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Legal History Meets the Honors Program

Robert B. Bennett

Butler University, rbennett@butler.edu

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Legal History Meets the Honors Program

Robert B. Bennett, Jr.

I. INTRODUCTION

The Academy of Legal Studies in Business Task Force on General Education argued persuasively that: “No serious measure of a civilization's achievements can afford to omit the role of law and the legal environment. Law studies are inexorably interpolated into the full breadth and depth of what society must pass on to the coming generations.”¹ The contributions of culture to the law and the law to culture cannot be overestimated. As Oliver Wendell Holmes noted:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.²

However, in my Legal Environment and Business Law courses, my focus has been necessarily confined to the present realities of law as a framework for and a constraint on business, with only such cultural and historical digressions which are necessary to place current realities in context.

It was with the importance of this symbiotic relationship of law and society in mind that I originally submitted a course proposal to teach in the Butler University Honors Program. I attempted to develop a course entitled *Law and Culture* which would look at some landmark periods or events in legal history and explore how those events were the product of their culture and how they affected their culture. Among the events or periods that I have looked at in iterations of the course have been the Nuremberg trials, the Scopes Monkey Trial, the modern American litigation explosion, and the events surrounding the U.S. Supreme Court decision *Kelo v. City of New London*.³ This article will discuss the course and these events and periods, together with resources that instructors might use in developing a similar course.

II. BACKGROUND

The Honors Program at Butler University intends to attract and retain the best students in the incoming class. The program seeks to offer a range of innovative, nontraditional, interdisciplinary courses culminating in students learning research methodology and leading to the writing of an honors thesis. The course work, which students take largely in the freshman and sophomore years, is divided into two credit hour courses of three types:

HN 100 Honors Freshmen Seminars are designed to introduce first semester freshmen to the honors experience; offered fall semester only.

HN 200 (or 201) Seminars examine a great work, thinker or artist from various angles: artistic, scientific, historical, philosophical, religious, etc.

HN 300 Colloquia focus on a central theme or question and examine it from a variety of disciplines and approaches.⁴

I developed *Law and Culture* for an HN300 designation, but the course could easily be revised to meet the standards for many universities' general education requirements.⁵ The course has now been through several different iterations but pertinent parts of a sample syllabus are attached as Appendix.

III. LAW AND CULTURE

A. Course Objectives

The course looks at the nature of law and its processes through discussion of selected literature and films. The principal focus of the course is to grapple with the issues of how law shapes culture and vice versa. Several recurring themes are the law as a reflection of or an instrument of social change, the relationship between law, ethics, and justice, and the human side of law and its processes, but the class is free to take its discussion in a number of directions. The course looks at these themes through the selection of selected milestone legal cases or events that seemed to shape the culture or important cultural events or movements that seemed to shape the law. Among the events that I have looked at in the course were the rise of Nazism and the implementation of the Jewish policies through the prism of the Nuremberg trials; the Scopes Monkey Trial as representing an epiphany of the conflict between faith and science; the rise of the litigious society; and the conflict between the state and the individual through the Supreme Court case *Kelo v. City of New London*⁶ and the reactions to it. Several classes also considered the culture of law schools and their effects on individuals and the law.

A goal of the course is to address the themes using a number of different types of texts, including court decisions, historical documents, novels, essays, research scholarship, and films.⁷ These texts vary in their approach from serious to scholarly to satirical. Similarly, I attempted to select historical periods or events that would capture the interest and the imagination of the students, as well as be rich in issues, perspectives, and historical sources. I also tried to select a classic film to accompany each of the units.⁸ The course begins with how law is shaped by culture and circumstance and how it in turn shapes society, proceeds to a discussion of what happens when cultures clash in society, considers law's effect on the individual, and concludes with a discussion of how law and culture are transmitted to succeeding generations.

B. Introduction to Law: Regina v. Dudley and Stephens⁹

The course begins with a discussion of the nature of law and its relationship to culture, through the discussion of the landmark case *Regina v. Dudley and Stephens*.¹⁰ Thomas Dudley and Edward Stephens were charged with the murder of Richard Parker on an open boat on the high seas following a shipwreck. The two defendants killed and ate Parker after nineteen days on the open boat, the final nine days without food and six days without water. Although the court acknowledged that none of them would have survived had they not eaten Parker and that Parker would have died first because of his youth and weakened condition, the court found the defendants guilty of murder and sentenced them to death.¹¹

The stark nature of the facts in the case elicit interesting discussion questions: How does the law come into play on the high seas? Whose law applies? Why? Do the extreme circumstances not justify the actions of the defendants? Is there an abstract “right” and “wrong”? Who makes the decision between the two? How do society's ideas of “right” and “wrong” become reflected in the law? Does the law influence what society views as “right” and “wrong”? Should the result in the case be different if Parker consented? What if the parties actually drew lots to decide who would be eaten as the defendants initially suggested?¹²

C. Law and Society: The Nuremberg Trials

Likewise, the rise of Nazism and the imposition of the racial purity laws that foreshadowed the Holocaust present stark issues of law, morality and ethics.¹³ What makes these historical events particularly intriguing is that many of the early steps took place under color of law¹⁴—and Daniel Goldhagen argues that they were the product of a German culture that was deeply antisemitic.¹⁵ In a series of laws referred to as the Nuremberg Laws, the German state deprived Jews of many incidents of citizenship and began the dehumanization that would culminate in the Holocaust.¹⁶ For example, the Nuremberg Laws provided: “A Jew cannot be a citizen of the Reich. He has no right to vote in political affairs and he cannot occupy public office.”¹⁷ The Nuremberg Laws also forbade the intermarriage or sexual relations between Jews and German nationals under penalty of imprisonment at hard labor.¹⁸ Moreover, Adolf Hitler reserved to himself the authority as the ultimate source of the law, an authority endorsed by the Greater German Reichstag. That authority included the right to “intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.”¹⁹

*1. Oppression Under Color of Law: Film: Judgment at Nuremberg*²⁰

Following World War II, an international military tribunal brought formal charges against twenty-four individual defendants and six organizations for crimes against the peace, war crimes, and crimes against humanity. The defendants included some of the most prominent surviving Nazis, like Karl Doenitz, Supreme Commander of the Navy, Hermann Goering, Reichsmarschall and Chief of the Air Force, and Rudolf Hess, deputy to Hitler. Their prosecution, which we have come to refer to as the “Nuremberg Trial,” lasted from November 20, 1945, until October 1, 1946. In fact, this famous trial was just the first of a series of twelve trials attempting to hold individuals responsible for Nazi aggression.²¹ Each of them considered fundamental issues about the nature of law and individual responsibility. In particular, there was no code of law or international agreement that made it illegal to persecute religions or exterminate populations in order to underpin the charge of crimes against humanity.²² Justice Jackson himself noted in his opening statement for the prosecution in the Nuremberg Trial: “Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.”²³ These issues are presented in a dramatic fashion in the film *Judgment at Nuremberg*.

