer alternative opinions." Janofsky et al., *supra* note 11, at S27.

99. *See* Janofsky et al., *supra* note 11; *see also* Goldstein & Rotter, *supra* note 15, at 366 ("As a threshold issue, psychiatrists should ascertain the appropriate legal standard of wrongfulness within the jurisdiction in question. Whether or not they are permitted to testify as to the ultimate question of the defendant's insanity, by properly relating their clinical psychiatric findings to the relevant legal criteria for criminal responsibility that apply, psychiatrists are better prepared to provide data and inferences to the factfinder that are needed to achieve the law's purpose."); Robert Lloyd Goldstein, *The Psychiatrists' Guide to Right and Wrong: Part IV and the Ultimate Issue Rule*, 17 BULL. AM. ACAD. PSYCHIATRY L. 269 (1989).

100. Janofsky et al., *supra* note 11, at S28; s*ee also* Yakush & Wolbransky, *supra* note 13, at 365 ("From an ethical perspective, forensic psychologists are expected to understand and utilize the legal criteria as put forth by statutes and/or case law.").

prohibit[101] and scholars and practitioners in the field may discourage[102] evocation of a forensic scientist's conclusion on "wrongfulness" or sanity, authorities in the field opine that "most courts expect ultimate opinion testimony."[103] Consequently, forensic scientists, like other experts, have and often will be expected to provide an opinion on the penultimate issue (did the defendant know that the acts were "wrongful," however defined at the time of the offense) or the ultimate issue (was the defendant sane at the time of the offense) before the trier of fact.[104] The AAPL notes that "[t]he opinion section is the most critical part of the forensic report. It should summarize pertinent positives and negatives and answer the relevant forensic questions, based on that jurisdiction's legal definition for being found not criminally responsible. The reasoning behind the opinion should be carefully explained."[105] The AAPL also explicitly recognizes that "[t]he federal government and some states now restrict psychiatric testimony to the defendant's diagnoses, the facts upon which those diagnoses are based, and the characteristics of any mental diseases or defects the evaluator believes the defendant possessed at the relevant time. They do not allow psychiatric testimony regarding the ultimate issue in the case."[106] The *AAPL's Practice Guideline for Forensic Evaluation of Defendants Raising the Insanity Defense*, nonetheless,

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101. *See* FED. R. EVID. § 704. Section 704 reads:

> Opinion on Ultimate Issue:
>
> (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
>
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier-of-fact alone.

102. *APA Statement*, *supra* note 15, at 19–20 ("The American Psychiatric Association is not opposed to legislatures restricting psychiatric testimony about . . . ultimate legal issues concerning the insanity defense . . . . When . . . 'ultimate issue' questions are formulated by the law and put to the expert witness who must say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will. . . . Determining whether a criminal defendant was legally insane is a matter for legal factfinders, not for experts."); *see also* Goldstein, *supra* note 99; Alan M. Goldstein et al., *Evaluation of Criminal Responsibility*, *in* HANDBOOK OF PSYCHOLOGY: VOLUME 11 FORENSIC PSYCHOLOGY 381, 397 (Alan M. Goldstein ed. 2003) ("In the best of all possible worlds, perhaps mental health professionals should not address ultimate legal issues. . . . For the present, however, experts are allowed to offer such testimony in virtually all jurisdictions and lawyers and judges expect them to do so.").

103. RICHARD ROGERS & DANIEL W. SHUMAN, CONDUCTING INSANITY EVALUATIONS 46 (2d ed. 2000).

104. For cases from a variety of jurisdictions in which forensic experts provided opinions on the penultimate or ultimate issues, see, for example, Guam: People v. Alvarez, 763 F.2d 1036 (9th Cir. 1985); Arkansas: Catlett v. State, 962 S.W.2d 313 (Ark. 1998); Hawai'i: State v. Uyesugi, 60 P.3d 843 (Haw. 2002); Illinois: People v. Dresher, 847 N.E.2d 662 (Ill. 2006); Vermont: State v. Zorn, 88 A.3d 1164 (Vt. 2014).

105. Janofsky et al., *supra* note 11, at S28.

106. *Id.*

anticipates that "full and detailed reasoning based on the standards of the jurisdiction's insanity test should be discussed in the evaluator's report, unless instructed otherwise by the referring party."[107] The court or attorneys may then direct or limit the testimony of the forensic expert to discussing those diagnoses, facts, and/or opinions that turn out to be the applicable and admissible ones in the case. In the end, with or without expressing a view of the ultimate issue, scientists need to prepare reports that respond to the applicable legal definitions of "wrongfulness,"[108] and, where one is not specified or ascertainable, to have an approach that provides for an informed analysis nonetheless.

B. Limits of the Proposed Approach

The proposed approach aims to assist the forensic expert in ascertaining the applicable definition of "wrongful" early enough in the diagnostic process to enable the expert to engage in a useful and accurate evaluation of the accused's mental state as it relates to sanity. Although this approach offers potential benefits, it also possesses limitations, including those that follow.

First, even the default proposal of a triadic analysis addressing each of the three definitions of "wrongful" does not anticipate the situation where a court defines it in a unique or unusual way outside the parameters of those definitions. Judges might draft their own definitions or variations of existing definitions or accept definitions drafted by counsel that do not conform to typical articulations of "wrongful" as contemplated by the three definitions discussed earlier. Whether such definitions will withstand appeal is likely to exceed the expert's purview. But, in such a case, even a triadic analysis might not be adequate to provide useful expert testimony to jurors on the issue of "wrongfulness" in insanity.

