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Ninth Circuit Review—The Insanity Defense: United States v. Hartfield and United States v. McGraw

Vincent J. Marella

III. THE INSANITY DEFENSE: UNITED STATES V. HARTFIELD AND UNITED STATES V. MCGRAW*

The insanity test, formulated by the American Law Institute,[1] has been adopted in some form by nearly all of the federal courts of appeals.[2] As set forth in the Model Penal Code, the test excepts from criminal responsibility one who, as a result of mental disease or defect at

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* This Note was prepared by J. Michael Dwyer.

1. The American Law Institute test provides in full:

> (1) 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.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Final Draft 1962) [hereinafter cited as ALI test].

In paragraph (1), the capacity to appreciate the criminality (wrongfulness) of one's conduct is the cognitive component of the test; the capacity to conform conduct to legal requirements is the behavioral component of the test. Paragraph (2) of the test, the "caveat paragraph," was enacted to exclude as a defense the "psychopathic personality" (United States v. Brawner, 471 F.2d 969, 993 (D.C. Cir. 1972)) and has not been adopted by the Ninth Circuit. *See* Wade v. United States, 426 F.2d 64, 72-73 (9th Cir. 1970).

The ALI test has supplanted the M'Naghten rule, which required that in order to successfully assert the insanity test

> 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 Case, 8 ENG. REP. 718, 722 (H.L. 1843).

2. In the Court of Appeals for the District of Columbia, the alternative word "wrongfulness" has been adopted in the first paragraph of the ALI test (note 1 *supra*), while the second paragraph of that test, although not part of a standard jury instruction, is used to avoid a "miscarriage of justice." United States v. Brawner, 471 F.2d 969, 991-94 (D.C. Cir. 1972). In five other circuits, wrongfulness has been adopted for use. *See* United States v. Frazier, 458 F.2d 911, 918 (8th Cir. 1972); Wade v. United States, 426 F.2d 64, 71-72 (9th Cir. 1970); Blake v. United States, 407 F.2d 908, 915-16 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680, 686 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966). The ALI test has been used as a guideline, rather than a requirement, in three circuits. United States v. Smith, 404 F.2d 720, 727 (6th Cir. 1968); United States v. Chandler, 393 F.2d 920, 926-27 (4th Cir. 1968); Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963).

The First Circuit, while not per se adopting the ALI test, apparently has rejected the M'Naghten test. See note 1 *supra*. In Amador Beltran v. United States, 302 F.2d 48, 52-53 (1st Cir. 1962), the court refused to pass on the issue of whether M'Naghten was still the proper test, stating instead that, on remand, the district court should reconsider the facts in light of United States v. Currens, 290 F.2d 751 (3d Cir. 1961). *Currens* rejected the M'Naghten test, and held that the "jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of law . . . ." *Id.* at 774.

the time he commits a criminal act, lacked "substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law." Since the Ninth Circuit's adoption of the ALI test,[3] it has had the opportunity, in a series of cases, to examine both the type of evidence and burden of proof required to establish the insanity defense, as well as the legal standard required by its formulation of the test.

A. Evidence of Insanity

In *United States v. Hartfield*,[4] the defendant was convicted of attempted robbery while armed with a dangerous weapon.[5] After his arrest, which occurred shortly after the commission of the offense, Hartfield began suffering from hallucinations brought on by a dosage of LSD.[6] At trial, defense counsel sought to introduce, as evidence of Hartfield's physical and mental condition immediately following the act, proof of drug intoxication which rendered him "incapable of forming specific intent."[7] The trial judge excluded the evidence on two grounds. First, the evidence was refused because it was being offered to show diminished capacity, which the court determined was not recognized in the Ninth Circuit.[8] Finding this to be error, the appellate court stated that diminished capacity was a defense to a specific intent crime. However, the evidence was not admissible in Hartfield's case since no specific intent was required.[9] The court nevertheless found that the evidence was admissible on the issue of insanity.

