PARADIGMS IN TEACHING CRIMINAL LAW

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I am sorry for having chosen such a ponderous title. I have nothing new to tell you. You are collectively and one at a time the greatest teachers and scholars of criminal law in North America. I only want to share some ideas and approaches based on the valuable work that has been discussed here.

I also know that some of you are here for the intellectual property sessions. I promise to talk a little later about the intersection of intellectual property and criminal law, based on some work I did about twenty years ago. And in any case, all of us in teaching should be thinking about the place of criminal law in the curriculum and what are its goals. I also note with pleasure that Judge Kozinski is at this conference, as I had planned to say something about a recent opinion of his.

I spoke yesterday to my colleagues Josh Sarnoff and Peter Jaszi, about how intangible property ideas are becoming formalized into the criminal law. Some years ago, I argued one of the Wedtech cases in the Second Circuit, on the issue of whether a deprival of intangible rights was a criminal conversion of property. Judge Altimari was skeptical of my position, and finally exclaimed, "Mr. Tigar, have you never heard of incorporeal hereditaments?" I was taken aback, and I paused and replied, "Judge Altimari, in the little town in Texas where I come from, people talk of little else."

Judith Areen advises that we should start a class "with something students care about or think they know rather than laying out a blueprint or theory of our own." For our subject, this is sound advice. Oh, yes, our students live in a world dominated by contract, and they are surrounded by property. They have some sense about torts, at least the more popular ones. But most of them don't have strong opinions about the Stature Quia Emptores, or the writ of covenant. Civil procedure is something of a mystery. But criminal law is big news. Hardly anybody is without fixed opinions, based on what they believe to be plentiful information. Our task: to confront these preconceptions and bring our students to a more rounded understanding of what this system is all about. This system that calls itself criminal justice.

Our subject – the criminal law – lies at the center of a great deal that is wrong today, and also of the most significant movement for human liberation that the world has ever seen. Our job is to awaken our students to these realities, while fulfilling our obligation to teach about reading statutes, offense elements and the rationale of punishment.

Fact: 1.7 percent of white males are in prison or jail, 3.9 percent of Hispanic males, and 11.9 percent of African-American males. The United States incarcerates a far higher percentage of its people than any advanced industrial country. How are we to understand the human conditions that these figures inadequately represent? How are we to do that while helping our students see how the rules of criminal law are used to produce these results? Jerome Frank wisely said:

> A legal system is not what it says, but what it does. Our 'criminal law,' then, cannot be described accurately in terms merely of substantive prohibitions; the

description must also include the methods by which those prohibitions operate in practice . . . .

What does the system do? Despite the figures on incarceration, the percentage of inmates charged with or convicted of white collar crimes has declined. Yet, the social harm committed by these criminals is by any measure enormous. Major public corporations have become a collection of kleptocratic fiefdoms, whose leaders enrich themselves at the shareholder's cost and conduct their operations at the expense of everybody else. The corporate leaders calculate the risks and costs of their behavior as well as its benefits. They, unlike the urban offender who will most likely plead guilty, really do have mens rea. The urban offender, who grows up with progressively limited life choices, cannot be said in the same way to have acted voluntarily. That is an insight from psychology, political science, and sociology, and an important one for me. The categories of mental element are, in the world of what the law really does, fictions.

The contrast between systematic and biased over-enforcement against the poor, and laissez faire for the rich, echoes the situation that existed in the first half of the 18th century, when the Black Acts were passed and came into full force. Here was the criminal law being deployed as a hammer against activities that were normal predictable incidents of poor people's lives, while speculative venturers ran wild with plundering escapades such as the South Sea Company.

For poor people and people of color, the administration of the death penalty is the most horrific example of the way the system is skewed. I cannot add to Professor Fagan's path-breaking insights, I can only thank him for them. He is more patient than I am. Let us say somebody, Ann Coulter maybe, proved to us that public flogging with a cat o' nine tails deterred some forms of crime. I would say "so what?" With the centuries of civilization and history piled so high, anybody who can't think of a better way to deter crime is no smarter than a bucket of dirt.