Stanley Kramer's *Judgment at Nuremberg*, which was nominated for eleven Oscars including that for best picture,²⁴ depicts the fictional trial of judges who were responsible for enforcing laws under the Third Reich. The film attempts a serious exploration of the differences between law,

justice, and morality, and the nature of individual responsibility. The lead trial judge, Dan Hayward, played by Spencer Tracy, seeks to understand how these judicial defendants could have operated as instruments of the immoral regime. The film, though periodically melodramatic, avoids easy solutions by focusing on appealing characters, defendant Ernst Janning, played by Burt Lancaster, and his supporter, Madame Bertholt, played by Marlene Dietrich. Ernst Janning is portrayed as a distinguished German legal historian and scholar, who joined in common cause with the other defendants to enforce the German laws respecting racial purity.²⁵ Janning's story is loosely based on the prosecution of Franz Schlegelberger, who served in the Ministry of Justice from 1931–42, ultimately serving as the Director of the Ministry of Justice. Schlegelberger received a life sentence from the tribunal.²⁶

Lawyers and judges apparently did not play much of a direct role in the National Socialist movement.²⁷ Like the film, the actual trial of Schlegelberger and the other Nazi judges focused on their responsibility for enforcing morally corrupt laws.²⁸ As the Nuremberg tribunal noted, the participation of the judges was in one sense more terrible than those responsible for the extermination “in that those who might have hoped for a last refuge in the institutions of justice found those institutions turned against them and a part of the program of terror and oppression.”²⁹ Professor Lippman estimates that 32,600 people were judicially sentenced to death during the twelve years of Nazi rule.³⁰ Moreover, Health Courts were established in 1934 to order sterilization of imbeciles and other individuals with hereditary diseases. Estimates are that over 300,000 people were sterilized by order of the courts.³¹ The film, though fictional, is based upon real events and makes a nice set piece to discuss against the real issues raised in the Nuremberg Trials.³²

Among the issues in the film is the extent of the defendants'—and ordinary Germans'—knowledge of the evils perpetrated by the Nazis. This issue is likewise addressed in the actual trial:

The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice.” He testified specifically that he could not imagine that any person in the Ministry of Justice or in the Party Chancellery or as a practicing attorney or a judge of a special (or) Peoples Court could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps. It has been repeatedly urged by and in behalf of various defendants that they remained in the Ministry of Justice because they feared that if they should retire, control of the matters pertaining to the Ministry of Justice would be transferred to Himmler and the Gestapo. In short, they claim that they were withstanding the evil encroachments of Himmler upon the Justice Administration, and yet we are asked to believe that they were ignorant of the character of the forces which they say they were opposing ... One man can keep a secret, two men may, but thousands never.³³

The film was originally developed for *Playhouse 90* by Abby Mann based on the Justice Trial at Nuremberg, the third of the series of thirteen trials. Technical advisor to the original production was Telford Taylor, one of the original participants.³⁴ The film is in black and white and integrates

some actual postwar footage as well as some actual scenes of the liberation of the concentration camps.³⁵

Among the questions prompted by the film³⁶ are: Who knew? What did they know? If they did know, what could they do? How could this happen? Who should be responsible? Are all Germans monsters?³⁷ Should judges be on trial for enforcing the law as it is written? Do judges have some higher duty to “justice” rather than the “law”? Should all of the members of the Nazi “criminal organizations” have been held responsible? Could these events have happened elsewhere? Were the Germans different?

2. *How Did This Happen?: Book: They Thought They Were Free*³⁸

A critical issue in the film is how these events could happen. To help explore this issue, students were assigned sociologist Milton Mayer's study of the rise of Nazism, *They Thought They Were Free*.³⁹ Milton Mayer, who is Jewish, a fact that he did not disclose to his interview subjects, seeks to explore how these events could happen by conducting interviews with ten ordinary Germans. These interview subjects were “sufficiently different from one another in background, character, intellect, and temperament to represent, among them, some millions or tens of millions of Germans and sufficiently like unto one another to have been Nazis.”⁴⁰ Although he calls the home town of his ten representative Germans “Kronenberg,” it is clear from the clues that he provides that they come from Marburg, Germany, a picturesque old town about fifty miles north of Frankfurt, which is home to the world's oldest Protestant university.⁴¹ Mayer's discussion of the particulars of German life provides some insights missing from some of the more sweeping histories. Some examples:

On November 10, 1938, the day after the arson of the synagogues, an American news service reported a trivial incident from a suburb of Berlin. A mob of children were carrying great sacks of candy out of the smashed shop window of a Jewish-owned candy store, while a crowd of adults, including some of the children's parents (including too, a ring of SA men in Brown Shirt uniform) stood watching. An old man walked up, an “Aryan.” He watched the proceedings and then turned to the parents and said to them: “You think you are hurting the Jew. You do not know what you are doing. You are teaching children to steal.” And the old man walked off, and the parents broke out of the crowd, knocked the candy out of their children's hands and dragged them wailing away. Man, in the form of the parents, had met the State, in the form of the SA. But it is doubtful if he knew it; after all, the SA men just stood there, without interfering.⁴²

Mayer attempts to explain the general indifference which greeted the transportation of the Jews:

When people you don't know, people in whom you have no interest, people whose affairs you have never discussed, move away from your community, you don't notice that they are going or that they are gone. When, in addition, public opinion (and the government itself) has depreciated them, it is still likelier that you won't notice their departure or, if you do, that you will forget about it. ... Remember: the teacher excepted, nine of my ten friends didn't know any Jews and didn't care what happened to them—all this *before* Nazism. And it was their government, now, which was carrying on this program under law. Merely to inquire meant to attack the government's justice. It meant risk, large or small, political or social, and it meant risk in behalf of people one didn't like anyway.⁴³

Perhaps most perceptively, and poignantly, Mayer quotes a colleague who argues that the world as he knew it was lost when he took the loyalty oath:

If I had refused to take the oath in 1935, it would have meant that thousands like me, all over Germany, were refusing to take it. Their refusal would have heartened millions. Thus the regime would have been overthrown, or, indeed would never have come to power in the first place. The fact that I was not prepared to resist, in 1935, meant that all the thousands, hundreds of thousands, like me in Germany were also unprepared, and each one of these hundreds of thousands was, like me, a man of great influence or of great potential influence. Thus the world was lost.⁴⁴

This is a remarkable analysis of personal responsibility, which I have used in many of my ethics classes. Mayer also reports on the observations of his subjects about the incremental nature of these ethical concessions. Each concession made the next one easier to rationalize.⁴⁵

The concerns addressed by Mayer are more than of historical significance; they serve as a cautionary tale to other societies, including the United States, of the dangers of intolerance. As Justice Jackson noted in discussing the accomplishments of the Nuremberg Trials:

In the first place, we have documented the history of this war. As Judge Parker has described it, we did a postmortem on a totalitarian state. You can trace in Goering's admission after admission the steps they took to overthrow a free government and set up a totalitarian state. It would be well worth the American's time to learn how it was done because the Weimar constitution had almost as good protection on paper for civil liberty as our Constitution has. Yet they managed to set up the concentration camps and the Gestapo and a dictatorship because the German people did not recognize the symptoms of a coming totalitarianism.⁴⁶

Many of Mayer's insights become chilling in light of post-9/11 America.⁴⁷

Other questions raised by Mayer include: Who knew? What did they know? If they did know, what could they do? Who should be responsible for the crimes perpetrated by the Nazis? Were all Germans monsters? How did the German attitudes shape the law and government and vice versa? Were the Germans different?⁴⁸

3. *Aftermath: Book: The Reader*⁴⁹

Bernhard Schlink, who by vocation is a law professor at Humboldt University in Berlin, explores the issues of law, justice, morality, and personal responsibility in a luminous novel, *The Reader*. The protagonist of the novel, Michael Berg, a high school student, is assisted by an older stranger, Hanna Schmitz, when he vomits in the street from hepatitis. To thank her for her assistance, he later returns to her house with flowers. A sexual liaison—or a love affair—ensues.⁵⁰ Although the relationship appears to have its unhealthy aspects, there appear to be moments of real tenderness and mutual dependency between the two. Among those moments is when Hanna has Michael read aloud to her.⁵¹ During one of the rocky periods in their relationship, Hanna disappears.

The next time that Michael sees Hanna is as a criminal defendant in a war crimes trial. She faces charges for her activities as a concentration camp guard. The main charges are that the guards were involved in the selection of women for extermination and that, at the end of the war, during a

forced march of the camp inmates away from the front, the prisoners are locked in a church overnight and not released after the church was bombed and set on fire. Michael attends the trial as a law school seminar project:

I can no longer remember what it was he [the professor] wanted to examine, confirm, or disprove. I do remember that we argued the prohibition of retroactive justice in the seminar. ... What is law? Is it what is on the books, or what is actually enacted and obeyed in a society? Or is law what must be enacted and obeyed, whether or not it is on the books, if things are to go right?⁵²

Hanna admits that she left a job at Siemens and applied to become a camp guard for the SS in 1943. Hanna's lawyer tries to get her released on bail, but the court declined, noting that Hanna had ignored all of the summonses that she had received. Hanna objects to a book containing an eyewitness account of a survivor not being read into the record. The judge overrules the objection because the book had been available to the defendants prior to trial.⁵³

Hanna is questioned by the judge regarding how prisoners were selected for the death camps and asks him: "What would you have done?" The judge's hesitant response: "There are matters one simply cannot get drawn into, that one must distance oneself from, if the price is not life and limb." In the view of observers: "The judge's answer came across as hapless and pathetic."⁵⁴

Through Hanna's trial and punishment, Michael reflects on the nature of her responsibility and that of her generation:

The generation that had been served by the guards and enforcers, or had done nothing to stop them, or had not banished them from its midst as it could have done after 1945, was in the dock, and we explored it, subjected it to trial by daylight, and condemned it to shame. Our parents had played a variety of roles in the Third Reich. ... We all condemned our parents to shame, even if the only charge we could bring was that after 1945 they had tolerated the perpetrators in their midst.⁵⁵

Michael also ponders the nature of forgiveness and reconciliation as Hanna's life plays out.

