Indiana Law riodical Review

Volume 40 No. 2

ARTICLES

Blaming the Mirror: The Restatements and the Common Law Kristen David Adams

Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony

Noah Clements

Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?

Bradford C. Mank

Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm

Joseph Scott Miller

NOTES

The Learned Intermediary Doctrine: An Efficient Protection for Patients,
Past and Present

Jennifer Girod

University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship

Heather E. Moore

You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff

Eric Thieme



INDIANA UNITARASITY

SCHOOL OF LAW

Indianapolis IUPUI JUL - 2 2007

SCHOOL OF LAW-INDPLS.



BNA's Law School Program

Multiple platforms, more choices
—for staff and students.

Delivery of timely information is one of the cornerstones of BNA's success. Now, BNA delivers services electronically, through IP authentication, to all law school faculty staff and their students.

By subscribing to any of four law school-wide electronic packages or building your own custom package, you can give your students access to the same valuable information as practicing attorneys. They'll conduct research and follow changes in the law in the same way senior partners do. Your students will not only be prepared for internships and clerkships, they'll be better equipped for any job.

To learn more about BNA's law school program, call BNA Customer Service at **800-572-3374** or visit us at **www.bna.com/lawschool.**



Indiana Law Review

Volume 40 2006-2007

Editor-in-Chief Heather Moore

Executive Managing Editor

Michelle R. Maslowski

Senior Executive Editor
Craig A. Defoe

Symposium Editor
Krysten Lester

Articles Editors

Kimberly Whyte Chowning Cathy A. Hewitt

Jason Howard

H. Max Kelln

Bri Kovac Stephanie Thielen Eckerle

Eric T. Thieme

Eva F. Wailes

Executive Notes Editor

Teresa Griffin

Executive Articles Editors

Jennifer Girod Sean Obermeyer

Note Development Editors

Tonya Combs

Taylor Hall

Suzanna Hartzell-Baird

Douglas R. Healey

Karl Horlander

Andrew Kossack

Lisa Lafferty

Emily L. Yates

Associate Editors

Russell Brown Amy Gilliatt Bill Hogg Anthony Hornbach

Members

Rasha Alzahabi
Amanda Asbury
Keith Berlin
Erin Casper Borissov
Fred Cline
Meredith Devlin
Christopher Eckhart
Elizabeth Ellis
Audra Ferguson-Allen

Art Fisher
Tony Gibbens
Scott W. Gotshall
Holly Handlin
Jacqueline B. Haydock
Christopher Koschnitzky
Kristin Lamb
Nathan Lundquist
Holly Moore

Melissa Neely
David Pryzbylski
Christopher Purnell
Daniel Robertson
Marcus Selig
Oni Sharp
Kate Shelby
Valery Slosman
Michael Sowers

Editorial Specialist
Chris Paynter

Faculty Advisor
R. George Wright

INDIANA LAW REVIEW

(ISSN 0090-4198)

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

Indiana Law Review Lawrence W. Inlow Hall 530 W. New York Street Indianapolis, IN 46202-3225 (317) 274-4440

Subscriptions. Current subscription rates for an academic year are \$30.00 (domestic mailing) and \$35.00 (foreign mailing) for four issues. 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 Indiana Law Review Business Office for \$10.00. Current Survey issues may be purchased for \$20.00. The Symposium Issue may be purchased for \$15.00. Please enclose payment with order. Claims for nonreceipt of current year's issues must be made within six months of the mailing date. Back issues may be ordered from: William S. Hein & Co., Inc., 1285 Main St., Buffalo, NY 14209-1987, (800) 828-7571, (716) 883-8100 fax, mail@wshein.com (e-mail for orders). Back issues are also available in an image-based format through HeinOnline, www.heinonline.org.

Manuscripts. The Indiana Law Review invites submission of unsolicited manuscripts. All citations should conform to The Bluebook A Uniform System of Citation (18th ed. 2005). Manuscripts should be double-spaced with standard one-inch 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.

