



Summer May 2024

## The New Mexico Civil Rights Act: Look Before You Leap

The Honorable Linda M. Vanzi

Rheba Rutkowski

### Recommended Citation

The Honorable Linda M. Vanzi & Rheba Rutkowski, *The New Mexico Civil Rights Act: Look Before You Leap*, 54 N.M. L. Rev. 363 (2024).

Available at: <https://digitalrepository.unm.edu/nmlr/vol54/iss2/5>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: [www.lawschool.unm.edu/nmlr](http://www.lawschool.unm.edu/nmlr)

# THE NEW MEXICO CIVIL RIGHTS ACT: LOOK BEFORE YOU LEAP

Linda M. Vanzi\* and Rheba Rutkowski\*\*

## INTRODUCTION

The New Mexico Civil Rights Act (“NMCRA”),<sup>1</sup> which became law in 2021, authorizes “[a] person who claims to have suffered a deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body” to “maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.”<sup>2</sup> In addition to allowing recovery of “actual damages” subject to a statutory cap, as well as equitable and injunctive relief,<sup>3</sup> the NMCRA allows courts to award prevailing plaintiffs “reasonable attorney fees and costs to be paid by the defendant.”<sup>4</sup>

Before the NMCRA’s enactment, New Mexicans could seek damages for constitutional violations under a federal statute enacted some 150 years earlier, 42 U.S.C. § 1983 (“Section 1983”), which authorizes “an action at law, suit in equity, or other proper proceeding for redress” for parties injured as a result of a “deprivation of any rights, privileges, or immunities secured by” the *federal* Constitution and laws caused by a “person” acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.”<sup>5</sup> Options for recovering damages for violations of *state* constitutional guarantees by government

---

\* University of New Mexico School of Law graduate; former trial judge at the Second Judicial District Court, Civil Division, and appellate judge on the New Mexico Court of Appeals; currently Of Counsel, Rodey, Dickason, Sloan, Akin & Robb, P.A.

\*\* Of Counsel, Butt Thornton & Baehr PC.

1. N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

2. *Id.* § 41-4A-3(B) (2021).

3. *Id.* § 41-4A-6 (2021).

4. *Id.* § 41-4A-5 (2021).

5. 42 U.S.C. § 1983 (authorizing the civil action); *see also* 42 U.S.C. § 1988(b) (allowing courts discretion to award “reasonable” attorney fees to “the prevailing party, other than the United States” in proceedings brought under Section 1983 and other statutes identified therein).

actors were limited.<sup>6</sup> The New Mexico Tort Claims Act (“TCA”)<sup>7</sup> permits certain claims against governmental entities and public employees pursuant to enumerated exceptions to the TCA’s general rule of immunity, but claims for “deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico”—as distinct from tort claims—may be actionable under the TCA only for alleged deprivations “caused by law enforcement officers while acting within the scope of their duties.”<sup>8</sup> The TCA, moreover, does not authorize recovery of attorney fees.<sup>9</sup>

---

6. See *Jones v. City & Cnty. of Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988) (“Section 1983 does not, however, provide a basis for redressing violations of *state* law, but only for those violations of *federal* law done under color of state law.” (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)); *Carter v. City of Las Cruces*, 1996-NMCA-047, ¶ 13, 121 N.M. 580, 915 P.2d 336 (“Unlike federal law, New Mexico has no statute analogous to § 1983 that would provide for damages against government entities or their officials for past violations of state statutes or the state Constitution.”); see also Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302, 306–14 (2018) [hereinafter *State Constitutional Litigation*] (explaining that most “provisions of the New Mexico Constitution are not self-executing” and discussing the lack of a statute, procedural rule, or judge-made law authorizing damages and attorney fees for violations of the state constitution).

7. The TCA, codified at N.M. STAT. ANN. §§ 41-4-1 to -30 (1976, as amended through 2022), declares “the public policy of New Mexico” to be that “governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act.” N.M. STAT. ANN. § 41-4-2(A) (1976). The TCA grants, subject to enumerated exceptions, “immunity from liability for any tort” to “[a] governmental entity and any public employee while acting within the scope of duty,” N.M. STAT. ANN. § 41-4-4(A) (2001), and is “the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the [TCA],” N.M. STAT. ANN. § 41-4-17(A) (1982); see also *Valdez v. State*, 2002-NMSC-028, ¶ 12, 132 N.M. 667, 54 P.3d 71 (explaining that, “in order for a plaintiff to sue a governmental entity, the cause of action must fit within one of the exceptions under the TCA” and that “it is well established that ‘absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right’” (citations omitted)).

8. N.M. STAT. ANN. § 41-4-12 (2020) (stating that TCA immunity “does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from . . . failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties” and defining “law enforcement officer” for purposes of this section as “a public officer or employee vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of or convicted of committing a crime, whether that duty extends to all crimes or is limited to specific crimes”). The TCA elsewhere references violations of “rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico” by a “public employee” acting “within the scope of his duty” in connection with the obligations of a “governmental entity” to provide a defense and pay a settlement or judgment entered against a “public employee.” *Id.* § 41-4-4(B), (D) (2001); see also *id.* § 41-4-17(A) (1982) (stating that “a governmental entity or any insurer of a governmental entity shall have no right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death, property damage or violation of rights, privileges or immunities secured by the constitution and laws of the United States or laws of New Mexico resulting in the settlement or final judgment”). For an analysis of the defense obligation of a governmental entity in the context of a Section 1983 suit against a tribal police officer, see generally *Loya v. Gutierrez*, 2015-NMSC-017, 350 P.3d 1155.

9. See *State Constitutional Litigation*, *supra* note 6, at 310–14 (discussing the lack of a means to recover attorney fees for plaintiffs seeking to enforce state constitutional rights); *id.* at 310 n.59 (citing N.M. STAT. ANN. § 41-4-19 (2008) (other citation omitted)).

Litigation under the NMCRA will require New Mexico courts to rule on questions concerning what the NMCRA's text authorizes and requires, as well as altogether different questions about how the constitutional provisions upon which NMCRA claims are based are to be interpreted and applied.<sup>10</sup> News articles and comments appearing in the months preceding and following the NMCRA's enactment, and court filings post-dating the NMCRA's effective date, suggest misunderstandings about the NMCRA, especially about its purported impact on doctrines developed in litigation under Section 1983.<sup>11</sup> What lawyers and judges misapprehend, or simply do not know, not only about the NMCRA but also about Section 1983 and the TCA, could have detrimental consequences to litigants and to the development of a sound and cogent body of law on the NMCRA and the constitutional provisions that ground NMCRA claims.<sup>12</sup> This article is intended to be a provisional compilation of matters to be considered in NMCRA litigation, offered in the hope that this preliminary work might assist lawyers and judges in litigating and adjudicating NMCRA claims in a well-reasoned and principled fashion.