As a second ground, however, the trial court had refused to allow the evidence as proof of insanity in "that the testimony was immaterial unless the defense offered expert testimony to connect what happened

3. Wade v. United States, 426 F.2d 64 (9th Cir. 1970). *See* text accompanying notes 25-38 *infra*.

4. 513 F.2d 254 (9th Cir. 1975).

5. Hartfield was convicted of violating 18 U.S.C. § 2113(a) and (d) (1970).

6. 513 F.2d at 256.

7. *Id.* at 259.

8. *Id.*

9. *Id.* In finding that the district court had "misapplied" the law of the Ninth Circuit, the court stated: "It is clear that we follow the rule that in a prosecution for a specific intent crime, intoxication (although voluntary) which precludes the formation of the necessary intention may be established as a defense." *Id., citing* Henry v. United States, 432 F.2d 114, 119 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971). However, the court, relying on its earlier decision in United States v. Porter, 431 F.2d 7 (9th Cir.), *cert. denied*, 400 U.S. 960 (1970), found that general intent was all that was required under the statute, and hence the defense of diminished capacity was inapplicable. 513 F.2d at 259.

to the defendant following the event to his mental competence at the precise time of the alleged crime."[10] Hartfield had sought to introduce testimony by two expert witnesses as to his mental condition approximately forty-five minutes after the commission of the offense, but these witnesses "could not state with medical certainty any conclusion as to Hartfield's mental condition at the time of the offense."[11]

The Ninth Circuit, in considering whether the trial court should have admitted expert testimony concerning Hartfield's condition *after* the commission of the act, stated that "[o]nly slight evidence is sufficient to raise the issue as to sanity for submission to the jury."[12] It concluded that

> [e]vidence of a defendant's mental condition reasonably near the time when the offense is committed, whether before or after, is also admissible and may be sufficient to support an inferential conclusion as to the defendant's mental status at the critical time.[13]

The court also stated that it could find "no authority for the proposition that so-called expert testimony is required as [being] indispensable to rebutting prosecution proof of sanity."[14]

The court's conclusion is particularly significant in light of its earlier statements and holding in *United States v. Porter*.[15] There the defendant, who had been convicted of robbery,[16] raised the defense of insanity and sought to have the ALI test applied under the limited retroactivity of *Wade v. United States*.[17] The court stated that even under such a test the defendant "would not have made out a viable insanity defense. The four Government psychiatrists who testified all expressed the opinion that defendant's substantial mental difficulties developed *after* the commission of the crime."[18] The defendant did not offer any "significant evidence to contradict the opinions of the Government psychiatrists as to when his mental illness developed or as to his mental balance at the time of the crime."[19]

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10. 513 F.2d at 259.
11. *Id.*
12. *Id.* The court relied on a statement by the circuit court for the District of Columbia: " '[W]hen insanity is in issue, "any and all conduct of the person is admissible in evidence." ' " *Id.* at 259, *quoting* United States v. Brawner, 471 F.2d 969, 976-77 (D.C. Cir. 1972), *quoting* A. GOLDSTEIN, THE INSANITY DEFENSE 54 (1967).
13. 513 F.2d at 260.
14. *Id.*
15. 431 F.2d 7 (9th Cir.), *cert. denied*, 400 U.S. 960 (1970).
16. Like Hartfield, Porter was convicted of violating 18 U.S.C. § 2113(a) (1970).
17. 426 F.2d 64, 74 (9th Cir. 1970).,
18. 431 F.2d at 8.
19. *Id.* at 9.

