Law faculty draw from their wide-ranging expertise to regularly publish their work in an extensive variety of scholarly journals. "Overbreadth in criminal liability rules, especially in federal law, is abundant and much lamented. ... In some areas of expanding substantive criminal law, answers to 'overcriminalization' ... lie not in reducing the scope of conduct rules, but in greater reliance on mens rea doctrines, redesign of enforcement institutions, and modification of sentencing practices."

Samuel W. Buell, Professor of Law
"The Upside of Overbreadth,"
New York University Law Review

Four New Books Feature Faculty Research

Washington University Law Faculty members bring passion and dedication to their legal scholarship. The following is a look at four books written by faculty members. The first two books, both upcoming, use historical analysis to offer new legal perspectives; the next two books represent fresh approaches to casebooks, in family law and environmental law respectively.

Using Better Judgment

When Professor Brian Tamanaha officially joins Washington University Law’s faculty in January 2010, he will bring with him the distinction of having debunked one of the more pervasive legal myths of the 20th century.

In his forthcoming book, Beyond the Formalist–Realist Divide: The Role of Politics in Judging, Tamanaha describes this myth. In the late 1800s and early part of the 1900s, judges were “formalists.” They believed that the law consisted of a logically ordered set of rules that allowed judges to deduce their ruling in any given case.

The myth goes on to describe how, in the 1920s and 1930s, “realists” arrived on the scene. They held that the law is full of gaps and contradictions—the same precedents can lead to different results depending on which judge hears the case. Judges decide cases based upon outcomes they desire, and then find legal support for the decision.

Interestingly, a combination of technology and luck led Tamanaha to determine that this widely accepted and oft-repeated “narrative” was, in fact, fiction.

“Last year I was at the Institute for Advanced Study in Princeton, New Jersey, preparing to write a new book,” Tamanaha explains. “I had some spare time and went online to a site where Hein Publishing had photocopied all of the law journals going back to the early 19th century and made them searchable.”

Out of curiosity, Tamanaha typed “judicial legislation” into the search field. He didn’t expect many, if any, results, because the myth held that judges didn’t legislate prior to the 1920s. To his surprise, he got a lot of “hits.”

“As I started to read these articles, I found many statements indicating that it was widely recognized in the 19th century that judges did, in fact, legislate,” Tamanaha explains.

As a check, he shared one passage with a colleague.

[Research Excerpt]

The quote read, in part:
“The most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the courts—perhaps have only been looked up after that decision was reached upon the general equities of the case.”

By Timothy J. Fox and Tony Fitzpatrick
“When,” Tamanaha then asked a colleague, “do you think that was written?” The colleague replied that it must have come from one of the leading “realists,” Benjamin Cardozo, perhaps, writing in the 1920s.

In fact, the passage dates to 1881—and it is from William G. Hammond, first full-time dean and professor at the St. Louis Law School (the predecessor to Washington University Law) and supposedly a “formalist.”

Tamanaha—who reads widely in sociology, anthropology, and many other disciplines—sees the debunking of this “formalist–structuralist” myth having wide-ranging implications not just for the law, but also for legal history and political science.

The myth “consists of a web of interlocking misinterpretations and confusions bundled in a mutually reinforcing package that is now virtually taken for granted,” he writes.

“The consequences of this collection of errors are ongoing and pernicious. Rooting out the formalist–realist story will help us recover a sound understanding of judging.”

By Timothy J. Fox

Thomas Jefferson’s Legacy


Yes, lawyer.

While Jefferson’s biographers and other historians often either ignore or downplay Thomas Jefferson’s legal career, David Konig, professor of law and of history in Arts & Sciences, believes that much can be learned by studying Jefferson’s time practicing in Virginia.

“Historians’ treatment of Jefferson’s role as a lawyer often betrays a certain amount of ‘lawyer bashing,’ on their part,” says Konig, who is currently editing Jefferson’s Legal Commonplace Book for Princeton University Press. Interestingly, the book demonstrates that Jefferson both paraphrased and commented on the legal scholarship of the day.

“I believe that Jefferson was a great statesman because he was a lawyer—not despite being a lawyer,” Konig explains.

In fact, in the nearly 1,000 cases that Jefferson handled between 1767 and 1774, he displayed “an uncommon interest in civil liberties and rights,” says Konig, noting that Jefferson took many pro bono cases, as well as slaves’ suits for freedom.

