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CONSTITUTIONAL RECALIBRATION: LESSONS FROM NEW MEXICO

Joanna C. Schwartz*

INTRODUCTION

On and off over the past several decades, and with particular force and urgency since George Floyd’s murder in May 2020, we have been engaged in a national conversation about the scope of government misconduct and the need for meaningful accountability. Civil lawsuits have long been one of the only means of getting some measure of justice when officials abuse their constitutional authority and they are often, in my view, the best among the available alternatives.¹ But their power has been greatly diminished in recent decades.

Those filing suit for constitutional violations have traditionally looked to federal court for vindication. Congress passed the Ku Klux Klan Act—part of which, known now as 42 U.S.C. § 1983, authorized civil suits—in 1871, during Reconstruction following the Civil War, as formerly enslaved people were being tortured and killed while state and local officials participated in the violence or stood idly by.² At the time, state courts and state law were considered inhospitable to suits brought by Black people; in most states, they were not even allowed to testify.³ In

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1. My endorsement of civil suits as among our best available alternatives should not be read to suggest that they are ideal. Alternative approaches may well offer more meaningful remedies and more fundamental change. *See, e.g.,* Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1623–28 (2019) (describing a “wide-ranging reckoning” in Chicago for those tortured by officer Jon Burge, including the creation of a public record documenting the torture, a formal apology, and reparations for survivors); *id.* at 1630–31 (“Transformative justice differs from certain other experiments in restorative justice—which are often focused primarily, if not exclusively, on individualized responsibility—in that transformative justice processes aspire to work toward broader social, political, and economic change.”). And changes to the scope of police authority—including limits on police involvement in traffic stops and mental health calls—may well prevent incidents of violence or misconduct from happening in the first place. For further thoughts on this topic, see Joanna C. Schwartz, *An Even Better Way*, CALIF. L. REV. (forthcoming 2024).

2. For a description of these and other legislative efforts undertaken by Congress in 1866–75, see generally, for example, Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

3. For a history of restrictions on state court testimony by Black and Chinese people, see generally Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966).

the view of the congressmen who supported the Ku Klux Klan Act, federal judges and juries were “able to rise above prejudices or bad passions or terror more easily” than their state counterparts.⁴ Thanks to Supreme Court decisions narrowly interpreting the Act and the Fourteenth Amendment, § 1983 lay dormant for almost a century: The Court first recognized that people could use the statute to sue government officials for violating their constitutional rights only in 1961.⁵ Since that time, so many government-friendly protections have been read into § 1983 that it has become a shadow of its aspirational self.⁶ Section 1983 doctrine, as it operates today, would likely be a great disappointment to those in Congress who supported the Act’s passage a century and a half ago.

In 2021, New Mexico offered a groundbreaking response to calls for more meaningful accountability: The New Mexico Civil Rights Act (NMCRA), which created a right to sue for violations of the New Mexico Constitution.⁷ The NMCRA allows people to sue local governments when their employees violate state constitutional rights, and prohibits the use of qualified immunity as a defense. The NMCRA additionally allows for prevailing plaintiffs to recover their attorneys’ fees, and requires local governments to collect information about successful cases. Section 1983 was passed by Congress to make up for inadequacies in state civil rights protections. Exactly 150 years later, New Mexico passed its Civil Rights Act to recalibrate civil rights protections in important ways that respond to long-standing and pressing concerns about the limitations of § 1983.

Given the current state of affairs in Congress and the United States Supreme Court, state-level reforms like those enacted by New Mexico are the best and most realistic hope for this type of constitutional recalibration. New Mexico is, therefore, a bellwether. In my view, both the substantive provisions of the NMCRA and New Mexico’s process of enacting and implementing that Act offer valuable lessons for other states across the country that may consider this type of constitutional recalibration in the future. In this essay, I offer four important lessons that lawmakers and advocates around the country should learn from New Mexico—lessons that I hope New Mexico will continue to heed.

I. LESSON ONE: QUALIFIED IMMUNITY IS JUST ONE PIECE OF THE PUZZLE

In recent years, conversations about the failures of police accountability have focused almost exclusively on qualified immunity. In my view, qualified immunity deserves all the criticism it has inspired; the defense, which was created out of whole cloth by the Supreme Court in 1967 and has repeatedly been strengthened over the subsequent decades, shields officers even when they have violated the Constitution, so long as there is no prior court opinion holding

4. *Monroe v. Pape*, 365 U.S. 167, 252 n.83 (1961) (Harlan, J., concurring) (quoting Representative John Coburn, CONG. GLOBE, 42nd Cong., 1st Sess. 460 (1871)).