Although *Hartfield* and *Porter* may appear contradictory, perhaps, more correctly, *Hartfield* represents a refinement of the court's opinion and holding in *Porter*. First, while it is unclear as to what type of evidence Porter sought to introduce in order to rebut the Government's expert witnesses, it is apparent that some evidence was introduced, but it was not "significant evidence." Since the court failed to indicate why the evidence was insignificant, *Porter*, based upon its facts, may be read as requiring a defendant to produce expert testimony once the Government has produced such evidence. *Hartfield*, however, indicates that no such requirement exists. The defendant is not required to produce expert testimony in order to rebut the Government's case. This would seem to apply even if the Government has produced expert testimony as to the defendant's sanity.[20]

A second possible clarification of *Porter* by the *Hartfield* court concerns the admissibility of evidence relating to the defendant's mental condition at a time other than the exact time when the offense is committed. In *Porter*, the Government sufficiently established that the defendant was sane at the time of the act and that the defendant's mental deterioration did not occur until after commission of the offense.[21] The defendant's evidence was not sufficient possibly because it pertained to his mental condition after the act was committed and defense counsel failed to show the connection between such evidence and the defendant's mental state at the time of the act. Any doubts left by *Porter* as to whether a defendant can introduce evidence of his

20. In *Porter*, the defendant claimed that the trial court had erred by not instructing the jury that he had no burden to produce witnesses or evidence on insanity. The court held that the jury instruction required the jury to find that every element of the crime charged had been proven beyond a reasonable doubt, and reasoned that this "adequately conveyed to the jury the thought that the defendant had no burden to produce evidence as to his insanity." *Id.* While the general limiting instruction given by the trial court would appear to be sufficient in the absence of any evidence offered by the defendant, an additional instruction, similar to that requested in *Porter* (" 'In considering the mental state of the accused, the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.' " *Id.* at n.3), should be given in light of the greater likelihood of defense evidence after *Hartfield*. This would avoid giving the jury the impression that the defendant has the burden of proof to establish his insanity.

Further, the *Porter* court indicated that even had the defendant produced evidence under the *Wade* standard, he "would not have been able to prove that he lacked 'substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.' " *Id.* at 8-9. Given *Hartfield's* ruling that any evidence can rebut the Government's expert testimony, the *Porter* court's conclusion appears erroneous and the jury should be further instructed that lay opinions should be considered in the same light as the expert testimony of the Government's witnesses.

21. *Id.* at 8.

later mental condition to show his mental incapacity at the time the offense was committed were dispelled by *Hartfield.*

In *Hartfield* the evidence related to the defendant's mental condition shortly after his arrest. However, the court did state that evidence of a defendant's mental condition, whether before or after the act, is admissible provided it is "reasonably near the time when the offense is committed." It is this type of evidence which would provide the basis of an inference that the defendant was suffering from a mental defect at the time of the act. Thus, the *Hartfield* court seems to indicate that the defendant need not independently establish any connection between a later mental state and the mental state at the time the offense is committed, provided that the evidence relates to the defendant's condition reasonably near the time when he committed the act.

However, *Hartfield* did not make clear what constitutes a reasonable time after the commission of the act. It would not appear that the *Hartfield* ruling is limited to the facts presented therein, *i.e.*, that a reasonable time after the act is limited to a period within one hour after the commission of the offense. Yet, no indication is given as to what amount of time would constitute an unreasonable length of time.[22] Presumably, this determination is to be made by the trial court. If, however, the court should find that the evidence is not "reasonably near the time" when the act is committed, the defendant may be precluded from presenting any such evidence as to his mental state at the time of the commission of the offense.[23]

B. Standard of Wrongfulness

Inherent in the adoption of the alternative word "wrongfulness" in the ALI test, is the question of whether that term means moral or legal wrong.[24] The simplest example of the difference in meaning between moral and legal wrong is the situation where one capable of understanding the physical and legal consequences of murder neverthe-

22. If the court intended to limit the time period to a relatively short one, it is possible that the *Hartfield* court, confronted with the same facts as in *Porter*, might have decided differently in that in *Porter* the mental deterioration of the defendant did not occur until one day after the commission of the act.

23. Notwithstanding its failure to fully explain the meaning of its holding in respect to the time element involved in allowing evidence of a defendant's post-offense mental state, *Hartfield* evidences a new trend in the Ninth Circuit. Based on *Hartfield*, evidence which might otherwise be inadmissible to show diminished capacity will be admissible to establish a defendant's insanity.

