Indiana Law Review



Volume 29 No. 3 1996

ARTICLES

Reform of Defense Representation in Capital Cases:
The Indiana Experience and Its Implications
for the Nation
Norman Lefstein

A Law Clerk and His Justice: What William Rehnquist
Did Not Learn from Robert Jackson

Laura K. Ray

Sex, Sectarians and Secularists: Condoms and the Interests of Children Yvonne A. Tamayo

NOTES

The Fair Pay Act of 1994 Thomas N. Hutchinson

A State Statutory Privilege for Environmental Audits:
Is It a Suit of Armor or Just the Emperor's
New Clothes?
Michael T. Scanlon

The Supreme Court Assaults State Drug Taxes with a Double Jeopardy Dagger: Death Blow, Serious Injury, or Flesh Wound?

Charles K. Todd, Jr.

When the Walls Come A 'Tumblin' Down: A Look at What Happens When Lawyers Sign Non-Competition Agreements and Break Them

Daylon L. Welliver

Career Move.

No doubt you plan to start a successful legal career soon, so here's a tip:

Start reading *Law Week* now. While you're still in law school.

Why? Because top attorneys nationwide read *Law Week* every week, and as you know, it's never a bad idea to follow in the footsteps of the best. But more importantly—

Law Week gives you complete coverage of today's most important cases, with immediate notification of precedent-setting court decisions in every legal field, plus unparalleled Supreme Court reporting.

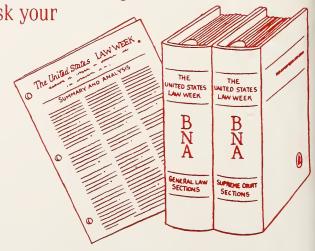
Indeed, *Law Week* puts *you* on the cutting edge of American law.

What better way to start a successful legal career.

Make your move now. Ask your professor for details on Law Week's low student rates today.



The Bureau of National Affairs, Inc. 1231 25th Street, N.W. Washington, D.C. 20037 202/452-4200



The United States

LawWeek

Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University School of Law—Indianapolis since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in international and comparative law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers from around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law, and in 1996 the *Review* will publish an issue addressing aspects of Chinese law.

Enrich your knowledge of the world around you, and help support the study of international law at Indiana University, with a subscription to the *Indiana International & Comparative Law Review*. Subscriptions are \$18.00 per year within the U.S./\$21.00 per year outside the U.S. (please make your check payable to *Indiana International & Comparative Law Review*).

Address inquiries to:

Indiana International & Comparative Law Review

735 West New York Street Indianapolis, Indiana 46202

(317) 274-1050

e-mail: iiclr@indyunix.iupui.edu

Digitized by the Internet Archive in 2011 with funding from LYRASIS Members and Sloan Foundation



Please enter my subscription to the INDIANA LAW REVIEW

NAME		
ADDRESS		
	Enclosed is \$ for subscriptions.	

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW-INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, \$25; Foreign, \$28 Student, \$17 (4 issues) Single Issue, \$8; Survey Issue, \$17; Centennial Issue, \$12

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
735 W. New York Street
Indianapolis, IN 46202
(317) 274-4440

Subscriptions. The current subscription rates are \$25.00 per four-issue (domestic mailing) and \$28.00 (foreign mailing). Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.

Single and Back Issues. Current single regular issues may be obtained from the *Law Review* Business Office for \$8.00. Current Survey issues may be purchased for \$17.00. The Centennial Issue may be purchased for \$12.00. Please enclose payment with order. Complete sets and single issues of prior volumes are also available from the *Law Review* Business Office. Unless a claim is made for nonreceipt of issues within one year of the mailing date, we cannot guarantee supplying the issues without charge.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *A Uniform System of Citation* (15th ed. 1991). Manuscripts should be submitted in duplicate and double-spaced with wide margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

Copyright: Copyright 1996. The Trustees of Indiana University. Except as may be expressly provided elsewhere in this publication, permission is hereby granted to produce and distribute copies of individual works from this publication for nonprofit education purposes, provided that copies are distributed at or below cost, and that the author, source, and copyright notice are included on each copy. This permission is in addition to rights of reproduction granted under Sections 107, 108, and other provisions of the U.S. Copyright Act.

Indiana University School of Law-Indianapolis

1994-95 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

- MYLES BRAND, President of the University. Ph.D. in Philosophy, University of Rochester (New York).
- GERALD L. BEPKO, Vice-President for Long-Range Planning, Indiana University; Chancellor, Indiana University-Purdue University at Indianapolis and Professor of Law. J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.
- NORMAN LEFSTEIN, Dean and Professor of Law. LL.B., University of Illinois; LL.M., Georgetown University.
- THOMAS B. ALLINGTON, Associate Dean for Academic Affairs and Professor of Law. B.S., J.D., University of Nebraska; LL.M., New York University.
- JONNA M. KANE, Assistant Dean for External Affairs. J.D., Indiana University-Indianapolis.
- RACHEL B. KEARNEY, Assistant Dean for Student Affairs. J.D., New York University School of Law.
- JONI D. THOMPSON, Assistant Dean for Development. M.A., Ball State University.
- ANGELA M. ESPADA, Assistant Dean for Admissions. J.D., Indiana University—Bloomington.
- KAREN MARKS, Director of Career Services. B.S., St. Joseph's College; M.S., Illinois State University.