Hanna is ultimately sentenced to life for her complicity in the crimes charged, partly because the codefendants gang up on her, claiming that she was in charge.⁵⁶ They cite as evidence a written report on the incident and her signed deposition in which she admits to having the key to the church so that she could have released the prisoners.⁵⁷ Michael realizes during the trial that both of these damaging contentions must be false because Hanna could neither read nor write.⁵⁸

Michael considers conveying this information to the judge, but, after talking the matter over with his philosopher father, decides not to.⁵⁹ As a result, Hanna is convicted and sentenced to life in prison.⁶⁰ After serving eighteen years of her sentence, her plea for clemency is granted. As she is nearing her release date, the warden writes to Michael requesting that he assist Hanna as she integrates back into society. He finds her a job and a place to live but is reluctant to go visit as the warden asks.⁶¹ He finally goes to visit Hanna on the Sunday before she is to be released. She tells him that the dead visit her in prison and call her to account.⁶² When he arrives at prison to pick her up on the day of her release, she is dead; she has hanged herself at daybreak. Michael visits her cell; the bookshelves in the cell are filled with literature about the camps. Hanna's will leaves 7,000

DM to the survivor of the fire.⁶³ Michael visits her in America and she refuses to accept the money. They decide to give the money to Jewish organizations for illiteracy.⁶⁴

Through narrative, Schlink contemplates the complicity of his parent's generation. How were they involved? What did they know, when did they know it? Schlink has grown up in a postwar Germany, in a sense surrounded by “war criminals“ of varying degrees of responsibility.⁶⁵ As his protagonist reflects, “I was guilty of having loved a criminal.”⁶⁶ Like Mayer, Schlink also ponders how these events could have happened. As Michael hitchhikes to a concentration camp, a truck driver who picks him up argues that these events can be better explained by indifference than evil, which is not unlike Mayer's conclusion.⁶⁷

Among the questions raised by the narrative⁶⁸ are: Why did Schlink write this novel? What is he trying to say about the law? What is the role of the Law in the narrative? What is he trying to say about the human condition? What is he trying to say about the holocaust? To what extent is his message different from the creators of *Judgment at Nuremberg* and *They Thought They Were Free*? What is he trying to say about modern Germany? How is it significant that Michael is a legal historian? What is the role of philosophy in the narrative? What would you have done in Hanna's situation? What do you think of the judge's answer to her question? What would Michael's father, the moral philosopher, think of the judge's answer? What is the significance of Michael's visit to the camp? What do you think of the driver's explanation for the evil? Why did Hanna admit to writing the report? Why could she never admit that she was illiterate? Should Michael have told the judge that she could not read? What is the significance of Hanna finally learning to read and write? Why did she choose to read the material that she did? Why did she commit suicide? Why did Hanna leave the money to the survivor? What do you think of the survivor's response? Did Hanna deserve absolution?

D. The Clash of Cultures in Society: The Scopes Monkey Trial

1. Background: the Trial of John Thomas Scopes

The trial of John Thomas Scopes for violating Tennessee's prohibition against the teaching of evolution in the public schools developed into one of the “trials of the century”⁶⁹ and exemplifies a dispute that is still raging in American public life, the conflict between science and religion. The Tennessee statute provided, in pertinent part:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any teacher in any of the Universities, Normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.⁷⁰

The concept of evolution of species by natural selection is generally attributed to Charles Darwin, though the concept was independently proposed by Alfred Russell Wallace whose work led to the publication of Charles Darwin's *Origin of Species*. Darwin proposed that the origin of species resulted from natural variation and selection within species. Those species, which were best adapted to their environments, were more likely to succeed and reproduce.⁷¹ A committee of the

leading citizens of Dayton, Tennessee, convinced Scopes, a substitute biology teacher, to accept the American Civil Liberties Union's (ACLU) offer to mount a challenge to Tennessee's ban.⁷² What began as a plot to spur economic development in Dayton, Tennessee, became far more consequential when William Jennings Bryan volunteered to defend Tennessee's fundamentalist position and the ACLU countered with the preeminent trial lawyer of the day, Clarence Darrow, to represent Scopes.⁷³ The titanic struggle culminated in William Jennings Bryan testifying as an expert witness on the Bible and its teachings with respect to creation. A discussion of the trial facilitates an examination of law, religion,⁷⁴ and the ideas of evolutionary biology.

2. *Movie: Inherit the Wind*⁷⁵

The film *Inherit the Wind* was based upon the play by Jerome Lawrence and Robert E. Lee, which in turn relied heavily on the real events surrounding the Scopes trial.⁷⁶ Although Lawrence and Lee's play was intended primarily as a commentary on the then recent McCarthy hearings,⁷⁷ enough of the real trial is preserved to serve as a framework for the discussion of the conflict between creationism and evolution.⁷⁸ This conflict is one that has periodically resurrected itself since the Scopes trial.⁷⁹

Relevant questions to discuss the film include: How did Lawrence and Lee use the historical events for their own purposes? What is the essential conflict? How is this conflict ultimately resolved? What is the interplay between law and culture in the trial and the play? How are the First and Fourteenth Amendments at issue here? What do you think about the way the case came to be? What do you think about the results of the case? Is the label, "Trial of the Century," appropriate?

In various iterations of the course, I have supplemented the use of the film with three different books, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion*,⁸⁰ *Darwin's Ghost*,⁸¹ and *The Spice Islands Voyage*,⁸² none of which has been entirely satisfactory. *Summer for the Gods* is a brilliant book, winner of the Pulitzer Prize for history, but it is heavy going for students who may or may not be interested in history. *Darwin's Ghost* is an updating of *The Origin of Species* and is equally challenging for many students. *The Spice Islands Voyage* is much more accessible for students, but it is much more focused on the contributions of Alfred Russell Wallace than Darwin and ends up being more of a travelogue than I would have preferred.

E. Law and the Individual

In addition to the sweeping historical events, I wanted the course to do some exploration of the themes of law and culture as it relates to the individual. Most recently, I introduced the conflict of property rights of the individual and the state through eminent domain with the film *The Castle*⁸³ and the U.S. Supreme Court decision *Kelo v. City of New London*.⁸⁴

1. *Movie: The Castle*

The Castle is a hilarious film about an "ordinary" Australian family whose home is being condemned to facilitate the expansion of the local airport. Apparently the airport expansion is really for the benefit of a private package delivery firm.⁸⁵ Although the house is clearly one that no one in his right mind would want, the homeowners clearly do—which is the point. When should

the rights of the individual be sacrificed for the public good? Is economic development the same as the public good? In the process of examining these serious issues, the film heavily satirizes Australian society, the legal system and big business. Obviously, using an Australian film emphasizes the point that these issues are not purely American concerns. Also, the use of the comedy nicely balances the use of the other dramatic films in the course, particularly the stark *Judgment at Nuremberg*.

