Testimony Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, 93rd Congress, on S. 1 and S. 1400

SEYMOUR POLLACK, M.D.

DR. POLLACK: Thank you, sir. On behalf of the American Academy of Psychiatry and Law, I would like to express my appreciation for the opportunity of appearing before you and presenting observations and comments on the insanity defense as outlined in Senate Bill 1 and Senate Bill 1400. The position I take is one not only representing the Academy, however; I also represent the University of Southern California Institute of Psychiatry, Law and Behavioral Science, of which I am the director. I also would like to offer comments about these Bills in my position as a professor in the University, as a forensic psychiatrist involved with a number of these issues, and as a private citizen.

Representing each of these positions, I would like first to present a joint posture, one strongly in favor of Senate Bill 1 in its definition of the insanity defense. And our joint position is strongly in opposition to the definition of insanity as presented by Senate Bill 1400.

In order to answer some of the questions that Senator Hruska raised with previous witnesses representing the American Psychiatric Association, I would like to depart from my prepared statement in the following comments, with my understanding that the prepared statement will be placed in the record at the conclusion of my testimony.

First, the actual number of insanity defenses raised in the trial courts of the United States is unknown; it varies from jurisdiction to jurisdiction, but it generally is believed to be quite low, consisting of no more than one percent of all serious charges of felonies coming before the trial courts throughout the nation. The number of successful insanity defenses is known to be much, much lower. From the most reliable material we have seen, in the past year there have probably been no more than one hundred defendants who were found not guilty by reason of insanity in all of the federal courts in the United States. We are, therefore, really dealing with a very small number of cases in which the insanity defense was successful in the federal courts. Nevertheless, the insanity defense plays a significant role in the criminal law and in the concept of criminal justice.

Senator Hruska raised questions about the number of psychiatrists involved with these issues and also questioned whether psychiatrists were capable of making the necessary assessments and evaluations of mental conditions related to criminal responsibility. Material provided to me yesterday at the Federal Bureau of Prisons reveals that we have in our federal correctional system fewer than seventeen psychiatrists who are involved in full-time positions in our federal prisons. And I understand that throughout the United States there are fewer than one hundred psychiatrists who are involved full time in the evaluation and treatment of the mentally ill offenders in all of the prisons and jails in every jurisdiction of these United States.

These few so-called correctional psychiatrists are only occasionally called upon for the evaluations of concern to criminal responsibility, although the psychiatrists associated with the federal medical facility at Springfield are much more frequently called upon for these assessments. Psychiatrists attached to St. Elizabeth's Hospital here in Washington, D.C., are also called upon much more frequently for these evaluations. But we have, in addition, a much larger number of psychiatrists who are in private practice who are

involved with these evaluations related to criminal responsibility, most frequently, psychiatrists who are called upon by private defense counsel, Assistant Federal Public Defenders, and Assistant United States Attorneys for their contributions to the criminal justice system. And it is to all of these psychiatrists that the American Academy of Psychiatry and Law has directed itself as a professional medical organization in its efforts to improve and upgrade our professional involvements with these matters.

Senator Hruska had asked whether we, as psychiatrists, are capable of applying ourselves to the relationship of significant mental illness to the kind and degree of mental incapacity that qualifies for exculpatory insanity. These questions were posed a few moments ago to Dr. Portnow and Professor Foster, representing the American Psychiatric Association. The members of the American Academy of Psychiatry and Law have strongly endorsed the opinion that we, as psychiatrists involved with forensic psychiatry, are capable of providing this significant material to the trier of fact for his consideration in the matter of criminal responsibility. In other words, we believe that psychiatrists can not only provide relevant and significant data about mental illness and offer data for identification of such mental illness and mental impairment, but also can describe how, in what way, and how meaningfully the mental incapacity resulting from mental illness was related to the issue of criminal responsibility.