Second, one route for accessing the applicable standards suggested in this Article involves reviewing the relevant pattern jury instructions. Locating those instructions may prove a manageable task in jurisdictions that make theirs readily available in a free online searchable format; in other jurisdictions, it may not. Moreover, as indicated above, even in those jurisdictions where the instructions are readily available and

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107. *Id.*; *see also* James L. Knoll, IV & Phillip J. Resnick, *Insanity Defense Evaluations: Toward a Model for Evidence-Based Practice*, 8 Brief Treatment and Crisis Intervention 92, 96 (2008) (In describing the procedure, the authors list the responsibilities of the psychiatrist, including "[o]btain correct legal standard" and "[f]ormulate opinion on insanity.").

108. Some scholars in the field explicitly criticize the prohibition on ultimate opinion evidence and opine that "[t]hough superficially attractive and undoubtedly satisfying to some skeptics of mental health expertise, the proscription of ultimate expert opinions in insanity cases is not only unwarranted and unnecessary, but, for a number of reasons, unworkable in practice." Richard Rogers & Charles Patrick Ewing, *Ultimate Opinion Proscriptions: A Cosmetic Fix and a Plea for Empiricism*, 13 Law and Hum. Behav. 357, 364 (1989).

provide explicit and reasonably clear guidance, a check of case law and legislative developments might still be prudent or necessary to ensure that court pronouncements or legislative developments have not altered the applicability of the language of the instructions. Legal research into case law or legislative developments is a skill taught in legal education and might not be part of the forensic expert's training. There are some risks inherent in performing legal research without appropriate training. The risk perhaps of greatest significance here is failing to ascertain the current and applicable standard. In addition, legal research can be challenging without the tools employed by trained legal researchers, like access to commercial legal search engines, such as WestlawNext and Lexis Advance. Law librarians might be able to provide assistance to address some of these limitations. Nonetheless, the research suggested may prove a daunting or inappropriate task for those not trained in legal research.

Third, an expert offering analyses under definitions of "wrongfulness" that turn out to be inapplicable could confuse jurors. If the determination of the standard remains undecided at the time of the expert's testimony, and the expert presents analysis under all three definitions of "wrongfulness," a jury might have difficulty applying only the definition that the court later determines is applicable. The situation could be even more challenging for jurors if the judge selects or drafts a definition that is different from the three presented. To avoid this confusion, the definitional question should be raised at the earliest practical stage.

Fourth, it is important to recognize that even careful and accurate detection and explanation of the applicable definitions of legal standards has limits. Among them, some research suggests that the specific language of a standard might not be determinative, and different standards may not produce different results.[109] Moreover, jurors might decide insanity issues "on the basis of their moral intuitions rather than by systematically applying the official instructions they are given[;]"[110] jurors might simply make their own evaluation of how severe the person's mental illness is and disregard the definitions altogether. That different standards might not produce different results and that jurors might disregard the legal standards does not, however, obviate the need for forensic experts to endeavor to ascertain those standards and apply them in their formal insanity evaluations.

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109. *See, e.g.*, *supra* note 15.

110. ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 175 (1991) (citing as an example research by Norman J. Finkel, *De Facto Departures from Insanity Instructions: Toward the Remaking of Common Law*, 14 LAW AND HUM. BEHAV. 105, 112–13 (1990)).

Finally, our proposed approach does not treat a host of related questions about insanity. For example, we do not attempt to resolve the boundaries of the three standards—for instance, how much congruence there should be between legal wrong and moral wrong. We do not embark on the debate about whether knowledge or substantial capacity to appreciate is a preferable approach. We do not propose whether the scope of a forensic expert's testimony should embrace commentary on the ultimate issue or be limited to preliminary matters. Nor do we suggest which definitional standard should ultimately be adopted.

Scholars and practitioners have long sought to distinguish the role of the forensic clinician from that of the trier of fact. Because the determination of a defendant's sanity belongs to the trier of fact, sometimes this involves efforts to cabin the clinician's role to a presentation of the relevant diagnoses and underlying facts regarding insanity and "wrongfulness," rather than allowing opinions on the penultimate or ultimate issue.[111] Nonetheless, we recognize that courts and attorneys commonly call on experts to testify specifically about "wrongfulness" and whether the defendant meets the legal test for insanity.[112] Consequently, we aim to provide guidance for such circumstances. In this Article, we offered a conceptual framework for the primary permutations of the term "wrongfulness" in the insanity context. In addition, we suggested a pragmatic resolution to the dilemma faced by the forensic expert in many of those instances where the legal definition of "wrongful" cannot be readily ascertained at the time of the psychiatric evaluation or the definition is subject to later conflict.

CONCLUSION

Legal insanity lies at the intersection of forensic science and the law. This Article confronts the forensic expert's conundrum when legal definitions of insanity vary or are indecipherable before the expert must complete an assessment in a criminal case. The Article first develops a means for conceptualizing the insanity defense through the metaphor of the lenses of a microscope to assist the trier of fact with the shifts in perspective that are often fundamental to understanding the forensic expert's evaluation and the insanity defense itself. The Article then parses and clarifies a convoluted collection of commonly applied legal definitions of "wrongfulness" in insanity law. In light of this clarified set of metrics, the Article analyzes approaches that a forensic expert might use to ascertain the applicable definition of "wrongfulness" in a manner that is timely to the evaluation. The analysis also recognizes circumstances

111. *See supra* notes 10, 101–02 and accompanying text.

112. For a discussion of this issue regarding the role of the forensic clinician, see, for example, *supra* notes 10, 101–04 and accompanying text.

where the standard is not ascertainable in time and proposes a remedy in which the expert engages in a triadic evaluation, applying each of three legal definitions of "wrongfulness" to the case. With the Article's analysis and recommendations, forensic experts should be better equipped to guide the trier of fact in evaluating "wrongfulness" in insanity claims in criminal cases.