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CONTENTS

PAGE

ISAAC MARKS MEMORIAL LECTURE

THE NAKED CROWD: BALANCING PRIVACY AND SECURITY IN AN AGE OF TERROR ..... *Jeffrey Rosen* 607

ARTICLES

GUILT BY EXPRESSIVE ASSOCIATION: POLITICAL PROFILING, SURVEILLANCE, AND THE PRIVACY OF GROUPS ..... *Linda E. Fisher* 621

This Article maintains that the First Amendment-based right of expressive association, interpreted most recently in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), can protect political and religious associations from intrusive law enforcement investigations that are unrelated to criminal activity. In the wake of September 11, federal and local police departments have renewed their longstanding practice of conducting surveillance and compiling dossiers on groups holding non-mainstream political views. Recently, targeted groups have included mosques and other gatherings of Muslims, as well as those opposed to the war in Iraq.

Balancing groups' right of expressive association against the compelling state interest in investigating potential terrorist activity, the Article proposes that investigations of First Amendment activity cannot begin absent a reasonable suspicion of criminal activity. Unless restrictions are placed on the government's ability to conduct surveillance of First Amendment activity, such surveillance will increase. The Article concludes that the proposed constitutional safeguards of protected expressive activity are necessary to avoid harming fragile associational rights in times of national crisis.

TEXT AND CIRCUMSTANCE: WARRANTY DISCLAIMERS IN A WORLD OF ROLLING CONTRACTS ..... *Stephen E. Friedman* 677

The law of warranty disclaimers has failed to keep pace with the proliferation and growing acceptance of "rolling" or "layered" contracts. Courts have not adequately addressed or resolved this tension and have failed to articulate an appropriate test for assessing these disclaimers in rolling contracts. This Article provides a flexible test based on language in Article 2 of the Uniform Commercial Code that validates certain disclaimers "unless the circumstances indicate

otherwise." The test would enable a trier of fact to find a disclaimer ineffective if the nature of the transaction is such that it puts the buyer off guard as to the existence or effect of a disclaimer. To illustrate the value of this test, the Article applies the test to the critical issue of disclaimers in rolling contracts involving consumer purchases.

The Article concludes that although it may be appropriate to provide some terms only after purchase or order, a warranty disclaimer in a consumer purchase is not such a term. A consumer typically expects that, although the seller may provide some minor terms after purchase, all the key product information will be presented "up front" in the transaction. A disclaimer of the implied warranty of merchantability should be considered just such key product information. Thus, when a purchase or order passes without disclosure of a disclaimer, a consumer is likely to be put off guard as to the existence or effect of a disclaimer disclosed afterwards. In short, sellers should generally not be able to "roll" warranty disclaimers into consumer transactions.

CLASS ACTION LAWYERS AS LAWMAKERS ..... *Bruce H. Kobayashi & Larry E. Ribstein* 733

Private lawyers are significant participants in legislative and judicial lawmaking. However, since law is a public good, lawyers face a significant free-rider problem in investing time and other resources in law-creation other than to the extent necessary to win the case for their client. This Article focuses on the lawmaking incentive problem inherent in class actions, and specifically on class action complaints. Because a class action lawyer prepares a complaint without knowing whether a court ultimately will select her as counsel for the class, the lawyer may have less incentive to put effort into the complaint than if she had been hired prior to drafting the complaint. This Article discusses ways such lawyers can be given adequate incentives to maximize the law-creation value of their complaints. It shows that direct protection, as through intellectual property rights, is not legally available, primarily because of due process concerns for public access to the law. We suggest that protection is best provided by the institutions for choosing the lead plaintiffs and lead counsel in class actions.

NOTES

WEIGHING IN ON THE SCALES OF JUSTICE: THE OBESITY EPIDEMIC AND LITIGATION AGAINST THE FOOD INDUSTRY ..... *Alyse Meislik* 781

FOIA FRUSTRATION: ACCESS TO GOVERNMENT RECORDS UNDER THE BUSH ADMINISTRATION ..... *Bradley Pack* 815

ARIZONA CASE NOTES

DUNCAN V. SCOTTSDALE MEDICAL IMAGING, LTD. ..... *Rachel Alpers* 843

STATE V. HICKMAN ..... *Joe Lin* 849

STATE V. DEAN ..... *Ann Redd* 857