24. When this issue has arisen in non-federal cases utilizing the M'Naghten test, courts have reached differing conclusions. *See* note 30 *infra.* Cases using the traditional M'Naghten test remain relevant in understanding the meaning of "wrongfulness" since

less kills based upon a belief that God has commanded it. Under a legal wrong theory, an insanity defense is not available if the defendant understood the act to be violative of legal sanctions. In such a case moral delusion is irrelevant. Conversely, a moral wrong theory affords the actor a shield from criminal liability in the form of delusion arising from his inability to comprehend the immorality of his act.

When the ALI test was adopted for use in the Ninth Circuit in *Wade v. United States*,[25] the Institute's suggested alternative of "wrongfulness" was selected in place of "criminality."[26] Following the lead of other circuit courts of appeals,[27] the Ninth Circuit thus excluded from

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the ALI test is, in part, a modernized and liberalized version of the M'Naghten rule. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 292-93 (1972).

The legal versus moral wrong question has been infrequently litigated in both federal and non-federal courts. In the former the issue may well remain a subject of infrequent litigation due to the behavioral aspect contained in paragraph (1) of the ALI test (see note 1 *supra*), which excludes from criminal responsibility one who lacks substantial capacity to act in conformity with the law. Since a person who suffers from a moral delusion is usually also unable to conform his conduct to legal norms, the actor escapes responsibility under the behavioral part of the test.

When the question arose under the M'Naghten test, "its substantiality was reduced if not removed by the control capacity test, since anyone under a delusion as to God's mandate would presumably lack substantial capacity to conform his conduct to the requirements of the law." United States v. Brawner, 471 F.2d 969, 992 n.40 (D.C. Cir. 1972).

One of the more celebrated cases involving the M'Naghten test was People v. Schmidt, 110 N.E. 945 (N.Y. 1915), which involved a defendant who confessed to murdering a woman and who pleaded insanity on the grounds that he suffered from moral delusions which justified his behavior.

> He told the physicians who examined him that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. He confessed to a life of unspeakable excesses and hideous crimes, broken, he said, by spells of religious ecstasy and exaltation. In one of these moments, believing himself . . . in the visible presence of God, he committed this fearful crime.

Id. (Cardozo, J.). The lower court had instructed the jury that even if the defendant believed in good faith that God had appeared to him and commanded the sacrifice, and the belief was a delusion, a result of a defect in reason, the defendant could not be judged insane if he knew the nature and quality of his actions, and he knew that it was wrong, in the sense that it was prohibited by the laws of the state. *Id.* at 946.

After an examination of the origins of the word "wrong," Justice Cardozo concluded that "[i]f . . . there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong." *Id.* at 949. In short, he urged an expansive interpretation lest "we rob the rule of all relation to the mental health and true capacity of the criminal." *Id.*

25. 426 F.2d 64 (9th Cir. 1970). Prior to *Wade*, the jury was instructed on the basis of a modified M'Naghten test. *See* Ramer v. United States, 390 F.2d 564 (9th Cir. 1968); Sauer v. United States, 241 F.2d 640 (9th Cir. 1957).

26. 426 F.2d at 71-72.

27. Those circuits which had preceded *Wade* in choosing the alternative standard of "wrongfulness" included United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966);

criminal responsibility persons who "knowing an act to be criminal, committed it because of a delusion that the act was *morally* justified."[28] In *United States v. McGraw*,[29] the Ninth Circuit was presented for the first time, since its adoption of the test in *Wade*, with an opportunity to examine the scope and meaning of "wrongfulness."[30]

In *McGraw*, the defendant was charged with bank robbery and asserted insanity as an affirmative defense. In support thereof, he offered two psychiatrists who testified that he lacked the requisite "substantial capacity"[31] at the time of the robbery. In rebuttal, the prosecution presented a psychiatrist who controverted the testimony of the defense psychiatrists.[32] On cross-examination, however, the prosecution's expert witness qualified his testimony by admitting that while the defendant could understand that his conduct violated legal norms, the defendant did not possess the capacity to appreciate the moral wrongfulness of his conduct.[33] At the close of the trial, the instructions failed to relate to the jury that "wrongfulness" meant moral rather than crim-