But I said there is another side. In the past 100 years, our profession has developed, articulated and applied transnational principles of criminal liability – accountability if you will – to violations of human rights and depredation of the international environment. That development includes the creation of transnational tribunals. It also includes rejection of defenses based on immunity and the defense of superior orders. Torture, genocide, crimes against humanity, war crimes and crimes against the peace have been defined authoritatively, and are now expressed in peremptory and non-derogable norms. High-profile cases against offenders have helped to mobilize popular opinion and have fulfilled a vital didactic function in the service of progress. For example, the public proceedings against Augusto Pinochet and his accomplices have put beyond doubt the facts of their crimes, just as the Nuremburg evidence stands as proof against those who would deny the Holocaust.

I know that this administration has sponsored wholesale violations of these transnational norms, and sought to undermine institutions that would enforce them. There are long memories in history, and even significant setbacks do not in the longer run retard its forward progress. Current events make it all the more important that we do our job of putting students into the broader context that lies beyond our borders and beyond the cabined view of our time. The present is history, and history is a shared experience of all the world's peoples.

After all, here as in all courses, we should be reminding ourselves that the rules we are studying are conventional and are the product of a given social and historical situation. They are not, that is, inevitable. Again, history is our guide. In the American South, we once told juries that black men naturally desired sex with white women, who naturally were repelled at such an idea, and that jurors should think about this truth in assessing whether the defendant's conduct amounted to an attempt to rape, or whether there was consent.

If we consider Judith Areen's idea, we have to think of our students as we would of jurors in a high-profile case. They think they know something about criminal law, enough to have strong opinions. But what they know is probably distorted, in some instances grotesquely. We have an advantage, however, over the trial lawyer. At the trial's end, the jurors grade him or her. In our classes, the jurors – our students – know that we are the ones handing out the grades. So that gets us perhaps a little more open-mindedness.

Don't get too confident, however, about the power of our magic. To pursue the criminal trial analogy, I think of the Lay-Skilling juror Mr. Delgado. He is an elementary school principal. He could not believe that Skilling and Lay did not know what was going on at Enron. "I have to know where my teachers are," he said. "Parents hold me responsible if their child is lost."

I'll tell you, though. The Enron case has proved to me that I am a racist. I mean, if I am walking in Houston and I see a well-dressed white man, I'll cross the street. I'm afraid he'll steal my pension.

Mind you, I continue to believe that criminal law can and must fulfill a core pedagogic function. We read statutes. We see how text, common law background, legislative history and lenity push and pull on the statutory words. We parse offenses into elements – act, mental element, circumstances. We can see, in the manipulation and application of these categories, the ways in which history, race and gender, politics and economics are at work.

These, at any rate, are some ideas with which I approach the issue: what will my syllabus look like when I teach criminal law to forty or fifty first year students next Spring in Durham?

I am going to present the students with six or so cases, all based to at least some extent on real events. As we explore the cases, the students will have to look in the casebook and some supplementary materials for the resources they need to analyze the issues as they come up.

Imagine with me that there is a criminal law casebook here on the podium. Let us say it is Joshua Dressler's book. This book has more than 1,000 pages. I could not assign all this material in a three-unit first year course. Now imagine that I also have up here a few more materials, such as a case from the International Criminal Trial for Yugoslavia, and some other items that I will be talking about in a moment. Now let us imagine that this casebook is an entire law library, and that we are going to use it in that way rather than a series of chunks of material that we can assign to students in some sort of order.

I propose that we think of criminal law as a series of paradigms drawn from the disciplines that we have been discussing, and bridge our treatment of those paradigmatic topics over the traditional categories that we find in the casebooks.

Rape allegations are on the front pages, and whether it is Duke lacrosse or Kobe Bryant, issues of race and gender intersect and some would say collide. In death penalty litigation, we have an eminent Harvard scholar deriding the insights that psychology can provide into the basis of human conduct.

The question is not, "are there issues here that can and must be part of our criminal law teaching?" No, the issue is how we can introduce them and keep them from overwhelming our and our students power to see that the basic traditional stuff of criminal law is still essential to understanding, and is the core of our discipline.