5. For a description of § 1983’s dormancy and revitalization, see Blackmun, *supra* note 2.

6. For a description of these many protections, how they came to be, and their impact on the ability of people to get some measure of justice and accountability when their rights are violated, see generally JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* (Viking, 2023).

7. See N.M. STAT ANN., § 41-4A (2021).

unconstitutional nearly identical misconduct.⁸ Officers have been awarded qualified immunity after stealing a quarter of a million dollars during a search;⁹ releasing a police dog on a suspect who had surrendered;¹⁰ and kneeling on a man's back for more than fourteen minutes until he died.¹¹

But qualified immunity is often, wrongfully, depicted as the only shield that makes it difficult for people suing government officials to get the justice they seek. Instead, the challenges of suing government and getting meaningful relief should be blamed on a whole slew of legal doctrines, rules, and practices. Supreme Court decisions have, for example, made it difficult to find an experienced civil rights attorney in many parts of the country; plead a "plausible" complaint; prove a constitutional violation; establish wrongdoing by local governments; and have standing to seek forward-looking relief.¹² Even when a person can get past all of those shields and secure a settlement or judgment, decisions by state and local governments across the country mute the deterrent effect of these awards: Local governments, not officers or police departments, almost always bear these financial costs, and many police departments make no effort to learn from these suits.¹³

When conversations about police accountability and reform focus exclusively on qualified immunity, they overlook the protections offered by these many other doctrines, rules, and practices. They also overlook the possibility of and benefits of enacting reforms that would address these other barriers to relief. Thankfully, those who drafted and passed New Mexico's Civil Rights Act did not make this mistake.

The NMCRA does prohibit the use of qualified immunity as a defense when people sue for violations of the state constitution, and given the outsized public focus on qualified immunity, it is perhaps unsurprising that this aspect of the Act has received the most attention.¹⁴ But the NMCRA does not stop there. It additionally addresses the challenges of establishing government liability by waiving the State's sovereign immunity and requiring that claims under the Act be treated as claims

8. For a description of the development of qualified immunity doctrine over the past several decades, see generally Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 70–71 (2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–18 (2018).

9. See *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

10. See *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018).

11. See Billy Binion, *Tony Timpa Wrongful Death Ends With 2 Out of 3 Cops Getting Qualified Immunity*, REASON (Sept. 27, 2023, 6:22 PM), <https://reason.com/2023/09/27/tony-timpa-wrongful-death-trial-ends-with-2-out-of-3-cops-getting-qualified-immunity/> [<https://perma.cc/NDZ9-DT9C>].

12. See generally SCHWARTZ, *supra* note 6, describing these barriers to relief.

13. See *id.*

14. See N.M. STAT. ANN. § 41-4A-4 (2021). For news coverage of the NMCRA focusing on its elimination of qualified immunity see, for example, Susan Dunlap, *Guv Signs New Mexico Civil Rights Act into Law, Ends Qualified Immunity*, N.M. POL. REP. (Apr. 7, 2021), <https://nmpoliticalreport.com/quick-reads/guv-signs-new-mexico-civil-rights-act-into-law-ends-qualified-immunity/> [<https://perma.cc/D6Q2-VLNN>]; Nick Sibilla, *New Mexico Bans Qualified Immunity For All Government Workers, Including Police*, FORBES (Apr. 7, 2021, 4:00 PM), <https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=695f370f79ad> [<https://perma.cc/P2XN-GKKD>].

against local government employers.¹⁵ To encourage more attorneys to bring meritorious cases under the NMCRA, it requires that attorneys be paid for their time when they prevail.¹⁶ It also addresses concerns that local governments do not learn from the lawsuits filed against them by requiring that they keep a record of all settlements and judgments paid for claims under the NMCRA, as well as a copy of the complaints in each of those cases.¹⁷ The NMCRA requires that these records be disclosed in response to public records requests, as well, facilitating public transparency.¹⁸

Legislatures and advocates in other states may well come to different conclusions about which aspects of their civil rights ecosystems are top priorities for reform. Although qualified immunity may well be towards or at the top of those lists, it should not be the sole focus; as New Mexico's Civil Rights Act makes clear, qualified immunity is just one piece of the puzzle.

