

# Style

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## Mr. Liberty

*As More White-Collar Criminals Land in Jail, a Sentencing Consultant Finds Himself in Demand*

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**P**eter Max's "Statue of Liberty" print hangs on the wall of Herb Hoelter's office in Baltimore. It's signed by the world-famous pop artist, inscribed out of gratitude.

And well it should be: Six years ago the artist, better known for colorful psychedelic posters than for breaking the law, pleaded guilty in federal court in Manhattan to tax evasion and conspiracy charges. He admitted to trading art for more than \$1 million in real estate without paying income tax on the proceeds.

For this illegitimate brush stroke, Max faced a maximum 10 years in prison and a \$500,000 fine. Even the minimum sentence then — four months behind bars — could have shut down his studio.

"His lawyer called and said, 'What can you do?'" recalls Hoelter, one of the nation's foremost "alternative sentencing consultants" whose specialty is the artful wangling of the federal guidelines that match crime to prison time. His job is to influence judges toward lenient sentences for his white-collar clients.

Knowing that U.S. District Judge Kimba Wood wouldn't let Max serve his sentence in a halfway house solely to keep his art business booming, Hoelter packaged a deal. He proposed that Max also do community service teaching art to disadvantaged children.

The judge bought it. She sentenced Max to pay back taxes plus a \$30,000 fine, to serve two months in work-release and to perform 800 hours of community service in Harlem schools.

Max won't comment on his crime and punishment. But Hoelter says the artist turned the children's paintings into a magnificent 55-by-10-foot mural that now decorates a

playground wall in Harlem.

"It was beautiful what he did," Hoelter says, and calls the Harlem project a shining example of how flexibility in sentencing enabled a talented lawbreaker to repay society rather than just rot in the slammer.

What troubles Hoelter and other sentencing specialists is what would happen if Peter Max were sentenced today: no Harlem art project, no creative alternative to a stretch behind bars.

The federal crackdown on book-cookers, insider traders, tax evaders and other white-collar crooks — fueled by public outrage over WorldCom, Enron and other recent corporate scandals — is transforming the traditional white-collar punishment of prison-lite into hard time. Many consider this crackdown long overdue.

Over the past year, Congress dramatically stiffened sentences for financial crimes, the Bureau of Prisons ditched halfway house treatment for white-collar criminals with short sentences, and the U.S. Sentencing Commission doubled some white-collar sentences to as much as 20 years. In April, President Bush signed into law a controversial bill designed to restrain federal judges from lessening sentences.

For sentencing specialists such as Hoelter, that's all bad news. Pointing upward, he sighs, "The guidelines only know one way to go."