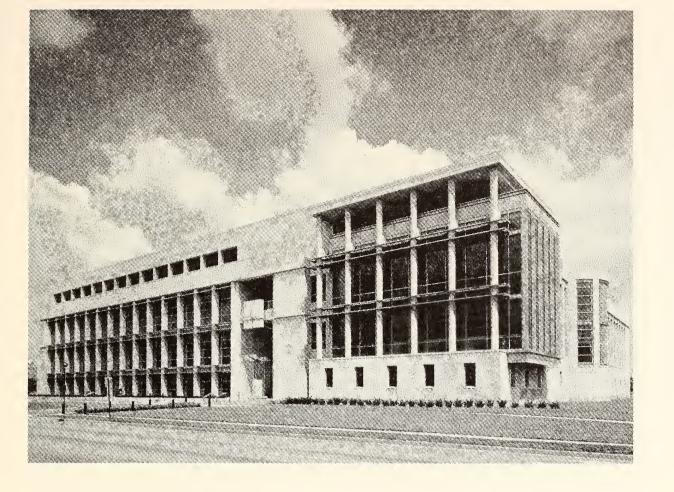
Copyright: Copyright 2007. The Trustees of Indiana University. Except as may be expressly provided elsewhere in this publication, permission is hereby granted to produce and distribute copies of individual works from this publication for nonprofit education purposes, provided that copies are distributed 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.

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. Current subscription rates for an academic year are: one year domestic \$30.00; foreign \$35.00. Send all correspondence to Editorial Specialist, *Indiana Law* Review, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



The entire text of this Law Review is printed on recycled paper.



Please enter my subscription to the INDIANA LAW REVIEW

Vame				
Address				
	Enclosed is \$	for	subscription(s)	

Mail to: ATTN: Editorial Specialist

at

INDIANA LAW REVIEW INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS

Lawrence W. Inlow Hall 530 West New York Street Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is: Domestic, \$30; Foreign, \$35; Student, \$20

Single Issue, \$10; Survey Issue \$20 Symposium Issue, \$15



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 public and private international 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. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

Name
School/Firm/Business
Address
City, State, Zip Code
Subscriptions within the U.S. are \$18.00 per year and outside the U.S. are
\$21.00 per year. I enclose \$ for subscription(s) to the <i>Indiana</i>
International & Comparative Law Review. Please make your check payable to Indiana
International & Comparative Law Review.

Mail to:

Executive Production Editor

Indiana International & Comparative Law Review

Lawrence W. Inlow Hall 530 West New York Street Indianapolis, Indiana 46202



In 2003, Indiana University School of Law - Indianapolis established a specialty law review focused specifically on health care law and policy:

INDIANAH EALTH LAWREVIEW

The scope of the INDIANA HEALTH LAW REVIEW includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, food and drug, and other current health-related topics.

Detach and mail this subscription form today to receive future issues

Subscription Price: \$20.00

- Two (2) Issues
- Automatic Renewal
- Foreign Mailing Is Extra

Mail form to:

Indiana Health Law Review
Indiana University School of Law – Indianapolis
Attn: Executive Business Editor
Lawrence W. Inlow Hall, Room 136C
530 W. New York Street
Indianapolis, IN 46202-3225

Questions?

Email: ihlr@iupui.edu Phone: (317) 278-9519 www.indylaw.indiana.edu/~ihlr

Name/ Compa	g Address: Title any/School	
City	State ZIP	
Email _		
Payme	ent Method: Enclosed (Make Check Payable to INDIANA HEALTH LAW REVIEW)	
	☐ Bill Me Later	

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

Indiana University School of Law—Indianapolis

2006-2007 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

- ADAM W. HERBERT, *President of the University*. B.A., M.A., University of Southern California; Ph.D., University of Pittsburgh.
- CHARLES R. BANTZ, Chancellor, Indiana University-Purdue University—Indianapolis. B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.
- SUSANAH M. MEAD, Interim Dean and Professor of Law. B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.
- THOMAS B. ALLINGTON, Associate Dean for Technology and Professor of Law. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.
- ANGELA M. ESPADA, Associate Dean for Student Services. J.D., Indiana University School of Law—Bloomington.
- JEFFREY W. GROVE, Associate Dean for Graduate Studies and Professor of Law. A.B., Juniata College; J.D., George Washington University Law School.
- ANDREW R. KLEIN, Associate Dean for Academic Affairs and Paul E. Beam Professor of Law. B.A., University of Wisconsin; J.D., Emory University School of Law.
- JONNA KANE MACDOUGALL, Assistant Dean for Institutional Advancement. J.D., Indiana University School of Law—Indianapolis.
- TERESA (TERRI) J. CUELLAR, Director of Technology Services. B.S., St. Bonaventure University, New York.
- VIRGINIA MARSCHAND, *Director of Administration and Finance*. B.A., Indiana University—Kokomo; M.P.A., Indiana University-Purdue University—Indianapolis; J.D., Indiana University School of Law—Indianapolis.
- CLAIRE GROVE, Director of the LL.M. Program. B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- PATRICIA KIMBERLY KINNEY, *Director of Admissions*. B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.
- AMANDA KAMMAN, Acting Director of Development. B.A., Indiana University.
- HEATHER MCCABE, Director, Public Health Law Program, William S. and Christine S. Hall Center for Law and Health and Grant Specialist. B.A., 1993, Indiana University—Bloomington; M.S.W., 1996, Indiana University School of Social Work—Indianapolis; J.D., 2003, Indiana University School of Law—Indianapolis.
- CHASTITY THOMPSON ADEWOPO, Director of Professional Development. B.S., Indiana University.