II. LESSON TWO: REFORMS ARE KNOBS, NOT SWITCHES

A second lesson made apparent by New Mexico's experience follows from the first. When discussions of police accountability focus solely on qualified immunity, reform can seem like an all-or-nothing proposition; a switch that flips on and off. Either we have qualified immunity in its full force, or it will be gone in its entirety. Yet a variety of adjustments could limit qualified immunity's power without doing away with the defense altogether.¹⁹ And because the relationship between rights and remedies is not determined solely by qualified immunity—but, instead, by interactions between a whole host of laws, rules, and practices—police accountability reform should be understood not as a switch but as a series of knobs that can be turned to create a better system.

Some have suggested that this is what the Supreme Court is already doing—adjusting these various constitutional and remedial doctrines to create a form of equilibrium, an “acceptable overall alignment” of rights and remedies.²⁰ If that's what the Supreme Court is intending to do, I don't think they're doing a very good job. Instead of creating equilibrium, the Supreme Court almost always gives undue

15. See N.M. STAT. ANN. § 41-4A-3 (2021); *id.* § 41-4A-9.

16. See *id.* § 41-4A-5.

17. See *id.* § 41-4A-11.

18. See *id.*

19. See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 259–64 (2013) (proposing that qualified immunity not protect conduct that is “clearly unconstitutional”); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1399–1400 (2021) (proposing that qualified immunity protections be overridden by clear and convincing evidence that officers acted in bad faith); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1611 (2011) (proposing that qualified immunity not apply to claims for nominal damages).

20. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006). See also, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 248 (2013); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

preference to the interests of government officials when they adjust those knobs.²¹ And, in the words of rocker Nigel Tufnel in the 1984 documentary *This is Spinal Tap*, the knobs that protect government interests seem to go all the way up to eleven.²² The New Mexico Civil Rights Act aims to recalibrate constitutional protections by turning several of these knobs—including the knobs controlling qualified immunity and local and state government liability—in the other direction.

Because police accountability reforms are a set of knobs to be adjusted—instead of a switch to be flicked on or off—different states can adjust those knobs in different ways to achieve what they consider to be the right balance. The fine-tuned nature of these adjustments becomes apparent by comparing, for example, the New Mexico Civil Rights Act with a similar law passed in Colorado in June of 2020.

Both the Colorado and New Mexico laws created a right to sue for violations of the state constitution without qualified immunity, and both allow for attorneys' fees for prevailing plaintiffs.²³ But the states' laws differ in who is called upon to answer those claims: in New Mexico, claims are brought against local governments; in Colorado, claims are brought against individual officers.²⁴ The states' laws also differ on indemnification rules: in New Mexico, local governments are obligated to indemnify officers for all conduct within the course and scope of employment; in Colorado, local governments are obligated to indemnify officers for all conduct that does not result in a criminal conviction.²⁵ The states' laws differ on financial limits of the claims: the New Mexico statute prohibits the imposition of punitive damages and limits awards to \$2 million; the Colorado statute includes no statutory immunities or damages caps.²⁶ The states' laws differ on financial obligations for officers: in New Mexico, officers bear no financial responsibility for settlements and judgments entered against them; in Colorado, an officer can be made to pay up to \$25,000 or 5 percent of a settlement or judgment (whichever is less) if they are found by their employer to have acted in bad faith.²⁷ The states' laws differ on obligations of local governments to collect information from these cases: New Mexico's law requires local governments to collect settlement and judgment amounts and the complaints filed in successful cases; Colorado's law has no similar provision.²⁸ And the states' laws differ on which government employees they cover:

21. See ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT 197–228* (2014) (describing the Court's restrictive standing requirements for injunctive relief, heightened pleading and summary judgment standards, limitations on civil rights plaintiffs' entitlement to attorneys' fees, and limitations on the availability of Bivens remedies); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 961 ("Taken as a whole, the Supreme Court's performance in shaping constitutional tort doctrine during the Rehnquist and Roberts eras reveals a methodologically untethered activism in service of the apparent goal of limiting suits to enforce the Constitution against government officials, especially in suits for damages and, more selectively, in suits for injunctions.").

22. *THIS IS SPINAL TAP* (Embassy Pictures 1984).

23. Compare N.M. STAT. ANN. § 41-4A-4 (2021), with COLO. REV. STAT. §§ 13-21-131(2)(b), 13-21-131(3), 13-21-131(4)(a) (2021).

