



NEW MEXICO LAW REVIEW

Volume 54
Issue 2 *Summer*

Summer May 2024

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Recommended Citation

Matthew R. Segal, *The Promise and Perils of State Civil Rights Legislation*, 54 N.M. L. Rev. 355 (2024).
Available at: <https://digitalrepository.unm.edu/nmlr/vol54/iss2/4>

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THE PROMISE AND PERILS OF STATE CIVIL RIGHTS LEGISLATION

Matthew R. Segal*

INTRODUCTION

Everyone agrees that constitutional rights are important, but beyond that they can't agree on anything. If you ask ten people to name the most important constitutional right, you might get ten different answers. Or, if you turn the question around, and ask ten different people where rights are most imperiled—if you ask them which places have the biggest problem with rights violations—you might, again, get ten different answers. Or everyone might say “not here.” People often insist that the real problems are in other states. Other towns. Other places.

For what it's worth, here's my view: constitutional rights are important wherever there are consequences for violating them, and constitutional rights are in peril wherever and whenever violating them is costless. If it costs nothing to violate someone's rights, that's what will happen.

The New Mexico Civil Rights Act figures to help make New Mexico a place where rights are respected rather than violated. It authorizes lawsuits for the violation of “any rights, privileges or immunities” secured by “the bill of rights of the constitution of New Mexico.”¹ It rejects qualified immunity, which means people can seek remedies in court even when there isn't a case on point with nearly identical facts.² And it authorizes the award of attorneys' fees, which means people will be more likely to find lawyers, and get justice, even when what happened to them did not result in significant physical injury.³

Today I want to talk briefly about what I think might be an underappreciated virtue of the New Mexico Civil Rights Act, and about the work that remains to be done.

These observations stem from my own experiences as a civil rights lawyer. For over 15 years, I have represented people who have felt that their civil rights and liberties were violated by government officials. I have worked with people who sought to vindicate their rights by filing civil lawsuits, and I have also worked with people who sought to vindicate their rights in other ways. Those include motions to suppress evidence and cases that reversed tens of thousands of wrongful

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1. N.M. STAT. ANN. § 41-4A-3 (2021).

2. *Id.* § 41-4A-4.

3. *Id.* § 41-4A-5.

convictions.⁴ Sadly, I have also worked with people who have not sought to vindicate their rights in any forum, because they perceived no meaningful way to do so. And finally, I have worked collaboratively on these issues with prosecutors and law enforcement stakeholders, including as a member of a commission on qualified immunity in Massachusetts.⁵

Based on those experiences, I want to make three points. First, the New Mexico Civil Rights Act is enormously promising, not just because it may allow people to vindicate their rights under the Bill of Rights of the New Mexico Constitution, but also because it will foster the development of case law on the New Mexico Constitution. Second, the New Mexico Civil Rights Act must be vigilantly protected from inevitable attempts to weaken it through case law. And third, no matter how helpful the Act proves to be to the people of New Mexico—and I hope it proves to be enormously helpful—it’s important to guard against the temptation to believe that the work is done. No civil rights remedy, no matter how expertly drafted, can perfectly protect civil rights and civil liberties. The creation of one tool, even a tool as useful as we all hope the New Mexico Civil Rights Act will be, should not come to be an impediment to the development of other tools.

I. DEVELOPING STATE CONSTITUTIONAL LAW

Debates about civil rights remedies sometimes lose sight of the fact that the goal is not to remedy violations of constitutional rights, but rather to prevent those violations from happening in the first place. As a civil rights lawyer, it has never been my goal to win a lot of attorneys’ fees. My goal is to get us closer to the day when my job won’t be necessary.

The New Mexico Civil Rights Act may help bring New Mexico closer to that goal, not only because the threat of lawsuits may help to deter violations of people’s rights under the New Mexico Constitution, but because the existence of lawsuits will give courts more opportunities to provide guidance on what those rights are. And that guidance, together with the threat of New Mexico Civil Rights Act lawsuits, may make it less likely that government officials will violate people’s rights in the first place.

As you’ve just heard from Julie Murray, as part of our work at the ACLU’s new State Supreme Court Initiative, we are trying to understand why some state courts interpret their state constitutions in line with the U.S. Constitution, while other state courts don’t. Sometimes the answer is complicated. It might have to do with the texts, traditions, and values that have developed in one state or another.

