

Reporter's Response to Judge Marcus

Judge Marcus has proposed to reformulate the “purposes of sentencing” provision, § 1.02(2), on a number of occasions over the past several years. These suggestions have been advanced by Judge Marcus, often in writing, to the project’s Reporter, Advisers, Members Consultative Group, and the ALI Council. At each level of consideration within the Institute, Judge Marcus’s arguments have failed to win the support of more than a small minority.

The dispute is a limited one. Judge Marcus is in agreement with the fundamental structure of the purposes provision when he writes, “I agree with the Reporter that proportionality should limit all sentences.”

In other respects, however, Judge Marcus expresses strong disagreement with the current draft—yet his objections rest on mischaracterizations of the draft. For instance, it is not true (as Judge Marcus writes) that the draft “encourages the routine and pervasive use of prisons” or “enshrines retribution as the lodestar of criminal justice” or “avoids responsibility for serving any social function.” These assertions are flatly inaccurate.

Nor is it true that the draft “eschew[s] public safety.” Section 1.02(2) explicitly endorses goals of “offender rehabilitation, general deterrence, [and] incapacitation”—which are the known mechanisms for achievement of public safety through criminal sentencing. Judge Marcus would prefer different word choices in § 1.02(2)—a preference that failed a vote of the Council in 2006—but the current language is far from a rejection of crime-reductive goals.

The Reporter asks only that members of the Institute give a fair reading to the proposed § 1.02(2) in advance of the 2007 Annual Meeting. That will be the best antidote to Judge Marcus’s misreading.

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