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### Foreword

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## FOREWORD

In June of 1986, Associate Justice William J. Brennan, Jr. delivered the Commencement Address at Loyola Law School, Los Angeles, California. Justice Brennan focused his remarks on the importance of providing equality of rights and opportunity to each person in our nation. In stressing this goal, Justice Brennan observed that lawyers occupy a unique position of utility in a country governed by a myriad of complicated laws and regulations. Because of their training, lawyers are equipped to play a "creative role in American social progress." Justice Brennan rejected traditional notions that it is sufficient for attorneys to dabble in civil liberties issues during their spare time. Rather, he suggested that only by devoting themselves to representing those deprived of their human rights do lawyers fulfill their responsibility to society. As our leading feature in this issue, we are proud to reproduce the full text of Justice Brennan's remarks.

In a refreshing departure from standard law review fare, Professor Allen Boyer develops a connection between the English decision of *Regina v. Dudley and Stephens* and Joseph Conrad's novel *Lord Jim*. *Dudley and Stephens* involved two castaway sailors charged with murder for killing and eating a shipmate while drifting helplessly at sea. Intending to make clear its disdain for such anthropophagous behavior even under extreme circumstances, the court rejected the sailors' defense of necessity. Written several years after the decision, *Lord Jim* focuses on the development of its main character after an incident analogous to the facts in *Dudley and Stephens*. Professor Boyer's article discusses the connection between the book and the case and the approach followed in each toward the criminal defense of necessity.

We are also pleased to include in our first issue Professor James Lindgren's response to an article printed in this publication a year ago. Addressing the issue "should blackmail be legalized," Professor Lindgren examines the diametrical positions regarding this question and articulates an insightful and persuasive defense for keeping blackmail a crime. Refuting the thesis of economists Walter Block and David Gordon for legitimizing blackmail, Professor Lindgren maintains that the *immorality* inherent in blackmail sufficiently warrants criminal punishment. His article "In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon" sets forth Professor Lindgren's thesis and criticism of

Block and Gordon, and represents the most recent publication regarding this continuing legal debate.

Our five student written selections include three Comments and two Notes. The first Comment addresses the methods by which a media defendant can discourage meritless libel suits. In recent years, many subjects of media scrutiny have challenged the media through litigation. Where plaintiff's claims are without merit, however, the costs of defending such suits substantially increase the risks of self-censorship. The author suggests four alternative actions that media defendants can take in response to meritless suits: infringement of first amendment rights, abuse of process, malicious prosecution and requests for attorney's fees. Analyzing each of the suggested solutions, the author concludes that not only are such actions feasible, but they are necessary to preserve the flow of information vital to a healthy, functioning democracy.

The second Comment explores the issues surrounding the continually evolving concept of total equitable indemnity. The Comment focuses on vicariously and derivatively liable tortfeasors and examines whether total equitable indemnity survives a good faith pretrial settlement after the advent of *American Motorcycle Association v. Superior Court* and California Code of Civil Procedure Section 877.6. Favoring the policy of settlement finality over that of equitable apportionment of loss, many courts have held that a settling tortfeasor is insulated from cross-claims for total indemnity by any nonsettling co-tortfeasor. After presenting an historical analysis regarding equitable allocation of fault and the position total indemnity occupies in that scheme, the author presents an analysis of the primary decisions concerning total indemnity. The author concludes that the policies underlying *American Motorcycle* and code section 877.6 have been misconstrued by some courts. The Comment then outlines a proposal wherein total indemnity survives good faith settlements while continuing to serve the twin policy goals of settlement finality and equitable allocation of loss.

Our third Comment discusses the current legal controversies involving satellite dish owners and providers of television signals. The author examines issues generated when signal providers scramble signals which dish owners believe they have a right to receive. In concluding that signal providers must be allowed to continue their scrambling, the author employs principles of property law and economic theory. The Comment also suggests guidelines to assist Congress and the Federal Communication Commission in resolving this controversy while addressing the concerns of all parties involved.

The first Note presented in this issue examines *RRX Industries, Inc.*

*v. Lab-Con, Inc.* This Ninth Circuit decision addressed issues arising out of Uniform Commercial Code Section 2-719—the Article’s provision regarding limitation of remedies. In *RRX*, the court held that since the limited remedy negotiated between the parties had failed of its essential purpose, all remedies under the U.C.C. were available. According to the Ninth Circuit, these remedies included the award of consequential damages, notwithstanding a contractual provision excluding such damages. This Note examines what effect the failure of a limited remedy has upon a consequential damages limitation and the differing approaches courts have adopted when confronting this issue. The author suggests that courts abandon the extreme polar positions they have adopted in favor of a more equitable and workable approach. Specifically, the author suggests that when a seller willfully refuses to perform a negotiated limited remedy, courts should render the consequential damages limitation unenforceable. However, when a seller attempts to perform its contractual obligations, but is unable to do so, courts should enforce the consequential damages limitation contained in the contract.

The second Note, our final selection in this issue, analyzes *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the recent defamation case decided by the United States Supreme Court. In *Greenmoss*, the Court attempted to resolve a conflict among state courts regarding the proper application of its earlier decision in *Gertz v. Robert Welch, Inc.*: whether the limitations on defamation suits brought by private plaintiffs were applicable against nonmedia defendants. Rather than clearly resolve the conflict, the Supreme Court resurrected a test it had previously rejected. If the speech involved is a matter of public concern, then the *Gertz* criteria apply. The author questions the wisdom in reviving this “matter of public concern” test as a threshold for triggering the *Gertz* analysis. Moreover, the Note proposes a simplified framework for defamation law designed to strike a workable balance between free speech and reputation interests.

*Board of Editors*