## I. THE NMCRA IS A VEHICLE FOR REDRESS AND NOT A SOURCE OF CIVIL RIGHTS

The term "civil right" is defined in different ways, but usually refers to individual rights such as the right to due process and the right to equal protection under the law.<sup>13</sup> Although some federal and state statutes confer such rights,<sup>14</sup> the NMCRA and Section 1983 do not. Instead, each statute authorizes a civil action against government actors, as defined in those statutes, to remedy claimed

---

10. See Linda M. Vanzi & Mark T. Baker, *Independent Analysis and Interpretation of the New Mexico Constitution: If Not Now, When?*, 53 N.M. L. REV. 1, 24–27 (2023) [hereinafter *Independent Analysis*] (discussing this point).

11. See, e.g., 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://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].

12. One speaker at the October 28, 2023 UNM School of Law Symposium, "The New Mexico Civil Rights Act: Its Meaning and Application," aptly observed that failure to litigate the NMCRA properly will have consequences for plaintiffs and defendants and that lawyers litigating NMCRA cases need to know more than judges. *Cf.* *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially) ("It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.").

13. See, e.g., *Civil Right*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "civil right" as "[a]ny of the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act," especially "the right to vote, the right of due process, and the right of equal protection under the law" and also as "civil liberty").

14. See, e.g., 42 U.S.C. § 2000a (prohibiting discrimination in places of public accommodation); 42 U.S.C. § 2000e-2 (prohibiting discrimination in employment); N.M. STAT. ANN. § 28-1-7 (2023) (prohibiting discrimination in matters including employment and public accommodations).

deprivations of rights conferred elsewhere.<sup>15</sup> The NMCRA identifies “the bill of rights of the constitution of New Mexico” as the source of rights that may form the basis of a claim under the NMCRA;<sup>16</sup> Section 1983 identifies the (federal) “Constitution and laws” as the source of rights that may form the basis of a Section 1983 claim.<sup>17</sup> The TCA also authorizes a civil action against defined government actors to remedy claimed deprivations of rights conferred elsewhere, provided that the claim falls within an enumerated exception to the TCA’s general rule of immunity. Although the TCA generally identifies tort law as the source of rights that may form the basis of a claim for which the TCA waives immunity, one exception provides that TCA immunity “does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from . . . [a] deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.”<sup>18</sup>

Judges and lawyers experienced with litigation involving Section 1983 and the TCA likely are cognizant of the difference between a statute that creates a cause of action to vindicate a right conferred by other law—*e.g.*, a constitutional provision or tort law—but others may not appreciate the distinction. The point, however basic, is important. It is crucial to understand, for example, that questions about what the NMCRA authorizes, allows and/or requires are not coextensive with questions about the nature and scope of the rights guaranteed by the provision of the New Mexico bill of rights asserted as the basis for an NMCRA claim. And standards applicable in determining what conduct violates a particular provision of the bill of rights may have no relevance in analyzing such statutory matters as what claims are actionable under the NMCRA. Another example concerns the “interstitial approach” adopted by the New Mexico Supreme Court in *State v. Gomez*,<sup>19</sup> to be applied where “a litigant asserts protection under a New Mexico [c]onstitutional provision that has a

---

15. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (explaining that “Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred’” and that “[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed.”) (quoting and citing *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979); citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)); *Chapman v. Hous. Welfare Rts. Org.*, 441 U.S. 600, 617–18 (1979) (stating that “one cannot go into court and claim a ‘violation of § 1983’—for § 1983 by itself does not protect anyone against anything” and “does not provide any [substantive] rights at all.”).

16. N.M. STAT. ANN. § 41-4A-3(B) (2021).

17. 42 U.S.C. § 1983. For a discussion of cases addressing federal statutes deemed to constitute “laws” forming the basis for a claim under Section 1983, see, for example, ERWIN CHEREMINSKY, FEDERAL JURISDICTION § 8.8, at 620 (8th ed. 2021) [hereinafter CHEREMINSKY] (analyzing cases including *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Middlesex Cnty. Sewerage Auth. v. Nat. Sea Clammers Ass’n*, 453 U.S. 1 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498 (1990); *Suter v. Artist M.*, 503 U.S. 347 (1992); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)).

18. See authorities cited *supra* notes 7–8 (quoting N.M. STAT. ANN. § 41-4-12 (2020)).

19. 1997-NMSC-006, 122 N.M. 777, 932 P.2d. 1.

parallel or analogous provision in the United States Constitution.”<sup>20</sup> *Gomez* articulated the approach as follows:

Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.<sup>21</sup>

Because it concerns analysis of state constitutional provisions, the *Gomez* interstitial approach has no relevance, and should have no application, to questions about the NMCRA itself—*e.g.*, the purpose(s) of the statutory scheme and what its text authorizes, allows and/or requires—even if the New Mexico Supreme Court continues to apply this approach in interpreting provisions of the New Mexico bill of rights alleged as the basis for NMCRA claims.<sup>22</sup>

The overarching point is this: Discernment of the difference between a statute authorizing a cause of action to vindicate rights conferred elsewhere and the right the cause of action authorizes a plaintiff to enforce is important, including for purposes of analyzing cases that interpret and apply Section 1983 (and, perhaps, analogous causes of action from other states as well<sup>23</sup>) and the TCA, and for evaluating if and to what extent principles and reasoning from such cases may or should be applied to claims brought under the NMCRA.<sup>24</sup>

## II. THE NMCRA IN CONTEXT

The NMCRA came into being against a background that includes decades of litigation under Section 1983 and the TCA. The development of sound and properly targeted theories, arguments, and rulings concerning NMCRA claims will

20. *Id.* ¶ 22, 932 P.2d at 8; *see also id.* ¶¶ 19–23, 932 P.2d at 7–8. The “interstitial approach” adopted in *Gomez* is one of several methods applied by state courts to deal with what has been described as the “timing” issue presented where a state constitutional provision has a federal counterpart. *See, e.g., Independent Analysis, supra* note 10, at 3–8 (and authorities cited therein).

21. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358–59 (1982)).

22. The New Mexico Supreme Court recently stated that “*Gomez* does not bind this Court as to our analysis of state constitutional questions, and we encourage thoughtful and reasoned argument in the future addressing whether the interstitial approach is the proper method to ensure the people of New Mexico the protections promised by their constitution.” *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272, 281. The interstitial approach is discussed further *infra*, although not in detail. For a deeper discussion of the approach and its adoption and application in New Mexico cases, *see Independent Analysis, supra* note 10, at 3–16, 24–27 (and authorities cited therein).

23. Analogous causes of action from other states are noted in N.M. C.R. COMM’N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, at 15–17 app. II (2020); *see also State Constitutional Litigation, supra* note 6, at 307–08 & nn.39–41.