In the few minutes I have today, I can illustrate my point only with a few examples. In some instances, there are reported cases that are in my view paradigmatic. We can pick them up and use them as centerpieces for a wide-ranging discussion, adding and adjusting the facts as we go along. For other categories, I suggest crafting a realistic hypothetical. Let us begin.

HOMICIDE

First, homicide. I see a criminal law course that gets the students' attention like a good opening statement should. Somebody is dead and we know who did it. But not just any homicide will do. You want one that lets you introduce the elements of the homicide offenses, and the way in which those elements do or do not permit the jurors to explore the real and sometimes understandable reasons why one human kills another. You would like a homicide that, with judicious tweaking of the facts in hypotheticals, illuminates principles of excuse and justification. You would like one that introduces issues of gender and race.

I suggest you teach homicide through State v. Norman, the North Carolina battered spouse case. Woman kills man. The state courts refuse to countenance even imperfect self-defense or any other form of justification. The case was so well-tried that the jury returned a manslaughter verdict even without any help from the jury instructions.

In order to see Norman in context, you can ask the students to read Susan Glaspell's play "Trifles." In the play, a man has been found dead and his wife arrested for murder. Two couples are in the snowbound farmhouse where the killing took place. The women and the men have different views of events. Trifles, written in the early 1900s, was based on Susan Glaspell's experience as a newspaper reporter, covering the trial in State v. Hossack, an Iowa case at the turn of the last century. A jury of white men of property convicted Mrs. Hossack her of first-degree murder. Ms. Glaspell first wrote a story with the mocking title "A Jury of Her Peers," and then the play. The Supreme Court of Iowa reversed the conviction, and its opinion is worth reading even though it does not deal with the elements of murder. The opinion is useful for showing what advocates ought to know – sometimes you win a case for a good reason that is not the real reason. The Court's opinion makes clear the Mr. Hossack was a right bastard.

It is no criticism of the brilliant Professor Dressler to note that he does not put the Norman case in his homicide chapter. In that chapter are several interesting cases, each of which has its own story. That multiplicity of stories can often be a problem. I urge you think about telling one compelling story that has all these ingredients either in it, or just one little hypothetical away. In order to get into the lessons of Norman, for example, you have to use the other cases and materials for reference only, as ways of illuminating the central case you have chosen.

In complex trials, we speak of round characters and flat characters, of people with a central role and those who are on the periphery. So must it be with our teaching.

The case provides you a means to introduce the historical and social context of homicide offenses and the gradations that are now being used based either on the Pennsylvania model or the Model Penal Code. There is, however, more. Every student will have an opinion about what should happen to Mrs. Norman. Almost every student will have ideas about how the defense counsel could have approached the case, to convey to jurors the human tragedy of that household.

Indeed, I suggest that as an initial assignment, you ask the students to read the Norman opinions and without any other study each student should write no more than one double-spaced page on what the State should do to Mrs. Norman and why, and on what approach her lawyer should take. From these answers I suggest you will see a range of issues that covers many topics that you want the class to consider.

In order to explore these ideas, you will have to approach the casebook in the non-linear way I have suggested. A student wonders if Mrs. Norman has a mental condition that is relevant. Skip ahead and have students read the material on excuse. A student wants to see the relationship between manslaughter and self-defense. Have the class read the material on justification. You can even add some facts. Is a gun dealer who sold her the gun liable for anything?

In approaching each of these issues, we need to open up the motivations of all the actors – Mrs. Norman, the lawyers, the judge and the jurors. Susan Glaspell's work exposes us, in particular, to the different perspectives that jurors might bring to the case. Insights from psychology, considered in the broadest sense, are important here.

The approach I have suggested is also designed to let us expose the inadequacy of the case method itself. We must challenge our students to put themselves into the situation that Mrs. Norman confronted, and then the drama of the trial itself, which the appellate opinions do not even try to capture. The Norman case, well-taught, a lesson about listening and caring – two skills for which the law school curriculum is not known.

