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Encounters with an Inconstant Cerberus: A Response to Mr. Schmitt

For the December 2015 issue of the *Federal Sentencing Reporter*, I analyzed the pieces of sentencing legislation pending in the present session of Congress.¹ Part of that analysis was an effort to assess the probable practical impact of the bill most likely to move forward, the Senate's Sentencing Reform and Corrections Act (SRACA).² My impact analysis of the SRACA drew on three sources: figures provided by the Sentencing Commission in a statement by Commission Chair Patti B. Saris to the Senate Judiciary Committee,³ an independent analysis by Dr. Paul Hofer, formerly a senior member of the Sentencing Commission's staff and now with the Federal and Community Defenders, and my own interpretations of and extrapolations from the available data.

In a March 3, 2016, letter (which appears in this Issue immediately before this response), Mr. Glenn Schmitt, Director of Research at the U.S. Sentencing Commission, says that I mischaracterized the Commission's figures on two points.⁴ First, I suggested that the Commission's estimate of 3,314 current inmates who might benefit from Section 102 of the SRCA—which would broaden the existing “safety valve” provision of 18 U.S.C. § 3553(f)—might be overstated because that estimate did not account for factors in Section 102 that would disqualify inmates from consideration, or for other disqualifying factors in the existing provisions of § 3553(f).⁵ Mr. Schmitt says the Commission did take these factors into account in arriving at its estimate.

Second, in my discussion of Section 106 of the SRACA, which would make retroactive the reductions in crack cocaine penalties of the Fair Sentencing Act of 2010, I characterized the Sentencing Commission's estimate of 5,826 possible beneficiaries as being the “number of old-law crack offenders still in prison.”⁶ Mr. Schmitt says that this characterization is inaccurate because the Commission's analysis excluded some old-law crack defendants still in prison, and included only those who were “sentenced at the old mandatory minimum penalties, and so could not seek any further reduction under the amended sentencing guideline, or who were unable to obtain a full reduction in their sentence because the old statutory minimum penalties acted to cabin the court's authority to reduce the sentence to a point within the new sentencing guideline range.”⁷

I am happy to receive these corrections. On the first point, I was either misinformed or, more likely,

misinterpreted the information I had about what the Commission's numbers meant. On the second point, I should have been more precise. I should have said that the Commission's number was the number of old-law crack offenders still in prison who were sentenced subject to mandatory minimum sentences but had not received the benefit of the Fair Sentencing Act. Therefore, if I may steal a line from the fictional incarnation of Sir Thomas More, I am well rebuked.⁸

Having now paraded myself in sackcloth and ashes, there nonetheless remain several points worth further discussion. The first is whether the corrections in Mr. Schmitt's letter change my analysis of the likely effect of the SRACA. The second is the perennial challenge posed by a Sentencing Commission which is at once the primary collector, principal interpreter, and sometimes jealous guardian of data about the operation of the federal sentencing system, a Commission that is at times an indispensable Oracle and at others a touchy Cerberus barring access to publicly funded data central to debates on large public questions.

I. The Likely Effect of the SRACA

The basic thrust of my analysis of the SRACA was, and remains, that it would be a modest step toward the amelioration of some notably severe federal sentences, but that it would affect relatively few federal prisoners. Nothing in Mr. Schmitt's letter materially alters my bottom line on this point.

Section 102 of SRACA, if enacted, would expand the reach of the existing “safety valve” provision of 18 U.S.C. § 3553(f). Qualifying beneficiaries of this provision would be sentenced pursuant to the Guidelines applicable in their cases, but without the limit imposed by a mandatory minimum sentence. Accordingly, some might receive lowered sentences. The Sentencing Commission estimated that 3,314 defendants annually might potentially benefit from Section 102. My rough guess was that, of this total, approximately 1,200 might actually do so.⁹ Some, though not all, of the assumptions upon which my approximation was based were wrong. However, Dr. Paul Hofer used publicly available Sentencing Commission data to perform a rigorous analysis of Section 102. His conclusion, published in FSR¹⁰ and cited in my article,¹¹ was that the annual number of likely beneficiaries of Section 102 ranges from



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500 to 1,144. I invariably defer to Dr. Hofer's superior expertise in all matters relating to federal sentencing statistics. I do so again here. In consequence, although the credit belongs entirely to Dr. Hofer, I end up in the roughly same place—an estimate that Section 102 might benefit, at most, between 1,100 and 1,200 defendants annually.¹²

As for Section 106, the SRACA provision making the Fair Sentencing Act retroactive, Mr. Schmitt's letter changes my assessment not at all. I made no effort to estimate how many inmates would actually receive reduction if Section 106 were enacted, but indicated that it would surely be substantially fewer than the 5,826 the Commission estimated to be theoretically eligible for relief. That remains my judgment.

