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# CORPORATE CRIME REPORTER

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## INTERVIEW WITH HERBERT J. HOELTER, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, BALTIMORE, MARYLAND

Let's say that you are convicted of a white collar crime. And you are facing a five-year sentence.

Herb Hoelter wants to help.

Even though you are convicted, and probably will do jail time, there are prisons, and then there federal prison camps – minimal security facilities. You want to be in a federal prison camp.

And Herb can help you get the sentence reduced, perhaps getting some of the time served giving lectures to business students about ethics.

And for the time that you must spend in prison, he can help place you in a camp next to your relatives. Or next to a major medical facility, if you are ill.

Hoelter is the co-founder and chief executive officer of the National Center on Institutions and Alternatives in Baltimore, Maryland.

We interviewed Hoelter on June 10, 2003.

**CCR:** What is your work?

**HOELTER:** I'm the CEO of the National Center on Institutions and Alternatives.

**CCR:** What is that?

**HOELTER:** It is a private, non-profit organization which I co-founded in 1977, to develop alternatives to traditional incarceration in both state and federal courts for defendants who were facing the prospect of imprisonment.

**CCR:** You graduated from the University of Buffalo and received your Master's degree from Marywood College in Pennsylvania.

**HOELTER:** Yes. After Marywood College, I worked for the state of Pennsylvania for Dr. Jerome Miller. He was at the time the Commissioner for Children and Youth. In June 1977, Dr. Miller and I co-founded the NCI.

**CCR:** What is the day-to-day work of the Center?

**HOELTER:** We operate a number of different programs, all with the same goal of providing alternatives to traditional institutions. We run programs for developmentally disabled clients as alternatives to state mental hospitals. We run educational and residential programs for emotionally and behaviorally challenged youth, as alternatives to reform schools and juvenile prisons. We also work across the country for defense attorneys and defendants in developing individual alternatives to prison when they are facing sentencing in court.

**CCR:** What is your budget?

**HOELTER:** Our overall organization budget is \$20 million.

**CCR:** Where does it come from?

**HOELTER:** The bulk of it comes from contract service work provided to state government and the Department of Education.

So, we have governmental work, foundations, individual contributions, and fee for service work for private clients.

**CCR:** What percentage of the budget is fee for service work for private clients?

**HOELTER:** About five percent.

**CCR:** The prison population increased remarkably over the past ten years. What is your philosophy on prisons?

**HOELTER:** For non-violent offenders, prisons are a waste of taxpayers' money. Most non-violent offenders can be handled safely and more effectively in the community at a much lower cost. The United States has certainly gone through one of the biggest experiments in incarceration in world history over the past twenty years.

It seemingly has had no effect other than to drain state and local budgets.

**CCR:** How many people are in prisons today?

**HOELTER:** Over two million people are now in federal, state and local prisons in the United States. Seventy-five percent of them are non-violent offenders. The prison population has grown from 500,000 in 1980 to 2 million last year. The United States now leads the world in the number of its citizens behind bars per capita.

**CCR:** Greater than China?

**HOELTER:** Yes, greater than China, greater than the former Soviet Union, greater than South Africa.

**CCR:** Why doesn't prison work for non-violent offenders?

**HOELTER:** The average non-violent offender has either a drug or alcohol problem. We know for example in state prisons that 65 percent of the people have drug or alcohol problems. The majority of them have committed a property crime. The majority of them have no educational background and/or poor economic backgrounds. Nothing that happens in prison helps any of those problems. Prisons over the past ten years have either financially or ideologically given up on the concept of rehabilitation and gone to pure custodial care.

So, when a person leaves prison after taxpayers have spent a significant amount of money on them, they are less equipped to handle the problems of the world than when they went in. If they happen to go straight, it is usually good luck, or they have had somebody in the community help them get through the rest of their lives without committing a crime.

The recidivism rate for state prisons is about 65 percent right now.

**CCR:** How many inmates in federal prisons?

**HOELTER:** Federal prisons now have about 160,000 inmates. When we started practicing in federal court in 1978, there were less than 25,000 prisoners in the federal system.