You may want to take the case a step further. When you ask students what should happen to Mrs. Norman, predictably there will be some discussion of a life sentence or even a death penalty. When I teach lawyers about defending capital cases, I begin by asking them to forget for the moment everything they know about criminal law as they practice it in the ordinary case. You know the ordinary cases, 90% of which are pleaded out. The defendant possessed a quantity of controlled substance. He acted "knowingly," or so we say even though we "know" that his social background predisposed him to use and even deal the drug. Here are, along the way, some powerful insights into the race-based decision-making of the process that calls itself criminal justice.

Yet in capital litigation, we are not only permitted but required by the teaching of Rompilla and Wiggins to search for, find and present the broadest possible evidence about the human conditions that led to this offense. And the Eighth Amendment gives us, when we do that, the right to have that evidence received, considered and given effect through meaningful jury instructions that focus the jurors' "reasoned moral response."

And yet, this very breadth of inquiry may at times be our enemy, for with all this information the jurors have plenty of items of information that they can attach to their own prejudices about outcome. My contention – that all of this process can never succeed in rationalizing the killing process – is beside the point of today's talk. But the

Norman case facts provide an excellent means to discuss the process. And while you are doing that, why in the name of reason did the local prosecutor charge the case as first-degree murder anyway, and why would he seek a death penalty? And there of course, you have opened up, vividly, the biases that infect the capital litigation process.

If students can see from Norman and Hossack how inadequate legal categories, skewed prosecutorial discretion, and biased juror attitudes affect process and results, they can better appreciate the way in which racism infects the criminal justice system. Nowhere is this infection clearer than in capital litigation.

INTERNATIONAL CRIME

Another paradigm is international crime. As the magistrate said in holding Augusto Pinochet liable for extradition, there is this growing trend towards creating and enforcing transnational standards. This movement is fueled in great part by the demand for defining and enforcing international human rights standards. But international criminal law has a broader reach and significance – predatory economic activity, environmental depredation, narcotics traffic, and even human slavery are organized and conducted across borders by people and entities that are beyond the ability of any individual nation to control. Thus we have international tribunals and the enforcement of transnational norms in domestic tribunals.

These criminal cases present exciting issues. The facts and evidence are on the front pages of the newspapers. The dispute over international tribunals is somewhat reminiscent of the federalism issues in a domestic context. The United States government opposes an international criminal court ostensibly because it is worried about prosecutorial discretion, as though that discretion is not the hallmark of our own system. The real reason for this hostility seems to be a worry that our own agents and officials will be prosecuted for human rights crimes such as torture.

The norms enforced by domestic and international tribunals were, in many if not most cases, not written down in statutes before the charged conduct occurred. We need to discuss with our students why this is or is not acceptable. In this discussion, an important guaranty of fairness is of course the mental element of offenses. The charters of the Rwanda and Yugoslavia tribunals require proof that the accused intentionally violated a known legal duty.

Therefore, studying the mental element of these offenses is particularly rewarding. As I suggested at the outset, these criminals calculate the consequences of their conduct. When dealing with ordinary urban crime, we treat the accused "as if" her conduct is the product of rational choice because otherwise we could not operate this system that jails such a high percentage of our people. We maintain our self-respect with the idea, as old as Sophocles portrayal of old blind Oedipus at Colonnus, that without guilty knowledge, there is "no sin" even for conduct done "wittingly."

But the human rights violator, like the white collar corporate defrauder, can more justly be said to have formed the forbidden intent.

Yet, from another perspective, many of these offenders are as much in the grip of social and historical forces as any urban law violator. Paul Touvier, the Vichy France collaborator who killed seven Jews, was extraordinary in his cupidity, but shockingly normal in his disgusting social attitudes. Therein, of course, lies one of the more common tragedies of many social injustices, which is just how deep and wide is the societal complicity that supports it.

These international cases, are useful as well because they tell students something important about sources of norms. They help to teach that rules of conduct are not inevitable, but are the specific product of historical processes.