24. Compare N.M. STAT. ANN. § 41-4A-3(C) (2021), with COLO. REV. STAT. § 13-21-131(1) (2021).

25. Compare N.M. STAT. ANN. § 41-4A-8 (2021), with COLO. REV. STAT. § 13-21-131(4)(a) (2021).

26. Compare N.M. STAT. ANN. § 41-4A-6(A) (2021), with COLO. REV. STAT. § 13-21-131(4)(a) (2021).

27. Compare N.M. STAT. ANN. § 41-4A-8 (2021), with COLO. REV. STAT. § 13-21-131(4)(a) (2021).

28. Compare N.M. STAT. ANN. § 41-4A-11 (2021), with COLO. REV. STAT. § 13-21-131 (2021).

New Mexico's law applies to all government employees; Colorado's law applies only to law enforcement.²⁹

I don't claim that the laws passed in New Mexico or Colorado have optimally adjusted the various knobs at their disposal or that every state should adopt one or the other of these laws. There would undoubtedly be disagreement across states about what the optimal relationship might be between rights and remedies, and the extent to which the New Mexico and Colorado laws achieve the correct balance. The key lesson to draw, instead, is that those seeking police accountability reforms should view their task not as flipping the qualified immunity switch, but instead as adjusting a slew of different knobs—qualified immunity, standards for municipal liability, sovereign immunity, indemnification, attorneys' fees, financial sanctions, and local government collection of data about lawsuits claims and outcomes among them—to achieve the balance they consider to be right.

III. LESSON THREE: LEGISLATION IS JUST THE FIRST STEP

In recent years, it has proven extremely difficult to pass police reform legislation that makes it easier to sue government for constitutional violations. Since 2020, Congress and legislatures in more than half of the states have considered such bills and almost all of them have, thus far, been tabled or voted down.³⁰ I leave it to those directly involved in the establishment of the New Mexico Civil Rights Commission and passage of the NMCRA to offer insights about the reasons for their success in the face of so many other states' failures. The lesson I want to emphasize from the successful passage of New Mexico's legislation is that passing the bill is just first step in a far lengthier process to understand and interpret its provisions. Enactment of legislation adjusts several knobs, but the implementation of that legislation will calibrate those adjustments further.

Every statute has ambiguous provisions that need to be understood and construed. Contributions to the New Mexico Law Review's symposium issue explore a handful of these provisions in the NMCRA. For example, Seth Montgomery and Isaac Green examine the scope of the NMCRA's attorneys' fee provision, which provides that "[t]he court shall award reasonable litigation expenses and attorney fees for all work reasonably necessary to obtain a successful result to any person who prevails in a court action to enforce the provisions of the New Mexico Civil Rights Act."³¹ Montgomery and Green question what it means to prevail in a court action and, specifically, whether a plaintiff prevails—entitling their attorney to reasonable fees—when their case settles. The United States Supreme Court has interpreted § 1988 to allow defense attorneys to waive the right to fees as

29. Compare N.M. STAT. ANN. § 41-4A-3D (2021), with COLO. REV. STAT. § 13-21-131(1) (2021).

30. See Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/K5B3-K3UC].

31. Isaac Green & Seth Montgomery, *All Violations Great and Small: Fulfilling the NMCRA's Promise of Attorney Fees*, 54 N.M. L. REV. 385, 407 (2024) (citing H.B. 4, § 5, 55th Leg., 1st Sess. (N.M. 2021)).

a condition of settlement.³² But Montgomery and Green argue that there is no sensible reason to limit awards of attorneys' fees to the small sliver of cases that happen to go to trial, when plaintiffs' attorneys win hard-fought victories through settlements.³³ And New Mexico courts have latitude to reach a different conclusion than the United States Supreme Court on this point.

Passage of the NMCRA may also inspire renewed consideration of the scope of the New Mexico Constitution because the statute provides a cause of action to enforce those state constitutional protections. For example, another contribution to the law review symposium by Levi Monagle and Aaron Whiteley argues that the New Mexico Constitution should be understood to include an affirmative duty to protect; a duty that the United States Supreme Court has held is not a part of the United States Constitution.³⁴ New Mexico courts will explore the scope of constitutional protections in coming years as they adjudicate cases brought under the NMCRA and by implication, shape the impact of the Act.

