Testimony of Robert Weisberg

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The U.S. Sentencing Guidelines are currently in a state of suspended animation, and I stress both words in that cliché. They are "suspended," of course, because in light of *United States v. Booker*, they are "merely" advisory and are indefinitely subject to the possibility of a Congressional response to *Booker* that could moot large portions of the original guidelines structure. But the state is one of "animation" because the Commission remains active and productive, generating well-researched new refinements of the guidelines fully in harmony with the original Congressional mandate and in accord with its mandated administrative processes.

This current situation is a reasonably healthy, if only accidental, equilibrium. Federal district court compliance with the guidelines remains quite high, and predictions that *Booker* would wreak havoc have been disproved. Appellate court guidance through a presumption of reasonableness for within-guidelines sentences provides a modest but fairly effective check on guidelines departures. A rough consensus has emerged that the current post-*Booker* situation shows that judges have mostly remained faithful to the guidelines but have, at the margin, moderated them with somewhat more deference to offender-focused characteristics—all this without raising any serious *new* concerns about inter-judge or inter-district disparity.

Nevertheless, this equilibrium, while having the effect of a very stable-looking, reasonably flexible system, rests on a bizarrely shaky legal foundation. At some point, however, satisfied it is with this equilibrium and however loath it is to take on the intellectual and political work of conceiving a new system, Congress may act. Therefore, although this suggestion has nothing to do with the original SRA mandate, the Commission should consider how it might orient its current work to ease a possible transition to new legislation—indeed to ensure that it is a transition and not a violent overthrow

It is possible, of course, that Congress will end up simply "Bookerizing" the guidelines in such a way as to maintain the current equilibrium and remove the odd remedial "advisory" principle. There have been many suggestions for how to do so—

from "topless" guidelines to formally legislating jury trial rights for some components of the sentencing decision. On the other hand, many components of the guidelines that do not raise *Booker* problems (most notably, for example, criminal history), may end up the subject of legislative refinement. Although no one knows what the final product will look like, to the extent that Congress relegislates things it may choose to render statutory many things which are now sub-statutory. In that regard, a useful way for the Commission to anticipate and prepare for legislation is to aim for simplification.

But of course how to perform that act of preparation depends on the structural form of the legislation one anticipates. At one extreme, we can imagine Congress replacing the guidelines with statutory rules of sentencing that amount to subcalibrations of the current statutes defining federal crimes. This would not be the worst result, or at least it would not be an outright anomaly among American jurisdictions. But regardless of whether the current complexity of the guidelines is justified as a general matter of jurisprudence—and there are many reasons to think it is not—it is inconceivable that Congress could simply render statutory the current guidelines or anything approaching the current guidelines in their complexity. If the Commission were to consider making the guidelines conducive to legislative adoption, simplification would have to be the key goal.

On the other hand, Congress might operate at a higher level of generality, redelegating guidelines construction to the Commission, but with statutory sentencing rules—in effect, guidelines for guidelines-- that somewhat constrained the authority of the Commission. But were Congress to consider doing so, it would either have to imagine, at least in broad conceptual terms, what a brand new set of guidelines would be; or it might end up editing the current guidelines in an effort to revise them in a way that they would like to see them re-issued (subject, of course, to further commission development of them). In the former case, this Commission would do Congress a service by offering a leaner, cleaner model of a guidelines system. In the latter case, it should avoid inviting Congress to get bogged down in an endless and politicized mark-up session reconsidering all the details of the currently complex system.

There is a deep historical irony in the current complexity of the guidelines. The proliferation of cells and rules was borrowed, of course, from the pre-SRA parole regulations. The *parole* guidelines

> were in the form of a two-dimensional grid. The seriousness of the prisoner's current offense (offense severity) was considered on the vertical axis with six categories (later increased to seven and then eight categories). The prisoner's likelihood of recidivism (parole prognosis) was considered on the horizontal axis with four categories. The dimension of parole prognosis was determined by use of a "salient factor score," an empirically derived parole prediction instrument. The intersections of the vertical and horizontal axes formed a grid containing time ranges (such as 12-18 months). The time range set forth the parole board's policy on the customary time to be served before release for a prisoner having that offense seriousness and parole prognosis, assuming good institutional conduct. Decisions outside the guidelines may be made for good cause and upon the provision of case-specific written reasons. For example, misconduct in the institution might warrant a decision above the applicable guideline range, and exceptionally good participation in institutional programs might warrant a decision below the applicable guideline range.[1]

The Commission ended up rejecting the very idea of parole because the mood of the times was solidly against the principle of broad judicial and administrative discretion and the ideal of rehabilitation which underlay the old parole system. But the cell structure was essentially borrowed form the parole regulations whose premises and purposes the SRA rejected.

The guidelines were more rooted in a retributive theory of just deserts for the nature of the crime, with considerable fine-tuning in the name of limiting retributivism, reducing disparity, and promoting proportionality, focusing on highly nuanced calibrations the definitions of acts, the culpable mental states with which acts are done, and the demonstrable harms these acts cause. A major criticism of the hyper-mechanical complexity of the guidelines has been that they are a misguided effort to achieve precision and reduce disparity—that they push legal rules beyond human

[1] Peter B. Hoffman, History of the Federal Parole System, http://www.usdoj.gov/uspc/history.htm (last visited May 18, 2009).

capacity to make moral judgments. If the guidelines are designed to address culpability and desert, then they depict human characters and actions in greater detail and with more purported nuance than Shakespeare could accomplish. On the other hand, if the goal were to predict future criminality and to assay what interventions might reduce recidivism, then some degree of complexity might make sense, on the premise that utilitarian social science might generate such complexity.

Thus, the Commission might reconsider the dual issues of parole and complexity at the star, or, more precisely, the Commission might urge Congress to do so. If it truly believes that all this complexity is necessary to capture the relevant differences and similarities among crimes and criminals, then it should consider that this complexity is at least as relevant to predictions of future crime and to the possibility of desistance from crime (whether cast in terms of specific deterrence or rehabilitation or even age- or medically-related reduction in capacity to commit crime as it bears on the need for incapacitation). And if so, the Commission would do well to attend to the emerging interest among both academics and criminal justice professionals in risk-needs assessment as an important component of correctional policy. Put differently, if the Commission favors complexity, it should use that complexity with an eye towards goals of punishment that the original commission eschewed, and it should transparently borrow from the emerging social science about violence prediction. And if it does so, it will realize that the key justification for or value of complexity may actually lie in informing decisions whether to use probation or parole as alternatives to or modifications of imprisonment.

But the other hand, and in a further irony, even modest risk/needs assessment, in its effort at scientific analysis of the particulars of criminal behavior will probably prove to be far simpler matter than the current guidelines. Just as risk/needs assessment and evidence-based practices are winning great favor, some of the best analyses of them tend call for much greater parsimony in their enumeration of measurement factors.[2] A move

[2]See Christopher Baird, National Council on Crime and Delinquency, A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System (Feb. 2009),

toward reduction in complexity as well as towards refined complexity—i.e., marginally incorporating the matrices of risk/needs assessment--would make the guidelines more faithful to the diverse goals of punishment, would effect a mid-course correction in the overly categorical tilt away from recidivism-prediction, and would tune the guidelines in such a way that Congress, if it chooses to act, might find the guidelines very digestible and translate-able.