

# Introduction to Defamation and the First Amendment: New Perspectives

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## DEFAMATION AND THE FIRST AMENDMENT: NEW PERSPECTIVES

### INTRODUCTION

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In the spring of 1982, Arthur B. Hanson of Washington, D.C., the late Philip D. Adler of Phoenix, Arizona, and Lloyd G. Schermer of Davenport, Iowa, trustees of the Alfred Wilson Lee and Mary I.W. Lee Memorial Trust, a fund created under the will of Miss Laura Lee of Washington, D.C., announced the granting of a handsome gift to the College of William and Mary in Virginia. The trustees, in accordance with Miss Lee's wishes, selected the Marshall-Wythe School of Law at William and Mary to be the recipient of funds to "establish an Institute of Bill of Rights Law with emphasis on the teaching of First Amendment principles, the American History of our jurisprudence, Legal English, and ethical philosophy." The work of the Institute of Bill of Rights Law was begun during the 1983-1984 academic session to support scholarly research of the constitutional principles contained in the Bill of Rights. The Institute also is supporting work on the history of the Bill of Rights and the members of its faculty hope to establish programs within the law school to facilitate interaction between the professions of law and journalism.

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The articles and comments that follow initially were presented as part of the Institute's first symposium held at the Marshall-Wythe School of Law this past April. The symposium was sponsored jointly with the *William and Mary Law Review* and was entitled, "Defamation and the First Amendment: New Perspectives." Professor James Zirkle, deputy director of the Institute, administered the two-day meeting that brought together lawyers, journalists, and professors of both law and journalism.

The sponsors were fortunate to assemble and present three principal speakers: David A. Anderson, Professor of Law at the University of Texas, who served as the first Visiting Lee Professor at William and Mary; Marc A. Franklin, Frederick I. Richman Professor of Law at Stanford University; and Frederick F. Schauer, former Cutler Professor of Law at William and Mary, and now a member of the law faculty at the University of Michigan. Their presentations were enlivened and enriched by several commentators, among them: Professors Gerald G. Ashdown, Paul A. LeBel, Cass R. Sunstein, William W. Van Alstyne, and Ms. Diana Daniels, whose reactions and views are published in this volume.

Twenty years have passed since the United States Supreme Court first measured a state court judgment in a civil libel suit against federal constitutional standards. In *New York Times Co. v. Sullivan*,<sup>1</sup> the Court found the Alabama common law rule of strict liability to be violative of the first amendment and substituted an actual malice standard for libel actions by public officials.

Ten years later in *Gertz v. Robert Welch, Inc.*,<sup>2</sup> the Supreme Court expanded the minimum constitutional requirements to be applied in defamation cases. The Court's opinion sought to fashion a coherent policy balance between the goals of the law of defamation and the constitutionally guaranteed freedoms of speech and the press.

The years since *Gertz*, contrary to the expectations of many who believed that the law of defamation would fade away, have seen public officials, entertainers, writers, and other public figures bringing libel suits, and often receiving substantial jury awards—particularly against media defendants. A recent commen-

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1. 376 U.S. 254 (1964).

2. 418 U.S. 323 (1974).

tator has stated that the Supreme Court's failure to fashion a coherent body of defamation law has contributed to the increased volume of libel litigation, and that the present melange of conflicting common law and constitutional rules that must be considered in defamation matters is unacceptable.<sup>3</sup>

The comments and reflections that follow are made by scholars who, mindful of developments since *Gertz*, have sought to fine tune the rules of defamation and the constitutional principles that must be weighed in a society requiring protection of both speech and reputation. The contributors have discussed, from different perspectives, what the next generation of defamation cases should accomplish, both as state common law and federal constitutional law.

The hope of those associated with the new Institute of Bill of Rights Law is that the articles and comments that follow will be the first of many publications fostered by the Institute to reflect scholarship and public discussion of Bill of Rights principles.

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3. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 63 (1983).