There will also, likely, be ways in which various other aspects of the civil rights ecosystem shift over time in response to the NMCRA's passage. Attorneys may be more willing to accept civil rights cases under the Act than they are under § 1983, and may be able to win more often. Local governments may change the way they budget for and pay settlements and judgments in these suits; the possibility of being sued without the protections of qualified immunity and the knowledge that local governments will bear the costs of any settlement or judgment may lead local governments to put some or all of these costs on the departments themselves. Insurers may adjust their premiums and deductibles in response to threatened or actual increases in payouts. The NMCRA's provision requiring governments to track information about the allegations and outcomes of these cases may also inform supervision, training, and policies. And each of these changes, if they come to pass, may influence subsequent decisions by local government budgeting officials, attorneys, insurers, and agencies' policymakers.

Civil rights ecosystems are perpetually adjusting everywhere in response to shifts in politics, national events, the economy, and legal rulings.³⁵ In New Mexico, the NMCRA shifted several aspects of the ecosystem all at once. The discussions and articles prompted by this symposium make clear that the various knobs calibrating constitutional protections in New Mexico will continue to be adjusted for many years after the legislation's passage.

IV. LESSON FOUR: FOLLOW FACTS, NOT FEAR

This leads me to a fourth lesson that New Mexico's experience offers: when doing the difficult work of crafting, passing, implementing, and evaluating accountability legislation, it is critically important to be guided by facts, not fear.

32. See *Evans v. Jeff D.*, 475 U.S. 717, 720 (1986).

33. See Green & Montgomery, *supra* note 31, at 389.

34. See Levi A. Monagle & Aaron E. Whiteley, *A New Jurisprudence of Constitutional Duty: Moving Beyond DeShaney through the NMCRA*, 54 N.M. L. REV. 487, 500 (2024).

35. For a description of the components of civil rights ecosystems and how they evolve, see generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

Many states have been unsuccessful in their efforts to enact this type of legislation because they were guided by fear instead of facts. To listen to opponents of police accountability legislation, there is a great deal to fear. I have participated in hearings in states across the country that have taken up bills similar to that enacted by New Mexico. In those hearings, union officials and government attorneys have argued that, if it is made easier to sue, courthouses will overflow with frivolous cases brought by ambulance-chasing civil rights attorneys, officers will be bankrupted for good-faith mistakes made in a split second, and no one will agree to become a government employee given these risks. Union officials and government attorneys offer no evidence to support these assertions. But they have, apparently, been frightening enough to doom police accountability bills introduced in more than half of the states across the country.³⁶

Similar arguments were made in New Mexico. After the New Mexico Legislature established the Civil Rights Commission and tasked it with recommending whether to enact a statute prohibiting qualified immunity for state constitutional claims, the editorial board of the *Albuquerque Journal* described in stark terms the dangers they imagined were associated with removing this protection for the police. They wrote:

Do we really want a simple negligence standard to apply to the split-second decisions officers have to make in potentially dangerous situations? Do we really want to take a rookie Albuquerque Police Department officer working graveyard in high-crime Albuquerque, making maybe \$60,000 a year, and put his or her house on the line for doing something in response to a 911 call that in 20/20 hindsight might have been done better?³⁷

The *Albuquerque Journal* editorial unquestionably painted a frightening picture. But that picture bears scant relation to reality. Under state law, New Mexico officers have long been indemnified, meaning that they are not financially responsible for settlements and judgments entered against them.³⁸ The United States and New Mexico constitutions prohibit only those searches and seizures deemed unreasonable.³⁹ Under the United States Supreme Court's interpretation of that reasonableness standard in *Graham v. Connor*, officers do not violate the Fourth Amendment when they make a reasonable mistake in a split second that could have been avoided with 20/20 hindsight.⁴⁰ And, according to the Supreme Court of New Mexico, *Graham's* capacious description of reasonableness applies to claims under

36. See Kindy, *supra* note 30.

37. Editorial Board, *Qualified Immunity Provides Reasonable Protection for Police Officers*, ALBUQUERQUE J. (Aug. 9, 2020), https://www.abqjournal.com/opinion/editorials/editorial-qualified-immunity-provides-reasonable-protection-for-police-officers/article_02faa17e-d4d1-5335-80c7-b861e1881d55.html [<https://perma.cc/4KL8-6K7V>].

38. N.M. STAT. ANN. § 41-4-4(C) (1976).

39. *Sisneros v. Fisher*, 685 F. Supp. 2d 1188, 1222 (D.N.M. 2010) (“New Mexico applies a reasonableness standard, much like federal law, to excessive-force claims under the New Mexico constitution.”).

40. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

the New Mexico Constitution as well.⁴¹ These protections—of officers’ bank accounts and against liability for reasonable mistakes—are wholly separate from qualified immunity doctrine.