They tell us something important about the didactic function of trials and the role of significant trials in shaping the historical record. As World War II drew to a close, Stalin and Churchill initially favored executing the Nazi leaders. The Treaty of London and the Nuremburg tribunals came into being after extensive discussion. One function of those trials was to put beyond the reach of all but the most factitious deniers any claim that there had not been a Holocaust. In France, the trials of Barbie, Touvier and Papon have played an analogous role. The pursuit of Augusto Pinochet in criminal and civil courts has been an important part of the re-democratization of Chile.

What example should you choose for this purpose? I like the case of Paul Touvier because it was tried under the 1964 French Penal Code, a simple statute with an interesting history. The facts are fairly straightforward. I have translated much of the trial record and the article that I co-authored with some of my students has most of the relevant information.

SEXUAL ASSAULT

All of us, I think, approach sexual assault crimes circumspectly, and in some past years I did not teach them at all. I now believe that there are too many lessons about too many aspects of our subject to leave these crimes alone. That said, I don't find any single case or group of cases that permit students to air their deeply-held feelings about these issues, and at the same time convey a solid sense of the legal rules.

I urge you to pick a case, or devise one, based on something that has happened in the recent past. The Duke lacrosse case is tempting, and the racial overtones of the prosecution process give us painful insights. There may be some rape shield law questions, but there do not seem to be enough other issues for the case to be a teaching vehicle.

Legal history and gender theory inform us about the law of sexual assault. If you are accused of picking my pocket, and I am a prosecution witness, here is some cross-examination you will not hear:

> Q: Now, Mr. Tigar, isn't it a fact that you were wearing pants with pockets that day?
>
> A: Why, yes, I suppose so.
>
> Q: Suppose? Well, sir, weren't your provocative, stimulating, tantalizing bulging pockets just asking to be entered by the first protuberant digit to come along?

You won't hear it because we understand, in the law of theft, a certain meaning of consent.

In the realm of embarrassing pages from the historical past, you can look at the Model Penal Code's treatment of consent and proof and the special way in which juries were to be told that the prosecuting witness was presumptively unworthy of belief.

Yet, the reaction to these disturbing events has also been problematic. Some rape shield laws can be seen as excluding defense evidence that is rationally persuasive of innocence.

The public debate over high-profile accusations of rape shows you how hot this topic can be. So here is a place where we can put Judith Areen's suggestion to the test. You want a test case for the students, woven of real-life and hypothetical events. You

might base it on the Kobe Bryant case, or weave it from the strands of the prevalent date rape episodes. Our students not only have opinions, almost all of them have real-life experience with consent or the lack of it, and with that other prime ingredient of disputed events – alcohol or some other mind-altering substance.

I don't think we can completely ignore the violent sexual assault cases, at least to let students see how events that inflame the community can quickly lead to hasty police work and a rush to unjust judgment. Yes, there is a chance here – and we cannot miss it – to remind our students of the rape cases of wrongful conviction and the reasons for it. This sort of reminder may help to make the rest of our class discussion a little more tolerant of one another's views.

However, you want your main test case to present the parallel universes of physical events and mental state. In the physical realm, we are concerned not only with the physiological element of penetration, but the physics of force.

In the mental realm, we have these two complex strands – the accused's perception and the complainant's perception of what is going on. Then, when the act is done, given the social taboos at work, they each get busy – at some level of consciousness – reworking the remembered events to get themselves comfortable with the story.

Consider the Kobe Bryant case as an example. There is no question that penetration occurred under circumstances that are disturbing no matter what your point of view. Mr. Bryant has a powerful motive to falsify. The accuser has a powerful motive to portray the event in a certain way, given the circumstances of her various relationships. The accuser is also taking a powerful psychotropic medication and presents herself for medical examination with clothing which on analysis casts some doubt on her version of the relevant events. The case in real life involved intense public argument with participation of feminist groups. It involved police and prosecutorial discretion or lack of it, media frenzy, and the ongoing impact of rape shield laws and mandatory court orders that sealed evidence from public view. The evidence the public could not see eventually leaked out, but the fact of sealing created a disconnect between the case that could or might be tried in court and the case the public thought it was learning about.

I need not describe the ways in which race and gender theory can be put to use in discussing these events.