2. Case: Kelo v. City of New London

The *Kelo* case arose out of an economic development plan of the city of New London, Connecticut, to revitalize its waterfront area.⁸⁶ The city sought to acquire 115 privately owned parcels, including that owned by Susette Kelo. The city intended to use the property in part for the construction of a facility for Pfizer Inc. The remainder was to be transferred to a private developer for the construction of a hotel, restaurants, shopping, and new residences. The parcels that the city could not acquire, it sought to condemn. Susette Kelo and other affected property owners sued claiming that the eminent domain action constituted an unconstitutional taking under the Fifth Amendment. A divided Connecticut Supreme Court upheld the taking. The U.S. Supreme Court granted *certiorari* “to determine whether a city's decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”⁸⁷ In a 5–4 decision, the U.S. Supreme Court affirmed, holding that “there is no basis for exempting economic development from our traditionally broad understanding of public purpose.”⁸⁸ The Court essentially deferred to state and local governments to decide what constitutes a “public use.”⁸⁹ The opinion has been sharply controversial. As the dissent notes, the majority has essentially eliminated the “public use” limitation from the Fifth Amendment.⁹⁰ The Court permits states to voluntarily restrict themselves from taking for economic development,⁹¹ an option that several of the states have chosen to take.⁹²

3. Other Possibilities

In other iterations of the course, I have used other texts to try and get at the issues of law and culture with respect to the individual. I have used the films *The Fortune Cookie*⁹³ or *12 Angry Men*,⁹⁴ together with a packet of reading materials,⁹⁵ to explore the American litigation explosion and its effect on society and the individual within society. *The Fortune Cookie* has Jack Lemmon starring as a cameraman who is injured while filming a football game. A shyster lawyer, played by Walter Matthau, convinces him that this injury is his ticket to wealth. A wildly escalating series of incidents ensue. Since this film directly addresses a number of stereotypes that students already have about lawyers and the law, it can be an effective vehicle to examine these preconceived notions. By contrast, *12 Angry Men* takes a dramatic look inside the jury room during a murder trial. The film can be a means to discuss a number of issues including jury decision making,⁹⁶ and the role of race and bias in society.

The McCarthy Hearings would also justify a similar kind of approach, particularly since there are two excellent movies that could serve as starting texts: *The Front*⁹⁷ or *Good Night and Good Luck*.⁹⁸ *The Front* is a serio-comic take on the Hollywood blacklisting prompted by the McCarthy Hearings, while *Good Night and Good Luck* is a serious look at the effects of the McCarthy

Hearings on the media, through CBS and Edward R. Murrow. Both films attempt to incorporate some of the actions and incidents from the hearings themselves.

At times, I have also included the film, *The Paper Chase*,⁹⁹ supplemented by readings from *One L*¹⁰⁰ and *Anarchy and Elegance*,¹⁰¹ to discuss how the law is passed on and to consider the issue of how culture, both of law school and society at large, might affect that legacy.¹⁰²

IV. CONCLUSION

The interdisciplinary nature of this course and the interplay of fiction, nonfiction, and film have caused students to appreciate the importance of law and its development and the interplay of law and culture. They also develop insights on the influence of law and culture on their daily lives. Perhaps these dramatic events, the survival instinct on display in *Regina v. Dudley and Stephens*, the Nuremberg Trials, and the Scopes Monkey Trial, and *Kelo*, explore not only the limits of law, they explore the meaning of humanity and what it means to live in a human society. The real interest and insights are to be found at the fringes of the law.

Teaching a course of the type described in this article has allowed me to interact with students in new ways and to take a fresh look at law, ethics, and culture. The integration of films, novels, nonfiction, and discussion has been an exhilarating opportunity to extend beyond the boundaries of a traditional law or ethics course, and it has encouraged me to explore fresh ways of delivering traditional course content. Moreover, it has been challenging, interesting, and fun. I have experienced student engagement and creativity to the extent that I have not experienced in any other courses. Not surprisingly, the course has been enthusiastically received by students and the Butler University Honors Program.

Appendix

APPENDIX: EXCERPTS FROM COURSE SYLLABUS

HN300: LAW AND CULTURE
PROFESSOR ROBERT B. BENNETT, JR. (BOB)

COURSE DESCRIPTION AND OBJECTIVES:

The course will look at the nature of law and its processes through selected literature and films. Several recurring themes are the law as a reflection of or an instrument of social change, the relationship between law, ethics and justice, and the human side of law and its processes, but the class is free to take its discussion in a number of directions. The objective is to provide a forum for discussion of these and related issues.

Texts:

Judgment at Nuremberg (film) (1961).

Milton Mayer, *They Thought They Were Free* (1955).

Selections from Nuremberg Trial Transcripts.

Bernhard Schlink, *The Reader* (1997).

Inherit the Wind (film) (1960).

Tim Severin, *The Spice Islands Voyages* (1997)

Selections from Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law* (1978), Chris Goodrich, *Anarchy and Elegance* (1993)

The Castle (film)

Occasional Readings.

Grading:

Participation 40%

Two Papers 60%

Class Preparation and Participation. A seminar course is worthwhile only if the participants are prepared and willing to share their ideas. The participation grade will be assigned by the instructor and peer grading and will be based on responses to written discussion questions and participation in class discussions.

Each class member will be a part of a discussion leader group. On that day, the group will help lead the discussion with the instructor. The group will probably want to meet with the instructor and discuss preparation and possible supplemental readings. The group will also probably want to give the remainder of the class some kind of advance assignment, such as discussion questions to review prior to class. The group may want to make a presentation about the work or its author. Students may, if they want, write one of the papers on the piece and use their work as a basis for discussion.

Essays/Papers. Students will be expected to write two short papers (about 6–8 pages—no presentation fonts). They are due November 1 and December 14. You will have the opportunity to revise the first paper. These will be your opportunities to pursue whatever interests you in this course. I want to put as few topic restrictions as possible. In doing the paper, do not forget that we do have a library on campus. Some ideas:

- 1 You might compare the themes of any of the works in this course.
- 2 You could latch onto a theme and compare across works. For example, you could compare how law portrayed in different ways in each of these works.
- 3 You could criticize the works on their artistic merits.
- 4 You could do a research paper on any of the aspects discussed.
- 5 You could discuss how law influences culture or culture influences law as revealed by these works.

Each paper may be an essay or a research paper. However, the themes should be clearly articulated in an introductory paragraph, and the exposition should clearly support the themes. The paper will

be graded for substance, creativity (extra credit for humor), grammar, punctuation, and spelling. Dire consequences await students who fail to “spell-check” their papers. Remember, to be accepted, the papers must include the academic honesty statement set forth in the syllabus. If you use any secondary sources, they must be clearly indicated, but no particular form of footnote or citation is required. Internet or encyclopedic sources should be viewed with skepticism and should not be the sole sources.

TENTATIVE SCHEDULE:

DATES:	SESSION AND READING ASSIGNMENT:
August 24	Introduction and orientation
August 31	Law and Society: Judgment at Nuremberg Read: Transcripts from Nuremberg Trials
September 7	Judgment at Nuremberg Read: They Thought They Were Free, Part I (Pp. 1–234)
September 14	Judgment at Nuremberg Read: They Thought They Were Free, Part I (Pp. 1–234)
September 21	They Thought They Were Free, Part I (Pp. 1–234) (Group A) Read: The Reader, Part 1
September 28	The Reader (Group B) Read: The Reader, Part 2
October 5	The Reader, Cont.
October 12–13	Reading Break
October 19	The Clash of Cultures in Society: Inherit the Wind Read: The Spice Islands Voyages
October 26	Inherit the Wind Read: The Spice Islands Voyages
November 2	The Spice Islands Voyages (Group C) Paper #1 Due

Read: The Spice Islands Voyages

November 9 Law and the Individual: The Castle
Read: Kelo v. City of New London; City of Norwood v. Horney

November 16 The Castle (Group D)
Read: Kelo v. City of New London; City of Norwood v. Horney

November 23 Thanksgiving Break

November 30 Passing on the Law: The Paper Chase
Read: Selections from One L and Anarchy and Elegance

December 7 The Paper Chase

December 14 Summing Up
Paper #2 Due

Footnotes

¹*Task Force on General Education, Legal Studies in General Education: Phase I Final Report*, 17 *J. Legal Stud. Educ.* 161, 178 (1999) [hereinafter *GenEd Report*].

²Oliver Wendell Holmes, *The Common Law* 5 (1881) (Mark D. Howe ed. 1963).

³545 U.S. 469 (2005).

⁴Butler Honors Program Application (copy on file with the author).

