



# NEW MEXICO LAW REVIEW

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Volume 24  
Issue 3 Summer 1994

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Summer 1994

## First Amendment - Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns: *State v. Powell*

Shad L. Brown

### Recommended Citation

Shad L. Brown, *First Amendment - Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns: State v. Powell*, 24 N.M. L. Rev. 495 (1994).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol24/iss3/13>

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# FIRST AMENDMENT—Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns: *State v. Powell*

## I. INTRODUCTION

In *State v. Powell*,<sup>1</sup> the New Mexico Court of Appeals held that New Mexico's criminal libel statute<sup>2</sup> violated the First Amendment when applied to public statements involving matters of public concern. Prior to *Powell*, New Mexico courts were silent on the application of the criminal libel statute to public concern cases. Moreover, the United States Supreme Court has not spoken "regarding the extent of any constitutional privilege against criminal prosecution for defamatory statements involving matters of public concern when the defamed person is neither a public official nor a public figure."<sup>3</sup> In *Powell*, the court applied the actual malice standard for public figure libel, first announced by the United States Supreme Court in *New York Times Co. v. Sullivan*<sup>4</sup> almost 30 years ago, to New Mexico's criminal libel statute.

While conforming to standards set by the Supreme Court and adopted in other states, the decision in *Powell* did not go as far as some would like. The court of appeals backed down from the stance taken by the district court, which held the entire statute to be unconstitutional on its face. The *Powell* court instead limited the statute's application to cases not requiring the actual malice standard. This Note reviews the origins of the actual malice standard as applied to public statements, examines the effect of *Powell's* rationale on New Mexico law, and discusses the approach taken by Judge Donnelly in his dissent.

## II. STATEMENT OF THE CASE

David William Powell, a teacher at Western New Mexico University, was convicted of criminal libel in Grant County magistrate court.<sup>5</sup> The conviction stemmed from accusations Powell had made against the university's acting vice-president for academic affairs, concerning the vice-president's performance in that position. Powell exercised his statutory right to appeal to New Mexico District Court of Grant County and received a trial de novo. Powell moved to dismiss the complaint on the grounds that the criminal libel statute was unconstitutional on its face and unconstitutional as applied to the charge against him. The district court granted Powell's motion, holding that the statute was

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1. 114 N.M. 395, 839 P.2d 139 (Ct. App. 1992).

2. N.M. STAT. ANN. § 30-11-1 (Repl. Pamp. 1984).

3. *State v. Powell*, 114 N.M. 395, 399, 839 P.2d 139, 143 (Ct. App. 1992).

4. 376 U.S. 254 (1964).

5. The facts of this case are set out in *State v. Powell*, 114 N.M. 395, 396, 839 P.2d 139, 140 (Ct. App. 1992).

unconstitutional on its face and as applied to libel of public officials or public figures, and that Powell's libel was against a public figure.

The New Mexico Court of Appeals affirmed the district court's dismissal, but on different grounds. Using a separate ground addressed in the appellate briefs,<sup>6</sup> the court of appeals held the statute unconstitutional when applied to public concern libel cases.<sup>7</sup>

### III. HISTORICAL AND CONTEXTUAL BACKGROUND

The *Powell* court looked to the United States Supreme Court for guidance in determining the fate of Powell and the New Mexico criminal libel statute.<sup>8</sup> The court examined the history of criminal libel statutes and historic United States Supreme Court decisions which created the actual malice standard in libel law, extended that standard to criminal libel statutes, and applied the actual malice standard to punitive damages in civil cases.<sup>9</sup>

#### A. *The Actual Malice Standard—New York Times Co. v. Sullivan*

In the landmark decision of *New York Times Co. v. Sullivan*,<sup>10</sup> the United States Supreme Court recognized a qualified privilege to make defamatory statements relating to the official conduct of public officials. In *New York Times*, the Montgomery, Alabama police commissioner sued the *New York Times*, alleging that he had been libeled by statements in a full-page advertisement published in the *Times*.<sup>11</sup> Sullivan won \$500,000 in damages in the circuit court of Montgomery County, and the award was sustained in the Alabama Supreme Court.<sup>12</sup>