Forensic psychiatrists are unfortunately involved with a number of widely publicized criminal-legal cases. I would like to refer specifically to the trial of Sirhan Bishara Sirhan for the assassination of Senator Robert Kennedy. Here the major issue in the trial was whether Sirhan, who was believed by all of the psychiatrists and psychologists involved in that case to be mentally ill, was sufficiently incapacitated by mental illness to allow him to avoid the full criminal responsibility for his act. The essence of the trial was Sirhan's mental state; and the assessment and evaluation of his mental state, as it related to the issue of criminal responsibility, were disputed considerably by all of the forensic psychiatrists involved in the case. Forensic psychiatrists, especially those called by the defense, were severely criticized because of the alleged poor quality of their contributions. Such public criticism may be behind Senator Hruska's question about the adequacy of the forensic psychiatrists' contribution to the administration of criminal justice. It is my belief, and that of the American Academy of Psychiatry and Law, that, if psychiatrists are adequately educated and trained in this area of forensic psychiatry, we are capable of adequately providing relevant and meaningful material of significance to the issue of criminal responsibility for consideration by the trier of fact.

But it is to this area that I would like to draw added attention. This is a subject that requires much greater attention than has previously been accorded to it by society, by the legal profession, as well as by the psychiatric profession. What I am referring to is the fact that throughout the United States, almost universally, we find that psychiatrists have not been provided with the special education and training that is necessary for their expertise, that is, the expertise necessary for their engagement in these kinds of identifications, assessments, and evaluations of mental states of significance to the issue of criminal responsibility. One of the stated aims of the American Academy of Psychiatry and Law is to upgrade our contributions in this area.

Very recently in the State of California where these problems have come to the foreground, a bill has been introduced that promotes such specialty education and training in forensic psychiatry and one that will certify forensic psychiatrists. Throughout the United States there are very few education and training facilities that direct themselves to the special training of psychiatrists in the application of psychiatry to legal issues for legal ends, that is, for the ends of law. Representing, then, both the American Academy of Psychiatry and Law and the University of Southern California Institute of Psychiatry and Law, I believe that the need to promote and provide such special education and training is paramount. In other words, I believe, irrespective of which Senate Bill, whether 1 or 1400, is passed by the United States Congress, the major problem is that of

promoting forensic psychiatry as an area requiring special attention, education, and training to provide psychiatrists with the expertise for their application of psychiatry to the issue of criminal responsibility.

A second matter to which I would like to draw your attention is the question of identifying the non-dangerous patient who is being considered for release from a hospital after having been found not guilty by reason of insanity.

The standard in both Senate Bills 1 and 1400 that identifies that individual who can be returned to the community following acquittal on the basis of not guilty by reason of insanity is the identification of that individual as no longer being harmful or dangerous to himself or to members of the community. I would like to recommend that all individuals who have been successful in an insanity defense or in any defense utilizing a psychiatric or mental state to reduce criminal responsibility be mandatorily followed for a minimum of one year after return to the community, that is, that each such person be subsequently followed for a minimum of one year by ongoing assessment, and if necessary, treatment by an established, qualified psychiatric service in the community. In other words, I am recommending that no such individual be released to the community following a successful psychiatric defense without mandatory community followup. A bill to this effect is now being considered by the California Legislature. Only by such community followup is it possible for such individuals (who have been mentally ill and impaired in a way and to the degree that allowed them to be exculpated from criminal responsibility) to demonstrate their capacity for continued control of their social behavior. In the absence of such followup in the community, it is not possible for us, as psychiatrists, to evaluate adequately how the individual will function in the open community. I, therefore, strongly recommend that such a provision be added to both bills.

In addition to the reasons I have offered in my prepared statement that favor Senate Bill 1, an additional reason for favoring Senate Bill 1 as against Senate Bill 1400 is that the former directs itself to the identification of those specific kinds of mental impairments and mental disabilities that hold special import for the social policy related to criminal responsibility. Senate Bill 1 directs itself to the concept of mental incapacity and not to mental illness *per se*.

As has been stressed by Senator Hruska, and also mentioned by Dr. Portnow, the concept of significance to criminal insanity is not that of mental illness, by itself, but rather the degree and kind of mental incapacity or mental impairment that is caused by mental illness. It is the impairment that has significance to the trier of fact in his assessment of the defendant's capacity for criminal responsibility. In other words, the historic concept is promoted by Senate Bill 1 that only if an individual is believed by the trier of fact to be so incapacitated by virtue of his mental illness, so impaired that he was substantially incapable at the time of the commission of the crime to appreciate the wrongfulness or criminality of that act or was substantially incapable of controlling his conduct with respect to that act, only then is society willing to exculpate him from criminal responsibility for that act. Senate Bill 1 thus cones down on the two most important features of criminal responsibility, features that have been specifically emphasized in social policy for centuries, features that can be evaluated by the trier of fact, and features that intimately relate mental illness to the concept of moral nonculpability.