24. *Cf. State v. Off. of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 28, 285 P.3d 622, 629 (acknowledging that statutes and jurisprudence from other jurisdictions may be relevant or helpful when interpreting New Mexico law but cautioning that “when relying on such authority we must ensure that another court is not relying on language that is absent from our statute or that the language of the statute differs so greatly from ours that it serves a different purpose”).

require, not only an understanding of the NMCRA's text, but also at least some knowledge of the respective texts of Section 1983 and the TCA; doctrines and standards created by courts in addressing claims brought under Section 1983 and the TCA; how those doctrines and standards evolved; and the reasons offered to justify them. This is so, not only because it is sometimes necessary to look back in order to find a path forward,<sup>25</sup> but also because awareness and understanding of doctrines and standards developed under Section 1983 and the TCA (and, perhaps, those developed in litigation under the civil-rights statutes of other states as well) will be important to guide decision-making in NMCRA litigation and to evaluate whether and to what extent doctrines, standards, principles, and reasoning from cases brought under Section 1983 and the TCA may properly be applied to NMCRA claims. It seems inevitable that litigants will proffer arguments based on law developed under Section 1983 and the TCA; indeed, defenses and arguments raised against NMCRA claims to date have included defenses based on the Section 1983 doctrine of "qualified immunity" and the argument that the NMCRA conflicts with the TCA's declared public policy of immunity for governmental entities and public employees, except as provided in the TCA.

#### A. Section 1983: Text and Doctrines

Section 1983 was derived from § 1 of the Civil Rights Act of 1871, entitled "An Act to Enforce Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."<sup>26</sup> The statute has been described as "largely moribund" during the first 50 years following its enactment and rarely used for another 50 years, with the subsequent "marked increase" in Section 1983 litigation attributed to factors including developments in the case law beginning in 1961 and the enactment of other legislation, including the Civil Rights Attorney's Fees Awards Act of 1976.<sup>27</sup> The body of law developed in litigation under Section 1983 is extensive and byzantine.<sup>28</sup> The reasons for the complexity are not obvious from the text of the statute, the entirety of which is set forth in two sentences:

---

25. The concept is not original to the authors. It may have been referenced by one of the Symposium speakers. A statement to the effect that it is sometimes "necessary to go backward in order to go forward" has been attributed to Martin Luther King, Jr., in a February 28, 1954 sermon entitled "Rediscovering Lost Values." Martin Luther King, Jr., *Rediscovering Lost Values*, in A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR. (Clayborne Carson & Peter Holloran, eds. 2001) (ebook). See article available at <https://theinwardturn.com/martin-luther-king-jr-sometimes-to-move-forward-we-have-to-go-back/> [<https://perma.cc/J8DB-F3V5>]. A different, more ominous, articulation is this: "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 7 *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE*, at 284 (Scribner's 1905).

26. Ch. 22, 17 Stat. 13; see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664 (1978) (describing the 1871 Act as "the precursor of § 1983"). Numerous authorities discuss the 1871 Act's legislative history. See, e.g., *Monell*, 436 U.S. 658 at 665-89; *Monroe v. Pape*, 365 U.S. 167, 171-91 (1961), *overruled in part on other grounds by Monell*, 436 U.S. 658; CHEMERINSKY, *supra* note 17, § 8.8.

27. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988); CHEMERINSKY, *supra* note 17, § 8.2, at 532-34.

28. Dean Erwin Chemerinsky has observed that "Section 1983 is the basis for almost all constitutional rulings arising from the actions of state and local governments and their officers."

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>29</sup>

As a textual matter, Section 1983 appears to be relatively straightforward, and the United States Supreme Court has described it as such:

By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.<sup>30</sup>

However, as a leading scholar in this area recently observed in a “primer” post aimed at readers who may not be familiar with the law of Section 1983, “much section 1983 doctrine has become increasingly technical,” with “a plethora of defenses called ‘immunities’ (absolute and qualified)” and other limitations imposed by the United States Supreme Court.<sup>31</sup> Some decisions purport to interpret Section 1983’s text, while others formulate extra-textual doctrines and standards. A full analysis of these matters is beyond the scope of this preliminary work,<sup>32</sup> but some are discussed below, by way of illustration, to alert readers to issues that may arise in NMCRA cases, notwithstanding—or because of—the NMCRA’s text.

---

CHEMERINSKY, *supra* note 17, § 8.1, at 526. Section 1983 is the subject of numerous treatises, including the following: SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (2023-2024 ed.); MARTIN A. SCHWARTZ, SCHWARTZ ON SECTION 1983: LAW AND COMMENTARY (2023); MARTIN A. SCHWARTZ, SCHWARTZ ON SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (4th ed. 2006); CHEMERINSKY, *supra* note 17, §§ 8.1-8.11, at 523–664.

29. 42 U.S.C. § 1983.

30. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (citing *Monroe*, 365 U.S. at 171).

31. Sheldon H. Nahmod, *An Updated Section 1983 Primer (1): History, Purposes and Scope*, NAHMOD L. BLOG (March 6, 2024, 1:21 PM), <https://nahmodlaw.com/2024/03/06/an-updated-section-1983-primer-1-history-purposes-and-scope/> [https://perma.cc/WYA7-KSUL].

32. This article is intended as an exploration, rather than the presentation of original research, and relies on the scholarship of others. The article cites CHEMERINSKY, *supra* note 17, frequently, not only because of Dean Chemerinsky’s expertise, but also because this single-volume work is especially clear, concise, and accessible to many.



*Section 1983 Defendants and Relief*

As noted, Section 1983 authorizes a cause of action against a “person” who, while acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,” allegedly violated rights protected by federal law. The United States Supreme Court concluded in *Monroe v. Pape*<sup>33</sup> that Section 1983 is intended “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position” and interpreted “under color of” state law broadly to include all actions taken by officials “clothed with the authority of state law.”<sup>34</sup> The interpretation adopted in *Monroe* encompasses “all actions taken in an officer’s official capacity, whether authorized by state law or in violation of it.”<sup>35</sup> In several decisions issued over the course of years, the Supreme Court has addressed questions concerning what state and local government entities and officials are “persons” subject to suit under Section 1983 and in what “capacity”; the circumstances under which various entities and officials may be liable; and the relief that may be awarded against them.

In partial summary, states are not subject to suit under Section 1983 in either federal or state court;<sup>36</sup> nor can state officials be sued in their “official capacities” for damages under Section 1983—in any court—although state officials may be sued in their official capacities for prospective relief.<sup>37</sup> Municipalities and other local government units are “persons” who may be liable under Section 1983 (for damages, injunctive relief, and declaratory relief), but only if “the action that is alleged to be unconstitutional implements or executes” an official policy or custom, and the municipality is not subject to vicarious liability—*i.e.*, liability for the conduct of employees or agents under a theory of *respondeat superior*.<sup>38</sup> In addressing the contours of municipal liability under Section 1983, the Court has created doctrines concerning what constitutes an official policy or custom, and has held that a Section 1983 plaintiff must not only “identify conduct properly attributable to the municipality” but also must “show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the

---

33. 365 U.S. 167 (1961), *overruled in part by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

34. *Id.* at 172, 182–85; CHEMERINSKY, *supra* note 17, § 8.3, at 534–37; *see also* *West v. Atkins*, 487 U.S. 42, 49 (1988) (explaining that conduct meeting the state-action requirement of the Fourteenth Amendment is conduct “under color of state law and will support a suit under § 1983” (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982))).