⁵*See GenEd Report, supra* note 1, at 171–84 (describing the typical framework of general education requirements and how a legal studies course might meet those requirements). *See also* Nim Razook, *Leviathans, Critical Thinking and Legal Philosophy: A Proposal for a General Education Legal Studies Course*, 21 *J. Legal Stud. Educ.* 1 (2003) (describing the development and outline of a general studies course).

⁶545 U.S. 469 (2005).

⁷I originally got the idea for this interdisciplinary, multimedia approach from Professor William K. Templeton, a finance professor at Butler University, who developed an honors course called *Money Culture*. He was in turn inspired by Paul F. Jessup, *Financiers in Literature*, 4 *Fin. Prac. & Ed* 73 (1994).

⁸I surveyed students prior to the beginning of the semester and virtually none had seen these films. Regarding the depiction of lawyers and legal issues in film, see generally Lawrence M. Friedman, *Popular Legal Culture: Law, Lawyers and Popular Culture*, 98 *Yale L.J.* 1579 (1989) (discussing how popular culture reflects trends in the law); Jessica

Silbey, Truth Tales and Trial Films, 40 *Loy. L.A. L. Rev.* 551, 551 (2007) (noting that, “It is inevitable at this point in our cultural history that law and popular culture are intertwined.”); *Rennard Strickland, The Cinematic Lawyer: The Magic Mirror and the Silver Screen*, 22 *Okla. City U. L. Rev.* 13 (1997) (discussing how the law and lawyers have been depicted in movies, including a large number of examples). Many legal studies professors incorporate films to prompt discussion on issues of law, ethics, or justice. *See, e.g., Robert J. Aalberts, Gideon's Trumpet*, 12 *J. Legal Stud. Educ.* 321 (1994) (film review); *Virginia W. Gerde et al., Using Film to Examine the Place of Ethics in Business*, 14 *J. Legal Stud. Educ.*, 199 (1996) (discussing the impact of film as a pedagogical tool); *Alan C. Roline, Reel Justice: The Courtroom Goes to the Movies by Pay Bergman and Michael Asimow*, 16 *J. Legal Stud. Educ.* 341 (1998) (book review).

⁹14 Q.B.D. 273 (1884).

¹⁰*Id.*

¹¹The Crown ultimately reduced the sentence to six months of imprisonment.

¹²Nathaniel Philbrick argues that the custom of the sea affected how sailors who committed cannibalism following shipwrecks were punished and even viewed by their contemporaries. Nathaniel Philbrick, *In the Heart of the Sea: The Tragedy of the Whaleship Essex 174*, 202 & 264–67 (2000). “The verdict of the community was less harsh. The drawing of lots was accepted by the unwritten law of the sea as permissible in a survival situation.”*Id.* at 202.

¹³The works on the rise of Hitler and Nazism are legion. For a historical overview, see, for example, Joachim C. Fest, *Hitler* (1974); William L. Shirer, *The Rise and Fall of the Third Reich* (1960).

¹⁴*See also Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 *Brooklyn L. Rev.* 1121, 1132 (1995) [hereinafter *Nazis in the Courtroom*] (Professor Stern notes: “After Hitler's violent putsch against the regime failed, he then undertook a so-called March of Legality. This march demonstrates one of the important things to remember about the Third Reich and its context: Throughout—and especially in the first two years after they came to power—the Nazis tried to maintain a facade of normalcy and legality, facades that allowed judges and attorneys to make their compromises and become complicitous.”).

¹⁵Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1997).

¹⁶Links to English translations of the Nuremberg Laws can be found at Jewish Virtual Library, *The Nuremberg Laws*, <http://www.jewishvirtuallibrary.org/jsourc/Holocaust/nurlawtoc.html> (last visited Sept. 25, 2008).

¹⁷Art. 4, sec. 1, The Reich Citizenship Law: First Regulation (Nov. 14, 1935), *available at* <http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurmlaw4.html>.

¹⁸Law for the Protection of German Blood and German Honor (Sept. 15, 1935), *available at* <http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurmlaw2.html>. This particular law has particular relevance to the film, *Judgment at Nuremberg*, discussed *infra* at notes 20–37 and the accompanying text.

¹⁹Quoted in excerpts from the decision of *United States v. Alstoeter*, reprinted in *The Nuremberg Trials: The Justice Trial*, <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm> (last visited, Sept. 27, 2008) [hereinafter, *The Nuremberg Trials*]. The same day, the Reichstag resolved, in pertinent part:

[T]he Fuehrer must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violation of these duties, the Fuehrer is entitled after conscientious examination, regardless of so-called well-deserved rights, to mete out due punishment, and to remove the offender from his post, rank and position, without introducing prescribed procedures.*Id.* The court cited instances in which Hitler did in fact intervene in judicial proceedings and punishments, including the sentence of a Jew, Marcus Luftgas, who had been sentenced to two and a half years for hoarding eggs, which sentence was altered to execution.

²⁰*Judgment at Nuremberg* (Roxlom Films, Inc. 1961).

²¹See Henry T. King, Jr., *The Legacy of Nuremberg*, 34 *Case W. Res. J. Int'l L.* 335 (2002) (containing a brief outline of the major trials).

²²For a discussion of the Nuremberg Trials, see generally, for example, Joseph E. Persico, *Nuremberg: Infamy On Trial* (Penguin Books 1994); Bradley Smith, *Reaching Judgment at Nuremberg* (1977).

²³Justice Jackson's opening statement is available at <http://www.courtstv.com/archive/casfiles/nuremberg/jackson.html> (last visited Sept. 27, 2008). A transcript as well as other resources is available at Courttv Online, *A Look Back at Nuremberg*, <http://www.courtstv.com/archive/casfiles/nuremberg/> (last visited Sept. 27, 2008). For a broad overview of some of the problems that the prosecution encountered at Nuremberg, see Robert H. Jackson, *A Country Lawyer in an International Court: Remarks by the Honorable Robert H. Jackson, Associate Justice of the United States Supreme Court, before The Virginia [State] Bar Association at the Hotel Roanoke, August 8, 1947*, reprinted in 33 *Va. Bar Ass'n News J.*, Sept. 2007, at 11. It may be fruitful to discuss whether the Nuremberg Trials had any lasting effects, in light of subsequent attempts at genocide in Rwanda, Bosnia, etc. See, e.g., Fergal Keane, *Season of Blood: A Rwandan Journey* (1995); Anthony Loyd, *My War Gone By, I Miss It So* (1999); Thomas Darnstaedt, *Die Zweite Weltkrieg: Ein Gluecksfall der Geschichte*, *Der*

Spiegel, Apr. 4, 2005, at 128 (discussing the Nuremberg Trial in its context and how it became a model for later international war tribunals); Alice Kaplan, *War On Trial*, *Civilization*, Oct./Nov. 1997, at 60; King, *supra* note 21.

²⁴The film won two Oscars; Maximilian Schell won Best Actor and Abby Mann won the Best Screenplay Adaptation.

²⁵*See supra* notes 14–18 and accompanying text. A key event in the film concerns the Feldenstein case, where a Jewish defendant was condemned for consorting with a Aryan woman, Irene Hoffman, played by Judy Garland, in violation of Article 2 of the Nuremberg Laws. This event is loosely based upon the Katzenberger case, a case presided over by one of the codefendants, Oswald Rothaug, in which Leo Katzenberger was tried for racial pollution with Irene Seiler. In the film version, Rothaug becomes Emil Hahn, played with gusto by Werner Klemperer, who went on to fame as Commandant Klink in the *Hogan's Heroes* television series. In the film, as in real life, both parties denied that sexual intercourse took place; the only evidence of a dubious relationship was that Seiler was witnessed sitting in Katzenberger's lap. In fact, the medical examiner questioned whether Katzenberger could physically consummate the relationship because of his age. These impediments notwithstanding, Katzenberger was sentenced to death and Seiler was sentenced to a term of imprisonment for perjury. As noted above, the statutory penalty for violation of the statute was a term of imprisonment; Rothaug helped the prosecution get around that little difficulty. Matthew Lippman, *The Prosecution of Josef Altstoetter et al.: Law, Lawyers and Justice in the Third Reich*, 16 *Dick. J. Int'l L.* 343, 415–17 (1998).