Those cases show Jefferson struggling with perhaps his greatest conflict: reconciling his hatred of slavery with the fact that slavery was the law of the land and deeply engrained in Virginia culture—to say nothing of the fact that Jefferson was, himself, a slave owner.

“Jefferson tried early in his career to convince the Virginia Assembly to end slavery, but the political forces were very strong against him. Slavery was so pervasive that Virginia law made it nearly impossible for him to free his own slaves,” Konig says.

As a product of the Enlightenment, Jefferson put his faith in the future improvement of society. He believed in natural law—that if America was a well-educated democratic society, then slavery would end as a result.

“Jefferson’s great tragedy is that he had it backwards,” explains Konig. “He didn’t realize that slavery had to be ended to bring about the society he wanted, not the other way around.”


“He believed that the law should be a learned profession, not just a job,” Konig says. “When he created the University of Virginia School of Law, he built not just a lawyer school, but a law school.”

Konig strives to maintain a similar distinction in his dual role as historian and legal scholar. Fortunately, he has found a rich environment for both at Washington University Law.

“The school is increasingly moving into interdisciplinary areas, and it is very supportive of the notion of history,” he says.

“After all, law is based on history—on precedent,” he says.

“The study of history shows how people have accommodated dilemmas. It serves as a guide, a way to put into perspective the struggles of today.”

By Timothy J. Fox
TWO NEW, INNOVATIVE TEXTBOOKS by law faculty look at changes in society and their impact on the law.

One, co-authored by Susan Freligh Appleton, the John S. Lehmann Research Professor for 2009–10 and the Lemma Barkeloo & Phoebe Couzins Professor of Law, juxtaposes the institution of adoption with the burgeoning practice of assisted reproduction. The other, authored by Kathleen F. Brickey, the James Carr Professor of Criminal Jurisprudence, is the first law school text devoted exclusively to the study of environmental crime.

In her book, Appleton examines a host of different family arrangements and legal responses—in turn, reflecting a society very much in flux. In her new book, Brickey bridges the historical divide between two discrete, specialized fields of law. Both books contribute to the expansion of the law school curriculum and offer students the opportunity to work with timely and unsettled issues.

APPLETON’S BOOK, Adoption and Assisted Reproduction: Families under Construction (Aspen), begins by exploring the law of parentage and its evolution. In her introduction, Appleton and her co-author, Professor D. Kelly Weisberg of the University of California Hastings College of Law, state: “Once parentage rules relied on biology, marriage to the child’s mother, and adoption. Now such familiar connections merely provide a starting point for more expansive and often more contested approaches that look at behaviors, functions, and intentions.”

The book has three primary points of departure: Whom does the law originally assign as the parent of a child? How does adoption change that original assignment? And how has the law addressed the challenges to traditional approaches posed by advances in reproductive technology? She says that the content of her text is meant to challenge common assumptions and provoke lively class discussions.

“I’ve been interested for many years in the way that family law constructs our understanding of parentage,” she says. “Many outside observers might think that the parent–child relationship is created by nature, with adoption as an exceptional case. But the law shapes our understanding of what constitutes a parent–child relationship well beyond the adoption context.”

Appleton says some scholars trace the origins of adoption to the early Romans, but modern adoption—as a practice to promote child welfare—officially began in 19th-century Massachusetts with the enactment of the first American adoption statute.

Common law principles often fill gaps in statutory laws. Appleton supplies the example of a woman who conceives a pregnancy so that she and her same-sex partner can rear the child. They function as a family for a time, but the family eventually dissolves and issues of custody, visitation, and child support arise. The partner with the biological link to the child might seem to have the inner track, but not always. The other partner would get equal rights and responsibilities in some jurisdictions, not quite equal in others, and no legal recognition at all in still others.

Even in families that appear to conform to more traditional norms, one finds significant variations in how the law responds to assisted reproduction—if the law addresses the subject at all. Genetic parents, for instance, might need a so-called “surrogate”...
to carry a pregnancy. When donor sperm, egg, or embryo is used, the intent underlying the arrangement is not for the child to be reared by the genetic parents, but rather by the woman who carries the pregnancy and her spouse or partner, if she has one.