Here is a case to which all of the Dressler casebook material relates in some way or another. We are not, however, asking students to read each case in order to dissect it as we would in a traditional case method class. Rather, the cases and notes are a library, a resource, to be read, understood and deployed in argument.

THEFT

I have written about the law of theft. Yes, E.P. Thomson and the young Karl Marx give us important insights. George Fletcher's early work remains important, although I found that he could have paid more attention to the Roman law sources. Even where modern "theft" statutes claim to have buried the common law offense categories, yet they rule us from their graves. So once again, Maitland is right. Justice Jackson's opinion in Morissette teaches us a great deal about how to read a statute.

In my old Texas article, I touched upon this modern tendency to expand the definition of property in ways that restrict the flow of information and ideas. This was not then a new insight, and has since that time become a staple of scholarship. Daniel

Ellsberg copies the Pentagon papers, and the government claims that he has stolen its intangible property in the information. Of course, the government cannot own a copyright in the material, so it uses ordinary theft laws. Now the Justice Department is exploring, for the first time in our history, the idea that journalists may become culpable "receivers" of the purloined goods.

A bright engineer or scientist leaves company A to join company B. He may take him knowledge, the sharing of which constitutes some form of unfair competition. Patent and copyright have been eclipsed by the law of trade secrets as legal devices to preserve a monopoly on information and ideas. And of course, the quid pro quo of copyright and patent – disclosure and a limited term – does not operate in the trade secret realm.

Given the ability and willingness of government and capital to bottle up information and ideas in this way, theft law is at an intersection of economic theory and legal history.

"What did she steal, and from whom, and how, and when?" goes the question, with apologies to the famous fellow who killed the killer of Charles the Good. "She stole information about the chip, from the DataBeta Corporation. How? By carrying it out in her head. When? Well, when she formed the intention to use it in a way that interfered with DataBeta's exclusive right to dictate how it was used, or maybe when she later disclosed it, thus committing a "conversion." So here we are with Rex v. Pear and the stolen horse, and George Fletcher's diagrams of the when and where of stealing.

That is the corporate form of the hypothetical, which draws on many real events. There is also a government or corporate whistleblower version, and maybe you would use both of them. In any of these scenarios, we can see the potential social utility of the actor's conduct, and the potentially harmful – or in the case of government information, unconstitutional – nature of the complainant's conduct.

To state what may be obvious, this is precisely the point that E.P. Thomson and the young Marx were making about the prosecutions of peasants for doing things that were essential and historic parts of their livelihood but at war with the objectives of the gentry and the urban bourgeoisie. Along the way, if we adopt this sort of paradigm, we can draw parallels to the conversion-trespass to chattels distinction in the torts course, and to some issues that the property teacher may be addressing.

Remember, there are some intellectual property types at this conference. In my view, just as finance capital replaced industrial capital as the driving force of monopoly capitalism, so intellectual property has become an essential ingredient of monopolization, and such doctrines as "work for hire" alienate the technical worker from the product of her labor.

THE LAW OF PARTIES

How responsible are "the usual suspects?" There are some aspects of the law of parties that are best seen in discussing conspiracy law. But I have been fascinated by the way in which relatively minor participants are swept up the criminal law net. For this work, I suggest simply that you use Tison v. Arizona, the death penalty case, and ask the hard questions about degrees of responsibility. In summing up for the penalty phase of the Nichols trial, where the underlying offense was conspiracy that resulted in death, I reminded jurors that only they knew the degree of responsibility they had found. The court's instructions to them permitted such a finding based on a relatively small amount

of participation. The same observation can be made about aiding and abetting. So how does the concept of proportionality work in such a setting?

INCHOATE OFFENSES

It is no secret that the law of attempt and conspiracy has shifted decisively in the past century, reflecting a shift in the state's rationale for punishment. The old idea of attempt focused on conduct that had gone far enough to create a social danger. The new idea focuses on the corroborated willingness to break the law. This new definition shifts the locus penitentiae backwards by what may be a substantial amount, and it also moves the essential inquiry from the realm of action into the actor's alleged mind. Along with this shift goes increased police power because the "crime" as to which probable cause may exist is farther away from accomplishment. Conspiracy prosecutions have also acquired a greater importance in the prosecutor's arsenal.