35. CHEMERINSKY, *supra* note 17, § 8.3, at 537.

36. As discussed briefly *infra*, suits brought in federal court implicate additional issues, including those arising under the Eleventh Amendment to the United States Constitution, which provides: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. For a deeper discussion of the Eleventh Amendment and its impact on which parties may be sued, what claims may be brought, and what relief may be sought in federal court, *see*, for example, CHEMERINSKY, *supra* note 17, §§ 7.1–7.7, at 445–522.

37. CHEMERINSKY, *supra* note 17, § 8.7, at 618–20 (discussing *Quern v. Jordan*, 440 U.S. 332 (1979); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989)).

38. *Monell*, 436 U.S. at 690–91; *see id.* at 694 (“[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”).

municipal action and the deprivation of federal rights.”<sup>39</sup> The Court has also stated that “the term ‘supervisory liability’ is a misnomer” in Section 1983 suits because, where there is no vicarious liability, “each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”<sup>40</sup> “[S]tate officials, sued in their individual capacities, are ‘persons’ within the meaning of § 1983” and may be held liable for damages.<sup>41</sup> Punitive damages are available in Section 1983 cases against government officials sued in their individual (personal) capacities but are not available in a Section 1983 case against a municipality.<sup>42</sup>

### *Immunities*

With Section 1983 suits unavailable against state governments; municipal liability under Section 1983 limited by court-created doctrines; and damages unavailable in Section 1983 cases against government officials in their official capacities, plaintiffs seeking to recover damages under Section 1983 often assert claims against state and local government officials in their “individual capacities.” But such claims are subject to court-created immunities—“absolute” and “qualified.”<sup>43</sup>

The United States Supreme Court has recognized that Section 1983 “on its face admits of no immunities.”<sup>44</sup> Nevertheless, the Court deemed it appropriate to “read it ‘in harmony with general principles of tort immunities and defenses, rather than in derogation of them,’” considering whether “an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871,” and, if so, “whether § 1983’s history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.”<sup>45</sup> Absolute immunity is

---

39. *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 404 (1997); *see also id.* (stating that “it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality” and that “[t]he plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the ‘moving force’ behind the injury alleged”); *id.* at 405 (“Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.”). In discussing the culpability standard for municipal liability based on a policy of inadequate training, established in *City of Canton v. Harris*, 489 U.S. 378 (1989), Dean Chemerinsky notes that the Supreme Court “has indicated, in dicta, that the deliberate indifference test under *Canton* is objective, not subjective.” CHEMERINSKY, *supra* note 17, § 8.5, at 563 n.67 (citing and quoting *Farmer v. Brennan*, 511 U.S. 825, 840 (1994)).

40. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *see also id.* at 676 (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”).

41. *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

42. *Kentucky v. Graham*, 473 U.S. 159, 167 n.13 (1985).

43. *See* CHEMERINSKY, *supra* note 17, § 8.6, at 576–77 (explaining that Section 1983 “creates liability for any person, acting under color of state law, who violates the Constitution and laws of the United States” and that “the Supreme Court consistently has held that all officers possess some degree of immunity from liability”); *id.* at 577–618 (discussing absolute and qualified immunity).

44. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *see also, e.g., Malley v. Briggs*, 475 U.S. 335, 342 (1986) (“on its face, [Section 1983] does not provide for any immunities”).

45. *Malley*, 475 U.S. at 339–40 (quoting *Imbler*, 424 U.S. at 418; *Tower v. Glover*, 467 U.S. 914, 920 (1984)).

generally determined under a functional analysis, based on immunities said to be rooted in the common law.<sup>46</sup>

The Supreme Court also has justified qualified immunity as a defense of good faith based on the common law.<sup>47</sup> But the Court expanded and “completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.”<sup>48</sup> Under that reformulation, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>49</sup> In subsequent cases, the Court has further modified the test, holding that conduct “violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right’” and that “existing precedent must have placed the statutory or constitutional question beyond debate.”<sup>50</sup> The Court has also allowed lower courts discretion to decide whether the right asserted was “clearly established” at the time of the challenged conduct before addressing whether the conduct alleged constitutes a deprivation of a federal statutory or constitutional right,<sup>51</sup> which means that courts may decide that qualified immunity applies to a given claim without reaching the question whether the conduct at issue violated the law. “The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’”<sup>52</sup>

There is no shortage of case law, scholarship, and commentary on qualified immunity, including in recent years significant criticism on several grounds and

---

46. See *Rehberg v. Paulk*, 566 U.S. 356, 362–64 (2012) (explaining that the Supreme Court has recognized that Congress intended Section 1983 to be construed in the light of common-law principles and “has looked to the common law for guidance in determining the scope of the immunities available in a § 1983 action”; taken a “functional approach” in considering absolute immunity; and determined that official acts including legislative, judicial, prosecutorial conduct, and witness testimony by government officials are “functions that are absolutely immune from liability for damages under § 1983”); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (“[N]otwithstanding § 1983’s expansive language and the absence of any express incorporation of common law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967))).

47. See *Pierson*, 386 U.S. at 554–55 (concluding that “[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities” and that police officers “should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid”).

48. *Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815–20 (1982)).

49. *Harlow*, 457 U.S. at 818.

50. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (citations omitted); see also *Dist. of Columbia v. Wesby*, 583 U.S. 48, 62–64 (2018) (summarizing the current test).

51. *Ashcroft*, 563 U.S. at 735 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

52. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (citing *Ashcroft*, 563 U.S. at 742).

increasing calls for reform.<sup>53</sup> Professor Joanna Schwartz has expressed the view that, “[a]lthough a good-faith defense was the impetus for qualified immunity, today officers are entitled to qualified immunity even if they act in *bad faith*, so long as there is no prior court decision with nearly identical facts.”<sup>54</sup> And one federal appellate judge has mused, “[I]t’s curious how this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.”<sup>55</sup> But the doctrine of qualified immunity continues to be a defense available to government officers sued in their individual capacities under Section 1983. And it will remain so until the United States Supreme Court or Congress says otherwise.<sup>56</sup>

## B. The TCA

The NMCRA came into being against the background of years of litigation under the TCA as well. It seems likely that many New Mexico litigators and judges have at least some familiarity with that statute and the context of its enactment. In brief, the TCA reinstated the general rule of sovereign immunity in tort litigation, abolished as a matter of the common law in *Hicks v. State*.<sup>57</sup> In so doing, the legislature declared “the public policy of New Mexico” to be that “governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act”<sup>58</sup> and made the TCA

the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the [TCA] and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought

---

53. See, e.g., JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE xv–xxi (VIKING 2023) [hereinafter SHIELDED]; Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CAL. L. REV. 201, 204 (2023); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 47 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1800 (2018); Zadeh v. Robinson, 928 F.3d 457, 478–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

