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Exemplary Legal Writing 2019: Four Recommendations

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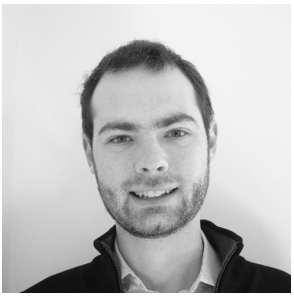
FOUR RECOMMENDATIONS

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Eric Foner
The Second Founding: How the Civil War and Reconstruction Remade the Constitution
(W.W. Norton 2019)

Part of the purpose of recommending exemplary law books of the past year to readers of the *Green Bag* is to bring to their focus books even such erudite readers may not have noticed that nonetheless deserve their attention. But when a book as splendid as Eric Foner's *The Second Founding* appears on the scene, the fact that it has already been so fully noticed and its author has won the Pulitzer Prize does not mean that it can be ignored here.

But in many ways, this brilliant, insightful, careful, well-crafted, and well-written book is also painful to read, for what it demonstrates is how even the great amendments to the Constitution that followed in the wake of the bloody Civil War have never, to this day, realized their full promise. The 13th, 14th, and 15th Amendments were not simply supposed to do away with slavery, but also to guarantee all persons, and most especially persons of color, full due process and equal protection. And it was the federal government, triumphal on the battlefield, that would enforce these rights.

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But almost immediately there was backsliding, led, alas, by the U.S. Supreme Court. The so-called *Civil Rights Cases* of 1883 pretty much scuttled Reconstruction, and later cases like *Plessy v. Ferguson* (1896) assured persons of color a second-class citizenship and life of subservience that has still not wholly disappeared. And, as Foner shows, history itself was re-written to justify these racist results. Indeed, as late as the 1940s, public school history textbooks — in the North as well as the South — portrayed Reconstruction as a vengeful imposition on white southerners that had to be eliminated in order to bind up the nation's wounds.

It was only after another traumatic event, World War II, that things began to change. Historians like John Hope Franklin began to set straight the actual record of the transformation of the ideals of Reconstruction into the reality of "Jim Crow" legislation. And the vicious reaction to *Brown v. Board of Education* (1954) exposed for all who cared to look the rampant racism practiced in the United States. Foner is a worthy follower of such ground-breaking historians, for he shows how the clear intent of the post-Civil-War constitutional amendments was betrayed, not least by the Supreme Court. But in his vivid account of the interrelationship between these amendments and the development of U.S. society, Foner also demonstrates how they may still provide the bedrock on which future progress can be built.

Elizabeth Papp Kamali
Felony and the Guilty Mind in Medieval England
(Cambridge University Press 2019)

To a remarkable extent, Anglo-American law, and especially its criminal law, turns on states of mind. Yes, there must be a wrongful act (the "actus reus"), but punishment is largely reserved for those who acted with a wrongful intent (the "mens rea"). Indeed, just planning a wrongful act can be enough to send one to prison, as in the law of conspiracy, if the wrongful intent is present. And most jurisdictions vary the term of imprisonment depending on whether the wrongful act was committed "willfully" (i.e., purposely or intentionally), "knowingly" (i.e., with knowledge of the likely consequences), "recklessly" (i.e., with conscious disregard of the likely consequences), or simply negligently.

All of this presupposes a view of what goes on in the human mind that Steven Morse of Penn Law School has described as "folk psychology" and that may or may not accord with reality. But as Elizabeth Papp Kamali, an assistant professor at Harvard Law School, demonstrates in this marvelous book, the concept of mens rea, of a guilty mind, has very deep roots in the

development of English law. In particular, after the Catholic Church announced early in the 13th century that it would no longer participate in trials by ordeal (such as throwing the bound accused in a stream to see whether he floated, in which case he was guilty, or sank, in which case he was innocent), the common law might have simply reverted to punishing those who committed bad acts, regardless of their state of mind. But, instead, English judges and juries very quickly developed the requirement that no one could be punished for any felony, that is, any serious crime, unless they acted with a wrongful intent.

One of the many great virtues of Kamali's book is to show that this development was itself an application of moral and cultural values then current, as reflected in the religious writings and popular literature of the time. It may have also reflected a desire for mercy in a period when conviction of a felony mandated the death penalty. For, as Kamali also shows, a substantial number of felony trials in medieval England resulted in acquittal, based on a finding that there was no mens rea.