Faculty

- THOMAS B. ALLINGTON, Associate Dean and Professor of Law. B.S., J.D., University of Nebraska; LL.M., New York University.
- EDWARD P. ARCHER, *Professor of Law*. B.M.E., Rensselaer Polytechnic Institute; J.D., LL.M., Georgetown University.
- JAMES F. BAILEY, III, Professor of Law and Director of Law Library. A.B., J.D., M.A.L.S., University of Michigan.
- GERALD L. BEPKO, Vice President for Long-Range Planning, Chancellor, and Professor of Law. B.S., Northern Illinois University; J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.
- ROBERT BROOKINS, Associate Professor of Law. B.S., University of South Florida; J.D., Ph.D., Cornell University.
- DANIEL H. COLE, Associate Professor of Law. A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark College; J.S.M., Stanford Law School.
- PAUL N. Cox, *Professor of Law*. B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.
- KENNETH D. CREWS, Associate Professor of Law and Library and Information Science. B.A., Northwestern University; J.D., Washington University; M.L.S., University of California, Los Angeles; Ph.D., University of California, Los Angeles.
- CLYDE HARRISON CROCKETT, Professor of Law. A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).
- Debra A. Falender, *Professor of Law*. A.B., Mount Holyoke College; J.D., Indiana University—Indianapolis.
- DAVID A. FUNK, *Professor of Law*. A.B., College of Wooster; J.D., Case Western Reserve University; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia University.
- PAUL J. GALANTI, *Professor of Law*. A.B., Bowdoin College; J.D., University of Chicago. HAROLD GREENBERG, *Professor of Law*. A.B., Temple University; J.D., University of Pennsylvania.
- JEFFREY W. GROVE, *Professor of Law*. A.B., Juniata College; J.D., George Washington University.
- FRANCES WATSON HARDY, Clinical Instructor. B.S., Ball State University; J.D., Indiana University—Indianapolis.

- WILLIAM F. HARVEY, Carl M. Gray Professor of Law & Advocacy. A.B., University of Missouri; J.D., LL.M., Georgetown University.
- MICHAEL R. HEISE, Assistant Professor of Law and Director, Program in Law and Education.

 A.B., Stanford University; J.D., University of Chicago; Ph.D., Northwestern University.
- W. WILLIAM HODES, Professor of Law. A.B., Harvard College; J.D., Rutgers, Newark.
- LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy*. A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University.
- HENRY C. KARLSON, Professor of Law. A.B., J.D., LL.M., University of Illinois.
- WILLIAM ANDREW KERR, *Professor of Law*. A.B., West Virginia University; J.D., LL.M., Harvard University; B.D., Duke University.
- ELEANOR D. KINNEY, Professor of Law and Director of the Center for Law and Health. B.A., Duke University; M.A., University of Chicago; J.D., Duke University; M.P.H., University of North Carolina.
- Walter W. Krieger, Associate Professor of Law. A.B., Bellarmine College; J.D., University of Louisville; LL.M., George Washington University.
- RONALD J. KROTOSZYNSKI, JR., Assistant Professor of Law. B.A., M.A., Emory University; J.D., LL.M., Duke University.
- NORMAN LEFSTEIN, Dean and Professor of Law. LL.B., University of Illinois; LL.M., Georgetown University.
- LYNN A. McDowell, Clinical Instructor. B.S. Indiana University; J.D., Indiana University—Indianapolis.
- DEBORAH McGregor, Lecturer in Law. B.A., University of Evansville; J.D., Georgetown University.
- Susanah M. Mead, *Professor of Law*. B.A., Smith College; J.D., Indiana University—Indianapolis.
- MARY H. MITCHELL, Professor of Law. A.B., Butler University; J.D., Cornell Law School.
- JAMES P. NEHF, Professor of Law. B.A., Knox College; J.D., University of North Carolina.
- THOMAS R. NEWBY, Lecturer in Law. A.B., J.D., Indiana University-Bloomington.
- LESLYE A. OBIORA, Assistant Professor of Law. LL.B., University of Nigeria; LL.M., Yale Law School; J.S.D. Candidate, Stanford Law School.
- DAVID ORENTLICHER, Associate Professor of Law. A.B., Brandeis University, J.D., M.D., Harvard College.
- DAVID R. PAPKE, *Professor of Law and American Studies*. A.B., Harvard College; J.D., Yale University; M.A. in American Studies, Yale University; Ph.D. in American Studies, The University of Michigan.
- H. KATHLEEN PATCHEL. Associate Professor of Law. A.B., Huntington College; J.D., University of North Carolina; LL.M., Yale University.
- Fran Quigley, Visiting Assistant Professor of Law. B.A., Hanover College; M.A., Indiana University—Bloomington; J.D., Indiana University—Indianapolis.
- JOAN M. RUHTENBERG, Director of Legal Writing. B.A., Mississippi University for Women; J.D., Indiana University—Indianapolis.
- ANDREW T. SOLOMON, Lecturer in Law. A.B., University of Michigan; J.D., Boston University.
- JUNE O. STARR, Associate Professor of Law. B.A., Smith College; M.A., Columbia University; Ph.D., University of California, Berkeley; M.S.L., Yale University; J.D., Stanford Law School.
- KENNETH M. STROUD, Professor of Law. A.B., J.D., Indiana University-Bloomington.
- JAMES W. TORKE, Professor of Law. B.S., J.D., University of Wisconsin.
- JOANNE ORR VAN PELT, Clinical Instructor. J.D., California Western.
- James Patrick White, Professor of Law and Consultant on Legal Education to the American Bar Association. A.B., University of Iowa; J.D., LL.M., George Washington University.
- LAWRENCE P. WILKINS, *Professor of Law*. B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas.
- MARY T. Wolf, Director of Clinical Programs. B.A., Saint Xavier College; J.D., University of Iowa.