The United States Supreme Court reversed Alabama's decision,<sup>13</sup> holding that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—

6. While the district court alluded to the statute's unconstitutionality as applied to matters of public concern, its opinion focused primarily on the facial challenge to the statute. See *State v. Powell*, No. CR 91-026, letter op. at 4-5 (Grant County Dist. Ct. of N.M. July 30, 1991). In its appellate brief, the State argued that the district court had misapplied the public concern test, and the State contended that the complainant was not a public figure. *State v. Powell*, 114 N.M. 395, 396 n.1, 839 P.2d 139, 140 n.1 (Ct. App. 1992). The court of appeals held that its focus on the public concern/public figure issue rather than the facial challenge was not unfair to the State, especially since the State's brief addressed the public figure issue. *Id.*

7. *Powell*, 114 N.M. at 396, 839 P.2d at 140.

8. *Id.* at 399, 839 P.2d at 143. A lack of New Mexico precedent forced the court to rely on federal cases. See *infra* note 33. Note also that the current incarnation of the New Mexico criminal libel statute, N.M. STAT. ANN. § 30-11-1 (Repl. Pamp. 1984), was enacted one year before the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). 1963 N.M. Laws, ch. 303, § 11-1.

9. *Powell*, 114 N.M. at 397-400, 839 P.2d at 141-44.

10. 376 U.S. 254 (1964).

11. The advertisement stated that police had committed acts of violence against civil rights protesters; Sullivan was Commissioner of Public Affairs for Montgomery, and in charge of the Montgomery police department. *New York Times*, 376 U.S. at 256-57.

12. *New York Times*, 376 U.S. at 256.

13. *Id.* at 292.

that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>14</sup>

### B. Actual Malice Applied to Criminal Prosecutions

The court in *Powell* noted that while the *New York Times* decision applied to a civil libel case, the Supreme Court had implied that the privilege applied to criminal libel prosecutions as well.<sup>15</sup> The Court clarified that implication in *Garrison v. Louisiana*,<sup>16</sup> holding that the *New York Times* privilege "limits state power to impose criminal sanctions for criticism of the official conduct of public officials."<sup>17</sup>

Garrison was convicted of criminal defamation after issuing a statement disparaging the judicial conduct of eight judges in the criminal district court of Orleans Parish.<sup>18</sup> The Supreme Court, in reversing Garrison's conviction, held that criminal libel statutes did not serve different interests than civil libel statutes.<sup>19</sup> The lack of distinction gave the Court no reason to apply a different standard for criminal libel statutes than for civil libel statutes,<sup>20</sup> and thus the Court held Louisiana's statute unconstitutional because it lacked the actual malice standard for criticism of the official conduct of public officials.<sup>21</sup> Since *Garrison*, the Supreme Court has not explored the scope of the *New York Times* privilege as applied to criminal libel statutes.<sup>22</sup>

### C. Actual Malice and Punitive Damages

The actual malice standard established in *New York Times* and extended in *Garrison* has been further extended to include private-figure plaintiffs in civil actions who wish to recover presumed or punitive damages for defamation. In *Gertz v. Robert Welch, Inc.*<sup>23</sup> the Supreme Court held that the actual malice standard applied in a civil libel trial involving punitive damages.

In *Gertz*, American Opinion magazine wrote an article about the murder prosecution of a Chicago police officer.<sup>24</sup> As part of the article,

14. *Id.* at 279-80.

15. *State v. Powell*, 114 N.M. 395, 399, 839 P.2d 139, 143 (Ct. App. 1992) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.")).

16. 379 U.S. 64 (1964).

17. *Id.* at 67.

