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Exemplary Legal Writing 2018: Four Recommendations

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FOUR RECOMMENDATIONS

Jed S. Rakoff[†] *& Lev Menand*[*]

The Secret Barrister
The Secret Barrister: Stories of the Law and How It's Broken
(Pan Macmillan 2018)

In an age of mass incarceration, it is not so easy to find good in the U.S. criminal justice system. But *The Secret Barrister* makes you appreciate the better aspects of our system by showing just how dysfunctional the corresponding English system has become. The book — written by an anonymous junior barrister — is a devastating, sometimes hilarious, and frequently heart-breaking account of how the criminal justice system in England and Wales is not only broke financially but broken in its ability to deliver justice, whether to prosecutors, defendants, victims, or the public.

Because of the unique British system enabling barristers (i.e., courtroom lawyers) to represent the prosecution in one case and an accused person in the next, the author is able to illustrate her widespread accusations with accounts of recent cases she handled and to maintain an objectivity rarely found in such first-person accounts. But what she recounts is alarming. Continuous reductions in the financial support given to the criminal justice system in the U.K. have led to a situation where none of the players — the police, the

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prosecutors, the defense lawyers, or even the judges — are given the tools to do their jobs adequately. To give just one example, one of the cases in which the Secret Barrister served as prosecutor involved a heroin addict named Rob who seduced a young girl, Amy, when she was 14, forced her to inject heroin and, once she herself became addicted, forced her to have sex with his dealers in order to pay for their supply. Over the next few years, Rob regularly beat Amy when she protested in the slightest, and finally he almost beat her to death when she was 22. In the hospital, Amy finally confided her plight to the doctors, who contacted the police, who in turn, after an investigation, arrested Rob on serious assault charges. But when the day came for Rob to stand trial, the prosecutor (i.e., the Secret Barrister) found that the authorities had misplaced the basic documents (such as witness statements required to be provided to the defense) necessary for the case to go forward. No fewer than four adjournments followed over the course of the next three months, as the prosecutor made every effort to obtain the missing documents, only to be confronted with the sad reality that the police, already stretched to the limits, had in their view more important things to do than search for misplaced documents. And so, the case was dismissed. According to the author, this kind of thing happens regularly.

To cope with financial contraction, moreover, the U.K. authorities have resorted to "efficiencies" (i.e., cheap, halfway measures) that in the U.S. would be considered a denial of due process. For example, an ever-increasing number of criminal cases (not just misdemeanors, but felonies as well) are now tried by three-judge panels of volunteer "lay magistrates" — i.e., non-lawyers who volunteer to give 13 days a year to hear such cases. About the only law that enters into their deliberations comes from an assigned law clerk (called a "legal advisor"), whose advice they frequently disregard. While defenders of this system note that it has roots in the common law going back at least to the fourteenth century (and what could be a better justification than that!), in fact, as the Secret Barrister notes, the only real defense for this bizarre lay-magistrate system is that it is quick and cheap.

Although both the book and the author of *The Secret Barrister* have created something of a swirl in British legal circles, the book remains relatively unknown in the U.S. But we ignore its lessons at our peril.

Lucy E. Salyer
Under the Starry Flag
(Harvard University Press 2018)

This fascinating and beautifully written work of legal history deals with a right guaranteed by U.S. law that many of us have never heard of: the right

of expatriation, i.e., the right to renounce a citizenship you previously held. More especially, it traces the far-from-peaceful origins of the Expatriation Act of 1868.

In 1867, forty Irish-American, most of them veterans of the Civil War and all of them naturalized U.S. citizens, sailed from New York to Ireland with a shipload of armaments, intending to aid the cause of Irish independence (the "Fenian Revolt"). But most of them were arrested by British authorities as soon as they reached Ireland, and several were then tried for treason, on the theory that they were still British subjects. At various points in the trial, the defendants' lawyers (who were hired by the U.S. government) argued in one way or another that the defendants had, as part of the oath they took to become U.S. citizens, expressly renounced any allegiance to Britain. Accordingly, whatever else they might be guilty of, they could not be held guilty of treason. But the British judges were quick to reject such arguments, citing the great Sir Edward Coke for the proposition that the British citizenry of these naturalized Americans was "written by the finger of the law in their hearts" forever.

Although the defendants were duly convicted and sentenced to prison, the notion that citizenship was not renounceable infuriated Americans who had not so long before fought a Revolution against the British Crown and who were building a nation composed of immigrants. Vehement protest rallies were held in New York and elsewhere, and not just among Irish-Americans, for, in the words of one U.S. newspaper, the notion of perennial citizenship was a "monstrous monarchial assumption." Reacting to the mood, Congress quickly passed the Expatriation Act of 1868 — still good law — which states that "the right of expatriation is a natural and inherent right of all people" and that any ruling to the contrary is "inconsistent with the fundamental principles of this government" and hence null and void. Although the short-term effect was to further fray relations between the U.S. and Britain (already harmed by tacit British support for the South during the Civil War), the principal of the right to expatriation ultimately prevailed and was even adopted, a century later, by the United Nations.

This brief account does not begin to do justice to Professor Salyer's skillful weaving together of all the political, social, economic, and emotional threads that made the British trial of the American Fenians and its legislative aftermath in the U.S. an important development in the rise of U.S. nationalism and its impact on international law and relations. And, given all the issues involving every aspect of immigration law now being debated in the U.S., Salyer's contribution to legal history may have some immediate relevance as well.