Emeriti

- AGNES P. BARRETT, Associate Professor Emerita. B.S., J.D., Indiana University.
- CLEON H. FOUST, Professor Emeritus. A.B., Wabash College; J.D., University of Arizona.
- HELEN P. GARFIELD. *Professor Emerita*. B.S.J., Northwestern University; J.D., University of Colorado.
- MELVIN C. POLAND, Cleon H. Foust Professor of Law Emeritus. B.S., Kansas State University; LL.B., Washburn University; LL.M., University of Michigan.
- RONALD W. POLSTON, *Professor Emeritus*. B.S., Eastern Illinois University; LL.B., University of Illinois.

Law Library Faculty

- James F. Balley, III, *Professor and Director of Law Library*. A.B., J.D., M.A.L.S., University of Michigan.
- MINDE C. BROWNING, Assistant Director for Readers' Services. B.A., Western Michigan University; M.L.S., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- RICHARD HUMPHREY, *Reference Librarian*; A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M..L.S., University of Kentucky.
- WENDELL E. JOHNTING, Catalog Librarian. A.B., Taylor University; M.L.S., Indiana University.
- BRUCE KLEINSCHMIDT, *Reference Librarian*; B.A., Furman University; J.D., University of Louisville; M.L.S., University of North Texas.
- Chris E. Long, *Visiting Catalog Librarian*. B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.
- MAHNAZ K. Moshfegh, Acquisition/Serials Librarian. B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.
- Kiyoshi Otsu, Computer System Specialist and Catalog Librarian. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.



Editor-in-Chief
Jeff Toole

Executive Managing Editor
Mark Lindsey

Executive Articles Editor
Beth Elaine Johnson

Executive Notes and Topics Editor
Patricia Ogden

Symposium Editor
Carla Hounshel Stagnolia

Articles Editors
Christopher A. Brown
Thomas Engle
Thomas A. Hardin
Diane Rae Hurtt
Thomas N. Hutchinson
Kristen Stenzel

Note Development Editors
Stacy Dimitri
David L. Hatchett
Timothy A. Ogden
J. Chris Reininga
Patricia Skelton
Marilee Springer

Associate Editors

Garlan Adams
Stacy Boger
Christine Cantrell
H. Joseph Cohen
Karla Cooper-Boggs
Russell Fowler
Jake Frost
Douglas Hasler
Veronica Jarnagin

Jamie Black McDaniel
Randall Mishler
Michael Scanlon
Jennifer Shoup
Jeffrey J. Skelton
Nicole L. Smith
Charles Todd, Jr.
Kenneth Waite
Daylon Welliver

Editorial Assistant
Chris Paynter

Faculty Advisor
Paul J. Galanti

Volume 29 Number 3

Copyright © 1996 by the Trustees of Indiana University

TABLE OF CONTENTS

ARTICLES

Reform of Defense Representation in Capital Cases:	
The Indiana Experience and Its Implications for the Nation	495
A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson Laura K. Ray	535
Sex, Sectarians and Secularists: Condoms and the Interests of Children	593
NOTES	
The Fair Pay Act of 1994 Thomas N. Hutchinson	621
A State Statutory Privilege for Environmental Audits: Is It a Suit of Armor or Just the Emperor's New Clothes?	647
The Supreme Court Assaults State Drug Taxes with a Double Jeopardy Dagger: Death Blow, Serious Injury, or Flesh Wound? Charles K. Todd, Jr.	695
When the Walls Come A 'Tumblin' Down: A Look at What	093
Happens When Lawyers Sign Non-Competition Agreements and Break Them Daylon L. Welliver	729
Volume 29 Num	nber 3

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law-Indianapolis, which assumes complete editorial responsibility thereof. Subscription rates: one year \$25; foreign \$28. Please notify us one month in advance of any change in address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law-Indianapolis, 735 W. New York Street, Indianapolis, Indiana 46202. Publication office: 735 W. New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 W. New York Street, Indianapolis, Indiana 46202.



