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A New Jurisprudence of Constitutional Duty: Moving Beyond DeShaney Through the NMCRA

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A NEW JURISPRUDENCE OF CONSTITUTIONAL DUTY: MOVING BEYOND *DESHANEY* THROUGH THE NMCRA

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ABSTRACT

The United States Supreme Court's holding in the seminal case of DeShaney v. Winnebago County Department of Social Services *has long foreclosed the viability of a wide array of failure-to-protect claims under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The linchpin of* DeShaney *is a "constitutional duty" analysis that is implicated only in select circumstances and serves as a threshold inquiry and a gatekeeping device.*

With the New Mexico Supreme Court's articulation of a foreseeability-free duty analysis in Rodriguez v. Del Sol Shopping Center *in 2014, and the Legislature's passage of the New Mexico Civil Rights Act in 2021, the stage is set for a rejection of the* DeShaney *analysis and the development of a new jurisprudence of constitutional duty in this state—free of threshold inquiries and embracing the structural similarity of common-law torts and "constitutional torts."*

By embracing this new jurisprudence of constitutional duty, New Mexico may assume the national pole position in testing and experimenting with Justice William Brennan's observation in Paul v. Davis *that there should be no distinction, for constitutional purposes, between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law.*

INTRODUCTION

In 1989—while analyzing the Due Process Clause of the Fourteenth Amendment in the seminal case of *DeShaney v. Winnebago County Department of Social Services*—the Supreme Court of the United States held that "[n]othing in the

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language of the Due Process Clause itself requires the State to protect the life, liberty, or property of its citizens against invasion by private actors."[1] Over the past three decades, *DeShaney* has come to stand succinctly, if not monolithically, for the proposition that "[a] State's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services."[2]

In the closing lines of his majority opinion in *DeShaney*, Chief Justice William Rehnquist noted that "the people of [a state] may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act," and that "[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular lawmaking process."[3] With the passage of the New Mexico Civil Rights Act ("NMCRA") in 2021, the New Mexico Legislature has taken Chief Justice Rehnquist up on his offer to reject the conception of "negative rights" underlying the *DeShaney* holding—but it has not limited itself to the realm or regulation of torts. Instead, through the passage of the NMCRA, the New Mexico Legislature has given the people of this state a powerful procedural tool for bringing to bear independent and often more expansive rights under the New Mexico Constitution in the context of the State's "failure to protect."

Section I of this Article details the *DeShaney* case facts, analysis, holdings, and dissent, as well as the opinion's legacy and outgrowths. It unpacks two federal exceptions to *DeShaney*'s general rule—the special relationship and state-created danger exceptions—and describes their limitations. Perhaps most importantly, Section I discusses the *DeShaney* majority's references to "constitutional duty," and how this concept offers an analytical bridge between common-law torts and "constitutional torts."

While Section I focuses on *DeShaney* and its dominance over failure-to-protect claims at the federal level, Section II focuses on the evolution of tort and constitutional failure-to-protect analysis in New Mexico. Specifically, this section discusses the treatment of failure-to-protect claims under the New Mexico Tort Claims Act (NMTCA) since 1976, the New Mexico Supreme Court's explicit adoption of a foreseeability-free duty analysis[4] in the case of *Rodriguez v. Del Sol Shopping Center* in 2014, and the State Legislature's passage of the NMCRA in 2021. When read in concert with a long line of New Mexico Supreme Court decisions addressing failure-to-protect claims under the NMTCA, the Court's adoption of a rebuttable presumption of duty in *Rodriguez* and the passage of the NMCRA create a new jurisprudence of constitutional duty, paving the way beyond *DeShaney*.

Having discussed the dominant federal paradigm in Section I and the potential for a state paradigm shift in Section II, Section III focuses on three practical considerations of critical importance to the development of this new constitutional duty jurisprudence through litigation in state court. Written with an eye to the

1. 489 U.S. 189, 195 (1989).

2. *Id.* at 189.

3. *Id*. at 203.

4. *See generally* Brenna Gaytan, *The Palsgraf "Duty" Debate Resolved:* Rodriguez v. Del Sol *Moves to a Foreseeability Free Duty Analysis*, 45 N.M. L. REV. 753 (2015).

challenges that New Mexico lawyers will face in convincing our courts to look beyond *DeShaney* and its progeny, this section briefly discusses the interstitial and primacy approaches to state constitutional analysis; the use of a "fundamental rights" framework to support constitutional duty policy arguments; and the importation of intentionality standards, or "culpable mental states," for breaches of constitutional duty and which serve as a limiting principle and unification of NMTCA and NMCRA analyses.

I. THE *DESHANEY* PARADIGM: HOLDINGS, EXCEPTIONS, AND THE RESTRICTION OF "FAILURE-TO-PROTECT" CLAIMS UNDER THE FEDERAL CONSTITUTION

This section begins with a short summary of the heart-wrenching facts underlying the *DeShaney* decision and summarizes Chief Justice William Rehnquist's majority holding and Justice William Brennan's dissent. The section then discusses the two widely recognized exceptions to the *DeShaney* rule—the special relationship and state-created danger doctrines—before concluding with an in-depth analysis of "constitutional duty," in the context of constitutional torts.

A. The Facts of *DeShaney*[5]

Joshua DeShaney was born in 1979 and placed in the custody of his father Randy DeShaney in 1980. Randy took his infant son to Winnebago County, Wisconsin. In January 1982, Winnebago County Department of Social Services (DSS) received an allegation that Randy had abused Joshua, that he had "hit the boy causing marks," and that Joshua was at risk of further child abuse. DSS interviewed Randy DeShaney. He denied the allegations. No further action was taken.

In January 1983, DSS received a report from a local physician that Joshua had been hospitalized "with multiple bruises and abrasions," leading the physician to suspect child abuse. DSS placed Joshua in temporary custody of the hospital but returned him to his father three days later (after the father agreed to the implementation of several protective measures, such as the enrollment of the young boy in a Head Start program).

In February 1983, emergency room personnel once again contacted DSS to report that Joshua had received suspicious injuries,[6] but the DSS caseworker—a woman named Ann Kemmeter—concluded that there was no basis for action.[7] In May 1983, Ms. Kemmeter noticed a bump on Joshua's head in the course of a home visit, but was told by Randy DeShaney that the boy "had gotten it falling off a tricycle."[8] In the course of another home visit in July 1983, Ms. Kemmeter noted that Randy DeShaney was not honoring the protective measures he had agreed to

5. Unless otherwise noted, the facts summarized in this section are drawn directly from the *DeShaney* opinion or the underlying opinion of the Seventh Circuit Court of Appeals, reported at DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298 (7th Cir. 1987).

6. *DeShaney*, 489 U.S. at 192.

7. The Supreme Court's opinion does not elaborate on the nature of these injuries or the basis of the DSS caseworker's conclusion. *See DeShaney*, 489 U.S. 189. Nor does the Seventh Circuit's opinion. *See DeShaney*, 812 F.2d 298.

8. *DeShaney*, 812 F.2d at 300.

with DSS in January. When Ms. Kemmeter visited the DeShaney home in September 1983, she was informed that Joshua had been taken to the emergency room with a scratched cornea. In October 1983, Ms. Kemmeter noted another bump on Joshua's head. In November 1983, Ms. Kemmeter noticed that Joshua had a scrape on his chin that looked "like a cigarette burn."[9] Later in November 1983, Joshua "was treated at the emergency room for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders."[10] DSS was informed by emergency room personnel that Joshua was a suspected victim of child abuse, "but there was no reaction from [DSS]"[11] and Joshua went home with his father once again.

When Ms. Kemmeter attempted to visit Joshua in January 1984, she was told "she couldn't see Joshua because he was in bed with the flu"[12]—an answer she apparently accepted. When Ms. Kemmeter attempted to visit Joshua again in March 1984, she was told that "Joshua had fainted in the bathroom for no apparent reason"[13] several days prior but did not visit with him (and gave no reason for failing to do so).

