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Foreword

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FOREWORD

"IF WE CANNOT END OUR DIFFERENCES AT LEAST WE CAN MAKE THE WORLD SAFE FOR DIVERSITY."

- President John F. Kennedy

In this post-Modern society, we have come to better appreciate the significance of diversity within our nation and the world. By recognizing the separate and unique voices of different groups, whether defined by religion, race, gender, ethnicity, sexuality, etc., we have become a stronger and more integrated world. However, this process of recognition, acceptance, and integration, is slow and difficult. As we have seen in recent years, unresolved conflicts and tensions are rampant around the globe, and for many countries, rooted in a long and unsettled history. Like the rest of the world, we, as Americans, are also familiar with conflict, from the international "War Against Terror" to domestic political, economic, and social divides. While it often seems that the notion of diversity is inextricably linked with conflict, war, and violence, it is important for all of us to seek out solutions to the conflicts our world faces and grapple with the underlying issues.

Ultimately, our integration process seeks an end to conflict and a peaceful world where different groups live together equally, while maintaining their own unique identities. To many people, such ideas like integration and "world peace" are cliché lines used by naïve idealists or beauty pageant queens. However, the reality is that whether or not a utopian world is ever achieved, each one of us is responsible as Americans and world citizens, and especially as members of the legal profession, to educate ourselves about conflict at home and abroad as part of this ongoing process.

The Buffalo Public Interest Law Journal provides a forum for discussion and debate about various conflicts and their potential resolutions. The 2005 issue adheres to our tradition of presenting diverse perspectives working to discuss, debate and deliberate public interest issues.

In Andrew Long’s article “The New Frontier of Federal Indian Law: The United States Supreme Court’s Active Divestiture of Tribal Sovereignty,” the author looks at the legal situation between the United States and Native Americans—an often
overlooked conflict prevalent within our nation. Part I of the article explores the historical background of federal Indian law and the foundational principles underlying the policy of tribal sovereignty. While federal Indian law was greatly shaped by Justice Marshall’s opinions in the 1830’s, which promoted a relationship of trust and protection between the federal government and the tribes, these foundational cases also provided for Congress’s absolute plenary power over them. In Part II of the article, the author takes a critical look at a Supreme Court trend beginning in 1978, in which tribal sovereignty was dramatically divested in favor of American individual rights and traditional mainstream values. The last section of the article analyzes the possible reasons for such drastic change within federal Indian law and the active divestiture of tribal sovereignty. The author suggests that these later Supreme Court decisions were based on an assumption of incompatibility between the rights of Americans and Indians, although the reasoning behind the assumption is not completely clear. Whatever the reasoning is for this trend in divesting sovereignty from Native American tribes, it is clear that their independence and self-governance have been significantly affected, forcing Indians to assimilate into mainstream American culture.

In “Rational Standard Setting in Lawyer Qualification: A Critical Look at the Proposal of the New York Board of Law Examiners to Increase the Passing Score on the Bar Examination,” Frederick Link challenges the New York Board of Law Examiners proposal on several bases, specifically the methodology of study on which the proposal is based. In Part I of his article, Link suggests factors that should be considered in determining an optimal passing score on the bar examination. Link notes that the Board of Law Examiners’ proposal fails to consider the well-being of New York states’ citizens and the proposal’s effects on social welfare. Instead, Link states that the proposal focuses on the performance standard of minimum competence.

Link argues further information is needed in determining whether to raise the passing score on the bar exam. He argues that the bases for the Examiners’ standards are insufficient and overestimates the appropriate talent score by focusing only on two
talent levels—talented and less talented. Link proposes a cost benefit analysis and argues that the optimal passing score should be set at a level where the marginal benefit due to improving lawyer quality is equal to the marginal cost due to the reduction in the number of lawyers permitted to practice law. In Part II, Link discusses and evaluates the methodology on which the Board based its proposal, determining that the methods were neither conducted nor conceptualized properly. Part III focuses on proposals for improvements and suggestions to the methodology used in that study. Link argues in favor of an unbiased standard focusing on the relationship between an applicant's exam score in relation to a lawyer's ability to practice law.

In Joseph Zargari's Note, "The Forgotten Story of the Mizrahi Jews: Will the Jews of the Middle East Ever be Compensated for their Expulsion from the Arab World?" the author takes a critical look at the Arab-Israeli conflict, particularly in regard to the plight of Israeli refugees in the Middle East following World War II and the 1948 Arab-Israeli War. The article begins with a discussion of the history of Jews in Arab lands, characterized by anti-Semitism, persecution, and exile. The author analyzes the historical basis for their persecution and considers the potential for compensation to the Israelis for their property which was left behind or stolen by Arab governments. The author then evaluates the potential legal remedies that could provide compensation—an effort which has more recently experienced significant attention. Lastly, the author analyzes the likelihood that full reparations are made in the near future in the context of the long history of the Palestinian-Israeli conflict. He recognizes that a successful agreement for compensation will most likely not be met until the larger conflict between the two groups comes to an end.

Giuseppe A. Ippolito's Note, "Does Plaintiff Exclusion Have a Role to Play in 21st-Century Negligence Litigation?" examines the evolution of plaintiff exclusion motions and their role in modern negligence litigation. The article discusses the development of such motions, which focus on a plaintiffs' inability
to participate at trial due to cognitive injuries that limit their understanding or awareness of the events unfolding before them. The author examines the conflict plaintiff exclusion motions have caused, pitting a defendant’s right to a trial free of prejudice against a plaintiffs right to attend trial. Ippolito discusses the impact that a severely injured plaintiff’s presence can have on a jury, leading to confusion regarding the issue on trial. Ippolito states that the courts have eroded plaintiff exclusion decisions in recent years for reasons such as disability discrimination and Seventh Amendment violations. However, Ippolito argues that plaintiff exclusion still has a role in American jurisprudence and suggests a modern test guiding courts in making plaintiff exclusion determinations. Ippolito suggests a modern standard, Enhanced Plaintiff Exclusion Test (EPET), which would provide step by step guidance and standards for judges and attorneys. Step 1 of this proposal calls for bifurcation of liability and damages phases of personal injury trials. Step 2 allows a defendant to file a plaintiff exclusion motion after bifurcation, but before the commencement of the trial. Step 3 would require an exclusion hearing in which the court could observe the plaintiff in person, providing the court with an opportunity to determine how prejudicial a plaintiff’s presence would be at trial. Step 4 involves examining exclusion safeguards. The author states that if a defendant can overcome the first three steps, then a plaintiff should be excluded from the liability phase of trial. If plaintiff exclusion occurs, the author states that safeguards to ensure fairness to both parties should occur. For example, Ippolito states that plaintiff’s attorney, expert witnesses, or the court could have the opportunity to explain to the jury why a plaintiff is not present at trial. Further, the author suggests that the jury could meet the plaintiff early in the case. Ippolito argues that EPET is a tool that balances the conflicting rights of both plaintiffs and defendants in personal injury trials.

The articles compiled in this volume of the Buffalo Public Interest Law Journal address important public interest issues challenging our diverse society. The authors’ discussion of societal conflicts—from the Israeli-Palestinian conflict and Native American struggles to the balancing of plaintiff and defendant
rights and the examination of testing standards for students—not only focus on problems, they focus on resolutions. The authors in this issue infuse these societal conflicts with their own perspectives, suggesting solutions to such conflicts for the benefit of the public interest.

Leah Szumach & Meredith Vacca