54. SHIELDED, *supra* note 53, at 74.

55. Zadeh, 928 F.3d at 480–81 (Willett, J., concurring in part and dissenting in part).

56. CHEMERINSKY, *supra* note 17, § 8.6, at 580 (stating that “the determination of the immunity to be accorded as a defense in a §1983 suit is entirely a question of federal law” and that “[s]tate immunities and defenses are not relevant in §1983 litigation, even when the §1983 suit is brought in state court” (footnotes omitted)); see also Howlett v. Rose, 496 U.S. 356, 375–81 (1990) (holding that “[t]he elements of, and the defenses to, a federal cause of action are defined by federal law” and that state courts “entertaining a § 1983 action must adhere to” federal law concerning federal causes of action). Headlines proclaiming, “New Mexico Abolishes Qualified Immunity” and “New Mexico Governor Signs Historic Legislation to End Qualified Immunity,” which appeared in the days following the NMCRA’s passage and signing, were misguided. No New Mexico statute (or judicial decision) can “abolish” a defense created by the United States Supreme Court to a cause of action enacted by Congress. Nor did the NMCRA “abolish” qualified immunity as a matter of New Mexico law, as New Mexico did not previously recognize the defense as a matter of state law.

57. 1975-NMSC-056, 88 N.M. 588, 544 P.2d 1153; see Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. REV. 249, 251 (1976) (stating that the TCA “is a direct response to *Hicks v. State*”).

58. N.M. STAT. ANN. § 41-4-2(A) (1976).

against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim.<sup>59</sup>

The New Mexico Supreme Court has recognized that “[g]overnmental entities are different from private parties” and determined that the TCA’s text shows that “[t]he legislature never intended government and private tortfeasors to receive identical treatment.”<sup>60</sup>

As noted above, the TCA permits certain claims against governmental entities and public employees pursuant to enumerated exceptions to the TCA’s general rule of immunity, but claims for “deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico” are cognizable under the TCA only for alleged deprivations “caused by law enforcement officers while acting within the scope of their duties.”<sup>61</sup> In litigation under the TCA, “[a] governmental entity and its public employees may assert any defense available under the law of New Mexico.”<sup>62</sup> In contrast to Section 1983, the TCA contains limitations and requirements concerning notice<sup>63</sup> and damages caps.<sup>64</sup>

### III. POTENTIAL ISSUES AND ARGUMENTS IN NMCRA LITIGATION: TEXT AND DOCTRINE

The NMCRA authorizes “[a] person who claims to have suffered a deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body” to “maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.”<sup>65</sup> While this provision expressly includes deprivations of rights due to “acts or omissions of a public body *or* person acting on behalf of, under color of or within the course and scope of the authority of a public body,”<sup>66</sup> the following NMCRA provision expressly requires that such claims “shall be brought exclusively against a public body” and directs that a “public body named in an [NMCRA] action . . . shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.”<sup>67</sup>

The NMCRA defines “public body” (with exceptions not pertinent here) as “a state or local government, an advisory board, a commission, an agency or an entity

59. *Id.* § 41-4-17(A) (1982).

60. *Marrujo v. N.M. State Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 24, 118 N.M. 753, 887 P.2d 747 (quoting N.M. STAT. ANN. § 41-4-2(A)); *see also* Kovnat, *supra* note 57, at 261–62 (“[E]xamination of the [TCA’s] statutory structure compels the conclusion that the purpose of the act is to treat the State and other governmental entities differently from individuals because to do otherwise threatens the public treasuries too much.”).

61. N.M. STAT. ANN. § 41-4-12 (2020).

62. *Id.* § 41-4-14 (1976).

63. *See id.* § 41-4-16 (1977).

64. *See id.* § 41-4-19 (2007).

65. *Id.* § 41-4A-3(B) (2021).

66. *Id.* (emphasis added).

67. *Id.* § 41-4A-3(C) (2021).

created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education.”<sup>68</sup> The NMCRA further provides:

The state shall not have sovereign immunity for itself or any public body within the state for claims brought pursuant to the [NMCRA], and the public body or person acting on behalf of, under color of or within the course and scope of the authority of the public body provided pursuant to the [NMCRA] shall not assert sovereign immunity as a defense or bar to an action.<sup>69</sup>

And it expressly prohibits “the use of the defense of qualified immunity” with respect to NMCRA claims.<sup>70</sup>

At first glance, it would seem that there is no reason to assume that doctrines developed in litigation under Section 1983 apply in NMCRA litigation. After all, there are numerous significant textual differences between the two statutes, and the existence of two statutory schemes, enacted by separate sovereigns authorizing a cause of action to redress claimed deprivations of rights afforded by separate bodies of law appears to present no preemption issue.<sup>71</sup> For example, the requirements that NMCRA claims “shall be brought exclusively against a public body” and that the named defendant “public body . . . shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body”<sup>72</sup> appear to authorize, as a textual matter, only suits against a named “public body”—and not against individual public officials—as well as imposition of direct and vicarious liability against the named “public body.” These textual points alone would seem to render inapplicable many doctrines, requirements, and limitations developed in Section 1983 litigation concerning state and municipal entities as defendants; the claims that may and may not be asserted against such entities; and the relief available and not available against such entities.

That said, the NMCRA’s text is not entirely free from ambiguity. For example, while section 41-4A-3(C) mandates that NMCRA claims “shall be brought exclusively against a public body” and that the “public body” named “shall be held liable for conduct of individuals” acting for the “public body,” section 41-4A-8, addressing indemnification, contemplates litigation and judgment on NMCRA claims against “a person acting on behalf of, under color of or within the course and scope of the authority of the public body.”<sup>73</sup> Section 41-4A-4 also appears to

---

68. *Id.* § 41-4A-2 (2021).

69. *Id.* § 41-4A-9 (2021).

70. *Id.* § 41-4A-4 (2021).

71. “Preemption” refers to the principle that “a federal law can supersede or supplant any inconsistent state law or regulation.” *Preemption*, BLACK’S LAW DICTIONARY (11th ed. 2019). “Preemption traditionally is found if a state law imposes obligations that are mutually exclusive with federal law, or if a state law frustrates the achievement of a federal objective, or if there is a clear congressional intent to preempt state law.” CHEMERINSKY, *supra* note 17, § 6.2, at 423; *see also* authority cited *supra* note 17.