**CCR:** What percentage of the federal prison population is white collar?

**HOELTER:** About 20 percent.

**CCR:** What percentage of the state prison population is white collar?

**HOELTER:** Probably one percent. The federal system historically had been for white collar criminals. That was true until the drug war hit big in the early 1990s. Now, about 60 percent of the inmates in federal prisons are drug offenders.

**CCR:** It used to be that the majority of the prisoners in federal prisons were white collar?

**HOELTER:** Yes. Absolutely. That was the case 15 years ago.

**CCR:** The white collar criminals who are getting out are advocating, as you do, for the deinstitutionalization, the emptying of prisons of non-violent offenders. We interviewed R. Foster Winans, the former *Wall Street Journal* reporter who did time for insider trading. He says prison doesn't work for anybody – white collar or street criminals. He suggests that if a Wall Street executive is convicted of fraud, he should be sentenced to clean up the floor of the NYSE, wearing an orange jumpsuit with the word "Inmate" on his back. When the cameras pan the floor of the exchange, people will see this executive doing hard time on the floor of the exchange.

**HOELTER:** We certainly advocate for public service alternatives. Some of the branding and shaming, putting a sign on your front lawn, type of alternative, serves more for weekly magazines and people talk shows than they serve as effective criminal justice alternatives.

**CCR:** What about the specific idea that Winans raises – having a convicted executive sentenced to cleaning up the floor of the stock exchange?

**HOELTER:** To do that rather than six months or a year in a federal prison camp – many executives would welcome the opportunity. However, we try to match a defendant and his or her skills to a particular need in the community.

Sure, there is a need to pick up trash on the floor of the stock exchange, but there is also an opportunity to help build hospitals, to teach in inner city schools, to do a lot of other more socially productive tasks.

**CCR:** What about shame as a deterrent?

**HOELTER:** It has a limited effect. By the time most of our white collar clients get to the point of sentencing, shame has already occurred. They have been all over the papers, their families have been exposed to publicity, they have been portrayed as greedy, sneaky, devious, individuals, independent of what their backgrounds might have been.

We talk in our business about collateral consequences, and shame is certainly one of them. And many of our clients have already been shamed.

Would it make some people happy to see an inmate in an orange jumpsuit on the floor of the NYSE? Sure – there goes that famous Wall Street insider trader. Again, there is certainly some advantage for some people. I don't think it will be as productive as it could be as a true community service sentence.

**CCR:** How would you sentence the Enron

executives, if they are convicted?

**HOELTER:** A central philosophy we have is that it is difficult to comment on a case if you don't know the individuals. It is central to us to know the individual involved, what their talents are, and what their circumstances are.

If I were devising a sentencing program for some of those individual defendants I would look at their ability to make financial restitution in a significant way. I would look at their ability to make social restitution. I would look at what organizations they could help in the most significant way. I would look at other ways of depriving them of liberty, such as using community corrections centers, or home electronic monitoring to limit freedoms and create social restrictions.

I would look at an overall sentencing program that would allow all of the goals of sentencing to be reached, not just simply the goal of punishment or the oft mentioned but unproven goal of deterrence.  
**CCR:** You're not big on retribution – an eye for an eye?

**HOELTER:** That's right. I'm not big on retribution. It is always easy to say an "eye for an eye," when it is not one of your own or somebody you know. Then it becomes a different story. I can't tell you how many defendants we have had in white collar cases who have said – "I used to be one of those guys, who yelled for more punishment, who yelled for retribution." And retribution certainly has its place, but I don't think it should have a prominent place.

**CCR:** How many cases have you handled?

**HOELTER:** The organization has handled over 15,000 cases.

**CCR:** How many of those are white collar?

**HOELTER:** Probably 20 to 25 percent.

**CCR:** Give me some examples of white collar cases.

**HOELTER:** Our white collar work goes back to the early 1980s. We worked for Dennis Levine, when he was caught on his insider trading. He performed community service for the better part of 1,000 hours in a program in an agency in New York that helped people being released from state prison find employment. He also taught them GED courses.