On March 8, 1984—the day after Ms. Kemmeter's final visit to the DeShaney household—Randy DeShaney "beat Joshua so severely that he critically injured Joshua's brain."[14] Joshua underwent emergency brain surgery, which "revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time."[15] This assessment could come as little surprise to DSS, which had by this point documented suspicious injuries to Joshua on eight separate occasions in a two-year span. It came as no surprise whatsoever to Ms. Kemmeter, who famously stated to Joshua's mother that "I just knew the phone would ring some day and Joshua would be dead."[16]

On the date of this final beating by Randy DeShaney, Joshua was four years old. He lived out the remainder of his life in an institutional care home—in a state of complete dependence and profound mental disability. He died November 9, 2015, at the age of thirty-six, with the adopted name of Joshua Braam.[17]

B. The Majority Holding and the Brennan Dissent

Through the aid of a guardian ad litem, Joshua sued Wisconsin DSS and various agents thereof under 42 U.S.C. § 1983, alleging that the State had deprived him of his liberty interest in bodily integrity by failing to intervene to protect him against his father's violent abuses.[18] He brought this claim pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[19]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 193 (1989).
16. *DeShaney*, 812 F.2d at 300.
17. Crocker Stephenson, *Boy at Center of Famous 'Poor Joshua!' Supreme Court Dissent Dies*, MILWAUKEE J. SENTINEL (Nov. 11, 2015), https://archive.jsonline.com/news/obituaries/joshua12-b99614381z1-346259422.html/ [https://perma.cc/DAW3-HBJP].
18. *DeShaney*, 489 U.S. at 189.
19. *Id.* at 191.

The district court granted summary judgment as to all defendants,[20] and the Seventh Circuit affirmed.[21]

Writing for a 6-3 majority, Chief Justice William Rehnquist began his analysis by asserting that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[22] He went on to add that the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other,"[23] and concluded "as a general matter . . . that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[24]

In arriving at this conclusion, Chief Justice Rehnquist emphasized that "[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes."[25] He further noted, however, that "not *all* common-law duties owed by government actors were constitutionalized by the Fourteenth Amendment" and that "the Fourteenth Amendment . . . does not transform *every* tort committed by a state actor into a constitutional violation."[26] While Chief Justice Rehnquist did not state explicitly which common-law duties of government actors had been "constitutionalized" or which torts became constitutional violations when committed by those government actors, it was his clear insinuation that the circumstances were limited to the "special relationships" and "state-created dangers" discussed in greater detail below. Efforts by the petitioners to invoke duties stemming from a special relationship between Joshua and Wisconsin DSS ultimately "afford[ed] petitioners no help" as Joshua had not been in state custody at the time he suffered his injuries.[27] Ultimately, the majority held that "the State had no *constitutional duty* to protect Joshua,"[28] but made sure to conclude its opinion with the following observation:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[29]

Writing in dissent, Justice William Brennan took issue with the majority's "neat and decisive divide between action and inaction," noting that he saw no meaningful

20. *Id.* at 193.
21. *Id.*
22. *Id.* at 195.
23. *Id.* at 196.
24. *Id.* at 197.
25. *Id.* at 202.
26. *Id.* at 202 (emphasis added).
27. *Id.* at 199.
28. *Id.* at 201 (emphasis added).
29. *Id.* at 203.

distinction between action and inaction on the record presented.[30] He took similar issue with the majority's "general principle" that "the Constitution does not establish positive rights" and noted that "this principle does not hold true in all circumstances."[31] To illustrate his point, Brennan listed a series of Supreme Court cases with apparently contradictory holdings regarding "fundamental rights" which were in fact reconcilable by differences in the underlying facts of each case.[32] The point, Brennan indicated, was "that a State's prior actions may be decisive in analyzing the constitutional significance of its inaction."[33]

To bridge the gap between his own discussion of action and inaction, and the majority's discussion of constitutional duty, Justice Brennan took note of prior Supreme Court decisions which acknowledged that "a State's actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties" which are then violated by a course of inexcusable inaction.[34] Brennan concluded his dissent with the powerful observation that "inaction can be every bit as abusive of power as action, [and] that oppression can result when a State undertakes a vital duty and then ignores it."

C. The Exceptions that Prove the Rule: Special Relationships and State-Created Dangers

While it is by no means the sole source of law for the proposition, *DeShaney* has become a widely recognized shorthand for the Supreme Court's "nearly categorical rejection of duty-to-protect" liability for government officials in every sector.[35] In this capacity, the case "has engendered a scholarly response that is impassioned and unequivocally negative."[36] Despite this scholarly response, no serious challenge to the *DeShaney* paradigm has emerged through the federal circuit courts, and the case continues to be cited regularly for its core holdings in each and every one of those circuits to date.[37] The *DeShaney* holding was reinforced in the

30. *Id.* at 206.

31. *Id.* at 205. Legal scholars have criticized this distinction between "positive" and "negative" constitutional rights as essentially meaningless. *See, e.g.*, Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, a Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 568–69 (2009) (illustrating that "[i]n its positive version, the Due Process Clause of the Fourteenth Amendment creates a right in the people to be governed by a non-arbitrary government. In its negative version, the cause prohibits the government from being arbitrary. The two versions are legally equivalent."). The distinction-without-difference between "positive" and "negative" constitutional rights is more of a distraction than a useful analytical tool and plays little part in the arguments presented in this article.

32. *DeShaney*, 489 U.S. at 207.

33. *Id.* at 208.

34. *Id.* at 207.

35. Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 992 (1996).

36. *Id.* at 983.

37. *See, e.g.*, Welch v. City of Biddeford Police Dep't, 12 F.4th 70, 75 (1st Cir. 2021); Brown v. City of New York, 786 F. App'x 289, 292 (2d Cir. 2019); Mears v. Connolly, 24 F.4th 880, 883 (3d Cir. 2022); Callahan v. N. Carolina Dep't of Pub. Safety, 18 F.4th 142, 146 (4th Cir. 2021); Keller v. Fleming, 952 F.3d 216, 226 (5th Cir. 2020); Colson v. City of Alcoa, 37 F.4th 1182, 1187 (6th Cir. 2022); Doxtator v.

2004 *Town of Castle Rock v. Gonzales* decision, where the Court held that failure-to-protect claims could no more be brought under a procedural due process theory than a substantive due process theory.[38]

There are two federally recognized exceptions to the *DeShaney* rule, commonly referred to as the special relationship exception[39] and the state-created danger exception.[40] The special relationship exception (sometimes referred to as the "custodial exception")[41] was acknowledged in *DeShaney*, with the majority stating that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."[42] This exception—historically rooted in cases like *Estelle v. Gamble*[43] and *Youngberg v. Romeo*[44]—allows for the existence of heightened duties extending from the State to incarcerated or involuntarily committed individuals in the State's custody. These two cases, then, stand for the proposition that "when the State takes a person into its custody and holds [them] there against [their] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [their] safety and general well-being."[45] "The affirmative duty to protect," Rehnquist added, "arises not from the State's knowledge of the individual's predicament or its expressions of intent to help [them], but from the limitation which it has imposed on [their] freedom to act on [their] own behalf."[46]

The second major exception to the *DeShaney* rule—the state-created danger exception—extends from the *DeShaney* holding. The *DeShaney* majority stated that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world,[47] it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[48] This fact was important to the Court's confidence in its

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O'Brien, 39 F.4th 852, 865 (7th Cir. 2022); Roberson v. Dakota Boys & Girls Ranch, 42 F.4th 924, 930 (8th Cir. 2022); Murguia v. Langdon, 61 F.4th 1096, 1108 (9th Cir. 2023); Hunt v. Montano, 39 F.4th 1270, 1278 (10th Cir. 2022); Vielma v. Gruler, 808 F. App'x 872, 878 (11th Cir. 2020).

38. Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

39. *See* Schwartz v. Booker, 702 F.3d 573, 580 (10th Cir. 2012) (discussing the "special relationship" exception as extending directly from *DeShaney,* 489 U.S. 189).

40. *See* Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 921 (10th Cir. 2012) (discussing the "state-created danger" exception as "a narrow exception which applies only when a state actor affirmatively acts to create, or increase a plaintiff's vulnerability to, danger from private violence.").

41. *See, e.g.*, Cartwright v. City of Marine City, 336 F.3d 487, 491 (6th Cir. 2003).

42. *DeShaney*, 489 U.S. at 198.

43. Estelle v. Gamble, 429 U.S. 97 (1976).

44. Youngberg v. Romeo, 457 U.S. 307 (1982).

45. *DeShaney*, 489 U.S. at 199–200.

46. *Id.* at 200. It is worth noting that this standard for determining "special relationships" – limiting the exception to situations where the State has "limit[ed an] individual's freedom to act on his own behalf" – was criticized by Justice Brennan for failing to acknowledge that individuals' freedoms are inherently limited by the overarching social contracts upon which any State's existence depends. *See id.* at 207.

47. It is further worth noting – and Justice Brennan's dissent emphasizes – that this "free world" imagined by Chief Justice Rehnquist was not meaningfully "free" for a four-year-old child being shuttled from one private living arrangement to another at the state's behest and under its nominal supervision. *See id.* at 210 (noting that "Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him.").

48. *Id*. at 201.