72. N.M. STAT. ANN. § 41-4A-3(C) (2021).

73. *Compare id.*, with N.M. STAT. ANN. § 41-4A-8 (2021) (“A judgment awarded pursuant to the [NMCRA] against a person acting on behalf of, under color of or within the course and scope of the

contemplate litigation against defendants other than a “public body,” as it prohibits use of the defense of qualified immunity by a “public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body.”<sup>74</sup>

As another example, key terms such as “under color of” and “qualified immunity” are undefined. The text arguably reflects a legislative assumption of familiarity with Section 1983 terms and concepts, as well as a common understanding of their meanings. Given the focus on Section 1983 in the NMCRA’s development, as in the work of the New Mexico Civil Rights Commission,<sup>75</sup> it seems plausible that the legislature intended those terms to have the same meanings for purposes of the NMCRA as they do in the controlling case law under Section 1983. Still, these terms are not defined in the NMCRA, and it seems highly likely that litigants in NMCRA cases will proffer arguments relying on law developed in Section 1983 litigation, at least as to certain aspects of the NMCRA statutory scheme. As noted previously, this has already happened, with defenses raised against NMCRA claims using language invoking the elements of qualified immunity, as formulated in Section 1983 cases, such as that the defendants “did not violate clearly established law.” In one case, the district court ruled, on plaintiff’s motion to strike, that the defense would not be allowed because the defense of qualified immunity is not available under the NMCRA.<sup>76</sup> Although it is difficult to imagine how one could argue that the district court erred in this ruling, given the explicit textual prohibition upon which the ruling relies, it also seems too early to assume that section 41-4A-4’s prohibition against the defense of qualified immunity definitively resolves the issue in every respect.

The NMCRA expressly preserves immunities afforded by other law, stating: “The prohibition on the use of the defense of qualified immunity pursuant to Section 4 [41-4A-NMSA 1978] [*sic*] of the [NMCRA] and the waiver of sovereign immunity pursuant to Section 9 [41-4A-9 NMSA 1978] of that act shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.”<sup>77</sup> Even without this provision, “[l]egal texts that seem categorical on their faces are frequently ‘defeasible’—that is, they are subject to implicit exceptions made by other rules of law.”<sup>78</sup> And, as Professor Joanna Schwartz has observed, “The Supreme Court created qualified immunity out of thin

---

authority of the public body shall be paid by the public body. The public body shall also pay for all litigation costs for the public body and for any person acting on behalf of, under color of or within the course and scope of the authority of the public body, including attorney fees.”)

74. N.M. STAT. ANN. § 41-4A-4 (2021).

75. See, e.g., N.M. C.R. COMM’N, *supra* note 23, at 1 (“It is time to hold public officials accountable for violating [civil] rights through a state analogue to Section 1983.”).

76. See Memorandum and Order at 3, *Vela v. City of Albuquerque*, D-202-CV-2022-07485 (Jan. 2, 2024) (granting Motion to Strike Insufficient Affirmative Defenses) (citing N.M. Stat. Ann. § 41-4A-4 (2021)).

77. N.M. STAT. ANN. § 41-4A-10 (2021) (first and third bracket sets in original). It is perhaps worth noting that the legislature included this provision, despite the view of a majority of the New Mexico Civil Rights Commission that the standards of the “substantive constitutional law” are sufficient to “provide the appropriate safeguards against liability for reasonable, good-faith conduct.” N.M. C.R. COMM’N, *supra* note 23, at 2 & n.3.

78. Baude, *supra* note 53, at 50.

air six years after it recognized the right to sue under Section 1983.”<sup>79</sup> Regardless of one’s views of qualified immunity, many believe that “some degree of immunity for individual officers is imperative.”<sup>80</sup> And it remains to be seen what immunities might be argued as applicable to NMCRA claims—based on statutory text, the common law, or some other source.

Those working with NMCRA claims would do well to consider, not only the NMCRA’s text, but also the respective texts of Section 1983 and the TCA; doctrines and standards created by courts in addressing claims brought under Section 1983 and the TCA; how those doctrines and standards evolved; and the reasons offered to justify them. This article does not examine the textual similarities and differences among these statutes, but lawyers and judges will need to know what they are, along with the issues that have arisen in pre-NMCRA cases involving claims asserted under both Section 1983 and the TCA predicated on the same alleged conduct and events.<sup>81</sup> Even in suits asserting only NMCRA claims, arguments concerning how the NMCRA should be interpreted and applied will doubtless invoke the TCA’s text and decisions addressing it. (Arguments based on Section 1983’s text, as distinct from arguments based on extra-textual doctrines developed in Section 1983 litigation, seem less likely.) One district court has rejected the argument that the NMCRA conflicts with the TCA’s declared public policy of immunity for governmental entities and public employees, except as provided in the TCA,<sup>82</sup> on the ground that the legislature’s authority to waive sovereign immunity is not limited to a single statute.<sup>83</sup>

There will be many questions concerning how the NMCRA’s text should be interpreted and applied, and whether and to what extent the law of Section 1983 and the TCA should be considered in addressing them. The issues mentioned here are but a few.

#### IV. OTHER CONSIDERATIONS IN NMCRA LITIGATION

##### A. The *Gomez* Interstitial Approach and Preservation Requirements

As noted, it is important to understand that questions about what the NMCRA authorizes, allows and/or requires are separate and distinct from questions about the nature and scope of the rights guaranteed by the provision of the New Mexico bill of rights asserted as the basis for an NMCRA claim, and that standards applied in determining what conduct violates a particular provision of the bill of rights have no relevance in analyzing the NMCRA itself. Professor Sheldon Nahmod

---

79. SHIELDED, *supra* note 53, at 73.

80. CHEMERINSKY, *supra* note 17, § 8.6, at 577; see *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (“[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”).

81. See, e.g., *Wells v. County of Valencia*, 1982-NMSC-048, ¶¶ 3–16, 98 N.M. 3, 644 P.2d 517.

82. N.M. STAT. ANN. § 41-4-2(A) (1976) (“[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act.”).

83. See Memorandum and Order at 2–4, *Vela v. City of Albuquerque*, D-202-CV-2022-07485 (Jan. 2, 2024).



made this very point in a recent “primer” post, explaining that “different constitutional violations have their own required states of mind” and emphasizing that these standards “are matters of *constitutional* interpretation, not Section 1983 interpretation.”<sup>84</sup> Similarly, the “interstitial approach” to constitutional analysis adopted in *Gomez*<sup>85</sup>—one of several methods applied by state courts to deal with what has been described as the “timing” issue presented where a state constitutional provision has a federal counterpart<sup>86</sup>—has no relevance in analyzing questions concerning the NMCRA, including what its text authorizes and requires.

Where the *Gomez* interstitial approach does properly apply, however, its requirements remain in force (as of this writing), and lawyers and judges litigating and adjudicating NMCRA cases must know them, including the special preservation requirements *Gomez* mandates, along with the law concerning preservation of issues for appeal in general.<sup>87</sup> The New Mexico Supreme Court recently stated, in *Grisham v. Van Soelen*,<sup>88</sup> that “*Gomez* does not bind this Court as to our analysis of state constitutional questions, and we encourage thoughtful and reasoned argument in the future addressing whether the interstitial approach is the proper method to ensure the

---

84. Sheldon Nahmod, *An Updated Section 1983 Primer (2): The Seminal Decision in Monroe v. Pape*, NAHMOD L. BLOG (March 8, 2024, 10:04 AM), <https://nahmodlaw.com/2024/03/08/an-updated-section-1983-primer2-the-seminal-decision-in-monroe-v-pape/> [<https://perma.cc/S5T7-XBFG>]

(explaining that *Monroe v. Pape* held that “[s]pecific intent was not required as a matter of section 1983 statutory interpretation”; noting that “equal protection violations require purposeful discrimination, *Washington v. Davis*, 426 U.S. 229 (1976), and Eighth Amendment violations require at least deliberate indifference, *Farmer v. Brennan*, 511 U.S. 825 (1994)”; see also *Board of Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 405 (“Section 1983 itself contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right.”) (internal quotation marks and citation omitted).