United States v. Shapiro, 383 F.2d 680, 686 (7th Cir. 1967); Blake v. United States, 407 F.2d 908, 915-16 (5th Cir. 1969). Since *Wade*, two other circuits have followed a similar course. United States v. Brawner, 471 F.2d 969, 991-92 (D.C. Cir. 1972); United States v. Frazier, 458 F.2d 911, 918 (8th Cir. 1972).

28. United States v. Wade, 426 F.2d 64, 71 (9th Cir. 1970) (emphasis added) (footnote omitted).

29. 515 F.2d 758 (9th Cir. 1975).

30. For a discussion of the meaning of "wrongfulness" in which non-federal case authorities are collected see A. GOLDSTEIN, THE INSANITY DEFENSE 52 nn.23 & 24 (1967) [hereinafter cited as GOLDSTEIN]. It would appear that the Ninth Circuit is the first federal circuit court to consider the issue of whether "wrongfulness" means legal or moral wrong. *See* note 37 *infra*.

31. This is the standard of cognition required by the first part of the test. See ALI text, *supra* note 1. The Ninth Circuit adopted this phrase in order to avoid the unrealistic absolutes of the M'Naghten test:

> While the M'Naghten and irresistible impulse rules contemplate, as insane, one who is totally devoid of cognitive or behavioral capacity, the A.L.I. test does not require total incapacity of either cognition or volition.

Wade v. United States, 426 F.2d 64, 71 (9th Cir. 1970).

32. 515 F.2d at 759.

33. *Id.* The court explained that the cross-examination of the prosecution's expert witness established his misapplication of the proper legal standard required by the Ninth Circuit's insanity test which utilizes a "moral" and not a "legal" wrong standard. The result was that the prosecution had totally failed to produce any evidence whatsoever of the defendant's insanity:

> Once the defendant has introduced sufficient expert testimony to support a reasonable doubt as to sanity, the government must: (1) introduce its own expert testimony in rebuttal; or (2) discredit the defendant's expert testimony on cross-examination; or (3) rely upon evidence from which the jury could infer that the defendant's expert testimony depends upon an incorrect view of the facts. Otherwise, the evidence of sanity is insufficient to support a conviction. None of the three alternatives was satisfied in this case.

Id. at 760 (citations omitted). See text accompanying notes 12-14 *supra*.

inal wrongfulness.[34] On appeal, the instruction was found to constitute reversible error.[35]

If the defendant were indeed suffering from a moral delusion concerning the bank robbery, even though recognizing the conduct to be violative of legal sanctions, *Wade* compelled an instruction that would relieve the defendant from criminal responsibility for his actions. Unfortunately, *McGraw* failed to expand on the rationale for the use of the word "wrongfulness." Since the adoption of this alternative word in *Wade* was accomplished with little discussion[36] and only by citation to circuits which similarly have provided insufficient explication of the reasons for such a choice,[37] *McGraw* is, in effect, an unthinking reiteration of *Wade*.[38]

This failure of meaningful comment creates potentially significant problems in drafting jury instructions. The court left unanswered the question of whether moral wrongfulness is to be judged by the defend-

34. 515 F.2d at 760.

35. *Id.*

36. In *Wade*, the court merely noted

> that three Circuits have adopted the word "wrongfulness" (the A.L.I.'s suggested alternative) in place of "criminality" in order to 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. We likewise believe that the term "wrongfulness" is preferable.

426 F.2d at 71-72 (footnote omitted).

37. *Wade* relied heavily on the fact that other circuits had adopted the same test. *Id.* Generally, the circuits have paid little attention to the reasons for selecting "wrongfulness" in place of criminality. Those that have, however, clearly indicate that the person who commits a criminal act while suffering from a moral delusion is one who is incapable of appreciating the "wrongfulness" of the act. The term definitely has come to mean moral wrong in these circuits.