Tim Wu
The Curse of Bigness: Antitrust in the New Gilded Age
(Columbia Global Reports 2018)

What — you reasonably might wonder — do checked bag fees and the ever-shrinking distance between your knees and the seat in front of you have to do with Cambridge Analytica, the Equifax data breach, and recent revelations that your phone company has been selling your location data to various "third-party service providers"? All of these things, Professor Wu tells us, are partially, if not primarily, the product of industrial concentration and the failure of the Justice Department to enforce our nation's anti-trust laws. Monopolists, it turns out, don't have to cater to consumers in the same way small firms do. Worse, mega-businesses can use their economic power to distort democracy.

Two parts historical narrative and one part call to arms, Wu's indispensable new survey of American anti-trust law seeks to explain how many American industries came to be dominated by just a handful of firms. On Wu's account, our anti-trust laws were originally designed in the 1890s and early 1900s not to ensure low prices for consumers, but to promote liberty and democratic self-government by limiting the accumulation and abusive exercise of private power. Specifically, Congress was concerned that the Constitution's protections against political oppression could not stop new, corporate oppressors, with names like Standard Oil, the Northern Securities Company, and American Tobacco. These trusts, Congress observed, controlled as much economic activity as the government and were not subject to the same restrictions. As one lawmaker put it, a people cannot be truly free if they are dependent, in their economic lives, on the "arbitrary will of another." Business tycoons like John D. Rockefeller, another lawmaker explained, possessed a "kingly prerogative," which was "inconsistent with our form of government."

American democracy survived, Wu suggests, because a series of presidents, beginning with Teddy Roosevelt in 1901, enforced the laws passed by Congress prohibiting contracts and combinations "in restraint of trade" and the monopolization of "trade or commerce." But beginning in the 1970s, Wu explains, a group of academics reconceived anti-trust law, arguing, with little basis, that Congress really meant merely to promote competition so as to ensure low prices. In 1979, these academics even convinced the Supreme Court. The result, Wu says, is our New Gilded Age, where prices are low, but the concentration of private power has suppressed wages, slowed economic growth, stifled innovation in science and technology, increased inequality, hampered democratic self-government, and fueled fascist political movements in the U.S. and abroad.

At the end of his book, Wu proposes a series of reforms, recommending breaking up media, technology, and transportation conglomerates, stopping mergers before they happen, and studying commercial practices in concentrated industries. Wu is a structuralist, and *The Curse of Bigness* is an important contribution to the emerging "law and political economy" literature, which examines how legal rules shape markets and how, in turn, markets shape legal rules. Wu's approach reveals that there is nothing inevitable about present arrangements; just as there was nothing inevitable about the break-up of Standard Oil a century ago. When President McKinley, awash in secret corporate campaign contributions, won the presidency in 1896, it seemed like the sun would never set on J.P. Morgan's railroad empire. Then a few years later, Roosevelt took the oath, brought suit against the Northern Securities Company, and the Gilded Age gave way to the Progressive Era.

Adam Winkler
We the Corporations:
How American Businesses Won Their Civil Rights
(W.W. Norton 2018)

American businesses today enjoy many of the same rights as living, breathing American citizens, including freedom of speech, freedom of the press, freedom of religion, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, and the right to trial by jury. Indeed, businesses routinely sue the government when they think one of these rights has been violated. And through such suits, businesses have successfully abrogated many duly enacted laws and deterred Congress and the states from enacting countless others. But it was not always so. In a sweeping new history of American constitutional law, Professor Winkler reveals how businesses won these rights and how, in many cases, they helped to define these rights, testing out new theories of constitutional interpretation that were later adopted by other groups and individuals seeking to vindicate their own rights.

Somewhat counterintuitively, Winkler shows that businesses achieved their many Supreme Court victories not by contending that corporations were legal "persons" entitled to the same protections as natural persons, but rather by arguing that, when it comes to the authority of the government to regulate their affairs, corporations were merely associations of natural persons whose rights the government must recognize, and courts must allow corporations to assert. For example, in what Winkler dubs the "first" corporate rights case, *Bank of United States v. Deveaux* (1809), the lawyer for the Bank, Horace Binney, convinced the Court that a corporation was a "mere collec-

tion of men" and that, accordingly, the Bank should be permitted to sue in federal court under Article III, section 2, which permits federal courts to hear cases "between citizens of different states."

Winkler fills out his narrative with lots of nourishing details about the lawyers and judges arguing and deciding the major cases. For example, he tells us how Roscoe Conkling, a drafter of the Fourteenth Amendment, lied to the Supreme Court in an effort to win new rights for businesses. (Conkling claimed, falsely, that Congress had intended the equal protection clause to apply to businesses, and that he had a notebook from the deliberations to prove it.) We also learn how a cabal of like-minded corporate rights enthusiasts passed off *Santa Clara County v. Southern Pacific Railroad* (1886) as standing for the proposition that corporations were persons within the meaning of the Fourteenth Amendment when the case was explicitly decided on other grounds.

Overall, Winkler is incredibly fair, taking pains to carefully dissect both sides of each case he examines. And, not every victory for a corporate plaintiff seems like a loss for the American people — or vice versa. For example, Winkler recounts how in *NAACP v. Button* (1963), the Supreme Court permitted the NAACP to assert the free speech and free assembly rights of its members in challenging a Virginia law that, among other things, required the NAACP to file annual lists of its members with the state. Drawing a line between when a corporation should be permitted to assert the rights of its members and when it should not is not as easy as it may seem. That is one of many reasons why a book like *We the Corporations* is long overdue and fills a hole in both our constitutional and corporate law scholarship.

"Economy is the method by which we prepare today to afford the improvements of tomorrow."

Clifford v. Raimondo
184 A.3d 673, 677 (R.I. 2018)
(quoting *Silent Cal's Almanack: The Homespun Wit and Wisdom of Vermont's Calvin Coolidge* 58 (David Pietrusza ed., 2008))