Because Senate Bill 1 provides specific criteria of moral culpability for evaluation and assessment by the trier of fact, whereas S. 1400 does not, S. 1 is markedly preferable to S. 1400. S. 1400 provides no criteria that will allow the trier of fact to relate the degree and kind of mental impairment to the concept of legal insanity with reasonable clarity and confidence.

Lastly, I would like to return to the problems of identification of the harmfulness or dangerousness of the mentally ill offender. In California we have encountered considerable difficulty with varying legal standards that relate to this concept of harmfulness or dangerousness of the mentally ill person.

Historically, persons who were identified as mentally ill and who rejected voluntary treatment for their mental illness were people who were involuntarily committed to institutions because of their need for treatment. More recently the concept has been spreading throughout the United States that the mentally ill person should be involuntarily detained and involuntarily treated only if he is so dangerous either to himself or to others as to warrant this involuntary commitment. In California, under our Mental Health Act of 1969, the so-called Lanterman-Petris-Short Act, one which is referred to quite frequently by other jurisdictions throughout the United States, mentally ill persons can be involuntarily detained and treated only when they are believed to be mentally ill and dangerous to themselves or others by virtue of their mental illness. They must constantly demonstrate such dangerousness by means of acts or threats; and specifically after a few months of involuntary detention, they can only continue to be so detained and treated if their observed conduct supports a conclusion that they are still physically dangerous to others while they are institutionalized. That mentally ill person who has not demonstrated such physical dangerousness by ongoing and continued physical acts which result from his mental illness must be released. The concept of dangerousness in California is so narrow that most people who are mentally ill, and many in fact are still quite dangerous by virtue of their mental illness, are neither committable to hospitals in the State of California nor are they persons who can be continued to be involuntarily detained and treated in an institution.

A number of mentally ill persons in the State of California come before the Federal Courts for trial, and occasionally an accused mentally ill person is found not guilty by reason of insanity. When persons charged with federal crimes are found to be not guilty by reason of insanity, they must be released to the community or referred to an appropriate State or County jurisdiction for assessment of their present dangerousness resulting from their mental illness. But I have mentioned, Mr. Chairman, how narrow the State of California standard of dangerousness is, as this standard relates to the issue of mental illness for the purpose of involuntary detention and treatment. We, therefore, have developed a very serious problem in the State of California with respect to those Federal defendants who have been found not guilty by reason by insanity. There have been a number of instances in which bank robbers or other parties involved in repetitive antisocial crimes of very serious nature have been acquitted on an insanity defense. Because of our very narrow standard for definition of dangerousness, these persons have not been identified as sufficiently dangerous to qualify for involuntary detention and treatment in our State institutions in California following their acquittal. In other words, in the State of California we have no legal procedures for removing such dangerous mentally ill persons from the community and retaining them in an institution until they are considered safe to return to the community. We have no way at the present time in our California jurisdiction of dealing with this problem, a problem that has resulted from differing concepts and legal standards of harmfulness or dangerousness of the mentally ill person. It is particularly necessary in Senate Bill 1, therefore, that the individual who is exculpated on the basis of criminal insanity be dealt with under a standard or definition of harmfulness or dangerousness that provides for adequate community protection as well as a legal standard that allows him to return to the community without being subjected to undue harassment and social control, such that would interfere with his adjustment and adaptation to the community.

What I am stressing is that legal standards or definitions of harmfulness or dangerousness of the mentally ill person vary from jurisdiction to jurisdiction. Recognizing this and the fact that under whatever Federal Code is finally developed, these individuals will subsequently be referred to their respective state jurisdictions for followup, and this is specifically outlined in Senate Bill 1, we can immediately foresee the continuing difficulties that such varying legal standards create. A United States attorney will certainly hesitate to refer a mentally ill defendant to a state jurisdiction following that

defendant's acquittal on an insanity defense when the state's legal standard of detention of such a person is such that the individual will be returned to the community within a very short period of time. And by "short" I mean even possibly within seventy-two hours, or possibly no more than a three-months' period of time, as currently exists in the standard of the State of California. And of even greater significance to society is the fact that under our present rules there is no possible way of reducing the likelihood that this mentally ill offender will not repetitively be found not guilty by reason of insanity, were he to be repetitively committing antisocial acts which were related to his mental illness, because such an individual would, in fact, repetitively qualify for a successful insanity defense.