18. *Id.* at 65-66.

19. For the Court's discussion on the erosion of historical differences between civil and criminal libel statutes, see *Garrison*, 379 U.S. at 67-69.

20. *Id.*

21. *Id.* at 77.

22. The only other Supreme Court case to review a criminal libel statute was *Ashton v. Kentucky*, 384 U.S. 195 (1966). However, the Supreme Court did not discuss the *New York Times* privilege; instead, the Court held Kentucky's criminal libel statute to be unconstitutionally vague. *Ashton*, 384 U.S. at 200.

23. 418 U.S. 323 (1974).

24. The facts of this case are set out in *Gertz*, 418 U.S. at 325-32.

American Opinion tied the attorney representing the victim's family to Communist activities and implied that his criminal record was extensive. Gertz sued for libel, and the publisher, Robert Welch, Inc., claimed the actual malice privilege. The district court held the statements to be libelous per se, and the jury was allowed to determine only damages. After the jury awarded \$50,000, the district court decided that the *New York Times* standard should apply, and entered a judgment n.o.v. for Welch. The Seventh Circuit Court of Appeals affirmed this decision, and Gertz appealed to the Supreme Court.

The Supreme Court held that Gertz was not a public figure, and that states were entitled to set their own standards for compensation of private individuals for libelous statements.<sup>25</sup> However, the Court added that the state interest in compensation of private individuals did not extend past actual injury to reputation.<sup>26</sup> For plaintiffs seeking punitive damages, the Supreme Court required a higher standard, that is, the actual malice requirement of "knowledge of falsity or reckless disregard for the truth."<sup>27</sup>

The *Gertz* decision left some question about whether the actual malice standard should be restricted only to punitive damages in a private-person civil suit. The Supreme Court clarified its position in *Dun & Bradstreet v. Greenmoss Builders*, holding that the actual malice standard is invoked only in cases of defamation of a private person which involves a public concern.<sup>28</sup>

*Dun & Bradstreet*, a credit bureau, was convicted of distributing credit reports containing false information about Greenmoss.<sup>29</sup> The Supreme Court found that the trial court failed to define "actual malice" for the jury and failed to determine whether Greenmoss was a public or private figure.<sup>30</sup> The Court determined that states have a higher interest in awarding presumed and punitive damages to private figure plaintiffs, and may set a standard which is lower than the actual malice standard.<sup>31</sup> The Court went on to reason that when private figures are libelled by speech which involves a matter of public concern, the actual malice standard is required to award punitive damages.<sup>32</sup>

#### IV. RATIONALE OF THE *POWELL* COURT

While New Mexico has little original defamation case law, the state has adopted much of the United States Supreme Court's decisions

25. *Id.* at 347.

26. *Id.* at 349.

27. *Id.*

28. 472 U.S. 749 (1985).

29. *Id.* at 751-53. The interesting "media vs. nonmedia" issues on which the Vermont Supreme Court rested its holding that *Dun & Bradstreet* was not entitled to the actual malice standard are beyond the scope of this Note.

30. *Id.* at 754-55.

31. *Id.* at 761.

32. *Id.* Note that this formulation is often referred to in New Mexico as the "limited public figure" test. See generally *Furgason v. Clausen*, 109 N.M. 331, 785 P.2d 242 (Ct. App. 1989).

through civil libel cases in New Mexico.<sup>33</sup> Few reported decisions have interpreted New Mexico's criminal libel statute.<sup>34</sup> Thus, relying primarily on Supreme Court precedent, the New Mexico Court of Appeals concluded in *Powell* that "the Constitution prohibits a conviction of criminal libel for public defamation made without actual malice on a matter of public concern."<sup>35</sup> Since *Powell*'s statements constituted public defamation, the court sustained the dismissal of the State's complaint. The court first reviewed the purposes of American criminal libel law. Next, the court reviewed the constitutionality of New Mexico's criminal libel statutes and the State's arguments on the statute's construction. Finally, the court applied its holding to *Powell*'s criminal charge.