One primary obstacle to giving a numerical estimate of those who would actually get a sentencing reduction under Section 106 is that relief would be discretionary with the sentencing judge.¹³ However, we have some suggestive data on how judges might behave when presented with petitions for retroactive relief. After the Fair Sentencing Act passed, the Sentencing Commission adopted conforming amendments changing the crack-powder ratio in the Guidelines. It made those guidelines amendments retroactive, even though it lacked the authority to make the Fair Sentencing Act itself retroactive.¹⁴ In practice, this meant that defendants could petition courts for discretionary retroactive application of the amended guidelines, but not for retroactive application of Fair Sentencing Act's changes to the quantity thresholds for mandatory minimum sentences. The Commission reports that 44.6 percent of the petitions for retroactive application of the amended guideline were denied.¹⁵ Of course, it appears that roughly one-quarter of the denials were based on the fact that a statutory minimum sentence remained in place due to the non-retroactivity of the Fair Sentencing Act,¹⁶ a stricture that Section 106 of the SRACA would remove, thus opening the possibility that some reductions denied after the guidelines change would be granted if Section 106 passed. On the other hand, it is also true that a judge who previously awarded a sentence reduction pursuant to the guidelines change might be reluctant to give the same defendant a second reduction in response to Section 106, even if it were technically available. At all events, a very substantial proportion of inmates technically eligible for consideration under Section 106 would receive no actual sentence reduction.

In sum, Mr. Schmitt's letter provides no basis upon which to alter my previously published conclusion about the likely effect of the 2015 version of the SRACA:

I estimate the total annual number of actual beneficiaries of the SRACA as, at most, 2,000, almost all of them from the expansion of the § 3553(f) safety valve to defendants with 2–4 criminal history points. Even using the Sentencing Commission's numbers of potential beneficiaries, the bill could, at most, benefit about 4,000 defendants per year. Against these numbers must be offset an unknown number of persons not now subject to mandatory minimums,

who would be subjected by Sections 101 and 104 of the SRACA to such minimums and would thus receive longer sentences than they now do. Finally, roughly 11,500 current inmates could, in theory, petition for sentence reductions, although far fewer than that number would receive such reductions.¹⁷

II. The Commission and Its Data

The foregoing discussion illustrates one of the sometimes underappreciated strengths of the federal sentencing guidelines system and of the Sentencing Commission. The very complexity of the Guidelines themselves and the existence of a Sentencing Commission with a relatively well-funded data collection and research arm means that we have a plethora of statistical information about federal sentencing. Consequently, we can have empirically based arguments about what the Guidelines do, or what changes to federal sentencing law might do, that would be difficult or impossible in most other jurisdictions.

That said, what we know about federal sentencing is to a large degree limited by the Sentencing Commission staff's decisions about what data to collect, what questions to ask about that data, and what to tell the rest of us about what they have done. The Commission's role as collector, interpreter, and guardian of data presents two broad problems.

First, historically, the Commission's research has largely been self-referential and judge-based. By this I mean that the Commission has mostly been interested in data about how the Guidelines are applied and the degree to which judges have complied with the Guidelines' rules. This is understandable, and in some measure even inevitable. The Sentencing Reform Act commanded the Commission to collect data of this sort,¹⁸ and the application of the Guidelines in each case creates reportable data about the facts the Guidelines have decreed to be important. Moreover, the Commission has limited staff and much of its time is inevitably consumed by processing the never-ceasing firehose of guidelines application data. That said, particularly for a good many years post-*Booker*, the Commission devoted immense resources to collecting and arranging data on departures and variances, seemingly to prove the continued relevance of guidelines rules in an advisory era.¹⁹ By contrast, the Commission has done little research on outcomes (by which I mean research about the relation between various types of criminal sentences and recidivism, crime rates, effects on communities, and so forth), risk prediction models, the systemic costs of imprisonment and other punishment types, the social costs of crime, or other subjects that might help the Commissioners decide what the rules *should* be, rather than telling them how often the existing rules are adhered to.