In United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), the Second Circuit, the first to adopt the ALI test of "wrongfulness," capsulized its rationale in a footnote (*id.* at 622 n.52) reiterating the holding in People v. Schmidt, 110 N.E. 945 (N.Y. 1915). See note 24 *supra*. The Seventh Circuit gave it even less attention, noting merely that "some will prefer the word . . . 'wrongfulness' over 'criminality.'" United States v. Shapiro, 383 F.2d 680, 685 (7th Cir. 1967). The Fifth Circuit in Blake v. United States, 407 F.2d 908, 914-15 (5th Cir. 1969), and the Eighth Circuit in United States v. Frazier, 458 F.2d 911, 915-17 (8th Cir. 1972), added little to the development of the concept, instead only referring to prior decisions in other circuits. The Circuit Court of Appeals for the District of Columbia, in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), presented a brief, but more thorough discussion. *Id.* at 991-92.

Thus, while the above circuit courts agree that "wrongfulness" is defined as moral wrong under the ALI test, explanations as to why this is desirable have not been forthcoming. Perhaps one reason for the meager discussions is that the issue is raised infrequently.

38. *McGraw* quoted the brief discussion in *Wade*, and stated that "for purposes of the insanity defense, 'wrongfulness' means moral wrongfulness rather than criminal wrongfulness." 515 F.2d at 759-60, *quoting* Wade v. United States, 426 F.2d at 64, 71-72 (9th Cir. 1970).

ant's personal standards or by the defendant's awareness that society adjudges the act wrong.[39] If the latter standard is intended, then any distinction drawn by the court between criminality and wrongfulness is meaningless, since in most cases one's conduct will be sufficiently removed from accepted norms that society's moral judgment would be identical to the legal standard.[40] If, instead, the focus of inquiry is to be directed to the defendant's personal judgment of the moral wrongfulness of his conduct, then logically, a subjective viewpoint would better relate the defendant's mental health to his corresponding criminal responsibility. Until the precise reach of the use of the term is clarified by the Ninth Circuit, the prosecution may well be able to restrict the perimeters of the insanity defense by arguing that moral wrongfulness should be judged from a societal rather than a personal perspective.[41]

If it can be argued that no theoretical distinction exists between "criminality" and "wrongfulness," pragmatic factors still may point towards adoption of the term "wrongfulness." For example, it has been noted that "wrongfulness" is more akin to conventional jury instructions,[42] and it has been stated that

> the practice has been to state merely the word "wrong" and leave the decision for the jury.
>
> While not entirely condonable, such practice is explained in large measure by an awareness that the jury will eventually exercise a moral judgment as to the sanity of the accused.[43]

While *McGraw* disappoints insofar as it fails to provide a fuller explanation for selection of moral rather than legal wrongfulness, and also fails to supply either scope or substance to a moral interpretation, it should satisfy those who seek liberalization of the insanity defense. At the very least, it should bring the moral and emotional factors of the defendant's conduct to the attention of the jury.[44]

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39. *See* GOLDSTEIN, *supra* note 30, at 52.

40. *See id. Contra,* Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong,* 14 MIAMI L. REV. 30, 49 (1959).

41. In United States v. Porter, 431 F.2d 7 (9th Cir.), *cert. denied,* 400 U.S. 960 (1970), the court refused to find, as prejudicial error, a jury instruction that did no more than to state that " 'a person who is insane at the time he commits an act is just not held responsible.' " *Id.* at 9 n.2. The court, although rejecting the contention that the instruction "left the jury free to define insanity 'according to their subjective belief,' " did state that the instruction "was neither necessary nor helpful to the jury . . . ." *Id.* at 9.

42. Sauer v. United States, 241 F.2d 640, 649 (9th Cir. 1957).

43. *Id.*

44. GOLDSTEIN, *supra* note 30, at 53.