### A. Purposes of Criminal Libel Statutes

Lacking a precedential interpretation of the New Mexico criminal libel statute, the court of appeals instead reviewed the purposes of criminal libel law in the United States. First, the court compared criminal penalties and punitive damages to determine "the interests served by permitting their imposition and the injury their imposition may cause to First Amendment interests."<sup>36</sup> The court concluded that free speech interests outweigh the imposition of civil or criminal liability for defamation "made without actual malice on a matter of public concern," except when a private person sues for actual injuries suffered.<sup>37</sup>

The court of appeals noted the Supreme Court's implication that "criminal libel laws serve very little, if any, purpose."<sup>38</sup> The court pointed to the Supreme Court's approval of a comment made in the official draft of the American Law Institute Model Penal Code, explaining the lack of criminal libel provisions:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the

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33. See *Marchiando v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982) (adopting the *New York Times* standard of actual malice for public figure plaintiffs); *Furgason v. Clausen*, 109 N.M. 331, 785 P.2d 242 (Ct. App. 1989) (incorporating *Gertz* into New Mexico law and establishing the test for determining whether a libel victim is a "limited public figure" as whether the offending material concerns a public controversy or is a topic of public concern). Neither decision considered the application of New Mexico's criminal libel statute.

34. Three early decisions dealt specifically with criminal libel, but all were based on the earlier incarnation of the statute, 1889 N.M. Laws, ch. 11. The current version of the statute, N.M. STAT. ANN. § 30-11-1 (Repl. Pamp. 1984), omitted some of the earlier law's provisions and added a definition of libel and the requirement that statements must be false (to conform with N.M. CONST. art. II, § 17). The State opposed *Powell*'s motion for dismissal at the district court level, partially on the grounds that "the statute has yet to be applied in a court of record." State's Memorandum of Law at 4, *State v. Powell*, 114 N.M. 395, 839 P.2d 139 (Ct. App. 1992) (No. 13,398).

35. *State v. Powell*, 114 N.M. 395, 399, 839 P.2d 139, 143, (Ct. App. 1992).

36. *Id.*

37. *Id.*

38. *Id.*

community's sense of security . . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A. that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.<sup>39</sup>

The court added that while the Supreme Court has not held all criminal libel laws to violate constitutional rights to free expression,<sup>40</sup> it has "clearly signalled the small weight to be given a claimed interest in criminal prosecution."<sup>41</sup> Combining this history of criminal libel purposes, the court of appeals concluded that false defamatory public statements involving matters of public concern may "be subject to criminal penalty only if made with actual malice."<sup>42</sup> The court then proceeded to determine whether New Mexico's statute required a finding of actual malice.

### *B. Constitutionality of New Mexico's Criminal Libel Statute*

The *Powell* court compared the Supreme Court's statement in *New York Times*, that actual malice amounted to a statement made "with knowledge that it [is] false or with reckless disregard of whether it [is] false or not,"<sup>43</sup> with New Mexico's statutory definition of malice:

[A]n act done with evil or mischievous design and it is not necessary to prove any special facts showing ill-feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby.<sup>44</sup>

The court concluded that the statutory definition of malice was not the equivalent of "actual malice" as defined by the Supreme Court.<sup>45</sup> Conceding that the two were not the same, the State argued that the constitutional defects in the statute could be cured through jury instructions on the actual malice standard in cases which require it.<sup>46</sup> The court of appeals rejected the State's arguments in three areas.

First, the State argued that jury instructions are procedural law rather than substantive law, and thus subject to the power of the judiciary.<sup>47</sup> The court quickly rejected that argument, saying "[t]o adopt the State's

39. *Id.* at 399-400, 839 P.2d at 143-44 (citing *Garrison v. Louisiana*, 379 U.S. 64, 69-70 (1964) (quoting MODEL PENAL CODE § 250.7 commentary at 44 (Tentative Draft 1961))).