"no-duty-owed" holding, and the logical inference was quickly drawn that the State may indeed owe constitutional duties in situations where it *did* play a part in the creation of particular dangers. Thus, as articulated in cases like *Wood v. Ostrander,*[49] *Davis v. Brady*,[50] and *Currier v. Doran*,[51] the state-created danger exception allows that "state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm."[52]

Erwin Chemerinsky has observed that "[t]here is no series of cases that are more consistently depressing than the state-created danger decisions" because "[t]he litigation typically arises [out] of a terrible tragedy" and "[t]he government almost always prevails."[53] Beyond the initial narrowness of the exception implied by the *DeShaney* majority opinion, the federal circuit courts have developed additional tests which narrow the viable path for plaintiffs still further. To make out a proper danger creation claim in the Tenth Circuit, for instance, a plaintiff must demonstrate that:

> (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way;
> (2) plaintiff was a member of a limited and specifically identifiable group;
> (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm;
> (4) the risk was obvious or known;
> (5) defendants acted recklessly in conscious disregard of that risk; and
> (6) such conduct, when viewed in total, is conscience shocking.[54]

Suffice it to say that such an extensive set of standards is difficult to satisfy even in situations where a *state-created danger* may itself be plainly demonstrated.

Lastly: in federal court, an injured party who successfully threads the needle on either the special relationship or state-created danger exception must still contend with the prospect of a qualified immunity defense.[55] In *Harlow v. Fitzgerald*,[56] the Supreme Court held that "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."[57] From this holding, federal courts have developed a two-pronged qualified immunity analysis which requires a plaintiff to demonstrate "(1) that an official violated a statutory or constitutional right, and (2) that the right

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49. *See generally* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989).

50. *See generally* Davis v. Brady, 143 F.3d 1021 (6th Cir. 1998).

51. *See generally* Currier v. Doran, 242 F.3d 905 (10th Cir. 2001).

52. *Id*. at 917 (citing Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996) (internal citations omitted) (emphasis added)).

53. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1 (2007).

54. Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1262 (10th Cir. 1998).

55. *See, e.g.*, *Currier*, 242 F.3d at 925 (finding a constitutional violation by a public actor named Shirley Medina on a "state-created danger" theory but dismissing the claims against her on qualified immunity grounds).

56. 457 U.S. 800, 818 (1982).

57. *Id.*

was 'clearly established' at the time of the challenged conduct."[58] Courts "may address the two prongs of the qualified-immunity analysis in either order,"[59] and "if the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense."[60]

Insofar as the qualified immunity doctrine "protects public employees from liability, it also protects them from the burdens of litigation."[61] It should come as no surprise that federal courts have come to apply the defense in a manner increasingly benefitting defendants. In its modern iteration, a "clearly established right is one that is sufficiently clear [such] that *every reasonable official* would have understood that what he is doing violates that right."[62] While the Supreme Court has allowed (at least theoretically) that qualified immunity analysis "[does] not require a case directly on point" in order to find that a right is clearly established, it has simultaneously "sent unwritten signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established."[63] In any event, "existing precedent must have placed the statutory or constitutional question *beyond debate*"[64] and the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[65] As very few questions are beyond debate for competent lawyers and judges, very few rights are clearly established for purposes of qualified immunity analysis.[66] Circuit Judge Don Willett of the Fifth Circuit has succinctly characterized the evolution of qualified immunity as "Section 1983 meets Catch-22," and his elaboration is worth quoting at length:

> Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.[67]

58. Quinn v. Young, 780 F.3d 998, 1004 (10th Cir. 2015).

59. Cummings v. Dean, 913 F.3d 1227, 1239 (10th Cir. 2019).

60. A.M. v. Holmes, 830 F.3d 1123, 1134–35 (10th Cir. 2016).

61. Allstate Sweeping, LLC v. Black, 706 F.3d 1261, 1266 (10th Cir. 2013) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

62. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (emphasis added) (internal citation omitted).

63. Gutierrez v. Geofreddo, No. CIV 20-0502 JB/CG, 2021 WL 1215816, at *12 n.7 (D.N.M. Mar. 31, 2021).

64. Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011) (emphasis added).

65. Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (internal citation omitted).

66. Judge James O. Browning of United States District Court of New Mexico has gone so far as to accuse the Supreme Court of "craft[ing its] recent qualified immunity jurisprudence to effectively eliminate § 1983 claims [against public actors in their individual capacities] by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong" of the qualified immunity analysis. McGarry v. Bd. of Cnty. Comm'rs for Cnty. of Lincoln, 294 F. Supp. 3d 1170, 1188–89, 1189 n.13 (D.N.M. 2018); *see also* Chemerinsky, *supra* note 53.

67. Zadeh v. Robinson, 902 F.3d 483, 498–99, 499 n.6 (5th Cir. 2018) (Willet, J., concurring), *opinion withdrawn on reh'g*, 928 F.3d 457 (5th Cir. 2019).

When taken in concert, these challenges—the threshold inquiries preceding a constitutional duty finding, the deliberate indifference standard, and the ever-present specter of qualified immunity—amount to a highly restrictive approach to failure-to-protect claims at the federal level. This was the paradigm intended by the majority in *DeShaney*, and it persists in the federal courts to this day.

D. The Role of "Constitutional Duty" in the *DeShaney* Analysis

"Constitutional duty" is the most important and amorphous concept in the *DeShaney* opinion. It is the concept upon which the holding turns: Joshua's claim against the State could not proceed because the State owed him no constitutional duty. The State could not be liable for its failure to protect Joshua because the State owed no "constitutional duty" to protect Joshua. Had the State owed a constitutional duty to Joshua and breached that duty by act or omission, the State may have been liable for the damage caused under the Due Process Clause of the Fourteenth Amendment.

As critical as the concept of constitutional duty is to the *DeShaney* holding—and to the thousands of federal civil rights cases decided by terse reference to that holding over the past three decades—the concept was never clearly defined in the opinion. The *DeShaney* majority uses the terms "duty" or "constitutional duty" approximately fifteen times in a twelve-page opinion, and clearly envisions a meaningful distinction between *duty* in the context of common-law torts and *constitutional duty* in the context of a Due Process Claim under the Fourteenth Amendment. Only a meaningful distinction between the two could allow the Court to hold that "the State had no constitutional duty to protect Joshua" while acknowledging that "the State [may have] acquired a duty under state tort law to provide him with adequate protection against that danger."[68] At the same time, the majority does not shy away from the term's close association with common-law tort analysis, nor from the restatements or treatises on torts which have traditionally shaped their contours. When Chief Justice Rehnquist writes that "not *all* common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment,"[69] one may logically infer that *some* common law duties were in fact "constitutionalized." When he writes that "the Fourteenth Amendment . . . does not transform *every* tort committed by a state actor into a constitutional violation,"[70] it is natural to ask which torts are so transformed—and who makes the decision to transform them, and how?

While there are no easy answers to these questions, *Daniels v. Williams,*[71] *Davidson v. Cannon,*[72] and *Paul v. Davis*[73] shed significant light on the divergent thinking of Justices Rehnquist and Brennan in grappling with them. *Daniels* and *Davidson*—issued back-to-back in 1986—dealt with injury claims by incarcerated individuals in state custody. In *Daniels*, the plaintiff slipped on a pillow left in a

68. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201–02 (1989).
69. *Id.* at 202 (emphasis added) (internal citation omitted).
70. *Id.* (emphasis added).
71. 474 U.S. 327 (1986).
72. 474 U.S. 344 (1986).
73. 424 U.S. 693 (1976).

stairwell by a jail deputy and sustained injuries from his fall.[74] In *Davidson*, the plaintiff was beaten and badly injured by a fellow inmate by whom he had previously been threatened.[75] The *Davis* plaintiff was characterized in local law enforcement flyers as an "active shoplifter" despite the dismissal of this charge by a local court.[76] Chief Justice Rehnquist delivered the Court's opinion in all three cases, and all are cited to support the holding in *DeShaney*.

The core holding in *Daniels*—that mere lack of due care by a state official may not deprive an individual of life, liberty, or property under the Fourteenth Amendment[77]—expressly overrode a contrary 1981 holding in *Parratt v. Taylor*.[78] In *Daniels*, the petitioner argued that "requiring complainants to allege something more than negligence would raise serious questions about what 'more' than negligence—intent, recklessness, or 'gross negligence'—is required."[79] Notably, Chief Justice Rehnquist did not appear to disagree with this assessment, but replied that "many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary."[80] To better drive his point home, Chief Justice Rehnquist quoted Oliver Wendell Holmes for the proposition that "the whole law [depends upon differences of degree] as soon as it is civilized."[81] He concluded by noting that "the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear."[82] In a footnote, Chief Justice Rehnquist observed that the petitioner had "concede[d] that [the] respondent was at most negligent," and that as such the case "affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause."[83] The natural implication of this footnote was that the triggering effect of government officials' *culpable mental states* on Due Process protections would be worth considering if and when the occasion afforded it.