We developed a community service program for a prominent contractor involved in a fraud case in the mid-1980s, where we worked with a world-renowned hospital in Pittsburgh that treated young kids with spina bifida. This contractor built a whole summer camp, a residential

program camp for kids and their families to live while they are being treated for spina bifida. That is still there today.

We've worked with professional athletes who were caught with drugs. One gave 500 hours of his time to lecture at high schools about drug use and ruined careers. There are literally hundreds of examples of defendants who created social good through their sentence.

**CCR:** These were sentences instead of prison?

**HOELTER:** Some of them were to mitigate a prison term, to lessen a prison term, and some of them served time in halfway houses. Some were totally in lieu of prison.

In the earlier days, it was more in lieu of prison. But since the Sentencing Guidelines took effect in 1987, much of our work has been to encourage a court to lower the sentence, but then to have some of the sentence served in a community service capacity.

**CCR:** What was the original purpose of the Sentencing Guidelines?

**HOELTER:** To reduce disparity in federal sentencing. So, if a common criminal robs a bank of \$10,000, and an executive robs a savings and loan of \$10,000, you want relatively similar sentencing.

In fact, the net effect has been to give prosecutors virtually unfettered discretion in charging the crime and setting a sentence that would limit a judge's discretion. The Sentencing Guidelines have been the abomination of the federal system. Most judges don't like them. Most defense attorneys don't like them. The only people who like the guidelines are prosecutors, because they now run the system.

**CCR:** But a judge isn't bound the guidelines.

**HOELTER:** Right.

**CCR:** Can a judge ignore the guidelines?

**HOELTER:** No, a judge cannot ignore the guidelines. But a judge can depart from the guidelines. A judge can look at the guidelines, say this would be your guideline under normal circumstances, but I find that in your case there are atypical circumstances, and I'm going to depart below the guideline to give you a different type of sentence.

Departures have grown in importance over the years and now are involved in almost 40 percent in federal court sentences.

**CCR:** The departures are eating the guidelines?

**HOELTER:** Yes, as they should.

**CCR:** The guidelines have been rendered

ineffective?

**HOELTER:** Not ineffective. Prosecutors can still create the charges where the judge starts the calculation in a guidelines case.

For example, there has been a dramatic rise in prosecutors charging money laundering. What might have been a fraud case or insider trading case ten years ago is now charged as money laundering. And they will argue that because the money traveled between two banks or two financial institutions, then in effect, there was money laundering. The government does that because the base for a money laundering guideline might be five years.

If they started with a fraud case, the base might be two years. So, the guidelines gives the prosecutor the ability to charge higher, which means that a judge, in order to depart, has to depart that much further to get a sentence that makes sense.

We try to get the judge to understand the entire case, the entire defendant, and all of the circumstances involved.

**CCR:** You get a white collar defendant as a client. You prepare a dossier for the judge. What might it include?

**HOELTER:** It would include their personal and professional background, with independent verification. It's not like your three best buddies who you play golf with write letters for you. You need more than that. It is independent verification. In a professional background investigation, we'll talk with attorneys, clients, vendors, people they've done business with and ask – what kind of guy was he?

Did he pay his bills? Was he honorable? Did he honor his contracts? We will look at a person's entire life. We look at anything that is special in their lives. Charitable works, and not just donating money. Was this person truly involved in doing substantive work in the community?

I had a tax case in Florida. This defendant was 74 years old. His wife had one of the most severe cases of Parkinson's disease in the country. He was her sole support. That qualified for a departure based on extraordinary family circumstances. So, we look closely at family circumstances.

We'll certainly look at any punishment that might have already occurred. Were there substantial civil settlements? Has restitution been made? Most attorneys are relatively good at applying the guidelines. But the volume of cases that we do allows us to look at many unreported cases, in which judges have granted departures for different

reasons. We can then say to the judge – you won't be the only judge who grants this type of departure, if you want to do it. And we would then bring up the precedent.

If it would be appropriate, we would develop some type of alternative, in lieu of total incarceration, or as part of what we would also call a mixed sentence, where the defendant might go in for a year, and then come out and do some kind of community service, rather than go in for two years or three years.