40. For example, false statements made with actual malice enjoy no constitutional protection. *Powell*, 114 N.M. at 399-400, 839 P.2d at 143-44 (citing *Garrison*, 379 U.S. at 75).

41. *Powell*, 114 N.M. at 400, 839 P.2d at 144 (citing *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) ("A strong argument may be made that there remains little constitutional vitality to criminal libel laws.")).

42. *Powell*, 114 N.M. at 401, 839 P.2d at 145.

43. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)); see also *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966) ("ill will, evil motive, [or] intention to injure" does not amount to actual malice).

44. N.M. STAT. ANN. § 30-11-1 (Repl. Pamp. 1984).

45. *Powell*, 114 N.M. at 401, 839 P.2d at 145.

46. *Id.*

47. *Id.*

argument would be to say that in every matter tried to a jury, the judiciary is not bound by statutes in setting forth to the jury the applicable law.<sup>48</sup>

Next, the State argued that statutory construction required the court to adopt a construction upholding the statute's constitutionality when it can be construed to support or void the statute.<sup>49</sup> While agreeing with the State's statement of statutory construction rules, the court of appeals concluded that the actual malice standard could not be found "in any rational construction of the language of Section 30-11-1 defining the requisite intent for criminal libel."<sup>50</sup> The court reasoned:

Because the statute defines the requisite intent, this is not a case where one can argue that statutory silence on the state-of-mind element of the offense creates an ambiguity. Moreover, it would stretch the imagination beyond human limits to say that there is an ambiguity in the criminal libel statute that permits it to be construed to require actual malice when the Constitution so requires but not to require actual malice otherwise.<sup>51</sup>

The State's last "interesting,"<sup>52</sup> but unsuccessful, argument was to ask the court "merely to read the statute together with the Constitution."<sup>53</sup> The State cited two cases which it claimed supported this view, *State v. Elder*<sup>54</sup> and *Reese v. State*.<sup>55</sup>

The court explained that *Elder* did not add an element to the statutory definition of the offense, but rather "was recognizing a constitutional defense to the criminal charge."<sup>56</sup> The court refused to apply *Reese* because a majority of the New Mexico Supreme Court "did not adopt the view that the judicial branch could add an element to an offense if so required by the Constitution."<sup>57</sup> Further, the *Powell* court found no support in the law of other jurisdictions which would permit the

48. *Id.*

49. *Id.* (citing *New Mexico State Bd. of Educ. v. Board of Educ.*, 95 N.M. 588, 591, 624 P.2d 530, 533 (1981)).

50. *Powell*, 114 N.M. at 402, 839 P.2d at 146.

51. *Id.* at 402, 839 P.2d at 146 (citing *State v. Ortega*, 112 N.M. 554, 562, 817 P.2d 1196, 1204 (1991) (statutory construction of criminal statutes where intent is essential element of defense)).

52. *Powell*, 114 N.M. at 402, 839 P.2d at 146.

53. *Id.*

54. 19 N.M. 393, 143 P. 482 (1914).

55. 106 N.M. 498, 745 P.2d 1146 (1987) (plurality opinion).

56. *Powell*, 114 N.M. at 402, 839 P.2d at 146. The criminal libel statute in *Elder* prohibited truth as a defense in almost all cases of libel. 1889 N.M. Laws, ch. 11, § 1-25. The New Mexico Supreme Court ruled that this portion of the statute violated the New Mexico Constitution. *Elder*, 19 N.M. at 402, 143 P. at 484. "In all criminal prosecutions for libel, the truth may be given in evidence to the jury . . ." N.M. CONST. art. II, § 17; see, e.g., *Esquibel v. State*, 91 N.M. 498, 501, 576 P.2d 1129, 1132 (1978) (judicial practice to recognize defenses that do not appear in statutes but are required by common law or the constitution).