Second, historically, the Commission kept much of its data in-house, publishing compilations and analyses of data in its invaluable annual *Sourcebook of Federal Sentencing Statistics*, but not making the underlying data files directly available to outside researchers or policy analysts.²⁰ For

a period, the annual datasets underlying the *Sourcebooks* were made publicly available only through the Inter-University Consortium for Political and Social Research, and only after considerable time delay. The complete unavailability of some datasets and the time lag involved in releasing annual datasets to the Consortium made it difficult, and sometimes impossible, to check the Commission's analyses, and sometimes prevented outside researchers from examining questions the Commission chose not to ask.

Both of these historical difficulties have in recent years been ameliorated. A few years ago, the Commission began making its data files back to FY 2002 available for download from its website.²¹ This has not only provided outside researchers and policy analysts invaluable raw material, but has also opened up a new vehicle of sentencing advocacy. Now that the Guidelines are advisory, judges are at liberty to give as much or more weight to the sentences other judges have imposed on similar defendants as they do to the sentence prescribed by the Guidelines. Defendants with savvy counsel and adequate resources can now commission independent statistical analyses of sentences imposed in comparable cases.

Likewise, the Commission has begun to expand the range of its research focus. A notable current example is a study of recidivism based on a database combining Commission data with rap sheet information provided by the FBI. The Commission published an *Overview* of its conclusions based on this dataset in March 2016,²² and projects that it will publish further analyses of the data over the next several years. One might kvetch a bit at the fact that a research apparatus wholly devoted to federal sentencing policy waited nearly thirty years to conduct a general study of the recidivism of federal prisoners,²³ particularly inasmuch as the Sentencing Reform Act of 1984 specifically mandated that the Commission "collect systematically and disseminate information regarding effectiveness of sentences imposed."²⁴ But that would be ungenerous to the good folks who are now advancing this invaluable project. Commission Research Director Glenn Schmitt deserves credit both for providing open access to the yearly data files and for presiding over projects like the recidivism study.

Still, problems remain. On some points, the Commission retains its old territoriality, insisting on exclusive control over some data sets and thus, as a practical matter, over the questions they can be used to answer. Cerberus still guards the sentencing data underworld (or, for you Potter fans, the Chamber of Secrets), and sometimes he wakes up and growls.

One difficulty relates to particular datasets upon which Commission reports are based. Sentencing researchers have for years requested that, when the Commission issues a report on a particular topic, it also release the supporting dataset. At various points, promises to do that have been forthcoming. Indeed, in a letter dated April 24, 2014, Mr. Schmitt stated that "in the next few months we will be posting the datasets used in recent Commission

publications."²⁵ However, few if any such postings have occurred.²⁶

A current instance of this phenomenon involves the Commission's recidivism study and the debate over the SRACA. In early 2016, a small group of conservative Republican senators launched a campaign to scuttle the SRACA. They contend that the bill would release "thousands of violent felons,"²⁷ in which category they include all persons convicted of drug trafficking offenses, particularly the defendants sentenced pursuant to drug mandatory minimums who would be eligible for relief under several provisions of the SRACA. Put dispassionately, their argument is that persons who commit drug crimes serious enough to warrant imposition of a mandatory minimum sentence pose a particularly high risk of committing violent crimes upon release. This argument is capable of being empirically tested if one has the necessary data . . . which happily the Sentencing Commission has recently gathered in its recidivism dataset.

The recidivism dataset contains re-arrest (post-release arrest for any reason including violations of conditions of supervised release), reconviction (conviction for any new criminal offense), and reincarceration data for all defendants released from federal custody in 2005.²⁸ Using this data, one can identify the overall recidivism rates for defendants convicted of different offense types. For defendants convicted of a new offense post-release, the data identifies the type of offense of which they were convicted, and thus allows determination of whether the new offense was violent or nonviolent. In short, analysis of this database would permit the Sentencing Commission to determine whether the class of drug defendants who might benefit from the SRACA are or are not likely to be violent recidivists—thus confirming or refuting a primary conservative argument against the bill.