Davidson was decided by reference to the holding in *Daniels*,[84] and arguably afforded an occasion to carefully examine whether the "culpable mental states" of government actors should separate viable failure-to-protect claims from non-viable claims, either in custodial settings or as a general rule. The facts of *Davidson* were more egregious than the facts of *Daniels* and suggested that the prison officials in *Davidson* had more culpable mental states than the prison officials in *Daniels*. As the custodial settings and eventual physical injuries to inmates could be deemed *constants* between the two cases, the proper variable—the difference between them, ripe for analysis—was a "conscious disregard" of risk by state

74. *Daniels*, 474 U.S. at 328.

75. *Davidson*, 474 U.S. at 345–46.

76. *Davis*, 424 U.S. at 695–96.

77. *Daniels*, 474 U.S. at 330–31.

78. 451 U.S. 527 (1981).

79. 474 U.S. at 334.

80. *Id.*

81. *Id.* (quoting LeRoy Fibre Co. v. Chi., Milwaukee, & St. Paul Ry. Co., 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring)).

82. *Id.* at 335.

83. *Id.* at 334 n.3.

84. 474 U.S. 344, 347 (1986).

officials in *Davidson* as opposed to a "mere lack of care" by state officials in *Daniels*.[85] Unfortunately, rather than taking the occasion afforded by *Davidson* to clarify the requisite culpable mental state triggering Due Process protections, Chief Justice Rehnquist zeroed in on the petitioner's allegation that prison officials "*negligently* failed to protect him from another inmate," and affirmed dismissal under the *Daniels* negligence standard without further discussion.[86]

The holding in *Davidson* drew two dissents—one from Justice Blackmun and another from Justice Brennan—which shed further light on the spectrum of culpable mental states noted by Chief Justice Rehnquist in *Daniels* and relied upon by the Third Circuit in *Davidson*.[87] Justice Blackmun's dissent began with a detailed examination of the facts of the case, emphasizing the number of warnings that the respondent prison officials had received of an imminent attack on the plaintiff Davidson before that attack occurred.[88] One of these warnings was contained in a note authored by the plaintiff himself, which was provided to prison officials—but as Justice Blackmun noted, those officials "made at least two *conscious* decisions not to act on the note," and subsequently forgot about it.[89] As a result, the plaintiff "suffered stab wounds on his face and body as well as a broken nose that required surgery."[90] "Even if respondents' conduct ordinarily would be considered only negligent," Justice Blackmun wrote, "the forewarning here changes the constitutional complexion of the case."[91] He noted that "[w]hen officials have actual notice of a prisoner's need for physical protection, 'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety.'"[92] Justice Blackmun concluded his analysis by noting that the conduct of the prison officials "very well may have been sufficiently irresponsible to constitute reckless disregard of Davidson's safety," and that "[e]ven if negligence is deemed categorically insufficient . . . recklessness must be sufficient."[93]

Justice Brennan's brief *Davidson* dissent helpfully distilled the lengthier dissent of his colleague, Justice Blackmun. While Justice Brennan agreed with the majority that "merely negligent conduct by a state official . . . does not constitute a deprivation of liberty under the Due Process Clause," Justice Brennan plainly stated his belief that "official conduct which causes personal injury due to recklessness or deliberate indifference, *does* deprive the victim of liberty within the meaning of the Fourteenth Amendment."[94] As he agreed with Justice Blackmun that the record in

85. Justice Blackmun alluded to this dynamic between the two cases in his dissent, calling *Daniels* "the easier companion case." *Id.* at 350 (Blackmun, J., dissenting).

86. *Id.* at 347 (majority opinion) (emphasis added).

87. *See* Davidson v. O'Lone, 752 F.2d 817, 828 (3d Cir. 1984) ("Liability under § 1983 may be imposed on prison officials even when the assault has been committed by another prisoner, if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials.").

88. *Davidson*, 474 U.S. at 350–52 (Blackmun, J., dissenting)

89. *Id.* at 352 (Blackmun, J., dissenting) (emphasis added).

90. *Id.* at 349.

91. *Id.* at 357.

92. *Id.* (citing Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1981)).

93. *Id.* at 358.

94. *Id.* at 349 (Brennan, J., dissenting) (emphasis added).

Davidson "strongly suggest[ed]" recklessness by state officials rather than mere negligence, Justice Brennan favored reversal and remand.[95] Notably, Justice Brennan offered no suggestion that this analytical approach should be restricted by special relationships, state-created dangers, or any other threshold inquiries.[96]

A fourth case sheds additional light on the divergent views of constitutional duty propounded by Justices Rehnquist and Brennan in *DeShaney*, *Daniels*, and *Davidson*. In support of his proposition in *DeShaney* that "the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation," Chief Justice Rehnquist cited to his own majority opinion in *Paul v. Davis*, issued over a decade earlier.[97] In *Davis*, the majority refused to make the "Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," and referenced the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law."[98] This position drew a sharp dissent from Justice Brennan, who wrote that the Fourteenth Amendment "clearly renders unconstitutional actions taken by state officials that would merely be criminal or tortious if engaged in by those acting in their private capacities."[99] Justice Brennan additionally reasoned that there should be no distinction, "for constitutional purposes, between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law."[100] Justice Brennan argued that the essential element of actions under § 1983 was "[a]buse of . . . [o]fficial position" —and while he questioned whether "mere negligent official conduct in the course of duty can ever constitute such abuse of power," he noted that "the police officials here concede that their conduct was intentional and was undertaken in their official capacities."[101]

Cases interpreting 42 U.S.C. § 1983 often refer to a "constitutionalized" injury claim as a "constitutional tort."[102] When coupled with discussions of "constitutional duty," this language begins to lend itself to an intuitive analytical framework—albeit one elided or explicitly rejected in much of the federal caselaw. This analytical framework is illustrated in the equations below, which highlight a distinct structural similarity:

95. *Id.*

96. *Id.*

97. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (citing Paul v. Davis, 424 U.S. 693, 701 (1986)).

98. *Davis*, 424 U.S. at 701 (citing Griffin v. Breckenridge, 403 U.S. 88, 101–02 (1971)).

99. *Id.* at 716 (Brennan, J., dissenting).

100. *Id.*

101. *Id.* at 717.

102. *See, e.g.*, Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 691 (1978) ("Congress did not intend municipalities to be held liable [under 42 U.S.C. § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort."); Pierce v. Gilchrist, 359 F.3d 1279, 1285 (10th Cir. 2004) (noting that the question of assessing "a claim actionable under § 1983" requires federal courts "to foray into the much-contested relationship between constitutional torts and the common law").

Tort = Duty + Breach of Duty[103]
Constitutional Tort = Constitutional Duty + Breach of Constitutional Duty

What, then, is "constitutional duty"—particularly in the context of a failure-to-protect claim? What does a breach of constitutional duty entail? Analysis of the majority opinions and dissents in *DeShaney*, *Daniels*, *Davidson*, and *Davis* offer two competing schools of thought. The first school of thought, championed by Chief Justice Rehnquist in *DeShaney*, conceives of constitutional duty as constrained by a fact-specific set of threshold inquiries, such as special relationships and state-created dangers, which serve as the first of a series of gatekeeping devices for government liability under the Due Process Clause.[104] The second school of thought, championed by Justice Brennan in his dissents in *DeShaney*, *Davidson*, and *Davis*, conceives of constitutional duty as a more omnipresent phenomenon—existing wherever constitutional rights are plausibly implicated, but subject to breach only when combined with a culpable mental state[105] beyond mere negligence.

While the Rehnquist and Brennan Schools differ in their understanding of the gulf between common-law and constitutional torts—and the accordant length and complexity of the bridge that must be built to cross that gulf—there is consensus that the State has an active role to play in regulating the bridge-building endeavor. As Chief Justice Rehnquist acknowledged in *DeShaney*, a state which desires to create a shorter, wider, more easily traversed bridge between common-law and constitutional torts "may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes."[106] While he also seemed to believe that creation of such a system would depend entirely on changes in the sphere of state tort law,[107] that need not necessarily be the case. Recent experience in the state of New Mexico, discussed in Section II below, raises the possibility that a state may recognize affirmative *constitutional* duties of care and protection as well—and that the breach of these constitutional duties may be actionable. This affirmative recognition would represent a dramatic but well-justified paradigm shift in the analysis of constitutional rights in New Mexico.

II. THE PARADIGM SHIFT IN NEW MEXICO: THE REBUTTABLE PRESUMPTION OF DUTY AND THE PASSAGE OF THE NEW MEXICO CIVIL RIGHTS ACT

DeShaney has foreclosed the viability of most failure-to-protect claims at the federal level, and the recent track record of the Roberts Court inspires little hope

103. *See Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining tort as "a breach of a duty that the law imposes on persons who stand in a particular relation to one another"). Negligence and intentional torts are separated by culpability; unlike negligence, intentional torts require a culpable mental state underlying breach of duty. *See id.*

104. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989).