As the Senator had mentioned initially, it is obvious, therefore, that significant problems exist in these areas of definition at the present time.

SENATOR HRUSKA: In California, are there statistics available as to the duration of that detention after a finding of incompetence to stand trial and so on? Are there statistics available as to the length of stay in an institution or under care?

DR. POLLACK: Yes, let me again return to the question of different standards, however. When an individual in a California court is found mentally incompetent to stand trial as against being found not guilty by reason of insanity, he is dealt with under a different legal standard; that is, this standard is different from the standard of harmfulness or dangerousness that applies to the mentally ill person who has been legally adjudicated as not guilty by reason of insanity.

SENATOR HRUSKA: And when was that standard enacted to law?

DR. POLLACK: The legal standards defining mental incompetency to stand trial and those defining not guilty by reason of insanity, as well as those defining commitment of these defendants following their legal adjudication, have been present for many years and are operating fairly satisfactorily. What has happened in the State of California of significance to the present Bills is that mentally ill persons who are not criminal defendants but are nevertheless dangerous by virtue of their mental illness are persons who are dealt with under the Mental Health Act of 1969, which has been in operation for only the past few years. This new mental health act dealing with the "commitment" of the mentally ill person who is not a criminal defendant at the time is the act that has significantly affected that federal defendant who is acquitted by reason of insanity, because this latter individual, after having been acquitted in the federal court, is one who has no criminal charge pending in the State court. Statutes in our State Penal Code control defendants who have been found not guilty by reason of insanity in the State court; but our State procedures dealing with persons who have been found not guilty by reason of insanity in the State courts do not apply to the federal defendant. In other words, the federal defendant who has been acquitted from a federal charge is an individual over whom the State courts have no jurisdiction.

Criminal defendants in our State courts who are found mentally incompetent to stand trial by virtue of mental illness are committed to State hospitals where they are treated and from which they return to State courts to stand trial after their mental illness no longer incapacitates them for the purpose of standing trial; that is, they are returned to stand trial when they are capable of appreciating the nature of the charges against them and capable of cooperating rationally with counsel in their defense.

Also in our State jurisdiction when a criminal defendant is found to be legally insane, that is, suffering from exculpatory insanity, he then also is evaluated by psychiatrists on the question of whether he is now free from dangerousness to himself or to others in the community by virtue of his mental illness to a degree and in a way that will allow him to return safely to the community; but this latter standard of dangerousness of this exonerated defendant is a standard of dangerousness that is different from that of the standard of dangerousness of the noncriminal defendant who is mentally ill. Whereas the Mental Health Act of 1969 requires that the mentally ill person (who has not been

involved in criminal acts that resulted in his exoneration from criminal responsibility) be returned to the community unless he continuously demonstrates his physical dangerousness by ongoing, continuing physical acts against others, no such legal standard or definition of dangerousness is included in the concept of dangerousness that applies to the mentally ill person who has been found not guilty by reason of insanity. In other words, there are two separate standards for dangerousness under two separate and distinct statutes in the State of California. One applies to the mentally ill offender who has been found not guilty by reason of insanity and the other applies to the mentally ill person who is considered to be dangerous by virtue of his mental illness but who has not been adjudicated as criminally insane as a result of a successful not guilty by reason of insanity defense.

Senate Bills 1 and 1400 assume that legal standards for definitions of harmfulness or dangerousness are uniform throughout the United States. They are not. Senate Bills 1 and 1400 assume that the legal definition of dangerousness of the individual under state standards for the commitment of such persons would be similar to federal standards. This is an incorrect assumption. Unless the federal government plans to develop federal hospitals throughout the country to deal with all federal defendants, all such mentally ill defendants who have been found not guilty by reason of insanity in federal courts will have to be dealt with under state procedures. It, therefore, becomes necessary to direct attention to the need for a generally acceptable legal standard and procedure that would be consistent in the various state jurisdictions as well as one that harmonizes state with federal jurisdictions. My discussion of this question is only to point out that these legal standards and definitions of dangerousness are not generally accepted throughout the country and that it is necessary to develop a definition and procedure that would be utilized throughout all state and federal jurisdictions, one that would provide for adequate community protection whilst promoting the defendant/patient's return to the community as quickly as possible following his recovery, but not until he is considered safe for such return.