But sometimes the answer is not complicated at all. Sometimes the answer—or at part of the answer—is that state constitutionalism is less robust than it might otherwise be because state courts have had relatively fewer opportunities to interpret and apply their state constitutions. This is especially true in states that lack

4. *Comm. for Pub. Couns. Servs. v. Att’y Gen.*, 480 Mass. 700, 108 N.E.3d 966 (2018); *Bridgeman v. Dist. Att’y for the Suffolk District*, 476 Mass. 298, 67 N.E.3d 673 (2017).

5. See Special Commission on Qualified Immunity, *Special Commission to Investigate and Study the Impact of the Qualified Immunity Doctrine to the Administration of Justice in the Commonwealth Final Report* (Jan. 4, 2022), https://jqcommissionma.files.wordpress.com/2022/01/qi-commission-final-report-3.pdf?force_download=true [hereinafter Massachusetts Qualified Immunity Commission Report].

express remedies for violations of state constitutional rights. “Most states have taken *no* measures to secure the enforcement of constitutional rights through constitutional tort litigation,”⁶ and the courts in those states therefore have fewer opportunities to clarify those rights and to consider whether they have different contours than the rights that federal courts have articulated under U.S. Constitution.

Even when state laws authorize lawsuits alleging violations of state constitutional rights, this same problem will arise if those laws offer a qualified immunity defense. The U.S. Supreme Court has held that a court can grant qualified immunity if it determines that the right in question was not “clearly established” at the time of the incident, without determining whether the defendant in fact violated that right.⁷ When courts accept this invitation to grant qualified immunity without resolving the underlying constitutional question, based on a view that the asserted right was not clearly established in the past, those courts also fail to clarify the law going forward. That lack of clarity leaves everyone in the dark, not just in the initial case, but in the one after that, and the one after that.

This dynamic can both stunt and warp the development of state constitutional law. It can stunt that development because, without a civil rights remedy, or with a remedy that is hamstrung by qualified immunity, some important constitutional questions go completely unanswered. And it can warp the development of state constitutional law because other important constitutional questions will be answered, but likely in criminal cases, where the facts tend to be quite favorable to government officials.

That is welcome terrain for the government. Think about a stop-and-frisk program whose constitutionality is adjudicated only in the relatively few instances where the stop turned up drugs, firearms, or other contraband, and the police initiated a criminal case.

Consider, for example, a law enforcement agency that disperses a group of protesters for what the agency asserts are good reasons, and what the protesters assert are unconstitutional reasons. In her keynote remarks, Julie Murray explained that the protesters may have an argument that their free speech rights under the New Mexico Constitution are broader than their rights under the U.S. Constitution, and therefore that the law enforcement agency might have violated the New Mexico Constitution even if it did not violate the First Amendment to the U.S. Constitution.⁸ But before the existence of the New Mexico Civil Rights Act, if those protesters weren’t physically injured, and there was no law providing for recover of attorneys’ fees, then those protestors might have had a hard time finding a lawyer to take their case. And so no court would decide who is right, and the law would remain unclear for the

6. Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 743 (2021).

7. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

8. Julie Murray, Senior Staff Attorney, Am. Civ. Liberties Union, Keynote Address at the New Mexico Civil Rights Act Symposium: Its Meaning and Application (Oct. 28, 2023); N.M. CONST. art. II, § 17 (“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, 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.”).

next protest, and the one after that. Hopefully, under the New Mexico Civil Rights Act, when situations like this arise, courts will be given opportunities to clarify the law.

Or consider a hypothetical case on behalf of a civil rights plaintiff bringing federal and state claims alleging police brutality. For the federal claim, the court would have the option of ducking any claim of unconstitutional excessive force if the court concludes that the law was not clearly established at the time of the incident. But now, under the New Mexico Civil Rights Act, that wouldn't be an option for the state claim. And for that reason, in this hypothetical case, state courts might clarify the issue. And if the plaintiff is right that the police used excessive force, maybe the court's decision will keep it from happening again.

Sometimes plaintiffs will win. Sometimes they won't. But unlike in a state with no civil rights act, cases will be litigated. And unlike in a qualified immunity system, wins and losses will hinge on the actual contours of the New Mexico Constitution, instead of the happenstance of what has or has not already been clearly established by existing case law. That should be good for the development of state constitutional law in New Mexico, and for the people who depend on it.