105. *See, e.g.*, *id.* at 211 (Brennan, J., dissenting) (noting that "the Constitution imposes on the State an affirmative duty of protection," while recognizing that "the Due Process Clause is not violated by merely negligent conduct"); Davidson v. Cannon, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting) (noting that "a violation of the Due Process Clause certainly should not require a more culpable mental state" than recklessness or deliberate indifference).

106. *DeShaney*, 489 U.S. at 202.

107. *See id*.

that any expansion of substantive due process rights lies on the horizon.[108] The future of failure-to-protect claims, then, resides in tort and constitutional law developed through state courts. Two relatively recent developments in New Mexico law provide hope for a new era of constitutional failure-to-protect claims.

First, in the landmark *Rodriguez v. Del Sol Shopping Center* case, the New Mexico Supreme Court adopted a foreseeability-free approach to the tort element of duty. This approach—drawn from the Restatement (Third) of Torts—requires courts to articulate policy rationale free from fact-based foreseeability considerations in order to conclude that a defendant owes no duty to a given plaintiff or to limit an existing duty to a particular plaintiff.[109] Under *Rodriguez*, the "ordinary duty of reasonable care" is essentially a rebuttable presumption[110]—and "foreseeability" is eliminated as a threshold inquiry upon which the existence of duty depends.[111] The modern and expansive conception of duty adopted in *Rodriguez* stands in sharp contrast to the narrow, circumstantially limited conception of constitutional duty articulated in *DeShaney*. Failure-to-protect claims, historically foreclosed by the principle that there is no affirmative duty to act to prevent harm by third parties,[112] may be recast as affirmations of the general duty of care established in *Rodriguez*.

Second, with the passage of the NMCRA, the New Mexico Legislature created a procedural vehicle for the pursuit of failure-to-protect claims *in state court*[113]—a forum where *DeShaney* is not the final word on the matter and where its analysis, holdings, and dissents may be critically parsed and selectively applied. The NMCRA allows any person who has suffered a deprivation of a right enshrined in the state's Bill of Rights to bring a damages claim against the offending public

108. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331–32 (Thomas, J., concurring) (arguing that "substantive due process is an oxymoron that lacks any basis in the Constitution," that "any substantive due process decision is demonstrably erroneous," and that "in future cases, [the Supreme Court] should reconsider all of this Court's substantive due process precedents" (internal citations omitted)).

109. Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 1, 326 P.3d 465, 467.

110. *See id.* ¶ 13, 326 P.3d at 471 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b) (AM. L. INST. 2010)) ("[O]nly 'in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.'").

111. *See id.* ¶ 1, 326 P.3d at 467. Foreseeability as a threshold inquiry is a common characterization of the relationship between duty and foreseeability in jurisdictions where the Restatement (Second) of Torts continues to hold sway. *See, e.g.*, Allright San Antonio Parking Inc. v. Kendrick, 981 S.W.2d 250, 252 (Tex. App. 1998) ("The threshold inquiry in a negligence case is duty. The question of duty turns on the foreseeability of harmful consequences, which is the underlying basis for negligence." (citation omitted)).

112. While the *DeShaney* majority articulated this principle in the context of a government defendant, it is equally applicable (and has historically been far more frequently applied) in the context of non-governmental defendants arguing that they simply owed no duty to protect a plaintiff harmed by a third party. *See, e.g.*, Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶¶ 2–5, 122 N.M. 537, 928 P.2 263; Romero v. Giant Stop-N-Go of N.M., Inc., 2009-NMCA-059, ¶ 7, 146 N.M. 520, 212 P.3d 408 (both cases considering gas stations' liability for criminal acts occurring on premises).

113. *See* N.M. STAT. ANN. § 41-4A-3(B) (2021).

body.[114] As such, the NMCRA allows for the state court adjudication of claims rooted in New Mexico's own due process clause,[115] its inherent rights clause,[116] and numerous other rights clauses for which there are no federal analogues. The NMCRA explicitly prohibits the use of qualified immunity as an affirmative defense to such claims.[117] In an era where the vindication of civil rights under 42 U.S.C. § 1983 has been persistently choked out by the metastasis of the qualified immunity defense,[118] it is difficult to overstate the importance of a blank procedural slate, or the promise of merits adjudication offered by the NMCRA.

DeShaney has dominated the discussion around failure-to-protect claims for nearly thirty-five years. Whether that dominance was substantive or procedural in nature—rooted in widely accepted notions of duty dependent on threshold inquiries like "special relationships," or a lone procedural path impassably narrowed by qualified immunity—the *Rodriguez* holding and the passage of the NMCRA render *DeShaney* incompatible with New Mexico law. The remainder of this section delves into the historical treatment of failure-to-protect cases brought under the New Mexico Tort Claims Act. It then examines the *Rodriguez* decision and the passage of the NMCRA in greater detail, with particular attention to the manner in which these two developments push New Mexico toward a more evolved understanding of the conception of "constitutional duty."

A. The Historical Treatment of "Failure-to-Protect" Claims Under the NMTCA

One natural starting point for analysis of "failure-to-protect" claims in New Mexico is the New Mexico Tort Claims Act[119] and the cases that stem from it. The NMTCA, passed in 1976 following the New Mexico Supreme Court's abrogation of common law sovereign immunity in *Hicks v. State*[120] in 1975, reestablished the state's immunity from suit while providing for certain enumerated waivers of immunity,[121] subject to significant restrictions on recovery in the event of a successful claim.[122] The NMTCA's declaration of legislative intent states that "government should not have the duty to do everything that might be done"[123]—a notion very much in keeping with the federal consensus acknowledged by both Chief Justice Rehnquist and Justice Brennan in *DeShaney*—but also notes that "[l]iability for acts or omissions . . . shall be based upon the traditional tort concepts of duty and

114. *Id.* Section 41-4A-2 of the NMCRA defines "public body" as "a state or local government, an advisory board, a commission, an agency or an entity 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." N.M. STAT. ANN. § 41-4A-2 (2021).

115. N.M. CONST. art. II, § 18.

116. N.M. CONST. art. II, § 4.

117. N.M. STAT. ANN. § 41-4A-4 (2021).

118. *See, e.g.*, Quinn v. Young, 780 F.3d 998, 1007 (10th Cir. 2015) (declining to consider the merits of a Fourth Amendment argument based on a conclusion that the law was not "clearly established").

119. N.M. STAT. ANN. §§ 41-4-1 to -27 (2020).

120. 1975-NMSC-056, ¶ 9, 88 N.M. 588, 544 P.2d 1153.

121. *See* N.M. STAT. ANN. §§ 41-4-4 to -12 (2020).

122. *See* N.M. STAT. ANN. § 41-4-19 (2007).

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

the reasonably prudent person's standard of care in the performance of that duty."[124] The New Mexico Supreme Court has long held that "[s]ince the Act is in derogation of petitioner's common law rights to sue respondents for negligence, the Act is to be strictly construed insofar as it modifies the common law."[125]

The vast majority of NMTCA claims arising from constitutional torts (including but not limited to "failure-to-protect" claims) are brought pursuant to Section 41-4-12.[126] This section is commonly referred to as the *law enforcement waiver*,[127] and states:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, the independent tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence, 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.[128]

Section 41-4-12 is modeled on the language of 42 U.S.C. § 1983.[129] The section waives immunity for "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."[130] It also waives immunity for various intentional torts[131] caused by law enforcement officers, but generally requires more than the mere negligence that satisfies the NMTCA's other statutory waivers.[132] Cases interpreting Section 41-4-12 have persistently held that injuries *caused by* law enforcement officers need not necessarily be *committed by* law enforcement officers, so long as the injuries

124. N.M. STAT. ANN. § 41-4-2(B) (1976).

125. Methola v. County of Eddy, 1980-NMSC-145, ¶ 23, 95 N.M. 329, 622 P.2d 234.

126. The remaining liability waivers of the NMTCA deal only with "the negligence of public employees while acting within the scope of their duties."

127. *See, e.g.*, Sanders v. N.M. Corrs. Dep't, 2023-NMCA-030, ¶ 5, 528 P.3d 716, 719.

