

## *Working Paper Series*

---

Villanova University Charles Widger School of Law

*Year 2006*

---

## Write On!

Steven L. Chanenson

Villanova University School of Law, [chanenson@law.villanova.edu](mailto:chanenson@law.villanova.edu)

This paper is posted at Villanova University Charles Widger School of Law Digital Repository.  
<http://digitalcommons.law.villanova.edu/wps/art56>

# THE YALE LAW JOURNAL POCKET PART

STEVEN L. CHANENSON

## Write On!

Pity the poor appellate judge. All alone, she sits in her chambers with just her clerks, law books, and the cold, bleak trial record for company. No witness's testimony to hear. No defendant's demeanor to observe. How is she supposed to determine what is – or is not – a reasonable sentence? How can she ascertain whether the sentencing judge honored the command of the remedial majority in *United States v. Booker* and “consider[ed]”<sup>1</sup> the myriad of potentially conflicting goals established by the Sentencing Reform Act of 1984 (“SRA”) as set forth in 18 U.S.C. § 3553(a)?<sup>2</sup> The appellate judge knows that a sentence that simply hides in the comfortable shadows of the now “effectively advisory”<sup>2</sup> Guidelines cannot be reasonable *per se*. After searching the *Booker* tea leaves for the thousandth time, she also suspects that her colleagues' growing acceptance of a presumption of reasonableness for Guideline-compliant sentences is mistaken – perhaps evens a dodge. So she looks for what Professor Douglas Berman calls “independent reasoned judgment.”<sup>3</sup> But how can she find it?

The answer to this puzzle – which should have been central to pre-*Booker* sentencing and is essential to post-*Booker* sentencing – rests in the mind of the District Judge. The trial judge who does not share his judgment and reasoning has done little for the appellate judge, the Sentencing Commission or the cause of just sentencing. Thus, the sentencing judge must explain his reasons, and meaningfully document how he grappled with the § 3553(a) factors to reach the sentence imposed. This means writing sentencing opinions.

Despite an arguable tension with the *Booker* merits majority, the SRA – in a section entitled “Statement of reasons for imposing a sentence” – requires

- 
1. 543 U.S. 220, 259 (2005) (Breyer, J.) (remedial majority).
  2. *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J.) (remedial majority).
  3. Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART (2006), <http://www.thepocketpart.org/2006/07/berman/html>.

WRITE ON!

sentencing judges who choose to vary from the now-advisory Guideline range to describe why in open court and commit those reasons to paper “with specificity in the written order of judgment and commitment.”<sup>4</sup> One might think that this provision would result in a veritable flood of well-reasoned sentencing opinions. But one would be wrong.

The Administrative Office of the U.S. Courts (“AO”) has created an anemic form ostensibly in an effort to comply with this requirement in the wake of *Booker*. Ironically described as a “Statement of Reasons,” this document contains a parade of nearly meaningless check boxes that mirror the broad § 3553(a) factors. While it does provide space for a factual justification, the form almost seems designed to encourage the kind of mechanical—and arguably unreasoned—approach to sentencing *Booker* tried to extinguish. This is thin gruel, indeed, for our unfortunate appellate judge. Compounding the injury, the AO prevents the public from seeing these insipid documents, just as it refuses to release all judge-specific information about sentences. By limiting judicial transparency, the AO’s deeply misguided resorts to secrecy only further the distrust and disdain that the other branches of government and, sadly, the public increasingly direct toward the judiciary.

Improving the quality and availability of all sentencing information—including sentencing opinions and judge-specific sentencing data—can yield numerous benefits. For example, if the court of appeals has the statistics demonstrating how the various district courts in its circuit exercise their sentencing discretion, it will be better able to give life to the concept of “reasonableness” review. Complete contextual information coupled with a meaningful written explanation will allow the appellate courts to put the sentence into the proper perspective. As Professor Marc Miller argued more than fifteen years ago, at the dawn of the U.S. Sentencing Guidelines, “Full written opinions, rather than transcripts or sentencing ‘forms,’ may provide the best source of commentary on the sentencing rules selected by a commission, and offer the best hope for further refinement, revision, and reform.”<sup>5</sup>

Written opinions help to communicate vital sentencing knowledge not only to the appellate courts but to Congress, the Commission, and the public as well. In fact, Congress and the public might have a better understanding of and respect for the judicial role if they were able to read an opinion describing *why* a judge imposed a sentence that—at an uninformed distance—might otherwise seem inappropriate. This increased understanding might even reduce the level of congressional frustration with judges that has contributed to the

---

4. 18 U.S.C. § 3553(c)(2) (2000).

5. Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3, 4 (1989).

proliferation of so many unwise and counterproductive mandatory sentencing laws. Regardless, well-reasoned sentencing opinions and judicial transparency concerning sentencing are two of the best weapons judges have to bolster their legitimacy and preserve their decisional independence.

Despite the AO's bureaucratic myopia, there is cause for some sentencing opinion optimism. First, a number of appellate panels have enforced the statutory reasons requirement and reversed in cases in which the judge failed to provide a sufficient explanation of the logic behind the sentence. More importantly, several district judges understand the importance of sentencing opinions—both for appellate review of the sentences they impose and for the proper operation of the sentencing system as a whole. Judges across the ideological spectrum, including, for example, Judges Lynn Adelman (E.D. Wisc.),<sup>6</sup> Peter Bataillon (D. Neb.),<sup>7</sup> Paul Cassell (D. Utah),<sup>8</sup> Nancy Gertner (D. Mass.),<sup>9</sup> Richard Kopf (D. Neb.),<sup>10</sup> and Steven Merryday (M.D. Fla.),<sup>11</sup> have all taken their responsibility to *document* their reasoned sentencing judgment seriously. Shortly after *Booker*, Judge Gertner hit the nail on the head when she observed that “an ‘advisory’ regime makes it all the more important that I adhere to my practice of writing opinions, outlining the reasons for the sentences I have imposed.”<sup>12</sup>

Sentencing opinions are helpful whether or not the judge varies from the advisory Guidelines. These opinions need not always be lengthy and their analytical depth can vary with the circumstances. The key is to provide a window into the discretionary sentencing process and to afford appellate courts something substantive to review.

Armed with adequate information from the sentencing judge, the appellate court will itself look to § 3553(a) because those factors “will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”<sup>13</sup> In practice, reasonableness review is likely to mean that there is “more than one right answer.”<sup>14</sup> Meaningful sentencing opinions—at both the trial and appellate levels—will help us understand *why* those multiple answers are right.

---

6. See, e.g., *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

7. See, e.g., *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005).

8. See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

9. See, e.g., *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005).

10. See, e.g., *United States v. Tabor*, 365 F. Supp. 2d 1052 (D. Neb. 2005).

11. See, e.g., *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358 (M.D. Fla. 2006).

12. *United States v. Jaber*, 362 F. Supp. 2d 365, 367 (D. Mass. 2005).

13. *United States v. Booker*, 543 U.S. 220, 261 (2005) (Breyer, J.) (remedial majority).

14. GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 194 (1996).

## WRITE ON!

Modern federal appellate review of sentences is a recent phenomenon introduced by the SRA. Before *Booker*, courts of appeal focused on enforcing the technical rules of the Guidelines and did so with (over)zealous enthusiasm. Perhaps they can bring that same passion to reasonableness review and usher in a “common-law-like”<sup>15</sup> revolution in sentencing. Remember our poor appellate judge? She and many of her colleagues are trying to bring order to our new sentencing world, but the reviewing courts cannot do it alone. They need help. They need more than just the bottom line of how many years the defendant will serve. They need to know *how* and *why* the district court got to that bottom line. They need meaningful sentencing opinions. District Judges, start your keyboards!

*Steven L. Chanenson is an Associate Professor of Law at Villanova University School of Law. Professor Chanenson is an Editor of the Federal Sentencing Reporter and a gubernatorial appointee to the Pennsylvania Commission on Sentencing who frequently writes and speaks about sentencing.*

Preferred Citation: Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146 (2006), <http://www.thepocketpart.org/2006/07/chanenson.html>.

---

15. Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & LAW 3, 21 (1989).