Unfortunately, the Commission's recently published *Overview* of the recidivism data does not answer the questions most germane to the SRACA debate. The publication focuses primarily on re-arrest rate, rather than reconviction rate, as a measure of recidivism. It does not separate from the larger class of drug defendants those who were subject to mandatory minimum sentences. And as to drug defendants who are reconvicted, it does not identify the type of crimes of which they were convicted. What is required to address the claims made by Senator Cotton and colleagues is the following information:

For defendants who were convicted of a drug offense carrying a mandatory minimum sentence, but who were not subject to a firearms mandatory minimum:

(a) The five-year and eight-year felony reconviction rate (meaning the rate of conviction of a new felony offense following release from federal custody);

(b) Five-year and eight-year breakdowns of offense types for which those reconvicted were convicted: that is, the number and percentage of members of the class of defendant described above who were convicted of homicide,

rape, robbery, assault, drug offenses, property crimes, etc. Based on the Commission's Overview publication and a conversation with Mr. Schmitt, it should also be possible to differentiate within the assault category between more and less serious grades of assault, e.g., aggravated vs. simple assault, and within the category of drug offenses between drug trafficking and drug possession.

This information is in the Commission's recidivism dataset and the Commission, or anyone with access to its dataset, could easily extract it.

I have asked Mr. Schmitt to have his staff perform the necessary analysis, and thoroughly explained how important it is to the SRACA debate. However, the response has been that the Commission will not respond to requests for analysis made by anyone other than judges, congressional staff, or the Justice Department when acting in its policy role. The justification for this general policy is that the Commission lacks the staff to respond to such requests, however germane they may be to a pressing public issue. I understand this policy. The Commission is short-staffed and it cannot commit to answering the questions of every curious member of the public, or of every nosy academic. Therefore, I asked Mr. Schmitt to release the dataset underlying its recidivism study so that I (well not really me, but somebody competent to do such statistical work) could perform the necessary analysis in time to inform the congressional debate. Mr. Schmitt again declined, insisting that the Commission would retain exclusive access over the data until it finished its projected series of publications on recidivism. This response seems to me less justifiable.²⁹

It may turn out that someone on Capitol Hill will realize the potential impact of proper analysis of the Commission's recidivism data, request such an analysis, and release it publicly once received. That would be a happy outcome to the present impasse. But even if that occurs, there remains a larger problem. The Commission should engage in some reflection about the proper balance between, on the one hand, its resource constraints, its responsibilities to other government departments, and its understandable desire to get the first publication credit for analyzing data it collects, and on the other hand, its obligation to inform public debate over pressing sentencing policy questions and the right of interested members of the policy community and the public to obtain timely access to data which, after all, was collected on the taxpayers' dime. Such reflection seems particularly appropriate in light of the commands of the Sentencing Reform Act that the Commission establish a research program "for the purpose of serving as a *clearinghouse and information center* for the collection, preparation, and *dissemination* of information on Federal sentencing practices," that it "*publish* data concerning the sentencing process," and that it "*collect and disseminate* information regarding effectiveness of sentences imposed."³⁰

I do not mean to be unduly critical here. The Commission's research staff has an overwhelming job that it performs admirably with fewer resources than it should

properly have. And, as noted above, the breadth of its agenda and its commitment to getting information to the public have both notably improved in recent years, in no small part as a result of Mr. Schmitt's stewardship. But there remains room for improvement. I hope these comments might stimulate a conversation directed to that end.