II. PROTECTING THE NEW MEXICO CIVIL RIGHTS ACT

In the civil rights world, nothing stays won. Every advancement must be vigorously defended, or else, inevitably, it will be eroded or reversed. And so, now that the New Mexico Civil Rights Act is here, it must be protected.

I say this because other civil rights remedies have been eroded over time. In Massachusetts, where I litigated for many years, there is a law called the Massachusetts Civil Rights Act (MCRA) that provides remedies for certain kinds of interference with state rights.⁹ The law was enacted in 1979, and at first blush it might seem very broad. For example, a person can be liable under the MCRA “whether or not [they were] acting under color of law.”¹⁰ But, seemingly as a check on excessive liability for non-government defendants, the law says that defendants are liable if they interfere with what the law calls “secured rights” by means of “threats, intimidation or coercion.”¹¹

This is where things went sideways. Although the MCRA's drafters may well have intended the “threats, intimidation or coercion” language to apply only to lawsuits against private actors, courts have construed it as a requirement that must be proved in any MCRA lawsuit, including a lawsuit against a government actor. Under this interpretation, a direct violation of someone's rights is not actionable under the MCRA, unless that violation of rights—no matter how egregious—was accompanied by “threats, intimidation or coercion.”¹²

9. MASS. G.L. c. 12, §§ 11H-J.

10. *Id.* § 11H. See *Nelson v. City of Cambridge*, 101 F. Supp. 2d 44 (D. Mass. 2000); *Ayasli v. Armstrong*, 56 Mass. App. Ct. 740, 780 N.E.2d 926 (2002); *Bell v. Mazza*, 394 Mass. 176, 474 N.E.2d 1111 (1985).

11. MASS. G.L. c. 12, § 11H.

12. See *Longval v. Comm'r of Corr.*, 404 Mass. 325, 333, 535 N.E.2d 588, 593 (1989) (“A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the [MCRA].”).

This interpretation leads to some absurd results. For example, it means that in practice excessive force, without more, has been deemed not actionable under the Massachusetts Civil Rights Act. Someone victimized by police misconduct will have a viable MCRA claim if the officer *threatened* to use excessive force, but not if the officer simply hauled off and *used* excessive force without threatening to do so beforehand. For example, if a Massachusetts police officer threatens to punch someone in the face for no good reason, that might be actionable under the MCRA. But punching them isn't!

The case law interpreting the Massachusetts Civil Rights Act has therefore left an enormous loophole in the protection that the MCRA affords the people of Massachusetts. In consequence, people whose constitutional rights are violated in Massachusetts often see no point in bringing lawsuits under the Massachusetts Civil Rights Act. As an attorney who represents police officers put it to a state commission, in Massachusetts, “virtually all Civil Rights lawsuits brought against public officials [as opposed to private individuals] are currently litigated under §1983 in the federal courts.”¹³

The weak protection of the Massachusetts Civil Rights Act also has other consequences that reverberate throughout the state legal system. In July 2020, the U.S. Department of Justice released a report of its only pattern-or-practice investigation of a police department during the Trump administration. The report concerned the Springfield, Massachusetts Police Department, and it found that the Department's Narcotics Bureau had engaged in a pattern or practice of excessive force in violation of the Fourth Amendment to the U.S. Constitution.¹⁴ What was the excessive force? It included “repeatedly punch[ing] individuals in the face”¹⁵—the very conduct falling inside the Massachusetts Civil Rights Act loophole.

Do I know for a fact that this pattern or practice would have been prevented if the MCRA had allowed, or had been interpreted to allow, civil rights lawsuits against police officers for excessive force? Do I know for a fact that the absence of a civil rights act in New Mexico contributed to the facts that resulted in a pattern-or-practice report by the DOJ against the Albuquerque Police Department in 2014?¹⁶

Well, I can't be sure. But I don't think it helped.