128. N.M. STAT. ANN. § 41-4-12 (2020).

129. Cal. First Bank v. State, 1990-NMSC-106, ¶ 30, 111 N.M. 64, 801 P.2d 646.

130. N.M. STAT. ANN. § 41-4-12 (2020).

131. The intentional torts listed in Section 41-4-12 are "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, [and] the independent tort of intentional spoliation of evidence." *Id.*

132. *See, e.g.*, Bober v. N.M. State Fair, 1991-NMSC-031, ¶ 32, 111 N.M. 644, 808 P.2d 614 (noting that while a law enforcement officer may be held liable for negligently causing infliction of one of the predicate torts, "no case has held that simple negligence in the performance of a law enforcement officer's duty amounts to commission of one of the torts listed in [Section 41-4-12]").

themselves result from one of the intentional torts listed in the statute.[133] Consequently, New Mexico caselaw provides support—albeit narrow support—for "failure-to-protect" liability under Section 41-4-12 where *negligent* acts or omissions of law enforcement officers proximately cause *intentional* torts committed by third-party non-state actors.

In *Methola v. County of Eddy*, the New Mexico Supreme Court addressed three consolidated "failure-to-protect" claims brought by inmates against county jailers under Section 41-4-12.[134] Each of the inmates in these cases suffered severe physical and/or sexual assaults by other inmates while in county custody.[135] The injuries suffered by one of the inmates—a man named Guadalupe Hernandez—were nauseatingly similar to the injuries suffered by Joshua DeShaney: after being beaten unconscious "in a loud fight which lasted at least one and a half hours," Mr. Hernandez "suffered irreversible brain damage, totally disabling him" and leaving him in a state whereby he would "require nursing care for the remainder of his life."[136] In assessing the reasoning of the New Mexico Court of Appeals that law enforcement officers could only be held responsible under Section 41-4-12 for their own *intentional* torts ("since the word *negligent* is not included in Section 41-4-12"), the Supreme Court found as follows:

> Section 41-4-12 does not speak of liability for personal injury or bodily injury resulting from assault or battery when *committed by* law enforcement officers. . . . Instead, the Legislature used the words "*caused by*" law enforcement officers, [and] the words "caused by" do not differ significantly from the usual meaning of proximate cause found in ordinary negligence cases.[137]

The Supreme Court went on to note that *cause* is a term traditionally used in negligence actions in New Mexico, and that "[i]t applies to acts of *omission* as well as acts of *commission*."[138] As such, the court ultimately held that "the Legislature intended [the phrase] 'caused by' in Section 41-4-12 to include those acts enumerated in that section which were caused by the *negligence* of law enforcement officers while acting within the scope of their duties."[139]

For over forty years, *Methola* has stood for the proposition that law enforcement officers in New Mexico may be liable for damages when they negligently fail to protect eventual victims from the intentional torts of third

133. *See, e.g.*, Weinstein v. City of Santa Fe *ex rel.* Santa Fe Police Dep't, 1996-NMSC-021, ¶ 21, 121 N.M. 646, 916 P.2d 1313 (noting that Section 41-4-12 waives governmental immunity "not only for intentional torts committed by law enforcement officers, but also for acts committed by third parties when caused by the negligence of the officers").

134. 1980-NMSC-145, ¶¶ 1–5, 15, 95 N.M. 329, 622 P.2d 234.

135. *See id.* at ¶¶ 2–5, 622 P.2d at 235.

136. *See id.* ¶ 2, 622 P.2d at 235.

137. *Id.* ¶ 19, 622 P.2d at 237 (citation omitted).

138. *Id.* ¶ 20, 622 P.2d at 238. This approach to causation is near-universal in the context of common law torts and was endorsed by Justice Brennan in his dissent in *DeShaney*. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Brennan, J., dissenting) ("[I]naction can be every bit as abusive of power as action. . . .").

139. *Methola*, 1980-NMSC-145, ¶ 24, 622 P.2d at 238.

parties.[140] However, the decision has a built-in limiting principle: the injuries suffered by the plaintiffs in *Methola* occurred while they were incarcerated, and the court's finding of duty in *Methola* hinged on the "custodial" nature of the relationship between incarcerated persons and their jailors.[141] This "custodial" logic for a finding of duty at the state level—closely akin to the "special relationship" test for constitutional duty at the federal level—has since been expanded to include duties arising under a variety of State statutes. In *Schear v. Board of County Commissioners of Bernalillo County*, the New Mexico Supreme Court held that "our statutes place a duty on law enforcement officers to investigate violations of the criminal law" — specifically referencing Section 29-1-1[142]—and that liability may be imposed under Section 41-4-12 where law enforcement officers breach this duty by negligently failing to investigate violations of the criminal law.[143] In responding to the concerns of other courts that this more expansive interpretation of the duties of law enforcement officers would lead to "dire financial consequences to municipalities," the *Schear* opinion stated that such consequences "[would] be far outweighed by the advantage to society of more responsive agencies."[144] "Why should the establishment of duty become more difficult when the state is the defendant?" the Court asked.[145] "Where there is no immunity, the state is to be treated like a private litigant."[146]

Cases following *Methola* and *Schear* have attempted to apply this even-handed approach to duty analysis in the context of Section 41-4-12. To the extent the duty analyses in these cases has been rooted in either "custodial" relationships or violations of statutory duties, New Mexico courts have had little trouble finding tort liability for law enforcement officers' negligent failures to protect private citizens from third-party harm.[147] However, the same courts have struggled when faced with

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140. *See, e.g.*, Wachocki v. Bernalillo Cnty. Sheriff's Dep't, 2010-NMCA-021, ¶ 29, 228 P.3d 504, 513 (citing *Methola* in support of a finding of liability where a case "involved an intentional tort committed by a third party as the result of negligence of law enforcement officers"), *aff'd* 2011-NMSC-039, 150 N.M. 650, 265 P.3d 701.

141. *Methola*, 1980-NMSC-145, ¶ 23, 622 P.2d at 238 ("We have held that when one party is in the custodial care of another, as in the case of a jailed prisoner, the custodian has the duty to exercise reasonable and ordinary care for the protection of the life and health of the person in custody.") (internal citation omitted).

142. Schear v. Bd. of Cnty. Comm'rs of Bernalillo Cnty., 1984-NMSC-079, ¶ 4, 101 N.M. 671, 687 P.2d 728; *see also* N.M. STAT. ANN. § 29-1-1 (1979) ("It is hereby declared to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware.").

143. *See Schear*, 1984-NMSC-079, ¶¶ 20–21, 687 P.2d at 733–34.

144. *Id.* ¶ 22, 687 P.2d at 733–34.

145. *See id.* ¶ 11, 687 P.2d at 731 (quoting Adams v. State, 555 P.2d 235, 241–42 (Alaska 1976)).

146. *See id.* (quoting *Adams*, 555 P.2d at 241–42).

147. *See, e.g.*, Cal. First Bank v. State, 1990-NMSC-106, ¶ 37, 111 N.M. 64, 801 P.2d 646, 654 (finding that a failure to apprehend or investigate reported criminal violations creates a cause of action under Section 41-4-12 where the failure proximately causes injury); Blea v. City of Espanola, 1994-NMCA-008, ¶¶ 13–17, 117 N.M. 217, 870 P.2d 755 (affirming "the narrow negligence exception of *Methola*" and holding that "allegations of negligent failure to detain [a third-party tortfeasor] give rise to a claim for which the legislature waived immunity under Section 41-4-12"); Weinstein v. City of Santa Fe *ex rel.* Santa Fe Police Dep't, 1996-NMSC-021, ¶ 35, 121 N.M. 646, 916 P.2d 1313 ("[L]ike Section

the task of analyzing duty in the context of constitutional claims where there is neither a custodial relationship nor a statutory predicate. In this context, New Mexico courts have at times reverted to a more traditional constraint of duty: a threshold foreseeability inquiry.

In addressing a "failure-to-protect" claim under Section 41-4-12 in *Torres v. State*, the New Mexico Supreme Court cited *Palsgraf v. Long Island Railroad Co.* for the proposition that "a court cannot impose a tort duty in relation to another person absent foreseeability."[148] Similarly, the court in *California First Bank v. State* noted that its finding of a law enforcement duty under Section 41-4-12 "rested upon the foreseeability of a risk of injury to the traveling public in the event sheriff's deputies failed to apprehend [a third-party tortfeasor] after they knew of his dangerously intoxicated condition."[149] When faced with the question of whether the plaintiff in the case could use Section 41-4-12 to bring a successful "failure-to-protect" claim under the Federal Constitution, the court held that "[the] plaintiff's claim in this regard was precluded under *DeShaney*"[150]—and that "the *DeShaney* opinion turns on a lack of duty to protect a citizen from dangers created by private actors" —but acknowledged that "the language of [a]rticle II, [s]ection 4 [of the New Mexico Constitution] militates against a conclusion that *DeShaney* is controlling authority" on the subject of state constitutional rights.[151] However, in *Lucero v. Salazar*—one of the few cases to invoke a Section 41-4-12 waiver on purely constitutional grounds—the New Mexico Court of Appeals stated that "[e]ven assuming Plaintiffs have a cause of action, based on [a]rticle II, [s]ection 4 of the New Mexico Constitution, we agree with Defendants' argument that, as a matter of law, Plaintiffs were unforeseeable as injured parties, and therefore Defendants owed no duty to them."[152]

From 1976 to 2014, New Mexico's courts approached constitutional torts committed by law enforcement officers in largely the same way that they approached common-law torts committed by private actors. As illustrated by *Lucero*, courts established duty by reference to a threshold foreseeability inquiry for private actors and public actors alike, even when the duty of a public actor was constitutional in nature. As emphasized in *Schear*, this task of establishing duty was no different and no more difficult for a government defendant than a non-government defendant—and in the absence of statutory immunity, "the state [was] to be treated like a private litigant."[153] As noted in *Methola*, no distinction was drawn between *acts* or *omissions*, even in the context of public actors.[154] The entire endeavor was

29-1-1, Sections 3-13-2, 4-37-4, and 4-41-2 each confer private rights cognizable under the Tort Claims Act.").