Notes

- ¹ Frank O. Bowman, III, *Good Enough to Be Getting On With? The State of Federal Sentencing Legislation, December 2015*, 28 Fed. Sent'g Rep. 105 (2015).
- ² *Id.* at 110–12.
- ³ Statement of Judge Patti B. Saris, Chair, U.S. Sentencing Commission, for the Hearing on "S. 2123, Sentencing Reform and Corrections Act of 2015" Before the Committee on the Judiciary, U.S. Senate (Oct. 19, 2015), available at http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20151021_Saris_Testimony.pdf.
- ⁴ Letter of Glenn Schmitt, 28 Fed. Sent'g Rep. 351 (2016).
- ⁵ Bowman, *supra* note 1, at 110–11.
- ⁶ *Id.* at 112. Mr. Schmitt's letter is a bit confusing on this point because it refers to Section 105 of the SRACA, a provision relating to the sentencing strictures of the Armed Career Criminal Act, rather than the section of the SRACA relating to retroactivity of the Fair Sentencing Act, which is Section 106 of the SRACA.
- ⁷ Schmitt, *supra* note 4.
- ⁸ Robert Bolt, *A Man for All Seasons* 144 (1990).
- ⁹ Bowman, *supra* note 1, at 112, fig. 1.
- ¹⁰ Paul J. Hofer, *Impact of the Sentencing Reform and Corrections Act of 2015*, 28 Fed. Sent'g Rep. 116 (2015).
- ¹¹ Bowman, *supra* note 1, at 111.
- ¹² As Dr. Hofer observes in his article, the Sentencing Commission's larger estimate of 3,314 defendants annually is based not on enactment of Section 102 alone, but also on the (unstated) assumption that, following the enactment of the SRACA, the Commission would enact corresponding changes to the Guidelines. Hofer, *supra* note 10, at 116–17. If we accept that assumption, then the probable number of beneficiaries of changes in both the statutes and the Guidelines might be higher than Dr. Hofer estimates.
- ¹³ See S. 2123, Sentencing Reform and Corrections Act of 2015, §§ 106(b) and (c).
- ¹⁴ U.S. Sentencing Commission, *Final Crack Retroactivity Data Report: Fair Sentencing Act*, Introduction (Dec. 2014), available at http://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USCC_Crack_Retro_Data_Report_FSA.pdf.
- ¹⁵ *Id.* at tbl. 1.
- ¹⁶ *Id.* at tbl. 9.
- ¹⁷ Bowman, *supra* note 1, at 112.
- ¹⁸ 28 U.S.C. § 995(a)(12) and (15).
- ¹⁹ See, e.g., the U.S. Sentencing Commission's *Quarterly Sentencing Updates*, published since 2006 and devoted almost entirely to measurements of judicial guidelines compliance, available at <http://www.uscc.gov/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates>.
- ²⁰ Paul J. Hofer, *Data, Disparity, and Sentencing Debates: Lessons from the TRAC Report on Inter-Judge Disparity*, 25 Fed. Sent'g Rep. 37 (2012).
- ²¹ See Sentencing Commission Data Files, <http://www.uscc.gov/research-and-publications/commission-datafiles>.
- ²² U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, available at <http://>

www.ussc.gov/research-and-publications/research-publications/2016/recidivism-among-federal-offenders-comprehensive-overview.

²³ Over a decade ago, the Commission did conduct a recidivism study focused on the degree to which the Guidelines' Criminal History Categories correlate with recidivism. Three reports on this subject were published in 2004–2005. See <http://www.ussc.gov/research-and-publications/topical-index-publications#recidivism>. However, the Commission has never published any additional reports after these initial, narrowly focused three. Moreover, the Commission did not release the underlying dataset when they published these reports, arguing as it does in the case of the current recidivism study, that it wanted time to mine those datasets before making them public. To this day, it has never released the dataset.

²⁴ 28 U.S.C. § 995(a)(16).

²⁵ Letter from Glenn Schmitt, April 24, 2016 (on file with author).

²⁶ The datafile from a 2012 report on the continuing impact of *United States v. Booker* on federal sentencing is posted on the Commission's website, but does not appear to contain any data not already available in the annual datafiles. See U.S. Sentencing Commission, *Commission Datafiles*, <http://www.ussc.gov/research-and-publications/commission-datafiles>.

²⁷ Michelle Ye Hee Lee, *Fact Checker: Sen. Tom Cotton's claim that sentencing reform bill would release "thousands of violent felons,"* Washington Post, Feb. 8, 2016, available at <https://www.washingtonpost.com/news/fact-checker/wp/2016/02/>

08/sen-tom-cottons-claim-that-sentencing-reform-bill-would-release-thousands-of-violent-felons/; Tom Cotton, *Why I Oppose Sentencing Leniency for Violent Felons*, Feb. 17, 2016, <http://www.tomcotton.com/2016/02/why-i-oppose-the-sentencing-reform-and-corrections-act/>. See also letter to Senate colleagues from Jeff Sessions, Tom Cotton, David Vitter, and David Perdue, February 9, 2016 (copy in possession of author) (claiming that drug traffickers are violent felons).

²⁸ U.S. Sentencing Commission, *Recidivism Overview*, *supra* note 22.

²⁹ Mr. Schmitt also contended that he could not release the recidivism datafile because of the terms of a Memorandum of Understanding with the FBI pursuant to which the Commission obtained the rap sheet data it correlated with sentencing and other data. He maintained that the MOU barred release of the datafiles because of FBI concerns about disclosing the identities of individual defendants. To ascertain the terms of the MOU and the precise character of any strictures on release of data, I asked Mr. Schmitt to provide me a copy of the MOU, which he has so far declined to do. Although the FBI might well have privacy concerns, they could presumably be dealt with by removing the individual identifiers before releasing the database, a task routinely accomplished in research of this kind. Absent more information, this explanation seems unconvincing.

³⁰ 28 U.S.C. §§ 995(a)(12)(a), (14), and (16).