57. *Powell*, 114 N.M. at 402, 839 P.2d at 146. The court of appeals also noted that in *Reese*, one member of the majority did not rely on constitutional grounds, and two members of the supreme court dissented. Judge Hartz further noted that the *Reese* court cited no authority from any jurisdiction to support its conclusion in that case. *Id.*

addition of an element to an offense by the judicial branch, and thus "assume[d] that such is also the law in New Mexico."<sup>58</sup>

Finally, the court reviewed decisions in other jurisdictions confronting the question of how to interpret a criminal libel statute that does not require proof of actual malice.<sup>59</sup> The court of appeals noted that none of those jurisdictions have inserted an actual-malice requirement into the statute. Instead, "the debate has been whether to strike the statute in its entirety,<sup>60</sup> or whether to hold only that the statute is unconstitutional as applied to defamation that cannot constitutionally be punished without proof of actual malice."<sup>61</sup> Concluding that it lacked the power to revise the language of the New Mexico criminal libel statute, the court of appeals held the statute "unconstitutional as applied to a charge of libel predicated on public statements that involve matters of public concern."<sup>62</sup>

Having found the criminal libel statute unconstitutional as applied, the court of appeals next turned to Powell's criminal charge.<sup>63</sup> The court assumed the facts of the complaint to be true.<sup>64</sup> The complaint alleged that Powell made public accusations of misconduct involving the complainant's position as acting vice-president for academic affairs for Western New Mexico University.<sup>65</sup> Examining the "content, form, and context"<sup>66</sup> of the libelous statement, the court said:

[T]he complaint alleges statements relating to the performance of the administration of a public institution of higher learning. This subject is a matter of public concern.<sup>67</sup>

58. *Powell*, 114 N.M. at 402, 839 P.2d at 146. The court of appeals relied on the United States Supreme Court to bolster its reasoning. *Id.* (citing *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) ("amendment may not be substituted for construction and . . . a court may not exercise legislative functions to save the law from conflict with constitutional limitation."); *Trade-Mark Cases*, 100 U.S. 82, 98 (1879) (no judicial power to give statute a narrower meaning in order to punish crimes not described in the language); *United States v. Reese*, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large.")).

59. *Powell*, 114 N.M. at 403, 839 P.2d at 147.

60. *Id.* (citing *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Eberle v. Municipal Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976); *Weston v. State*, 528 S.W.2d 412 (Ark. 1975); *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972)).

61. *Powell*, 114 N.M. at 403, 839 P.2d at 147 (citing *People v. Ryan*, 806 P.2d 935 (Colo.) (en banc), *cert denied* 112 S. Ct. 177 (1991) (example of an unconstitutional statute as applied to cases requiring actual malice)).

62. *Powell*, 114 N.M. at 403, 839 P.2d at 147.

63. *Id.*

64. *Id.* at 404, 839 P.2d at 148 (quoting *United States v. Besmajian*, 910 F.2d 1153, 1154 (3rd Cir. 1990) ("In considering a defense motion to dismiss [a complaint], the court accepts as true the factual allegations set forth in the [complaint].")).

65. *Powell*, 114 N.M. at 404, 839 P.2d at 148. The court noted that the parties were never identified by name in the complaint. *Id.* The complainant drafted her own complaint on a magistrate court form. State's Brief-in-Chief at 3, *State v. Powell*, 114 N.M. 395, 839 P.2d 139 (Ct. App. 1992) (No. 13,398).

66. *Powell*, 114 N.M. at 404, 839 P.2d at 148 (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985)).

67. *Id.* at 405, 839 P.2d at 149.

Because Powell's alleged libel was a matter of public concern and thus entitled to the *New York Times* privilege of actual malice, the New Mexico criminal libel statute was not available for prosecuting Powell.<sup>68</sup> The court of appeals affirmed the district court's dismissal of the case against Powell.