**CCR:** Do country club prisons exist?

**HOELTER:** Country club prisons are a myth. Certainly, inmates over the years have played tennis in prison. It was an accepted recreational program in many of the federal prisons. Now, that has been done away with.

**CCR:** What about getting time off to play golf?

**HOELTER:** Never. I have never seen any inmates play golf, or had any clients who played golf. Never had any inmates who had access to a swimming pool. Those are entire myths.

The federal prison system operates on levels of security. Those inmates who are deemed a risk or danger, are confined in a high security or medium security prison. Those inmates who are deemed low risk and who present no danger to anybody, are confined in a low security prison, or a federal prison camp.

Many of the federal prison camps are former military barracks. And as part of those military barracks, they had recreation facilities. Some guys like to play basketball, some guys like to lift weights, some guys like to run, some guys like to play tennis. And there was that ability before it became a media issue and people started asking – why are these guys playing tennis in prison. Well, they were playing tennis in prison for recreation, the same way others played basketball in prison for recreation.

That became a political issue, and they've done away with tennis.

**CCR:** Where do you want your clients to be in the federal prison system?

**HOELTER:** Obviously, if you have a client who qualifies for a federal prison camp, you want them to go to a federal prison camp.

**CCR:** Among the various federal prison camps, are there some where you want them to go and others you try and avoid?

**HOELTER:** Clearly, there are some that may be better than others. They all have the same routine. It

is a standard routine in prison. When you go to a visiting room, you are strip-searched. When you leave a visiting room, you are strip-searched. When you enter prison, you are strip searched. You have standing head counts. You have sitting head counts.

The routine is the same throughout the federal prison system.

**CCR:** Are there wardens with bad reputations?

**HOELTER:** Certainly, some wardens are tougher than others, but they rotate wardens throughout the system, so you can't always count on that.

Some federal prisons have more educational programs, some have alcohol treatment programs. We generally try to have a defendant serve his sentence as near as possible to his relatives, which is the operating philosophy of the Federal Bureau of Prisons.

If you have a defendant from New York, whose parents are elderly and retired, and they live in Florida, and they can't travel, you may want to see if you can ask the Federal Bureau of Prisons to assign the defendant to the prison in Florida. This way at least he can see his relatives if you are going to serve prison time for a couple of years.

There are varying circumstances. The best you can do is maintain an active file on most of the federal prisons, which we do. The volume of cases that we work on allows us to know the Federal Bureau of Prisons institutions very well. The Bureau is an independent agency and even judges can only recommend. But they generally try to do the right thing.

**CCR:** Are mandatory minimums really mandatory, or can you work your way around them?

**HOELTER:** The only way you can get departures from mandatory minimum sentences is to cooperate with the government, and then you can get the mandatory waived.

**CCR:** How many of your white collar cases are cooperation cases?

**HOELTER:** That's a tough one for me personally. Many of my clients go to trial or plea without a deal. This is particularly true in high-profile cases. If it is a cooperation case, the government agrees to what is called a 5(k)(1) motion, which is a motion to depart for cooperation.

Once the government agrees to a departure, the next question is – how far will the judge depart? If you have a client who is facing a guideline of 37 to 46 months, and he is cooperating with the government, and he is going to get a 5(k) motion,

you try and put the best argument forward so that the judge departs as far as possible.

When there is a departure motion, the government usually doesn't say – depart one year, or depart two years, or depart to probation. That discretion is totally up to the judge. Once the door is open, it is the judge's decision to determine how far to depart.

**CCR:** How many competitors do you have in this field?

**HOELTER:** We started the whole practice in 1978. For the first ten years, we did training programs around the country for public defenders – to teach them how to become effective sentencing advocates.

Many of those people have now gone on to private practice. There are a number of attorneys who now specialize in sentencing. They take on the whole case. NCIA is very effective at being third base coaches. We don't have any need to be front and center on our cases. We are content to play a secondary role and help the attorney and the client get the best possible sentence.

It is our view that if a defendant is faced with a period of incarceration, it is incumbent upon the court to know everything possible about the case and the individual.