“Different jurisdictions have followed different approaches to the question whether genetics, gestation, or intent determines the legal consequences of the particular arrangement, and people often travel to a place that has laws consistent with their objectives—a phenomenon known as ‘reproductive tourism,’” Appleton says. “In many places, a free market flourishes and the absence of regulation proves attractive,” she adds.

The Internet also has contributed to change. For example, Web sites allow many offspring to discover the identity of the sperm donor who helped conceive them and any genetic half-siblings. Appleton says the law often takes a back seat to both market forces and informal arrangements made by interested parties.

Appleton incorporates works of literature, nonlegal scholarship, and popular culture to help bring to life the emotion-charged issues raised by the legal topics, including issues of identity, ancestral roots, and family secrets. For example, she uses two contemporary films, Juno, about a teen relinquishing her baby for adoption, and Casa de los Babys, about a group of affluent American women visiting an unnamed Latin American country to adopt, as talking points for discussions about race, class, gender, culture, privilege, and sexuality.

Appleton and co-author Weisberg recently completed work on the fourth edition of their casebook Modern Family Law: Cases and Materials. Appleton says that producing a casebook challenges a scholar to conceptualize a field, to explore ways to immerse students in the field, and to introduce them to critiques of the field. Nonetheless, Appleton concedes that she often finds even more rewarding the freedom to venture beyond such basics and to undertake the more creative work that law review articles permit. Over the years, her scholarly agenda has included both types of publications.

BRICKEY’S BOOK. Environmental Crime: Law, Policy, Prosecution (Aspen), is designed for use in a variety of contexts, including law school courses and seminars and more broadly, in graduate and undergraduate environmental studies programs.

Although the historical origins of environmental regulation were found in the law of public nuisance, the advent of major environmental legislation in the 1970s and 1980s heralded an era of increased public and Congressional support for sending polluters to jail, Brickey notes. The new laws included the Clean Water Act; Clean Air Act; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the Resource Conservation and Recovery Act (RCRA). Other measures led to the creation of the U.S. Environmental Protection Agency (EPA), the development of a formal environmental crime enforcement program in the Department of Justice, and for the first time the imposition of felony penalties for serious breaches of environmental standards.

Brickey, who specializes in white collar crime, provides a unique criminal enforcement perspective on environmental prosecutions and employs a variety of pedagogical approaches to make the book accessible to students with little or no technical or legal background.

The book explores a range of possible legal responses to environmental violations. These often include simultaneous prosecution under both environmental laws and conventional criminal statutes for offenses such as conspiracy, fraud, and cover-up crimes. “I don’t think anyone has tried to address environmental crime from this perspective,” she says.

Although most of the cases included in her book are reported judicial decisions, she also uses contemporary high-profile prosecutions as case studies. One example involves asbestos contamination in Libby, Montana. In that case, the W.R. Grace company had taken over the operation of a mine that produced vermiculite containing an extremely toxic form of asbestos. Disregarding the safety of the miners and the Libby community itself, W.R. Grace failed to provide the miners with appropriate protective gear, concealed what it knew about serious public health dangers the mining operation posed, and literally blanketed the town with asbestos-laden dust. Many workers and residents developed life-threatening illnesses ranging from asbestosis to lung cancer, and at least 200 of them died from asbestos-related diseases.

Although W.R. Grace and several of its executives were ultimately indicted, it took years for the case to go to trial because
of the number and complexity of legal and factual issues that had to be resolved. When all was said and done, the defendants were acquitted, and the citizens of Libby were left angered that justice had not been served.

“I use case studies like this and the Consolidated Edison steam pipe explosions in New York to illustrate the enforcement challenges that environmental regulators and prosecutors face,” Brickey observes. “The book also demonstrates how environmental laws interface with both conventional criminal statutes and worker protection laws like OSHA and the Mine Safety Act, and explores the social consequences of serious environmental violations.”

Writing the environmental crime book was “a liberating experience,” Brickey notes. “While it built on a number of things I’ve done in my white collar crime casebook, it also offered a wonderful opportunity to experiment with innovative approaches to the material. The end result is that the book contains a lot of elements that historically haven’t been put together as a cohesive whole.”

Her next project, also for Aspen, will be a book on corporate fraud. “Bernie Madoff finally took my mind off things I’ve done in my white collar crime casebook, it also offered a wonderful opportunity to experiment with innovative approaches to the material. The end result is that the book contains a lot of elements that historically haven’t been put together as a cohesive whole.”

By Tony Fitzpatrick