### C. *Practical Effect of Powell on New Mexico Law*

Because of the *Powell* decision, until the New Mexico Legislature chooses to revise the criminal libel statute, false statements made with actual malice against public figures are unpunishable through criminal proceedings. Public figures must resort to civil remedies, which have kept up with the changes since *New York Times*. Further, the court of appeals' decision gives little guidance as to whether criminal libel laws continue to serve a compelling state interest in New Mexico. While the court strongly hints that there seems to be little state interest in criminal prosecution of libel,<sup>69</sup> the court did not resolve the issue when it refused to declare the statute unconstitutional in its entirety. One judge on the panel, however, advocated declaring the statute facially unconstitutional.<sup>70</sup>

## V. ABOLISHING THE STATUTE—JUDGE DONNELLY'S DISSENT

In a separate opinion, Judge Thomas Donnelly preferred the district court's rationale and objected to the consideration of grounds not argued before the district court.<sup>71</sup> Judge Donnelly noted that the libelous material was never introduced into evidence nor stipulated to at the district court level, precluding the court of appeals' determination of whether the statement was indeed false or published with actual malice.<sup>72</sup> The lack of material also made it "difficult to determine as a matter of law" whether the material involved an issue of public concern.<sup>73</sup> Without this evidence, the court could not conclude that Powell's statement was entitled to the actual malice standard.<sup>74</sup> However, under the district court's analysis of the language of the criminal libel statute, "the statute is facially inconsistent with the protections accorded under the First Amendment."<sup>75</sup> Judge Donnelly stated that "[a] statute is constitutionally overbroad and facially invalid if it encompasses con-

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68. *Id.*

69. *See supra* notes 38-39, and accompanying text.

70. *Powell*, 114 N.M. at 405, 839 P.2d at 149 (Donnelly, J. concurring in part, dissenting in part).

71. *Id.*

72. *Id.*

73. *Id.* at 405-06, 839 P.2d at 149-50.

74. *Id.*

75. *Id.* at 406, 839 P.2d at 150.

stitutionally protected, as well as unprotected, speech.”<sup>76</sup> The judge believed that the criminal libel statute as written permitted prosecution of speech without meeting the actual malice requirement of *New York Times* and *Garrison*.<sup>77</sup> The statute’s lack of distinction between public and private figure plaintiffs made New Mexico’s criminal libel statute “facially invalid”<sup>78</sup> when compared to First Amendment requirements. Judge Donnelly agreed with the majority that the problems with the statute could not be cured by jury instructions. However, he concluded that the New Mexico Constitution required proof of the same standard of malice in any criminal libel prosecution involving a matter of public concern, “irrespective of the status of the person alleged to have been defamed.”<sup>79</sup>

## VI. CONCLUSION

The *Powell* decision limits the application of New Mexico’s criminal libel statute to defamatory statements which do not involve public statements involving matters of public concern. The decision modifies New Mexico criminal libel law to be compatible with the *New York Times Co. v. Sullivan* standard which requires proof of actual malice in public concern cases. The New Mexico Court of Appeals leaves unanswered the question of whether a criminal libel law is an effective means of punishing defamatory statements. Similarly unanswered is the question of whether New Mexico should even punish libel through its criminal system, or whether its interests are better served through the civil libel provisions. The court’s inaction puts these questions back into the legislative arena for consideration of whether the underlying policies of criminal libel laws continue to be relevant in modern-day New Mexico.

SHAD L. BROWN

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76. *Id.* (citing *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (en banc); *City of Seattle v. Huff*, 767 P.2d 572 (Wash. 1989) (en banc); *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct. App. 1986); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978)).

77. *Powell*, 114 N.M. at 406, 839 P.2d at 150 (Donnelly, J., concurring in part, dissenting in part).

78. *Id.* at 407, 839 P.2d at 151.

79. *Id.* (quoting N.M. CONST. art. II, § 17: “In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.” (emphasis added)).