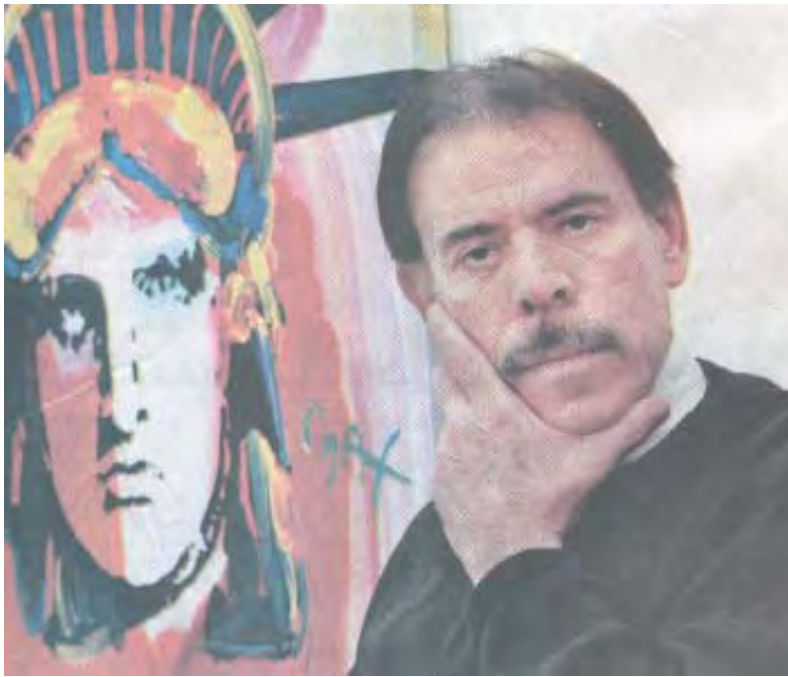


### SENTENCE PARSERS

Hoelter is the guy with the get-out-of-jail cards. He is co-founder and director of the National Center on Institutions and Alternatives, which works for sentencing and prison reforms. The 450-employee nonprofit organization — headquartered in Baltimore with offices in Alexandria, New York and Boston — pioneered the field of sentencing consulting for all kinds of defendants, from white-collar criminals to death-row inmates.

In 1977, after rewiring Pennsylvania's juvenile justice system, Hoelter and his mentor, juvenile justice guru Jerry Miller, set their sights higher and founded NCIA to lobby for national sentencing reform. They soon were hearing from criminal defense lawyers seeking to tip the scales of justice in their clients' favor.

"There was no system before that," says Hoelter, whose educational background is in social work, not law.



After pleading guilty to tax evasion and conspiracy, artist Peter Max was sentenced by Judge Kimba Wood to two months in work-release, 800 hours of community service, back taxes, and a fine. Max has Herb Hoelter to thank for avoiding prison.

One case led to another. By the early '80s, NCIA had started training public defenders in sentencing strategies. But of 15,000 cases NCIA has handled in the 25 years since, many of them have been of the highest profile, with names such as Ivan Boesky, Michael Milken, Dennis B. Levine and Marion Barry.

Though arguably controversial, sentence consulting has evolved into an expected part of white-collar cases, says Marc Mauer, executive director of the Sentencing Project, a D.C.-based organization of sentencing mitigation specialists.

"The white-collar client has the best lawyers money can buy and they get the best sentencing specialists money can buy," says Mauer.

Today there are more than 300 sentencing specialist firms nationwide.

Alan Ellis of Sausalito, Calif., got into the business in 1980 when, as a criminal defense lawyer, he "saw that court decisions were going against criminal defendants and, for most people, the key questions were how much time am I going to get and where am I going to do it." Of the 6 percent of federal criminal cases that go to trial, the government prevails in 75 percent, says Ellis, whose client list includes John Walker Lindh and Lyndon LaRouche.

"There was a need out there," says Ellis, and the need wasn't being met by defense lawyers. "Most criminal defense lawyers are interested in cross-examining the snitch and delivering the closing argument that would bring tears to the jury's eyes," he says. "I was more interested in explaining to the judge who my client was and why he or she did it and why he or she was worthy of a break."

Back in his office, Hoelter explains how NCIA does that. He pages through the prosecutor's 35-page pre-sentence report on one of his cases, a 70-year-old charged with fraud. The background section on the defendant's life is seven pages. "And that's a long one — they're usually four pages," he says. "To us, that's ridiculous."

He flips open NCIA's report — two inches thick. The personal history is 20 pages, followed by the history of his charitable works, the sentencing alternatives, and an explanation of why the judge should give the defendant a break — family matters, health matters, abuse problems — plus letters written on his behalf.

"If you're going to take somebody's life for three, four or five years," says Hoelter, "you have the obligation to know everything you can about the person, the crime, the circumstances and anything that was going on — and then make a fair decision."

"A lot of people view white-collar guys as these nefarious corporate thieves. There is certainly a lot of stuff that happens out there. But there but for the grace of God goes an awful lot of guys."

### A TANGLE OF GUIDELINES

Since enacted in 1987, the federal sentencing guidelines have bloated to a thousand pages — a complexity of upward and downward variances judges can make in 150 crime categories.

"The guidelines were promulgated with the notion that fairness in sentencing would happen — the guy who robs a 7-Eleven for \$100 doesn't get hit for 10 years when the guy who

robs the savings and loan for \$100 million gets probation," says Hoelter. "But now it's a disaster that has reshaped the entire federal judicial system" by taking discretion out of the judge's hands.

"Everybody goes to jail. There's now a presumption of incarceration," says Hoelter, adding that this has contributed to the federal prison population increasing from 30,000 in 1980 to 165,000 now.