Determining a defendant's state of mind when he allegedly committed a wrongful act remains a principal focus of criminal law today. Often, it is no easy task. But as Kamali convincingly demonstrates, it nonetheless became the heart of criminal law as early as the 13th century, because people then, as now, felt that punishment should be reserved for those who acted with "bad" intentions.

Katharina Pistor
The Code of Capital:
How the Law Creates Wealth and Inequality
(Princeton University Press 2019)

In much of the world the first day of May is called "May Day," commemorated by socialists as "International Workers' Day" or "Labor Day." In 1958, locked in a Cold War with the communist Soviet Union, President Eisenhower decided to enact a bit of counterprogramming. He proclaimed that in the United States May 1 would be known as "Law Day." Although Eisenhower undoubtedly meant to extoll the virtues of the "rule of law," in her provocative new book, *The Code of Capital*, Katharina Pistor shows how the rule of law may sometimes seem like the rule of capital. This is because, as Pistor puts it, "Capital Rules by Law."

The idea that law and capital are close cousins is not new. Pistor, however, deepens the analysis — showing how law creates and defines various forms of property, allowing certain people to amass wealth and preserve it over time. She identifies four ways in which capital is "coded": by establishing

"priority," one person's right to exclude another from using or controlling an asset; "durability," one person's ability to extend priority over long periods of time; "universality," one person's ability to establish priority against all others; and "convertibility," the ability to exchange an asset for the state's money. In four magisterial chapters, Pistor surveys how lawyers code these properties into land, debt, and ideas, and how they use the corporate form to protect capital from other claimants like workers, creditors, and governments. Pistor then takes her analysis global — showing how governments have enabled lawyers to shop for law — to use the corporate form of Ireland, the intellectual property regime of the United States, and the tax rules of Panama.

Because one of her primary audiences is lawyers and law students, Pistor focuses on the ways partners and associates at big firms exacerbate wealth inequality. On her account, much of today's divergence can be traced to what goes on in their private offices. But, as Pistor notes, lawyers can play this role in large part because of choices made by governments to recognize these legal modules and enforce their terms. As a result, reversing wealth inequality, which Pistor tackles in her final chapter, will surely require more than just discriminating lawyers. It will require lawmakers to change the background enabling statutes, which let lawyers turn the tax code into swiss cheese or starve the public domain of creative works and useful knowledge.

Sarah A. Seo
Policing the Open Road:
How Cars Transformed American Freedom
(Harvard University Press 2019)

Most of us encounter state authority primarily, if not exclusively, in our cars. True, we sometimes interact with government officials while passing through customs — answering inquiries about where we've been and what we are carrying with us. But the number of trips we take in and out of the country sum to a fraction of the number of trips we take along the country's many streets, boulevards, and highways. Each time we use one of these concrete paths, Sarah Seo teaches us in her absorbing new book, *Policing the Open Road*, we inhabit a hybrid space — we are inside private property but traveling on public land. We want the government to protect us from harm — on the road ordinary negligence can be fatal — but we also expect to be able to go about our business uninterrupted and undisturbed.

Seo explores this tension and its effects on the law over the past hundred years, showing how cars have changed the way we relate to our government and how our government relates to us. In the horse and buggy days, policing

was focused on marginalized groups, and police rarely encountered the "respectable" classes. Law enforcement was local, and communities engaged in self-policing. Seo argues that cars unsettled these pre-modern patterns — allowing people to live, work, and relax in different jurisdictions. "Locality has been annihilated," she quotes Herbert Hoover as saying, "distance has been folded up into a pocket piece." With the advent of the auto, the neighborhood, Seo explains (this time quoting Roscoe Pound, the longtime dean of Harvard Law School), ceased to be a "social and economic unit" and "neighborhood opinion" no longer served as an effective social control mechanism. Cars also gave millions of Americans ways to kill and maim each other. The result was an institutionalized modern police force, which developed to meet the challenge of "automobility."

Seo's tale is essential reading not just for those interested in the fourth amendment and police reform, one of the most pressing issues in the country today. It also contains lessons for policy makers focused on tackling other disruptive technologies. Twitter, Google, and Facebook, for example, resemble in many respects Ford and General Motors one hundred years ago. Social media, like cars, are unsettling existing social patterns.

It took the police and the courts decades to adjust to mass driving, and we are still struggling with the consequences of expanded police forces and enlarged police discretion. If Seo's work is any guide, we can expect it to take just as long to come to terms with the traffic on our new information highways.