85. *State v. Gomez*, 1997-NMSC-006, ¶¶ 19–23, 122 N.M. 777, 932 P.2d 1.

86. See, e.g., *Independent Analysis*, *supra* note 10, at 3–8 (and authorities cited therein). For a deeper discussion of the interstitial approach and its adoption and application in New Mexico cases, see *id.* at 3–16, 24–27.

87. *Gomez*, 1997-NMSC-006, ¶¶ 22–23, 932 P.2d at 8 (explaining that, “[w]hen a litigant asserts protection under a New Mexico Constitutional provision that has a parallel or analogous provision in the United States Constitution, the requirements for preserving the claim for appellate review depend on current New Mexico precedent construing that state constitutional provision” and stating separate requirements for preservation where “established precedent construes the provision to provide more protection than its federal counterpart” and where “a party asserts a state constitutional right that has *not* been interpreted differently than its federal analog”) (alteration in original). Lawyers cannot know with certainty whether an appellate court will deem an issue to have been preserved, or decide to reach an unpreserved issue. Compare *State v. Mares*, 2024-NMSC-002, ¶¶ 3, 30, 51, No. S-1-SC-38948, 2023 WL 8864959, at \*1, \*7, \*12 (refusing to reach the question whether article II, section 14 of the New Mexico Constitution provides greater protection than the Sixth Amendment of the U.S. Constitution because the state constitutional claim was not properly preserved in the trial court), with *State v. Ortiz*, 2023-NMSC-026, ¶¶ 23–24, 539 P.3d 262, 270 (deciding to address an unpreserved issue, reasoning that “this Court may address unpreserved issues that involve, among others, the fundamental rights of a party” and that “[a]s this case involves Defendant’s fundamental right to be free from unreasonable searches, this Court has the inherent authority to address the issue, even if it was not preserved below”) (citing *Gomez*, 1997-NMSC-006, ¶ 31 n.4, 932 P.2d. at 10, and characterizing it as “recognizing this Court’s discretion to hear unpreserved search and seizure issues”).

88. 2023-NMSC-027, 539 P.3d 272.

people of New Mexico the protections promised by their constitution.”<sup>89</sup> This statement appears in a footnote following an analysis concluding that the case at bar could not be resolved with the *Gomez* interstitial approach and could be resolved under the New Mexico Constitution without applying *Gomez*.<sup>90</sup> That footnote indicates the Court’s agreement with views expressed by Justice Bosson in his special concurrence in *State v. Garcia*,<sup>91</sup> and quotes a portion of this concurring opinion that includes the following: “*Gomez* is not inscribed in granite; it is not part of the state Constitution. It is merely a means to an end.”<sup>92</sup> Justice Bosson’s concurrence is written “solely on the issue of preservation.”<sup>93</sup> As previously observed elsewhere, however, “[t]he admonition of Justice Bosson in addressing the issue of preservation requirements under *Gomez* seems . . . fully applicable to the issue of the constraints *Gomez* imposes on independent analysis of the state constitution.”<sup>94</sup> In the meantime, *Gomez* has not been overruled; the New Mexico Supreme Court continues to apply it;<sup>95</sup> and lawyers and judges will need to do so as well, as long as *Gomez* stands as precedent. That undertaking may be more difficult in some instances, as the *Gomez* interstitial analysis has not been applied in a clear and consistent fashion in civil cases.<sup>96</sup>

Whatever happens with interstitial analysis, federal law can and likely must be considered in many cases involving state constitutional provisions with federal analogues. This is so for several reasons, including that grounds for principled decisions may be stated in federal decisions addressing federal analogues, and the need for judicial efficiency and economy demands that relevant, existing case law be consulted in this context as in other contexts.<sup>97</sup>

## B. The Adequate-and-Independent-State-Ground Doctrine

Additional issues may arise in cases involving claims asserting a deprivation of rights under state constitutional provisions with federal analogues—and potentially in any case in which issues of state law are interwoven with federal law—based on the United States Supreme Court’s “adequate-and-independent-state-ground” doctrine. Dean Erwin Chemerinsky describes the doctrine this way:

---

89. *Id.* ¶ 19 n.7, 539 P.3d at 281 (citation omitted). For a deeper discussion of the interstitial approach and its adoption and application in New Mexico cases, see *Independent Analysis*, *supra* note 10, at 3–16, 24–27 (and authorities cited therein).

90. See *Van Soelen*, 2023-NMSC-027, ¶¶ 11–20 & n.7, 539 P.3d at 279–81.

91. *State v. Garcia*, 2009-NMSC-046, ¶¶ 54–63, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring).

92. *Id.* ¶ 56, 217 P.3d at 1046 (Bosson, J., specially concurring); see *Van Soelen*, 2023-NMSC-027, ¶ 19 n.7, 539 P.3d at 281 (quoting this paragraph with alterations).

93. *Garcia*, 2009-NMSC-046, ¶ 49, 217 P.3d at 1044 (Bosson, J., specially concurring).

94. *Independent Analysis*, *supra* note 10, at 25–27.

95. See *State v. Ayon*, 2023-NMSC-025, ¶¶ 27–30, 538 P.3d 66, 73–74 (discussing *Gomez* and analyzing the right claimed under article II section 10 of the New Mexico Constitution “because the Fourth Amendment does not protect the right that Defendant asserts”).

96. See *Independent Analysis*, *supra* note 10, at 3–16, 24–27 (discussing this problem).

97. *State v. Gutierrez*, 1993-NMSC-062, 116 N.M. 431, 863 P.2d 1052, which addresses the question whether evidence obtained by virtue of an invalid search warrant may be admitted under the “good-faith” exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984), is a pre-*Gomez* example of such an analysis.

Simply stated, the Supreme court will not hear a case if the decision of the state's highest court is supported by a state law rationale that is independent of federal law and adequate to sustain the result. Phrased slightly differently, the Court must decline to hear the case if its reversal of the state court's federal law ruling will not change the outcome of the case because the result is independently supported by the state court's decision on state law grounds.<sup>98</sup>

Dean Chemerinsky's treatise on federal jurisdiction discusses the origins and development of this doctrine in detail.<sup>99</sup> Key decisions include *Michigan v. Long*,<sup>100</sup> which created a presumption in favor of Supreme Court review and adopted a requirement that a state court wishing to preclude that review must include in the decision a "plain statement" that it relied on state law as an independent basis for the judgment in question, reasoning as follows:

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.<sup>101</sup>

---

98. CHEMERINSKY, *supra* note 17, § 10.5 at 774–802.

99. *Id.* at 774–75.