When Hoelter consulted on the drug conspiracy case of Redskins defensive back Tony Peters back in 1983, he "did an alternative" to prison that sentenced the all-pro to lecture at schools about the evils of drugs.

Tony Peters, same case, 2003? "He gets five years mandatory," says Hoelter.

He runs his finger down a column of codes and figures representing months in prison in the sentencing guidelines. "You can see that the number of zeroes are very few," he says. "The government firmly believes that white-collar defendants need to spend a lot of time in prison to learn their lesson. That makes our job all the more necessary."

According to the 2001 "Federal Sentencing Statistics" sourcebook, white-collar crime accounts for 17 percent of federal court cases. To balance the presumption of incarceration in those cases, sentencing specialists invoke a variety of accepted reasons to argue for "downward departures." At the top of the list is cooperating with prosecutors — not the defense team's favorite departure. Others that can reduce sentences include diminished capacity (alcoholic or mental issues), aberrant behavior in an otherwise exemplary life, reparation of funds, and extraordinary past community service.

For a food corporation executive convicted two years ago of securities fraud, Hoelter got a 33-month term reduced by half by getting him into prison alcohol treatment. In Wall Street wonderboy James McDermott's insider trading case, Hoelter got a 36-month sentence cut to eight months and 300 hours of community service after the judge agreed that his daughter needed him in her recovery from a health problem.

In his 2001 antitrust case, the multimillionaire Sotheby's chairman A. Alfred Taubman, convicted of rigging auction prices, faced a maximum of three years and a civil fine of nearly \$200 million. Hoelter packaged a proposal emphasizing Taubman's 40 years of exemplary community service, from building hospitals to sitting on education boards.

The judge gave him a year and a day.

In the case last year against former U.S. congressman Edward M. Mezvinsky, who operated a \$10 million "Nigerian letter scam," Philadelphia lawyer and sentence specialist Stephen R. LaCheen got his client's guideline

sentence of 180 to 210 months reduced to 80 months at minimal-security Eglin Federal Prison Camp in the Florida Panhandle by persuading the defendant to accept responsibility for his crime.

Hoelter calls this bargaining for best possible sentences “balancing the scales of justice.” Alexandria lawyer and sentencing consultant Alan J. Chaset is more direct: “My job is to use the system as it is presented to me to the benefit of my client. . . . To a certain extent you have to spin, or manipulate, or cajole, that square piece into the round hole that is your case.”

Besides manipulating jail time, where your client does it is crucial.

In Taubman’s case, Hoelter detailed the 78-year-old defendant’s ailments — diabetes, hypertension and heart problems — persuading the judge to recommend that the defendant do his time at the Federal Medical Center in Rochester, Minn., located next door to the Mayo Clinic. It’s one of six federal prisons with advanced medical facilities.

Other minimum-security prison camps may provide better recreational facilities, or more treatment programs, or more active religious programs, such as the prison camp at Otisville in southeast New York, which caters to Jewish inmates. After the Bureau of Prisons stopped publishing its annual index of prisons, “Facilities,” in 1992, Alan Ellis began publishing his own 400-page “Federal Prison Guidebook,” which has become something of a Fodor’s Behind Bars.

Another sentencing tactic is to question basic fairness. In Michael Milken’s prominent 1990 tax case, the junk bond king’s almost two decades of philanthropy didn’t dissuade the judge from handing down a 10-year sentence. But afterward, Hoelter argued that it would be unfair for Milken to do more time than his Wall Street buddy Boesky, who had given him up to the feds. The judge modified Milken’s sentence to 3 1/2 years — about the same as Boesky’s.

Given the current environment, Hoelter thinks unfairness could come into play in the upcoming Enron cases. “The government is asking for 15 years, 10 years,” he says, acknowledging that he is consulting for Enron clients, though he won’t say who. The charges against finance chief Andrew Fastow alone add up to nearly a thousand years in prison. “If you look back at some of the more significant white-collar crimes, those numbers are out of whack.”

Others argue, however, that what has traditionally been out of whack are sentences that let monied, white-collar criminals off

easy, and the harsher regulations and guidelines are correcting that.