148. Torres v. State, 1995-NMSC-025, ¶ 15, 119 N.M. 609, 894 P.2d 386 (quoting *Palsgraf*, 162 N.E. 99, 100 (N.Y. 1928)).

149. *Cal. First Bank*, 1990-NMSC-106, ¶ 35 n.7, 801 P.2d at 656.

150. *Id.* ¶ 38, 801 P.2d at 657.

151. *Id.* ¶¶ 41–45, 801 P.2d at 658.

152. Lucero v. Salazar*,* 1994-NMCA-066, ¶ 8, 117 N.M. 803, 877 P.2d 1106.

153. Schear v. Bd. of Cnty. Comm'rs of Bernalillo Cnty., 1984-NMSC-079, ¶ 11, 101 N.M. 671, 687 P.2d 728 (quoting Adams v. State, 555 P.2d 235, 242 (Alaska 1976)).

154. Methola v. County of Eddy, 1980-NMSC-145, ¶ 21, 95 N.M. 329, 622 P.2d 234

undergirded by a policy of incentivizing more responsive agencies,[155] even at the occasional cost of financial consequence to the State and its political subparts. Throughout it all, any statutory constraint on the ability of an injured individual to seek legal redress from the government was strictly construed.

If a "tort" equals a "duty" plus a "breach of duty," and a "constitutional tort" equals a "constitutional duty" plus a "breach of constitutional duty,"[156] the cases decided under Section 41-4-12 teach us that there is no great categorical difference between these two types of personal injury claims in New Mexico—there is no great gulf to be bridged. The comfortable interplay between "tort" claims and "constitutional tort" claims under the NMTCA, and their parallel treatment by courts, also gives rise to a strong inference that a change in New Mexico law regarding "tort" claims should extend to "constitutional tort" claims in kind.

B. *Rodriguez* Eliminates the Threshold Inquiry of Foreseeability in Duty Analysis

In 2014, the New Mexico Supreme Court expressly adopted the Restatement (Third) of Torts approach to duty analysis in negligence claims in *Rodriguez v. Del Sol Shopping Center Associates.*[157] This approach precludes courts from relying upon fact-specific foreseeability considerations in determining the presence or absence of a legal duty.[158] In precluding a reliance on foreseeability in determining duty, the *Rodriguez* court eliminated the threshold inquiry that characterized duty analysis under the Restatement (Second) of Torts.[159] The decision in *Rodriguez* also resolved a discordant history of state case law in which some opinions utilized foreseeability as a factor in determining the existence of a legal duty while others did not.[160] In *Rodriguez*, the New Mexico Supreme Court held that the latter approach was correct, overruling all prior cases with a contrary holding.[161] Foreseeability, as a fact-intensive inquiry, is reserved for jury consideration.[162] While New Mexico courts are still free under *Rodriguez* to determine as a matter of law that no reasonable jury could find a *breach* of duty by a given defendant—or that a breach did not proximately cause a plaintiff's damages—negligence claims may no longer be dismissed for a lack of duty without specific policy analysis into

155. *See supra* note 144 and accompanying text.

156. *See supra* notes 102–05 and accompanying text.

157. *See* 2014-NMSC-014, ¶ 1, 326 P.3d 465, 467.

158. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010) ("A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.").

159. *See supra* note 111.

160. *See Rodriguez*, 2014-NMSC-014, ¶ 3, 326 P.3d at 467 (agreeing that "New Mexico case law has created confusion regarding the extent to which foreseeability considerations are relevant to the legal determination of duty").

161. *Id.* ("We overrule prior cases insofar as they conflict with this opinion's clarification of the appropriate duty analysis in New Mexico.").

162. *See id.* ¶ 4, 326 P.3d at 468.

whether duty for the entire class of such claims should be denied or limited.[163] Moreover, only in "exceptional cases . . . may [a court] decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."[164] The practical effect of this last holding cannot be overstated: *Rodriguez* creates a rebuttable presumption of duty in tort cases in New Mexico.

Rodriguez is also instructive as to New Mexico's approach to non-governmental "failure-to-protect" claims, insofar as it dealt with harms inflicted by a non-party. In *Rodriguez*, a truck crashed through the storefront glass of a medical clinic located in a Santa Fe shopping center, killing three people and injuring several others.[165] The plaintiffs sued the owners and operators of the shopping center on a theory of negligence, alleging that defendant Del Sol Shopping Center had caused the plaintiffs' injuries by failing to install speed bumps, barriers, signage, and other traffic control measures that could have prevented the tragedy.[166] These claims were dismissed by the district court on summary judgement, holding that the unforeseeable nature of the accident mandated a finding that there was no duty for Del Sol to protect the plaintiffs from the criminal acts of reckless drivers.[167] Although the New Mexico Court of Appeals correctly recognized that foreseeability should not be considered in determining whether the defendants owed plaintiffs a duty, the Court nonetheless improperly engaged in a foreseeability- and reasonableness-driven duty analysis.[168] As a result, the Supreme Court determined that the Court of Appeals erroneously supplanted a breach of duty analysis with its own ostensibly duty-related policy inquiry by weighing the facts of the case—a task reserved for juries.[169]

While the questions posed in *Rodriguez* dealt with the duty owed by an owner/occupier of land, subsequent decisions have affirmed that the Court's "foreseeability-free" duty analysis applies across the board in negligence actions. For example, in *Morris v. Giant Four Corners, Inc.*, the New Mexico Supreme Court applied the *Rodriguez* duty standard in recognizing a cause of action for negligent entrustment of chattel.[170] Addressing a fact pattern similar to a "failure-to-protect" claim—albeit the failure of one private citizen to protect another completely unknown to him—the Supreme Court utilized the *Rodriguez* duty analysis to determine whether a gasoline vendor owes a duty to an injured plaintiff to refrain from selling gasoline to a third-party driver the vendor knows or should know is intoxicated.[171]

In *Morris*, a clerk at a service station sold gas to an intoxicated individual, who then killed another driver after crossing the center line on the highway.[172] Suit was brought against the gas station in federal court, and the federal court certified

163. *See id.* ¶ 24, 326 P.3d at 474.

164. *Id.* ¶ 13, 326 P.3d at 471 (quoting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) (AM. L. INST. 2010)).

165. *Id.* ¶ 2, 326 P.3d at 467.

166. *Id.*

167. *See id.* ¶ 2, 326 P.3d at 467–68.

168. *See id.* ¶ 12–22, 326 P.3d at 470–74.

169. *See id.* ¶ 22, 326 P.3d at 473–74.

170. 2021-NMSC-028, ¶ 11, 498 P.3d 238, 243.

171. *Id.* ¶ 1, 498 P.3d at 241.

172. *Id.* ¶¶ 4–7, 498 P.3d at 241–42.

the question of duty back to the state Supreme Court for consideration.[173] Factors that may have precluded liability under a foreseeability-driven duty analysis were instead categorized as considerations for a jury evaluating breach, irrelevant to the initial duty determination.[174] Pursuant to *Rodriguez*, the Court's policy analysis confirmed the existence of an unmodified duty of ordinary care for the cause of action at issue.[175] Notably, the Court made its decision over the objection of the defendant that "there is no duty to control a third person's conduct so as to prevent personal harm to another"[176] and that "the only exception to this general rule is where a *special relationship* exists between the actor and the person injured or the actor and the third person."[177] The Court's rejection of this argument in *Morris* amounts to a direct rejection of the precise threshold inquiry mandated by *DeShaney*. In addition to the decision in *Morris*, subsequent decisions of New Mexico's appellate courts have solidified the *Rodriguez* holding in the context of negligent hiring and retention of a contractor[178] and negligent rendering of insurance services.[179]

The message sent by the New Mexico Supreme Court in *Rodriguez* is clear: when analyzing torts in the state of New Mexico, duty is presumed and traditional threshold inquiries regarding foreseeability are prohibited. While the presumption of duty may be rebutted in "exceptional circumstances" by the artful deployment of compelling policy arguments, the burden of persuasion practically ensures that the most subjective and experience-based decisions in these cases will be reserved for juries.[180] If this is the way the New Mexico Supreme Court wants duty to be analyzed in the context of torts, a critical question is begged: why should duty be analyzed any differently in the context of constitutional torts? Historically, of course, the practical answer was that most constitutional torts had to be litigated in federal courts that did not share New Mexico's levelling philosophy as to the accountability of public actors. However, as of July 1, 2021, that is no longer the case.