It's important to make sure that the New Mexico Civil Rights Act, which holds such promise, does not go down this road. And perhaps it won't. After all, the Act straightforwardly authorizes lawsuits for the “deprivation of any rights, privileges or immunities pursuant to the constitution of New Mexico due to acts or omissions of” a public body or anyone acting under the authority of a public body. The Act also straightforwardly forecloses a qualified immunity defense for those lawsuits. So, if you are thinking to yourself that there is no reason for concern,

13. Massachusetts Qualified Immunity Commission Report, *supra* note 5, at 9.

14. U.S. Dep't of Justice Civil Rights Division & U.S. Attorney's Office for the Dist. of Massachusetts, Investigation of the Springfield, Massachusetts Police Department's Narcotics Bureau, at 10 (July 8, 2020), https://www.justice.gov/d9/press-releases/attachments/2020/07/08/spd_investigative_report_7-8-20_final_version_0.pdf.

15. *Id.* at 2.

16. *Justice Department Releases Investigative Findings on Albuquerque Police Department*, U.S. DEP'T OF JUST. (Apr. 10, 2014), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-albuquerque-police-department> [<https://perma.cc/U5LU-UDU5>].

because the New Mexico Civil Rights Act is so airtight that it cannot possibly be susceptible to attempts to weaken it, well, you might be right.

But you might also be wrong. If anything, the story of the federal civil rights remedy, 42 U.S.C. § 1983, demonstrates that it can be virtually impossible to insulate a civil rights statute from interpretations that water it down. As many of you know, § 1983 was enacted as the Civil Rights Act of 1871.¹⁷ Also known as the Ku Klux Klan Act, it came in response to resistance by states to recognizing the full rights and humanity of formerly enslaved Black people. The text is broad:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .¹⁸

This language is straightforward, just like the New Mexico Civil Rights Act. Yet courts have construed § 1983 to contain limitations found nowhere in the text. These limitations include a qualified immunity defense that generally shields government actors from § 1983 liability so long as their actions do not violate “clearly established statutory or constitutional rights of which a reasonable person would have known,”¹⁹ and a limitation on liability for municipalities whose employees or agents violate people’s rights.²⁰ Section 1983’s fate should serve as a cautionary tale for anyone who thinks their state’s civil rights act, as written, is perfect.

III. CONTINUING TO INNOVATE

In my experience as a civil rights lawyer, every new reform or advancement is quickly followed by claims that no more reforms or advancements are needed. That will inevitably happen with the New Mexico Civil Rights Act. Its existence will be cited as a reason not to try other things that might be capable of protecting and enforcing constitutional rights. Those arguments will be wrong.

Again, I will use Massachusetts as an example. In 2020, the Massachusetts Legislature passed a policing bill that created something called the Peace Officer Standards and Training, or POST, Commission.²¹ The POST Commission now publishes some information about police officers who have been found to have committed misconduct.²² In response, five Massachusetts district attorneys have submitted a brief to the state’s highest court arguing that, “in most circumstances,” prosecutors should be able to discharge their duty to inquire about police misconduct

17. See 42 U.S.C. § 1983.

18. *Id.*

19. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

20. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

21. MASS. G.L. c. 6E, §§ 1–16.

22. See *id.* § 8; POST COMMISSION, OFFICER DISCIPLINARY RECORDS DATABASE, <https://www.mass.gov/info-details/officer-disciplinary-records-database> [https://perma.cc/WA6Y-K2D9] (last visited March 8, 2024).

by doing “no more” than checking the POST Commission’s web site.²³ The web site lists only sustained findings of misconduct, which of course may represent just the tip of the iceberg. Yet these district attorneys argue that prosecutors should not have to bother asking the police officers with whom they work, and on whom they rely to convict and imprison people, whether the officers have committed misconduct.²⁴

But, of course, this argument is wrong. The mere possibility that this new Commission might have some evidence about officers does not relieve prosecutors of their constitutional duty, under cases like *Brady v. Maryland*²⁵ and *Giglio v. United States*,²⁶ to search for and disclose impeachment evidence directly from any officer who is a member of their prosecution team.

The truth is that in civil rights enforcement we need a belt-and-suspenders approach because every civil rights act makes tradeoffs, and none of them is perfect. The New Mexico Civil Rights Act, for example, authorizes suits only against the public bodies that authorize government officials to act.²⁷ On the one hand, this approach might help to give those public bodies the incentive to train their employees to avoid violating people’s rights in the first place. On the other hand, because the Act does not authorize suits against individual government officials, those officials might sometimes need some extra help to comply with the constitution.