“It is a knee-jerk response to say white-collar criminals have gotten off easy,” says Hoelter. “The average first-time offender on a nonviolent, non-white-collar offense goes to court and gets probation. He gets a second chance. The average white-collar criminal now gets prison. The new guidelines and the more harsh amendments are nothing more than a political reaction.”

## THE ENRON EFFECT

One reason President Bush created the Corporate Fraud Task Force last July was to investigate whether white-collar criminals get the punishment they deserve, says Justice Department spokesman Bryan Sierra.

“It is our view that we do need to get tough on these types of crimes in response to situations like Enron and WorldCom and other hard-core profile white-collar cases,” says Sierra.

Part of the task force’s mission is to determine how to restore integrity to a marketplace shaken by corporate corruption, says Sierra. “One way to do that is the deterrent factor in enforcing the laws and sentences that are on the books and conveying the message that corporate crime will be punished.”

As for the legal ease strategies of sentencing specialists, he says, “our views may differ from them on whether or not white-collar crime deserves hard jail time. But we have a responsibility to the victims of these frauds.”

Seattle attorney Steve Berman represents 20,000 current and former Enron employees in a lawsuit against Enron, former Enron executives and other defendants. He says most of his clients lost their retirement nest eggs in the Enron collapse and many are financially ruined.

“There is no question these people have to go to jail,” says Berman, who expects a stampede of victims wanting to give victim-impact statements if any Enron executives are brought to trial and sentenced. “They should receive sentences that if not the maximum are on the heavy side.”

Sixty-four-year-old Charles Prestwood of Conroe, Tex., worked for Enron and its predecessor for 33 years. He accumulated \$1.3 million in Enron stock for his retirement. When Enron collapsed, he lost all but \$4,000. “Anybody who had anything to do with the downfall of Enron ought to go to jail for a long time,” he says. “I know there are maximums and minimums that I don’t understand, but I think they ought to get the maximum and with no parole.”

But Webster “Webb” Hubbell, a client of Hoelter’s, argues that tough sentences for white-collar offenders don’t always make sense.

Once chief justice of the Arkansas Supreme Court and associate attorney general in the Clinton administration, Hubbell pleaded guilty in 1994 to tax evasion charges arising out of the Whitewater investigation. His request that, based on his past public service, he be allowed to serve full-time community service as a Boys Club coach instead of going to jail was turned down, but Hoelter was able to get him assigned to the campuslike federal prison camp in Cumberland, Md. He served 18 months.

“There were a lot of people in prison who had a lot of talent and could have been helping people outside — PhDs who should be teaching math and not mowing lawns, doctors who should be working inner-city clinics and not picking up cigarette butts,” says Hubbell.

Sentencing consultant David Novak, who also knows his way around a prison cell, says overly aggressive sentencing can interfere with rehabilitating white-collar criminals.

Referring to himself as “the poster boy for federal incarceration of white-collar offenders,” Novak says his year and a day in Eglin turned his life around.

He pleaded guilty five years ago to mail fraud and making a false distress signal. Then the owner of a flight school near Seattle who needed money, Novak had intentionally crashed his aircraft to file a false insurance claim.

While serving his final 78 days at a halfway house, Novak polished the behind-bars diary that would become his 200-page book, “Downtime: A Guide to Federal Incarceration,” a prison survival manual. It was a steppingstone to a new career — as a sentencing consultant who has been there, done that.

Based near Portland, Ore., Novak has now worked on cases in 30 courts, has clients serving time in 60 institutions, and has sold 10,000 copies of the book.

“I wouldn’t even consider going through it today without bringing on a specialist,” says Novak, who didn’t have one in his trial. “Without breaking a sweat, my sentence would be almost double now — closer to 27 months.”

Hoelter says helping his clients who may have cheated, lied and stole millions doesn’t mean he excuses white-collar crime. He thinks there are other punishments besides prison, ones that can pay back to society. “But people lose that sense of balance because what they read about that person in the paper most often is that he is a greedy malcontent,” he says. “He may be in some cases, but more often than not there is the rest of the story.”

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