As I look over the casebook offerings on these subjects, I understand the problem of choosing cases that illustrate the difficult concepts at work. However, I don't find much in there that is exciting. Depending on how old you are, the idea of "conspiracy" has had a lot of emotionally-laden rhetorical workout. We have had the international communist conspiracy, the black power conspiracy, the Mafia conspiracy, the terrorist conspiracy, also known as Al Qaeda. These reifications of otherwise vague threats have great power. And yet each of them harbors what I suggest are the most interesting and significant aspects of conspiracy law and perhaps even of attempt.

Conspiracy has, since its origins as a religious offense, drawn a line between perceived social danger and laudable or protected conduct. Political activists almost a thousand years ago even called themselves "conspirationes." As for attempt, well we almost all know the difference between the desire for a certain result and the intention to bring it about.

Conspiracy and attempt share with the law of parties this crucial distinction between knowledge of illegality and joining with it, again, with the desire to make it happen. The most effective teaching vehicle is therefore one that focuses on what the court in United States v. Spock called the "bifarious" conspiracy. Of this sort of thing, there are dozens of examples, ranging from labor organizations, to anti-abortion groups, to alleged terrorist organizations. People join in political activity, even knowing that the organizing effort as a whole may involve unlawful conduct. But they are not conspirators.

Right now, the Bush administration is intent on scaring everybody so much that we all forget the constitution and common sense. The hallmark of anti-terrorist legislation, rulemaking and prosecution is overbreadth. One main progenitor of overbreadth, in the criminal process, is the conspiracy prosecution.

As we look at conspiracy and the law of parties, we might consider the strange case of Hossein Afshari and others, indicted for providing material support to a foreign terrorist organization. The Ninth Circuit has now upheld the main parts of the statute. So here are some secular opponents of the present Iranian government who have some connection to a group that was classified as a foreign terrorist organization in 1997, when the Clinton administration wanted to make nice with the Iranian leaders. The designation is mostly based on secret evidence and not subject to meaningful judicial review when the organization itself sued to challenge it. And now the court of appeals has held, over a cogent and eloquent dissent by Judge Kozinski, that the individual defendants cannot

challenge the legitimacy of the designation and that they can be liable even though their support was limited to the group's legitimate and constitutionally-protected aims.

On remand, some of these issues may become clearer, but right now we can say that the discussion in the Spock case, like that in the Scales and Noto opinions in volume 367 of U.S. Reports, provides a wonderful teaching vehicle.

By the way, the district court opinion dismissing the indictment was written by Judge Robert Takasugi, who spent his young years in a Japanese relocation camp and therefore has a poignant personal story to tell about overbroad and punitive reactions to perceived danger. He tells that personal story with a wry smile, but that only makes the remembered experience all the more compelling.

I caution though against reading too much too soon into this wave of so-called anti-terror prosecutions. Today's alleged terror conspirators are the "other" – in a long string of "others." There were the commie "others," the draft resister "others," the racial violence "others: -- and those are just a few within my own professional lifetime.

And each time the law turned out to be less certain, and the prosecutors less honorable, than the advocates claimed and perhaps more supple than some judges were willing to admit.

Oh, yes, in each period many paid a terrible price. Indeed, I think that is the lesson, that the present, however dark, is also history.

CONCLUSION

As you can see, I think that the best way to introduce the insights you have into the curriculum is to abandon the traditional categories of discussion in favor of seeing a series of six or so cases holistically. We have by now internalized the idea that law is about stories. The stories we tell in the law are didactic and directed. We appropriate remembered events and arrange them in a certain way, in order to get a certain result from judges or jurors. To do that work, we need to know what to appropriate for our story. Neither the story nor the rules that define it are inevitable. They, and each of their elements, are socially and historically determined. That social and historical process is defined and illuminated by subjects that have different names and different emphases but that come together to bring us a clear and unitary vision. History, race, gender, political science, economics, psychology – the topics of your discussions here. As for me, I am a sometime schoolteacher and an itinerant teller of tales. And I thank you for listening.