²⁶*See, generally* Lippman, *supra* note 25; Doug Linder, *A Commentary on the Justice Case* (2000), in *The Nuremberg Trials*, *supra* note 19; Guide to the Trial Notebooks from the Nuremberg Justice Case, Tarlton Law Library, <http://www.lib.utexas.edu/taro/utlaw/00022/law-00022.html> (last visited Sept. 27, 2008).

²⁷Lippman, *supra* note 25, at 353.

²⁸*See generally* *The Nuremberg Trials*, *supra* note 19. Professor Lippman notes, “The implementation of Nazi policies, to a significant degree, was the product of legal decrees and judicial deliberations and decisions.” Lippman, *supra* note 25, at 432. *See also* *Nazis in the Courtroom*, *supra* note 14 at 1122–23 (“The relationship between law and morality has been the subject of ongoing debate. The debate presupposes that a judge may find himself caught between the law and his own conscience. Should the judge park his conscience at the courthouse door in applying law? Does a judge, applying the law as written, discharge his responsibilities.”); Markus Dirk Dubber, *Book Review: Judicial Positivism and Hitler's Injustice: Hitler's Justice: The Courts of the Third Reich*, 93 *Colum. L. Rev.* 1807 (1993) (discussing the role of judicial positivism in courts in Nazi Germany).

²⁹*See The Nuremberg Trials*, *supra* note 19 (containing excerpts from the decision of *United States v. Alstoeter*). Interestingly, Professor Weisberg argues that laws facilitating

Jewish persecution were enforced in Nazi Germany and Vichy France, but a similar statutory scheme in Italy under Mussolini was largely ignored until the Germans invaded; *Nazis in the Courtroom*, *supra* note 14, at 1135.

³⁰Lippman, *supra* note 25, at 343.

³¹*Id.* at 373–74. Forcible sterilization is also at issue in the film, leading Rolfe, the defense attorney, to cite the U.S. *Buck v. Bell*, 274 U.S. 200, 207 (1927), in which Oliver Wendell Holmes ruled:

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck “is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,” and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough. *See also* Stephen J. Gould, *The Mismeasure of Man* 335–36 (1981) (discussing and providing a postscript to *Buck v. Bell*).

³²For a discussion guide to the film, see *Learning Guide to Judgment at Nuremberg*, [http://www.teachwithmovies.org/guides/judgment at nuremberg.html](http://www.teachwithmovies.org/guides/judgment%20at%20nuremberg.html) (last visited Sept. 4, 2001). A script of the film is available at *Judgment at Nuremberg Script-Dialogue Transcript*, http://www.script-o-rama.com_scripts/j/judgment-at-nuremberg-script-transcript.html (last visited Sept. 26, 2008). The 2001 Broadway adaption is also available in print form; Abby Mann, *Judgment at Nuremberg* (2002). For a discussion of Abby Mann's problems in constructing a film from the real events, see *Suzanne Shale, Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media: The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 *U.S.F. L. Rev.* 991 (1996). For modern applications of the issues at play in the Justice Case, see *Milan Markovic, Essay: Can Lawyers Be War Criminals?*, 20 *Geo. J. Legal Ethics* 347, 356–61 (2007) (considering the potential liability of John Yoo and Jay S. Bybee as war criminals for their role in drafting the “Torture Memo” used by the Bush administration to justify harsh interrogation tactics in the questioning of captured terror suspects); *Detlev F. Vagts, Agora: Military Commissions Act of 2006:*

Military Commissions: A Concise History, 101 *Am. J. Int'l L.* 35 (2007) (looking at the history of the use of military commissions and considering whether they display a “putrid pedigree”).

³³*The Nuremberg Trials*, *supra* note 19.

³⁴Taylor was the chief prosecutor in the Justice Case and the author of Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). Some of Taylor's comments on the script are available at “Judgment at Nuremberg” (Playhouse 90): Correspondence (Dec. 20, 1957), <http://library.law.columbia.edu/ttp/TTP-JN.html>. Among his comments to a draft of the script were:

There is a confusion here about the meaning and relation of “Crimes Against Humanity” and “Outlawing War”. As to the outlawing of war, the Nuremberg concept most directly related was called “Crimes Against Peace”, embodying a criminal prohibition against planning, preparing or waging an “aggressive war”. In legal terms this was the most adventurous of the Nuremberg concepts and has also been most criticized on the basis that making war had not previously been considered a crime and that therefore punishing people on this ground would violate the principle against *ex post facto* trials. Whereas “Crimes Against Humanity” was the phrase used to indicate crimes such as racial exterminations and other mass atrocities against racial or national groups. “Crimes Against Peace” were not involved in the Judge's trial in Nuremberg, but “Crimes Against Humanity”, were.

³⁵Films of concentration camp liberation were actually shown at Nuremberg. For a discussion of the legal issues surrounding their introduction, see Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *Yale L.J.* 449 (1995). Douglas notes that the use of black and white in the original liberation films was a strategic trial decision; technicolor was available at the time and the film footage filmed by George Stevens was filmed using a handheld color camera. However, the Army feared that the technicolor projectors would not be available for courtrooms and movie theaters of the day. *Id.* at 468–69.

³⁶I have a fairly general list of questions that I can adapt for use to incorporate any film into class: How did this movie make you feel? What emotions did the film evoke? How did it evoke them? What did you think about this movie? What was the theme of the film? What points was the filmmaker trying to make? How did he make these points? Was the filmmaker realistic in his/her treatment? How did the director use light/color/music? In general, I try to move from the general to the specific. I also try to move from the emotional to the analytical. I want to encourage students to think critically about the film and their reactions to it.

³⁷In an exchange with Judge Haywood, Mrs. Bertholt says that she has a mission: “To convince you that we're not all monsters.” Mann, *supra* note 32, at 53.

³⁸Milton Mayer, *They Thought They Were Free: The Germans 1933–1945* (1955).

³⁹Mayer notes:

Dreadful deeds like Auschwitz had been done before in human history, though never on so hideously handsome a scale. But they had not been done before in an advanced Christian society like—well, like ours. If we would keep such deeds from ever being done again, at least in advanced Christian societies, it might be worth digging a little deeper than the shallow grave so hurriedly dug at Nuremberg.*Id.* at ix. Students directed me to another book that explored how these events could happen, which several said was required reading in their high schools: Morton Rhue, *The Wave* (1981) (pen name of Todd Strasser). The book is a fictionalized account of an incident that occurred at Cubberly High School in Palo Alto, California, in 1966–67, in which Ron Jones started the “Third Wave” movement in an effort to explore with his students the rise of the Third Reich. A description of the events can be found at Leslie Weinfield, *Remembering the 3rd Wave* (1991), <http://www.ronjoneswriter.com/wave.html>. The story has just been released as a feature film in Germany, *Die Welle* (Rat Pack Filmproduktion GmbH & Constantin Film Produktion 2008). See also Georg Boenisch, *Holocaust: Ort des Unfassbaren*, *Der Spiegel*, Jan. 24, 2005 (discussing the question: how could it come to the systematic murder of almost six million Jews?).

⁴⁰*Id.* at xvii. His attempt to discern the feelings of the average or ordinary German makes for interesting comparisons to Goldhagen's thesis. Goldhagen, *supra* note 15.

⁴¹This point is also made by Professor Epes. See Hansford M. Epes, Jr., *The Crisis of Liberal Democracy*, 9/2 *Miscellany* 65, 68–69 (1974).

⁴²Mayer, *supra* note 38, at 49–50. This story is consistent with Goldhagen's argument that, notwithstanding popular belief, resistance to the Jewish policy did not inevitably lead to harsh results. *E.g.*, Goldhagen, *supra* note 15, at 116.

⁴³Mayer, *supra* note 38, at 125–26.

⁴⁴*Id.* at 180. The taking of the loyalty oath is a significant issue in *Judgment at Nuremberg*, which is addressed in the cross-examination of Dr. Wickert, the Minister of Justice preceding Janning:

Rolfe: Dr. Wickert, do you consider yourself free of responsibility?

Dr. Wickert: Yes, I do.