100. 463 U.S. 1032 (1983).

101. *Id.* at 1040–41; *see also, e.g.*, *McGirt v. Oklahoma*, 549 U.S. \_\_\_, 140 S. Ct. 2452, 2479 n.15 (2020) (“Because the [state court]’s opinion ‘fairly appears to rest primarily on federal law or to be interwoven with federal law’ and lacks any ‘plain statement’ that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us.”) (quoting *Michigan* 463 U.S. at 1040–41, 1044 (1983)); *ASARCO v. Kadish*, 490 U.S. 605, 624–25 (1989) (addressing the question

This requirement should at least be considered in every case involving rights protected by a state constitutional provision with a federal analogue, or where issues of state law are interwoven with federal law.

### C. Litigating NMCRA Claims with Other Claims

The NMCRA's remedies "are not exclusive and shall be in addition to any other remedies prescribed by law or available pursuant to common law."<sup>102</sup> A given set of facts alleged to form the basis for an NMCRA claim might also support claims under the TCA and/or Section 1983. In these circumstances, several questions and considerations arise for plaintiffs, such as whether it is possible and advisable to assert claims under multiple statutes in the same lawsuit, how to plead them, and where to file the lawsuit. The choices made in this regard will, in turn, inform decisions to be made by defendants. Lawyers experienced in civil-rights litigation are familiar with these considerations and likely are prepared to address them in connection with the NMCRA, but this may not be true for those new to civil-rights litigation. Some matters warranting consideration and research are mentioned here.

**Notice:** Section 1983 has no notice requirements, but the NMCRA and TCA do. While the notice provisions are similar in some respects, there are differences.<sup>103</sup>

**Jurisdiction and Venue:** The TCA directs that "[e]xclusive original jurisdiction for any claim under the [TCA] shall be in the district courts of New Mexico"<sup>104</sup> and also specifies venue requirements.<sup>105</sup> The NMCRA authorizes "an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court"<sup>106</sup> but is silent as to venue. It thus appears that, for a case in which both TCA and NMCRA claims are asserted, the TCA would control the propriety of venue.

**Federal Court:** As discussed, the law of Section 1983 is rife with technical requirements about what claims may be brought against what parties, which immunities apply under what circumstances, and how claims and defenses are to be pleaded and proved. Suits brought in federal court implicate additional complexities, including the stringent pleading requirements generally applicable in federal court,<sup>107</sup> and the impact of the Eleventh Amendment to the United States

---

whether the state-court decision below "rested on an adequate and independent state ground that would defeat review of the federal issues by this Court"; concluding that the decision "is not based on an adequate and independent state ground" because it "focuses solely on the federal statutes" and "did not divorce the state constitutional issue from the questions of federal law" (citing, *inter alia*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

102. N.M. STAT. ANN. § 41-4A-3(E) (2021).

103. *See id.* § 41-4A-13(2021); *id.* § 41-4-16 (1977).

104. *Id.* § 41-4-18(A) (1976).

105. *See id.* § 41-4-18(B) (1976) ("Venue for any claim against the state or its public employees, pursuant to the [TCA], shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe County. Venue for all other claims pursuant to the [TCA], shall be in the county in which the principal offices of the governing body of the local public body are located.")

106. *See id.* § 41-4A-3(B) (2021).

107. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Constitution with respect to what relief may be sought against what governmental entities in federal court.<sup>108</sup> At least one federal district court has held that the Eleventh Amendment bars the NMCRA claims asserted in that case, reasoning that the NMCRA's waiver of sovereign immunity, in section 41-4A-9, is limited to actions commenced in "any New Mexico district court," as provided in section 41-4A-3, and that there was no basis for the exercise of supplemental jurisdiction because 28 U.S.C. § 1367 does not abrogate immunity under the Eleventh Amendment and so "does not authorize federal district courts to exercise jurisdiction over claims against nonconsenting states."<sup>109</sup>

**Removal:** Plaintiffs who bring NMCRA claims in state court and include claims under Section 1983 (or other claims sufficient to ground federal jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 1343) may face removal to federal court (pursuant to 28 U.S.C. § 1441 or 28 U.S.C. § 1443).

**Abstention:** Another issue for consideration in cases brought in or removed to federal court is the potential application of one or more abstention doctrines; in particular, abstention doctrines directing that a federal court decline to exercise jurisdiction in order to allow the state to clarify unclear state law.<sup>110</sup>

**Limitations on Damages:** Section 1983 does not limit the amount of damages that may be recovered. The NMCRA and TCA do.<sup>111</sup> There undoubtedly will be litigation concerning how the text of the NMCRA provision limiting recovery should be interpreted. In cases in which claims are brought under multiple statutes, "double recovery" will be an issue as well. The New Mexico Supreme Court has held, in a case involving "an action for damages under the [TCA] where the plaintiff also pursues, by reason of the same occurrence, an action against the same government under 42 U.S.C. § 1983[.]" that "[i]n those cases where tort damages will constitute a portion of the damages for deprivation of a constitutional right, general principles against double recovery will prevail."<sup>112</sup>

## CONCLUSION

We end where we began. There will be many questions concerning how the NMCRA's text should be interpreted and applied. The NMCRA came into being against a background that includes decades of litigation under Section 1983 and the TCA. The development of a sound and cogent body of law concerning NMCRA claims will require, not only an understanding of the NMCRA's text, but also at least some knowledge of the respective texts of Section 1983 and the TCA; doctrines and standards created by courts in addressing claims brought under Section 1983 and the TCA; how those doctrines and standards evolved; and the reasons offered to justify

108. See U.S. CONST. amend. IV; see also CHEMERINSKY, *supra* note 17.

109. Valdez v. Grisham, 559 F. Supp. 3d 1161, 1180–81 (D.N.M. 2021), *aff'd*, No. 21-2105, 2022 WL 2129071 (10th Cir. 2022) (internal quotation marks and citations omitted).

110. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 499–500 (1941) (concluding in a case involving a challenge to a Texas law with constitutional implications that the federal district court should "restrain" its authority because Texas Supreme Court had "the last word" on the state law at issue); see also CHEMERINSKY, *supra* note 17, §§ 12.2.1, 12.2.2 at 857–74 (discussing abstention under *Pullman* and *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959)).

111. See N.M. STAT. ANN. § 41-4A-6(A) (2021); *id.* § 41-4-19(A), (B) (1976, as amended 2008).

112. Wells v. County of Valencia, 1982-NMSC-048, ¶¶ 16–17, 98 N.M. 3, 644 P.2d 517.

them. This article is intended to be a provisional compilation of these matters, offered in the hope that this preliminary work might assist lawyers and judges in litigating and adjudicating NMCRA claims in a well-reasoned and principled fashion.