Faculty

- CYNTHIA M. ADAMS, *Clinical Associate Professor of Law.* B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.
- THOMAS B. ALLINGTON, Associate Dean for Technology and Professor of Law. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.
- JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
- CYNTHIA BAKER, Associate Clinical Professor of Law and Director, Program on Law and State Government. B.A., J.D., Valparaiso University.
- GERALD L. BEPKO, Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law. B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.
- KAREN E. BRAVO, Assistant Professor Law. B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.
- ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.
- KENNETH D. CHESTEK, Clinical Associate Professor of Law. B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.
- DANIEL H. COLE, R. Bruce Townsend Professor of Law. A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark Law School; J.S.M., J.S.D., Stanford Law School.
- JEFFREY O. COOPER, Associate Professor of Law. A.B., Harvard University; J.D., University of Pennsylvania Law School.

- PAUL N. COX, Centennial Professor of Law. B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.
- KENNETH D. CREWS, Associate Dean of the Faculties for Copyright Management; Samuel R. Rosen Professor of Law and Professor of Library and Information Science. B.A., Northwestern University; J.D., Washington University School of Law; M.L.S., University of California, Los Angeles; Ph.D., University of California, Los Angeles.
- JAMES D. DIMITRI, Clinical Associate Professor of Law. B.S., Indiana University; J.D., Valparaiso University School of Law.
- JENNIFER ANN DROBAC, Associate Professor of Law. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.
- GEORGE E. EDWARDS, Professor of Law and Director, Program in International Human Rights Law. B.A., North Carolina State University; J.D., Harvard Law School.
- FRANK EMMERT, John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law. Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.
- NICHOLAS GEORGAKOPOULOS, *Professor of Law*. Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.
- JEFFREY W. GROVE, Associate Dean and Professor of Law. A.B., Juniata College; J.D., George Washington University Law School.
- FRANCES WATSON HARDY, Clinical Associate Professor of Law. B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.
- LINDA KELLY HILL, Professor of Law. B.A., J.D., University of Virginia.
- JOHN LAWRENCE HILL, *Professor of Law.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.
- 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 School of Law.
- HENRY C. KARLSON, *Professor of Law.* A.B., J.D., LL.M., University of Illinois College of Law.
- ROBERT A. KATZ, Associate Professor of Law. A.B., Harvard College; J.D., University of Chicago Law School.
- ELEANOR D. KINNEY, Hall Render Professor of Law; Co-Director of the Center for Law and Health and Executive Director, Latin American Law Program. B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.
- ANDREW R. KLEIN, Associate Dean and Paul E. Beam Professor of Law. B.A., University of Wisconsin; J.D., Emory University School of Law.
- ROBERT E. LANCASTER, Clinical Associate Professor of Law. B.A., Millsaps College; J.D., Tulane Law School.
- NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus*. LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.
- MARÍA PABÓN LÓPEZ, Assistant Professor of Law and Co-Director, Latin American Law Program. B.A., Princeton University; J.D., University of Pennsylvania Law School.
- GERARD N. MAGLIOCCA, Associate Professor of Law. B.A., Stanford University; J.D., Yale Law School.
- ALLISON MARTIN, Clinical Associate Professor Law. B.S., J.D., University of Illinois.
- DEBORAH McGregor, Clinical Associate Professor of Law and Assistant Director of Legal Analysis, Research and Communication. B.A., University of Evansville; J.D., Georgetown University Law School.
- MARY H. MITCHELL, Alan H. Cohen Professor of Law. A.B., Butler University; J.D., Cornell Law School.
- NOVELLA NEDEFF, Clinical Associate Professor of Law. B.A., J.D., Indiana University.
- JAMES P. NEHF, Cleon H. Foust Fellow and Professor of Law and Director, European Law Program. B.A., Knox College; J.D., University of North Carolina Law School.
- DAVID ORENTLICHER, Samuel R. Rosen Professor of Law and Co-Director of the Center for Law and Health. A.B., Brandeis University; J.D., M.D., Harvard College.
- JOANNE ORR, Clinical Associate Professor of Law. B.S., Indiana State University; J.D., California Western School of Law.
- ANTONY PAGE, Assistant Professor of Law. B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