Rolfe: Dr. Wickert, did you ever swear to the Civil Servant Loyalty Oath in 1934?

Colonel Parker: Your Honor, I object. The witness does not have to answer that question. He is not on trial.

Rolfe: All Germany is on trial, Your Honors. This Tribunal placed it on trial when it placed Ernst Janning on trial. If responsibility is to be found, the widest latitude is to be permitted.

Haywood: Objection overruled.

Rolfe: Did you ever swear to the Civil Servant Loyalty Oath of 1934?

Dr. Wickert [pausing]: Everyone did.

Rolfe: We are not interested in what everyone did. We want to know what you did. I will

read you the oath from the Reich Law Gazette, March 1933. “I swear that I shall be obedient to the leader of the German Reich and people, Adolf Hitler; that I shall be loyal to him; that I will observe the laws; and that I will conscientiously fulfill my duties, so help me God.”

Dr. Wickert: Everyone swore to it. It was mandatory.

Rolfe: Yes. But you're a perceptive man, Dr. Wickert. You could see what was coming. You should see that National Socialism was leading Germany to disaster. “It was clear to anyone who had eyes and ears.” Didn't you realize what it would have meant if you and men like you, had refused to swear the oath? It would have meant that Hitler would never have come to absolute power. Why didn't you doctor?

[Wickert is unable to reply.]

Can you give us an explanation? Did it have something to do with your pension? Did your pension mean more to you than your country?

[Dr. Wickert stares at him. It is a conclusion that he has dared not reach about himself.]

Colonel Parker: Your Honor!

Rolfe: No further questions.

Colonel Parker: Your Honor, I object to the entire line of questioning and ask that it be stricken from the record!

Rolfe [with irony]: I thought the prosecuting council [sic] was dedicated to finding responsibility. Mann, *supra* note 32, at 31–33.

⁴⁵Mayer, *supra* note 38, at 166–71. This issue of incrementalism is also directly addressed by *Judgment at Nuremberg*. In the final scene, which features a conversation between Janning and Haywood, Haywood chastises Janning, “Herr Janning. It came to that [sending millions of people to gas ovens] the first time you sentenced to death a man you knew to be innocent.” Mann, *supra* note 32, at 110. *See also* Wolfgang Borchert, *There's Only One Thing, in The Man Outside* 268–70 (David Porter trans., 1971) (addressing the issue of personal responsibility for war).

⁴⁶Jackson, *supra* note 23, at 17. *See also* *Nazis in the Courtroom*, *supra* note 14, at 1130 & 1134 (Professor Stern arguing that at the beginning of the twentieth century, Germans prided themselves on the “high standards and the incorruptibility” of the legal system. Professor Weisberg adds that the legal traditions in Vichy, France, were similar to the United States.). *See also* Sinclair Lewis, *It Can't Happen Here* (1935) (fictionally positing the rise of fascism in Depression-era America).

⁴⁷*E.g.*, Mayer, *supra* note 38, at 166 (“What happened here was the gradual habituation of the people, little by little, to being governed by surprise; to receiving decisions deliberated in secret; to believing that the situation was so complicated that the government had to act on information which the people could not understand, or so dangerous that, even if the people could understand it, it could not be released because of national security.”).

⁴⁸In at least one respect, Mayer implies that the Germans are different: in their obedience to authority. For example he relates the story: “My friend Willy Hofmeister, the

policeman...was telling me that a German policeman never used his gun except in cases of extreme personal peril. 'Well,' I said, 'when you order a car to stop and it doesn't, don't you fire?' 'We wouldn't,' he said, 'but when you order a car to stop, it stops.'" *Id.* at 153. In grappling with this question, one of the class groups brought the results of the Milgram experiment into the discussion that was specifically designed to test obedience in light of the events of Nazi Germany. See Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper Perennial Modern Classics 2004).

⁴⁹Bernhard Schlink, *The Reader* (Carol Brown Janeway trans., 1997). The book is published in Germany as Bernhard Schlink, *Der Vorleser* (1995) (the title meaning "the [male] reader [aloud]" resolving a linguistic ambiguity introduced in the English translation—that is, the title in German clearly refers to the narrator). See also Bernhard Schlink, *Girl With Lizard*, *New Yorker*, Aug. 6, 2001, at 64 (considering the lingering effects of Nazi Germany in short story form).

⁵⁰The author is intentionally ambiguous about the exact nature of their relationship. This sexual relationship seems to have prompted its selection for the Oprah Book Club. However, it seems from the tenor of their discussion that Oprah Winfrey did not understand the book. The Oprah Winfrey Show: Reader Discussion, http://www2.oprah.com/tows/pastshows/tows_1999/tows_past_19990331.jhtml (last visited March 14, 2007).

⁵¹Schlink, *supra* note 49, at 41.

⁵²*Id.* at 90–91. Obviously, this issue is a central concern of *Judgment at Nuremberg*. See *supra* notes 20–26 and accompanying text. See also Sybille Bedford, *The Worst That Ever Happened: The Trial of Twenty-Two Former Staff of Auschwitz Concentration Camp, Frankfurt, West Germany, in As It Was: Pleasures, Landscapes and Justice* 218–60 (1990) (reporting on a similar ancillary trial, of twenty-two former staff members of the concentration camp, Auschwitz, conducted by the West Germans, on charges of complicity to mass murder).

⁵³Schlink, *supra* note 49, at 108–09.

⁵⁴*Id.* at 111–12.

⁵⁵*Id.* at 91.

⁵⁶*Id.* at 114–16.

⁵⁷*Id.* at 126–29.

⁵⁸*Id.* at 131–34. Hanna's illiteracy in a very literate society has led some critics to contend that Schlink is "soft" on war criminals, excusing or explaining Hanna's participation in these events by her weakness. I agree with Professor Roth's defense of Schlink on these charges. Jeffrey I. Roth, *Reading and Misreading The Reader*, 16 *Cardozo Stud. L. & Lit.* 163 (2004).

⁵⁹*Id.* at 139–44 & 158. A good Kantian, Michael's father encourages him to respect Hanna's dignity.

⁶⁰*Id.* at 161.

⁶¹*Id.* at 191–94.

⁶²*Id.* at 195–99.

⁶³*Id.* at 203–07.

⁶⁴*Id.* at 210–15.

⁶⁵See also Laura Santini, *Out of the Attic, Family Memoirs With a Nazi Past: Berliner Katrin Himmler Was Shocked at SS Ties; Grandmother's Connections*, Wall St. J., Nov. 7, 2007, at A1 (discussing a Berlin woman's discovery of her grandfather's ties to the SS).

⁶⁶Schlink, *supra* note 49, at 134.

⁶⁷*Id.* at 149–52:

“You're right, there was no war, and no reason for hatred. But executioners don't hate the people they execute, and they execute them all the same. Because they're ordered to? You think they do it because they're ordered to? And you think that I'm talking about orders and obedience, that the guards in the camps were under orders and had to obey?” He laughed sarcastically. “No, I'm not talking about orders and obedience. An executioner is not under orders. He's doing his work, he doesn't hate the people he executes, he's not taking revenge on them, he's not killing them because they're in his way or threatening him or attacking him. They're a matter of such indifference to him that he can kill them as easily as not.”*Id.* at 151. See *supra* note 43 and accompanying text. See also Douglas O. Linder, *Essay: Journeying Through the Valley of Evil*, 71 *N.C. L. Rev.* 1111, 1112 (1993) (arguing that injustices in the United States can be at least partially explained by distance and indifference: “Evil is the consequence of distractions and inattention. Whereas one must work to be good, one happens to be evil.”).

⁶⁸Aside from Oprah Winfrey's discussion guide (see *supra* note 50), there are a number of discussion guides available online; e.g., Random House, Reading Group Center: The Reader by Bernhard Schlink, <http://www.randomhouse.com/vintage/read/reader/> (last visited Oct. 3, 2008).