After five days of hearings, public comments, and deliberation, a majority of Commissioners voted to recommend several provisions that became the New Mexico Civil Rights Act. Accompanying their recommendations was a report filled with evidence and analysis about the current state of § 1983 law, the current state of New Mexico law, legislative activity across the country, and a study of almost 1,700 federal civil rights lawsuits filed in New Mexico that made clear qualified immunity was the reason a small percentage of federal claims were dismissed.⁴²

In recommending passage of the NMCRA, the New Mexico Civil Rights Commission chose facts over fear. The legislature did, as well. So did Governor Michelle Lujan Grisham, who signed the bill into law. As the governor explained, when signing the bill: “In response to some of the commentary surrounding this measure, I will say: This is not an anti-police bill. This bill does not endanger any first responder or public servant—so long as they conduct themselves professionally within the bounds of our constitution and with a deep and active respect for the sacred rights it guarantees all of us as New Mexicans.”⁴³

A common concern about the NMCRA is that it will impose too many costs on local governments. When these fiscal concerns were raised to the Civil Rights Commission, the Commission evaluated available data and concluded that the Act was actually “not the seismic shift some have portrayed and will continue to portray.”⁴⁴ In reaching this conclusion, the Commission relied on evidence that ending qualified immunity should not vastly increase the number of suits or payouts, noted that many of the provisions in the NMCRA are not new—attorneys’ fees were already available under the federal law and officers were already indemnified under state law—and that punitive damages could not be awarded pursuant to the Act.⁴⁵ In February 2023, legislation was introduced to do away with the NMCRA, again based on concerns about increased litigation and negative effects on officers and departments.⁴⁶ But after the Legislature’s fiscal impact report determined that the NMCRA was not actually causing the feared increase in settlements and judgments—and that, instead, there had been no verdicts or settlements under the Act two years after its passage—the bill was tabled.⁴⁷

I am not suggesting that the New Mexico Civil Rights Act should never be reconsidered, or that the concerns that have been raised would never be valid under

41. See *State v. Ellis*, 2008-NMSC-032, ¶¶ 25–31, 144 N.M. 253, 186 P.3d 245.

42. See generally N.M. C.R. COMM’N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, (2020), <https://www.nmlegis.gov/handouts/ALESC%20121620%20Item%204%20.1%20-%20Civil%20Rights%20Commission%20Report.pdf> [<https://perma.cc/LA97-UCYY>].

43. Office of the Governor, *Gov. Lujan Grisham Ratifies Civil Rights Act* (Apr. 7, 2021), <https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-ratifies-civil-rights-act/> [<https://perma.cc/7RBS-HH2J>].

44. See N.M. C.R. COMM’N, *supra* note 42.

45. See *id.*

46. Curtis Segarra, *Committee Tables a Bill Aimed at Removing New Mexico Civil Rights Act*, KRQE (Feb. 6, 2023, 2:56 PM), <https://www.krqe.com/news/politics-government/legislature/new-mexicos-civil-rights-act-stands-for-now/> [<https://perma.cc/8L4Y-JFT2>].

47. See *id.*

any circumstances. Instead, my point is that we should be guided by data and by the realities on the ground, not by myths and misrepresentations that sound frightening but have no basis in reality—particularly when doing so would require victims of government misconduct to bear the costs of their own constitutional violations. When the Commission first entertained concerns about the fiscal impact of the NMCRA, it noted that the Legislature has dealt with these types of concerns in the past by “going forward thoughtfully, observing how a statute operates, and readjusting when the facts show it is necessary.”⁴⁸ This is what New Mexico has done thus far with regards to the NMCRA. I hope that this is what New Mexico continues to do. And I hope that other states have the courage and confidence to follow New Mexico’s evidence-based approach if and when they consider similar legislation.

CONCLUSION

In its 2020 report recommending passage of the New Mexico Civil Rights Act, the New Mexico Civil Rights Commission quoted United States Supreme Court Justice Louis Brandeis, writing: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁹

By passing the NMCRA, New Mexico has established itself as just this kind of laboratory. Legislators, judges, lawyers, and advocates across the country are—or should be—watching. I hope that they take to heart the lessons that New Mexico’s experiment has revealed. Qualified immunity is just one piece of the puzzle. Reforms are knobs, not switches. Legislation is just the first step. Follow facts, not fear. I hope New Mexico continues to heed these important lessons, as well.

48. See generally N.M. C.R. COMM’N, *supra* note 42.

49. See *id.* (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting)).