Indeed, in my own practice, I have certainly brought cases under civil rights acts. But I have also used other tools. In 2017, a case that my colleagues and I brought in response to a drug lab scandal resulted in the court-ordered dismissal of drug charges in over 21,000 cases.²⁸ We believe it was the single largest dismissal of wrongful convictions in U.S. history. That case wasn’t brought under a state civil rights act. It was the culmination of years of litigation by many advocates, which built precedents about the state’s duty to identify and address convictions tainted by government misconduct.²⁹

Not only is it simply wrong to say that any one tool fixes everything, that kind of thinking can give rise to the false belief that correcting injustice is someone else’s problem. We all know the story of *Gideon v. Wainwright*,³⁰ the U.S. Supreme Court case ensuring that the state cannot sentence an indigent person to prison unless the state has made a criminal defense attorney available to that person at the state’s expense. But fewer people know that, in the wake of *Gideon*, poor people had fared worse in our legal system than they did before. The indigency rate for state felony

23. Brief of Amici Curiae District Attorneys for the Plymouth, Berkshire, Essex, Northwestern, and Worcester Districts at 15, *Commonwealth v. McFarlane*, 493 Mass. 385, 225 N.E.3d 812 (2024), https://www.ma-appellatecourts.org/pdf/SJC-13430/SJC-13430_11_Amicus_Plymouth_District_Attorney_and_Others_Brief.pdf.

24. *Id.*

25. 373 U.S. 83 (1963).

26. 405 U.S. 150 (1972).

27. N.M. STAT. ANN. § 41-4A-3(C).

28. *Bridgeman v. Dist. Att’y for the Suffolk Dist.*, 476 Mass. 298, 67 N.E.3d 673 (2017).

29. *See, e.g., Bridgeman v. Dist. Att’y for the Suffolk Dist.*, 471 Mass. 465, 30 N.E.3d 806 (2015); *Commonwealth v. Scott*, 467 Mass. 336, 5 N.E.3d 530 (2014).

30. 372 U.S. 335 (1963).

cases near the time when *Gideon* was decided was 43 percent. In the decades after *Gideon*, that number grew to 80 percent.³¹

Why is that? The scholar Paul Butler has suggested that this phenomenon might be due partly to the possibility that, once *Gideon* guaranteed defense attorneys to low-income people charged with crimes, prosecutors no longer had to worry that they would look bad if they brought charges mainly against poor people without lawyers.³² Instead, they might think there is no problem with disparately charging low-income individuals because, hey, they'll get lawyers, and it will be the job of those lawyers to protect them. In short, by making a new right available to certain people in our legal system—namely, the right to a lawyer—*Gideon* might have had the unintended consequence of making everyone else feel like they'd been let off the hook to do right by those people.

Now that the New Mexico Civil Rights Act has provided a new resource to people whose state rights have been violated—namely, lawsuits—it's important to recognize, and guard against, those same risks. If all goes well, the Act will help to remedy, and even deter, unlawful conduct by public officials.

But those possibilities do not, and should not, let anyone else off the hook. The Act will not solve every problem, and its existence should not be viewed as a reason to abandon other potential solutions. Nor does the Act supply a reason to say that it is solely up to civil rights plaintiffs and their lawyers to address the problem of illegal government action—while leaving others off the hook. If unlawful police violence is happening in New Mexico, or if other civil rights violations are occurring, the New Mexico Civil Rights Act may empower the victims of those violations to seek justice in court. But that doesn't—cannot—mean that it is just up to victims, and their lawyers, to solve civil rights problems. It's up to all of us.

CONCLUSION

Civil rights lawsuits are important. They can provide some justice to people who are harmed by government misconduct. They can deter, both specifically and generally, misconduct by government actors. And they can help to develop the contours of state constitutional law, particularly in areas where state constitutional law might provide greater protection for individual rights than is available under federal law.

But valid civil rights lawsuits are typically a sign that something has gone wrong. They mitigate wrongdoing that never should have happened in the first place. And their aim, our aim, is to prevent that wrongdoing. So it is important to remember, at every turn, the reason why the New Mexico Civil Rights Act holds such promise: The goal is not to create lawsuits; it's to create justice.

31. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2181 (2013).

32. *Id.* at 2197 (“If prosecutors had brought most of their cases against the poor during the pre-*Gideon* era when most indigent defendants did not have lawyers, prosecutors would have looked like bullies.”).