We provide substantial, credible, detailed information about the person, about his background, and about the case. Hopefully, we can then convince the judge that instead of having our client do laundry at Allenwood, or mow the lawns on an Air Force base, that part or all of that time can be used in a more useful manner by serving the community.

The average cost of incarcerating a federal prisoner is now \$22,000.

**CCR:** I've heard it was \$40,000.

**HOELTER:** That's for the maximum security facilities. The average prison camp is about \$22,000 a year.

**CCR:** What is the average for state prisons?

**HOELTER:** The average is about \$25,000, but that factors in both low security and maximum security facilities at the state level.

**CCR:** Any thoughts on the Martha Stewart case?

**HOELTER:** It is interesting to see a prosecutor work as hard as this one did to find a criminal charge to indict her.

**CCR:** Let's say she is convicted and she is your client. What do you say to a judge about her sentencing?

**HOELTER:** Again, it is difficult to deal with hypotheticals. We don't know her except how she has been portrayed in the media. In general terms, she would have incredible talents to offer the community. It is clearly, from what I can see, not an egregious criminal case that deserves a maximum period of incarceration. The government clearly doesn't like her because she fights. She is going toe to toe with the federal prosecutors. But the government doesn't like anybody who fights back.

I remember back in the 1980's when they raided the Princeton Newport offices on a Friday afternoon. They sent a team of FBI agents into their offices in Princeton, New Jersey and Newport, California. They went to trial and eventually the defendants won on appeal. But in the meantime, the government had ruined their lives by raiding their offices, parading them before the media.

This whole notion of perp walks and having these guys paraded in handcuffs in the courthouse is certainly an abuse of power by the federal government, and certainly unnecessary from a criminal justice standpoint. The government is well aware that all of these defendants are prepared to surrender with due notice.

**CCR:** If you were a federal prosecutor charged with cracking down on corporate and white collar crime, how would you do it differently?

**HOELTER:** I don't know that they are charged with cracking down on corporate crime and white collar crime. If they want to enforce the law, they should do what they did in the 1980s, which is to enforce the law fairly and not try cases in the media, not hold press conferences.

**CCR:** But that's exactly what Rudolph Giuliani did in the 1980s – he started the media trials.

**HOELTER:** That's exactly how it started.

**CCR:** But why not – this is a good way to bring to the public's attention a serious criminal problem, and it has a general deterrent effect.

**HOELTER:** That's where the argument breaks down. If it has a general deterrent effect, then when they paraded the insider traders off of the trading floor in the 1980s – later to be acquitted, by the way – there wouldn't have been insider trading in the 1990s. The idea that there is general deterrence because of these high profile cases is nonsense.

**CCR:** So, you say just enforce the law, don't give it any publicity?

**HOELTER:** Deterrence from a criminal justice perspective is highly overrated. There is very little if

any empirical evidence that shows that deterrence works.

**CCR:** How do you deter crime then?

**HOELTER:** The research shows that for white collar convicts, a short prison sentence is as effective as a long sentence. The length of the sentence has no impact. It is the same way for drug crimes. The idea was that if you impose mandatory minimums for drug and handgun crimes, the drug trade would diminish. In fact, it hasn't occurred.

You control crime through effective and fair criminal justice policies and developing more of a crime prevention approach. We get laughed at when we say that perhaps some of these guys should go out and give ethics lectures about how to stay out of trouble, to talk to young students.

I think it was Bob Morvillo, who is Martha Stewart's defense lawyer, that coined the phrase that the government can "indict a ham sandwich" if it wants. And I sincerely believe that the government targets high profile individuals to indict and then decides later what charges it should bring. I've seen it happen too many times.

Certainly, there are guys out there who commit crimes. I'm not an apologist for white collar criminals. But if we are going to go through the whole process of indicting them, shaming them, putting them and their families on the evening news – then there ought to be some kind of a balance in the system that says – if that happens to me, then maybe I shouldn't have to do five years and maybe I can do two years and a year of community service.

There has always been a double standard for white collar criminals. The average first time or even second time defendant in a state court proceeding does not go to prison. For the average first time white collar defendant, there is invariably a presumption of incarceration.

