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PANEL V

EQUALITY VERSUS DISCRETION IN SENTENCING

ILENE H. NAGEL—STEPHEN BREYER—TERENCE
MACCARTHY

INTRODUCTION BY THE HONORABLE FRANK H. EASTERBROOK*

Ever since the beginning of the republic, both state and federal judges have had wide discretion in imposing sentences. They have had discretion in the sources of information they used in imposing sentences within a range, based on their own mix of considerations of desert, deterrence, rehabilitation, and incapacitation, and in deciding how to weigh each of these factors. For example, some judges believe that violent offenses are more serious than property offenses, and others hate stealth offenses more than violent offenses. In addition to the discretion implicit in the range for each statute, judges have had the discretion to choose between consecutive and concurrent sentences.

The result is a great deal of variation: judge-to-judge, urban versus rural, and region-to-region. In a northern city such as Chicago, a crime involving a small transaction of drugs might lead to an award of probation. In a rural southern city, on the other hand, the identical crime might lead to a twenty-year sentence. A national consensus developed that this variation is inappropriate.

In 1984, without opposition, Congress passed a determinate sentencing law. Several states have passed parallel laws. The Sentencing Guidelines became effective for crimes committed after November 1, 1987. The package has several components: more elaborate fact-finding; statements of reasons; appellate review; and ranges based on the seriousness of the main offense with aggravating and mitigating circumstances. Proponents of this package hoped that it would end judge-to-judge and region-to-region disparities, promote candor in sentencing, and provide judges with relative values in sentences.

It is appropriate to ask: What are the Sentencing Guidelines and will they work? The panel today will address these questions. Some people believe that even though the system is designed to reduce discretion, it is very difficult to implement in practice. Although there was a national consensus in 1984 that reducing discretion is a great idea, this consensus has evaporated.

This evaporation reflects a traditional pattern in the regulation of conduct by the government that has carried over to the regulation of sentences. Some

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people would treat determinate sentencing as no different in principle from price control—it imposes a single price for a single activity. These people would predict the development of the standard responses to price control: black markets and queues.

The Guidelines' parallel to the black market is charging discretion. The prosecutor and the defendant may take the crime off the books by not charging the real offense, by charging some subset of the offense, or by withholding from the judge the information necessary to impose the sentence. Forms of misbehavior also exist. For example, if the Guidelines require a sentence that is too high for the judge's druthers, a much higher rate of acquittal or conviction on lesser included offenses or, to put it mildly, winking at the facts when the time comes to make the decision might occur.

The authors of the Guidelines need to control these responses to the Guidelines. The possibility of the creation of a substantial fact-finding apparatus, and, because of the various forms of evasion, no greater uniformity in real sentences, cause concern. The program for this afternoon's panel is a description of what it is that is being done and some questions about whether it will work in practice.

Here to discuss these questions are two members of the Sentencing Commission and one member of the criminal bar: Ilene Nagel, Stephen Breyer and Terence MacCarthy.