- MICHAEL J. PITTS, Associate Professor of Law. B.S.J., Northwestern University; J.D., Georgetown University Law Center.
- H. KATHLEEN PATCHEL, Associate Professor of Law. A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.
- FLORENCE WAGMAN ROISMAN, William F. Harvey Professor of Law. B.A., University of Connecticut; LL.B., Harvard Law School.
- JOAN M. RUHTENBERG, Clinical Professor of Law and Director of Legal Analysis, Research and Communication. B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.
- JOELM. SCHUMM, Clinical Associate Professor of Law. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.
- LAWRENCE P. WILKINS, William R. Neale Professor of Law. B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas School of Law.
- LLOYD T. WILSON, JR., Associate Professor of Law and Director, Central and Eastern European Law Program. B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.
- MARY T. WOLF, Clinical Professor of Law and Director of Clinical Programs. B.A., Saint Xavier College; J.D., University of Iowa College of Law.
- R. GEORGE WRIGHT, Lawrence A. Jegen III Professor of Law. A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

Emeriti Faculty

- EDWARD P. ARCHER, *Professor of Law Emeritus*. B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.
- JAMES F. BAILEY, III, *Professor of Law Emeritus*. A.B., J.D., M.A.L.S., The University of Michigan.
- AGNES P. BARRETT, Associate Professor of Law Emerita. B.S., J.D., Indiana University.
- CLYDE HARRISON CROCKETT, *Professor of Law Emeritus*. 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 Emerita*. A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.
- DAVID A. FUNK, *Professor of Law Emeritus*. A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.
- PAUL J. GALANTI, *Professor of Law Emeritus*. A.B., Bowdoin College; J.D., University of Chicago Law School.
- HELEN P. GARFIELD, *Professor of Law Emerita*. B.S.J., Northwestern University; J.D., University of Colorado School of Law.
- HAROLD GREENBERG, *Professor of Law Emeritus*. A.B., Temple University; J.D., University of Pennsylvania Law School.
- WILLIAM F. HARVEY, Carl M. Gray Professor of Law & Advocacy Emeritus. A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.
- W. WILLIAM HODES, *Professor of Law Emeritus*, A.B., Harvard College; J.D., Rutgers University School of Law—Newark.
- WILLIAM ANDREW KERR, *Professor of Law Emeritus*. A.B., West University; B.S., Duke University; J.D., LL.M., Harvard Law School.
- WILLIAM E. MARSH, Professor of Law Emeritus. B.S., J.D., University of Nebraska.
- RONALD W. POLSTON, *Professor of Law Emeritus*. B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.
- KENNETH M. STROUD, *Professor of Law Emeritus*. A.B., J.D., Indiana University—Bloomington.
- JAMES W. TORKE, Carl M. Gray Professor of Law Emeritus. B.S., J.D., University of Wisconsin.
- JAMES PATRICK WHITE, *Professor of Law Emeritus*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

Law Library Faculty

- JUDITH FORD ANSPACH, Professor of Law and Director, Ruth Lilly Law Library. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
- DRAGOMIR COSANICI, *Head of Reference*. B.A., Michigan State University; M.I.L.S., University of Michigan; J.D., University of Kansas.

- DEBRA DENSLAW, Reference Librarian. B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.
- RICHARD HUMPHREY, Reference Librarian. A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.
- WENDELL E. JOHNTING, Assistant Director for Technical Services. A.B., Taylor University; M.L.S., Indiana University.
- CHRIS E. LONG, 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.
- MIRIAM A. MURPHY, Associate Director of Law Library. B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.
- KIYOSHI OTSU, Computer System Specialist. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.

Indiana Law Review

Volume 40 2007 Number 2

Copyright © 2007 by the Trustees of Indiana University

TABLE OF CONTENTS

ARTICLES

Blaming the Mirror: The Restatements and the Common Law Kristen David Adams	205
Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony Noah Clements	271
Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers? Bradford C. Mank	291
Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm Joseph Scott Miller	351
NOTES	
The Learned Intermediary Doctrine: An Efficient Protection for Patients, Past and Present Jennifer Girod	397
University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship Heather E. Moore	423
You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff Eric Thieme	

Volume 40 Number 2

