

## Teaching White Collar Crime: A Fresh Perspective

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Academics rightfully pride themselves on organizing large amounts of material into broad, useful concepts. This task is particularly difficult in the field of white collar crime because the contours of the subject area are difficult to define. The standard approach seems to be to divide the course material into two broad concepts: substance and procedure. Into the former category, most white collar crime casebooks place the elements of the white collar crimes, the discussion of *mens rea*, entity liability, and the federal sentencing guidelines. In the latter category, the casebooks discuss grand jury practice, self-incrimination privilege and immunity, plea bargaining, and document production. Although casebooks rarely explain the decision to organize the material along these lines, it can be assumed rightly that the decision has some pedagogical benefits. Primary among those benefits is the ability to lump relatively diverse ideas into one of two general categories. As a result, structuring and restructuring the course material does not disturb the basic course narrative.

Another benefit to the substance/procedure division is that students are first introduced to the substantive crimes before launching into the more technical analysis of procedure. There is an advantage, for instance, in understanding the complexities of mail fraud elements before examining the process by which the grand jury may determine whether or not to accuse someone of committing the crime. By analyzing the substantive cases first, the students generally obtain a surface appreciation of the procedural issues simply through close analysis of the cases. As a result they have some understanding of the procedural part of the course before even reading any procedural cases.

Those experienced in teaching white collar crime can no doubt add greatly to my short list of advantages to organizing the class material along the substance/procedure duality. And while the division may seem natural to those same experienced educators, it is more intuitive to structure the class in a way that bears some relation to the life of a white collar case. A reasonable alternative to the substance/procedure format is to organize the course along the path of a case: pre-indictment, indictment, and post-indictment.

Pre-indictment represents the formation of the investigation and grand jury practice and procedure. It is here, at the beginning of a case (and thus the course), that a criminal prosecutor initiates a case based upon an Inspector General or FBI investigation. Perhaps the case is brought to a prosecutor's attention based upon a civil *qui tam* action. It is also here, at the beginning, that the challenges of parallel

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proceedings most often present themselves. Should a civil *qui tam* case be stayed pending a criminal investigation? What dangers may befall a prosecutor working in tandem with the Securities and Exchange Commission? These questions must be answered at the beginning, not the end.

It is also at the commencement of a case that most witnesses assert their self-incrimination privilege and in which prosecutors take proffers and offer immunity. Looking at Fifth Amendment issues takes place relatively early in the course, as does discussions of subpoenas *duces tecum*. Once a prosecutor has done some investigation, she must confront pre-charging decisions such as whether she has the necessary *mens rea* to charge individuals or entities. Thus, it is here, during the pre-indictment stage, that *mens rea* and entity liability are presented to the students.

During the indictment section of the course, students examine the various white collar crimes. Here, like the traditional substantive portion of the textbook, the students examine the primary white collar crimes within the prosecutor's toolbox, and discuss the strengths and weaknesses of charging a particular crime by mastering the elements of each.

Finally, post-indictment primarily represents plea bargaining, cooperation and sentencing, although ambitious syllabi may also include a discussion of suspension and debarment.

The potential advantages of organizing the material along the life-cycle of a white collar case are apparent. Not only does organizing the course this way conform to reality, but it allows the students to travel along a white collar case as both prosecutor and defense attorney identifying strategies for both along the way. There are other pedagogical benefits as well. Discussion of many of the substantive white collar cases is enhanced if the students have an understanding, for instance, of the grand jury process and grants of immunity. Many of the substantive cases are difficult to understand if the student does not grasp why one person was granted immunity and another indicted when, in fact, they were coconspirators in crime.

As a topic of study, white collar crime is unique in that it presents both fascinating substantive and procedural legal issues. It is both a study of specific statutes and advanced areas of criminal procedure. As educators, it is to our great advantage to integrate substance and procedure as much as possible to reflect the true complexities of our field of interest. By dividing our class into two separate areas (substance and procedure) we do not advance that cause as forcefully. Students also respond well to the organization I suggest. It facilitates classroom discussion and appeals to their sense of logic. It allows increased opportunity to integrate more experiential learning into the classroom, including dividing the students into two groups (prosecution and defense) and litigating a mock white collar case from investigation to sentencing.

As white collar crime rightly becomes a more popular class at law schools and others begin teaching the subject, they too will confront the conflict between the “traditional” way of organizing the course material and, what is for me, the intuitive way. Hopefully, the debate will continue.