SENATOR HRUSKA: Do you think that the civil commitment procedures in S. 1 would rectify the situation that you describe in California?

DR. POLLACK: No.

SENATOR HRUSKA: You don't think so?

DR. POLLACK: No. The civil commitment procedures in S. 1 would rectify the situation only if the legal standards and definitions were spelled out more clearly and if State procedures were to be developed that would insure the involuntary detention of those mentally ill federal defendants exonerated on an insanity defense until they were no longer defined as dangerous. Senate Bill 1 specifically states that defendants who have been found not guilty by reason of insanity be referred to the Secretary of H.E.W. and that all such individuals should be sent to state jurisdictions as quickly as possible.

I do not remember the exact terminology of Senate Bill 1 in this regard, but it is necessary in that Bill to spell out the specific procedures so that whatever the state standards and legal definitions of dangerousness would be, as these apply to mentally ill persons who have been excused from criminal responsibility on the basis of legal insanity, that such persons who are found not guilty by reason of insanity in the federal courts likewise be held in their state jurisdictions under the provisions of state law that maximize community security and provide for safety from further acts by these mentally ill persons. In the absence of such features, the operation of a federal statute, such as that dealing with criminal insanity in Senate Bill 1, will fail.

Finally, I would like to underscore a number of false beliefs or myths which I believe have erroneously influenced a number of persons to recommend and be in favor of Senate Bill 1400. There is a belief, a false belief, that many defendants fake insanity. Although some criminal defendants certainly do attempt to fake insanity, and some individuals are, in my opinion, able to "con psychiatrists" to arrive at the mistaken con-

clusion that they are actually legally insane, nevertheless, experience demonstrates that such circumstances are not only quite infrequent but are actually rare. Furthermore, with increased expertise as a result of improved education and training, psychiatrists trained in forensic psychiatry will unquestionably further reduce the number of such errors.

Another myth is that many individuals, after having been found not guilty by reason of insanity, are released to the community after very short periods of institutionalization; and an additional myth is that persons who are mentally ill and who have been found not guilty by reason of insanity following their release are prone to continue to repeat their antisocial acts.

The truth, Senator Hruska, is that relatively few, very few defendants are actually successful in their insanity defenses. It is also true that the definition of legal insanity that is provided in Senate Bill 1 has been in actual operation for a number of years in almost all of the federal jurisdictions and that this definition of legal insanity that is described and defined in Senate Bill 1 has still not excused most of the criminal defendants who have raised the insanity defense in these federal jurisdictions. In other words, the Senate Bill 1 definition of legal insanity has demonstrated in its operation that it has provided adequately for the administration of criminal justice in these jurisdictions.

Also, in most federal jurisdictions, and I am excluding California, after a defendant has been found not guilty by reason of insanity in a federal court, he is referred to the state for commitment; and in those states in which legal procedures provided for adequate community protection from mentally ill offenders who have been excused from criminal responsibility, the individual concerned remains in an institution until he can safely be returned to the community. He is in custody. I use the phrase "in custody," meaning that he remains in a mental institution, the so-called hospital for the criminally insane, until he can be identified as being nondangerous by virtue of his mental illness, i.e., safe for return to the community. In fact, in most states the mentally ill offender who has been excused from criminal responsibility on the basis of an insanity defense remains in such an institution for a much longer period of time than he would remain in custody were he to have been incarcerated in a penal institution as punishment for his crime.

It is clear from available statistics that an insanity defense frequently results in the defendant remaining in custody for a longer period of time than he would have, had he not raised the psychiatric defense. This, I think, is unfortunate, but I am trying to point out for those who introduced S. 1400, Senator Hruska, that the concepts that led to Senate Bill 1400 are myths and incorrect beliefs.

SENATOR HRUSKA: You have spelled that out quite definitely in your statement.

DR. POLLACK: Thank you.

SENATOR HRUSKA: Mr. Summitt, have you any questions?

Well, thank you, Dr. Pollack, for being with us and furnishing us with this testimony.

(The prepared statement of Seymour Pollack in full follows:)