**CCR:** Wait a second, you are saying that the double standard cuts the other way – that street criminals get preferential treatment over white collar criminals?

**HOELTER:** Absolutely, and it always has. People say that these white collar guys get off easy. I've never seen that. I've been in the sentencing profession for 25 years. And I have never seen white collar guys get off easy.

**CCR:** What about failure to prosecute cases?

**HOELTER:** That's a different kind of case.

**CCR:** If the power politics work so that the laws are lax, the regulation is lax, and the prosecutions are

deferred, that is a real double standard.

**HOELTER:** Anybody who has spent any amount of time in a state courthouse can see hundreds of cases on a weekly basis in which there is either deferred prosecution or probation before judgment, where a client is given probation unsupervised, and you keep yourself clean and you are not prosecuted for it. On the other hand, I have rarely seen a deferred prosecution in a white collar case.

**CCR:** We reported on one last week.

PNC ICLC Corp., a subsidiary of the PNC Financial Services Group, Inc., of Pittsburgh, Pennsylvania, will pay \$90 million to a restitution fund and \$25 million in penalties to the United States as part of a deferred prosecution agreement on criminal charges of conspiracy to violate securities laws. (See "PNC Gets Deferred Prosecution Agreement in Fraud Case," 17 *Corporate Crime Reporter* 23(4), June 9, 2003).

Increasingly now, the Justice Department is cutting deferred prosecution deals with corporations. It wasn't intended for major corporate crime cases. And the U.S. Attorney's manual makes this clear.

**HOELTER:** Those are organizations, not individuals. We've been asked to help out in about a dozen or so corporate cases. It is generally when they are pleading guilty, and want to perform public service.

**CCR:** When you started this organization, did you see yourself doing this amount of white collar work?

**HOELTER:** The white collar work actually started from the beginning. In 1979, we worked on behalf of a lawyer who was convicted of embezzling from his clients. And then the work made sense to us. There were times in the early 1980s when the government was supporting alternative sentencing for white collar criminals. The tenor has certainly changed. We worked the cases during the savings and loan debacle. We worked dozens of antitrust cases. We worked fraud in VA hospitals. The government finds crime when it needs to.

**CCR:** Traditionally, the progressive, left, liberal argument is that we shouldn't put non-violent people in prison. But here you are arguing on behalf of white collar criminals that they shouldn't be put in prison. Will the experience of white collar criminals in prison lead to the reform of the entire prison system?

**HOELTER:** I would hope so. The system has gone

unchecked for the past fifteen years. People understand the argument. This isn't an argument about letting predatory violent criminals go on the street. This is about creating a system that works.

**CCR:** You would effectively empty the federal prisons.

**HOELTER:** If I were king for a day, I would certainly find programs for about 60 to 70 percent of federal prisoners, no question.

**CCR:** Outside of the prison system?

**HOELTER:** I would create a system that would follow the research in the field. There is some benefit for a short prison sentence – six to twelve to eighteen months. To get somebody's attention. But for those defendants who needed treatment, I would devise a whole panoply of treatment programs, for alcohol, for drugs, for gambling, for whatever those needs might be. I would create a massive community service project – like a Marshall plan. I would have these prisoners working every day for years in their communities, creating some benefit from what everybody knows is a tragedy.

**CCR:** Would you agree that white collar and corporate crime inflicts more damage on society than street crime?

**HOELTER:** Not necessarily, no. That's a tough generalization to make. There are some white collar crimes – Enron is one example – where people who have lost a lot of money. But I'll bet a lot of shareholders also made money on Enron. And not just the executives. The people who lost money – a question is were they making money for five years hand over fist when Enron was on the go.

I remember the savings and loan industry and the executives who were pilloried in that case. And those convictions resulted from a regulation change. The FDIC changed the regulations about valuation of collateral.

And all of a sudden, boom, guys are indicted because the FDIC said – don't evaluate your collateral the same way you did last year.

That's tragic what we did to some of those people. There are different aspects of corporate crime. So can you say generally, it's worse than street crime? I don't think so.

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