⁶⁹For a general discussion of the Scopes trial, see Matthew Chapman, *Trials of the Monkey: An Accidental Memoir* (2001); Stephen J. Gould, *Hen's Teeth and Horse's Toes* 263–90 (1994); Edward J. Larson, *Summer For the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (1998); Mary Lee Settle, *The Scopes Trial: The State of Tennessee v. John Thomas Scopes* (1972); Arthur Weinberg Ed., *Attorney for the Damned* 174–228 (1957). For a variety of online resources including excerpts from trial transcripts, see *Famous Trials in American History: Tennessee v. John Scopes: “The Monkey Trial”* (1925), <http://www.law.umkc.edu/faculty/projects/ftrials/scopes/scopes.htm>.

⁷⁰Tennessee House Bill 185 (1925), *available at* <http://www.law.umkc.edu/faculty/projects/ftrials/scopes/tennstat.htm>.

⁷¹For a discussion of Darwin's ideas, see generally Charles Darwin, *On the Origin of Species* (1859), *available at* <http://www.gutenberg.org/dirs/etext98/otoos11.txt>; Steve Jones, *Darwin's Ghost: The Origin of Species Updated* (2000); David Quammen, *Song of the Dodo* (1996) (discussing the contributions of Alfred Russell Wallace); Tim Severin, *The Spice Islands Voyages 4–11* (1997); Carl Zimmer, *Evolution: The Triumph of an Idea* (2001).

⁷²Gould, *supra* note 69, at 264–65.

⁷³*Id.*

⁷⁴It might be a mistake to assume that students know more about their own religious traditions than they do about the ideas of Charles Darwin. *See, e.g.*, Stephen Prothero, *Worshipping in Ignorance*, *Chronicle Rev.*, Mar. 18, 2007, at B6 (“Nonetheless, Americans remain profoundly ignorant about their own religions and those of others.”).

⁷⁵*Inherit the Wind* (United Artists 1960).

⁷⁶Jerome Lawrence & Robert E. Lee, *Inherit the Wind* (Bantam pathfinder 1960).

⁷⁷Larson, *supra* note 69, at 239–46. Larson also itemizes the differences between the events in play and the real trial. The McCarthy hearings would also be appropriate for a course of this type, but may evoke a different movie selection, such as *The Front* (Columbia Pictures Corp. 1976) or *Good Night and Good Luck* (Warner Independent Pictures 2005).

⁷⁸According to polls, at least one hundred million Americans accept creationism. Jones, *supra* note 71, at 1. Their number includes, reportedly, one of the 2008 vice presidential candidates; Alec MacGillis, *Palin Gives Beliefs, Demurs on Policies: Couric Queries Nominee on Social Issues*, *Wash. Post*, Oct. 1, 2008, at A07.

⁷⁹The most recent installment in the controversy is *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that a school board policy requiring the teaching of “intelligent design” as an alternative to evolution violated the Establishment Clause of the First Amendment). *See also* *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down an Arkansas statute prohibiting the teaching of evolution); Gould, *supra* note 69, at 280–90 (discussing challenges to Arkansas requirements to teach creationism); Suzanne Sataline, *Scopes, 2005: “Design” Theory Faces Legal Test*, *Wall St. J.*, Sept. 22, 2005, at B1 (discussing the *Kitzmiller* decision). Note that the continuing controversy on this issue has caught the attention of the international press. *See, e.g.*, Joerg Blech et al., *Darwins Werk, Gottes Beitrag*, *Der Spiegel*, Dec. 24, 2005, at 136.

⁸⁰Larson, *supra* note 69.

⁸¹Jones, *supra* note 71.

⁸²Severin, *supra* note 71.

⁸³The Castle (Working Dog 1997).

⁸⁴545 U.S. 469 (2005).

⁸⁵The underlying facts in the movie are eerily similar to the North Carolina Supreme Court case *Piedmont Triad Airport Auth. v. Urbine*, 554 S.E. 2d 331 (N.C. 2001). The defendant Urbine challenged the condemnation of a 2.326 acre parcel for an airport expansion as lacking a valid public use under Article V, Section 2(1) of the North Carolina Constitution. Urbine claimed that the condemned property was to be for the exclusive use of an airport tenant, Federal Express Corporation. The trial court rejected Urbine's claims and authorized the condemnation. The North Carolina Supreme Court accepted the case without review by the court of appeals. The court affirmed, explaining that there are two prongs to the public use analysis. First, the use must involve a "reasonable connection with the convenience and necessity" of a particular municipality. Second, the use must benefit "the public generally, as opposed to special interests or persons." *Id.* at 333. The court noted the "convenience and necessity of having an air cargo facility adjacent to existing airport runways and facilities." The court pointed to expansion plans dating back to 1990 and the general public's desire for better airports. Although the Federal Express deal may have influenced the timing of condemnation and expansion, the taking is constitutionally permissible notwithstanding the "incidental benefits to the private companies involved." *Id.* at 333–35.

⁸⁶*Kelo*, 545 U.S. 469.

⁸⁷*Id.* at 472–77.

⁸⁸*Id.* at 484–87.

⁸⁹The Court noted:

Just as we decline to second guess the City's considered judgments about the efficacy of its development plan, we also decline to second guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U.S., at 35 36, 99 L. Ed. 27, 75 S. Ct. 98. *Id.* at 494.

⁹⁰Justice O'Connor argued in dissent:

Today the Court abandons this long held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic

development takings “for public use” is to wash out any distinction between private and public use of property and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.*Id.* at 488–89.

⁹¹In the words of the Court:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.*Id.* at 494.

⁹²*Elisabeth Sperow, The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 *McGeorge L. Rev.* 405, 415–26 (2007) (discussing federal and state responses to *Kelo*). See also *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006), which involved very similar facts to *Kelo*, in which the Ohio Supreme Court reached the opposite result under the Ohio Constitution.

⁹³The Fortune Cookie (Phalanx-Jaelem & The Mirisch Corporation 1966).

⁹⁴12 Angry Men (Orion-Nova Productions 1957).

⁹⁵The packet included material from the popular press including, for example, Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. News & World Rep., Jan. 30, 1995, at 50; Barbara Holland, *Do You Swear that You Will Well and Truly Try...?*, *Smithsonian*, Mar. 1995, at 108; Philip K. Howard, *The Death of Common Sense*, U.S. News & World Rep., Jan. 30, 1995, at 57; and Aric Press et al., *Are Lawyers Burning America*, *Newsweek*, Mar. 20, 1995, at 32.

⁹⁶There is a large body of literature on jury decision making, much of which is cited in *Robert B. Bennett, Jr. et al., Seeing Is Believing; or Is It? An Empirical Study of Computer Simulations as Evidence*, 34 *Wake Forest L. Rev.* 257 (1999); *Jordan H. Leibman et al., The Effect of Lifting the Blindfold From Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 *Am. Bus. L.J.* 349 (1998); *Jordan H. Leibman et al., The Rise and Fall and Perhaps Rise Again of the “Blindfold Rule” in Modified Comparative Fault Cases: A Proposed Experiment*, 102 *Dickinson L. Rev.* 33 (1998); *Robert B. Bennett, Jr. et al., Using a Jury Simulation as a Classroom Exercise*, 15 *J. Legal Stud. Educ.* 191 (1997); *Robert B. Bennett, Jr. et al., The Empirical Legal Research Initiative: An Interim Report to the Academy*, 14 *J. Legal Stud. Educ.* 237 (1996).

⁹⁷The Front (Columbia Pictures Corp. et al. 1976).

⁹⁸Good Night and Good Luck (Warner Independent Pictures et al. 2005).

⁹⁹The Paper Chase (20th Century Fox et al. 1973).

¹⁰⁰Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law School* 28–33 (1978).

¹⁰¹Chris Goodrich, *Anarchy and Elegance* 30–48 (1993).

¹⁰²Examples of discussion questions on the film include: How would you characterize the culture at Harvard Law School based upon the movie? What do you think is endemic to legal education, and what appears to be specific to Harvard? In what kind of situations or classes would the Socratic Method be an effective educational device? How is that different than a discussion? How does it differ from the Socratic Method as practiced by Socrates? How are the goals different? What educational goals favor the Socratic Method in the context of law schools? Is the culture depicted in the movie one that has special value in legal education? The subject of Kingsfield's course is contracts. What are contracts and why are they an important subject of concern in law school? Why should law get involved in private agreements? How does contract law play a role in our culture and vice versa?