C. The NMCRA Paves the Way for a New Jurisprudence of Constitutional Duty

The New Mexico Civil Rights Act passed into law in the spring of 2021 and became effective on July 1, 2021.[181] It created a private, civil cause of action in state courts for "deprivation of any rights, privileges or immunities secured pursuant to

173. *Id.* ¶¶ 1, 3, 498 P.3d at 241.

174. *Id.* ¶ 46, 498 P.3d at 252.

175. *Id.* ¶¶ 11, 47, 498 P.3d at 243, 253.

176. *Id.* ¶ 21, 498 P.3d at 245 (noting defendant's citation of RESTATEMENT (SECOND) OF TORTS § 314).

177. *Id.* (emphasis added).

178. Lopez v. Devon Energy Prod. Co., 2020-NMCA-033, 468 P.3d 887.

179. Hovey-Jaramillo v. Liberty Mut. Ins., 2023-NMCA-068, 535 P.3d 737.

180. *See* Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 22, 326 P.3d 465, 473 (noting that foreseeability determinations are reserved for the jury because "such determinations require the jury's common sense, common experience, and its consideration of community behavioral norms.").

181. *Gov. Lujan Grisham Ratifies Civil Rights Act*, OFFICE OF THE GOVERNOR (Apr. 7, 2021), https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-ratifies-civil-rights-act [https://perma.cc/A8PC-YPB2].

the bill of rights of the constitution of New Mexico."[182] The statute was passed in the wake of the nationwide protests of the killing of George Floyd by officers of the Minneapolis Police Department in May of 2020, and other instances of police violence against people of color.[183] However, the NMCRA does not limit itself to claims against law enforcement officers, and instead allows claims for civil rights violations caused by *any* public actor "under color of or within the course and scope of the authority of a public body."[184] Most states have no such statutory equivalent, and the two other states that do limit claims under their civil rights acts to the context of constitutional violations by law enforcement officers.[185]

In keeping with New Mexico cases interpreting Section 41-4-12 of the NMTCA, the NMCRA expressly states that actionable deprivations of rights may be caused by act *or omission*[186]—with omission being essential to most failure-to-protect claims, in contravention of the majority rule in *DeShaney*. The NMCRA requires suits to be brought directly against public bodies, but holds them vicariously liable for the acts of their agents.[187] It requires those public bodies to indemnify their agents when those agents are "acting on behalf of, under color of or within the course and scope of authority of the public body,"[188] and also requires public bodies to pay for the litigation costs and attorney's fees associated with the defense of these agents.[189] It waives sovereign immunity, and precludes public bodies from invoking it.[190] Perhaps most importantly, the NMCRA expressly prohibits the use of the defense of qualified immunity, which has come to thoroughly constrain the adjudication of constitutional torts in the federal sphere.[191]

As *Rodriguez* sets New Mexico apart from the foreseeability-driven status quo in the realm of common-law torts, so does the NMCRA set New Mexico apart from the *DeShaney*-driven status quo in the realm of constitutional torts. No other state in the country has enacted a law that provides such a well-paved road to the independent adjudication of constitutional torts under its state constitution—or the opportunity for the exploration of new terrain that a new road necessarily entails. In allowing for this independent adjudication of constitutional torts in a forum and a legal environment not bound by federal threshold inquiries or qualified immunity,

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

183. *Historic Civil Rights Bill Signed Into New Mexico Law*, ACLU (Apr. 7, 2021, 5:45 PM), https://www.aclu.org/press-releases/historic-civil-rights-bill-signed-new-mexico-law [https://perma.cc/895K-2DU9].

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

185. *See* COLO. REV. STAT. § 13-21-131 (2021) (providing for a "civil action for deprivation of rights" by "peace officers"); *see also* CONN. GEN. STAT. § 52-571k (2021) (providing for an "[a]ction . . . resulting from deprivation of equal protection of the laws of the state committed by a police officer). While Massachusetts has enacted a civil rights statute, it is only enforceable through action by the state attorney general—it does not authorize private civil suits. *See* MASS. GEN. LAWS ch. 12, § 11H (2021).

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

187. *Id.* § 41-4A-3(C) (2021). For purposes of this article, any further reference to "public actors" should be understood to mean "individuals acting on behalf of, under color of or within the course and scope of the authority of [a] public body" as that term is defined in the NMCRA. *Id.*

188. *Id.* § 41-4A-8 (2021).

189. *Id.*

190. *Id.* § 41-4A-9 (2021).

191. *Id.* § 41-4A-4 (2021).

the NMCRA represents the culmination of decades of effort by New Mexico's legislative and judicial branches to ensure that the government is held accountable when its agents cause harm in violation of their duties. Over the course of decades—through the passage of the NMTCA, the egalitarian interpretation of Section 41-4-12, the shift to a new tort paradigm in *Rodriguez*, and the recent passage of the NMCRA—New Mexico's legislative and judicial branches have set the stage for the explicit adoption of a new jurisprudence of constitutional duty far closer to the Brennan School than the Rehnquist School. Perhaps more importantly, they have set the stage for the adoption of a new jurisprudence that exists independently of either the Brennan *or* Rehnquist School—a jurisprudence that looks first and foremost to New Mexico law and legal history.[192]

This new jurisprudence embraces the close similarity of common-law and constitutional torts, and endeavors to analyze them similarly. It recognizes, as Justice Brennan recognized in his *Davis* dissent, that there should be no distinction for constitutional purposes "between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law."[193] It honors the lessons of Section 41-4-12, which does not meaningfully differentiate "acts" from "failures to act" or a law enforcement officer's intentional torts from their "deprivations of rights, privileges, or immunities."[194] If the establishment of *duty* should be no more difficult when the state is the defendant, why should the establishment of *constitutional duty* be any more difficult when the state is the defendant? The new jurisprudence leans eagerly into the proposition from *Schear* that where the state has no immunity, the state is to be treated like a private litigant.

In recognition of the close similarity of torts and constitutional torts, this new jurisprudence analyzes constitutional duty in the manner dictated by the New Mexico Supreme Court in *Rodriguez*. It establishes constitutional duty as a rebuttable presumption wherever constitutional rights are plausibly implicated by a well-plead complaint. It does so without reference to judicially established threshold inquiries like foreseeability, while simultaneously allowing for judicial modification of constitutional duty in those exceptional circumstances where "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[195] It recognizes that if a foreseeability-driven duty analysis has narrowed the scope of constitutional duties in the past (as in *Lucero v. Salazar*), a foreseeability-free duty analysis should broaden the scope of constitutional duties in the present and future. As a natural extension of this analysis, and again in keeping with *Rodriguez*, the new jurisprudence endorses the proposition that the work of evaluating and deciding the thorniest issues of constitutional torts should be reserved for *juries*, bringing their "common sense, common experience, and … consideration

192. For a thorough treatment of this important subject, see generally Arne R. Leonard, *New Mexico True: Crafting a More Inclusive and Independent Method of State Constitutional Interpretation for Claims Under the New Mexico Civil Rights Act*, 54 N.M. L. REV. 425 (2024).

193. Paul v. Davis, 424 U.S. 693, 716 (1986) (Brennan, J., dissenting).

194. *See supra* note 130 and accompanying text.

195. Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 13, 326 P.3d 465, 471 (quoting RESTATEMENT (THIRD) OF TORTS § 7(b)).

of community behavioral norms"[196] to bear in assessing breaches of constitutional duty, causation, and damages resulting from the acts or omissions of public actors.

Some of these propositions may seem obvious. They are not. They fly in the face of *DeShaney*'s logic and holdings, and *DeShaney*'s logic and holdings have played an outsized role in the analysis of constitutional torts and duty since 1989. *DeShaney's* logic, holdings, and jurisprudence have slowly but surely become incompatible with New Mexico law. The true significance of the NMCRA, then, is that it creates a vehicle that the people of New Mexico may use to leave *DeShaney* and the Rehnquist School of constitutional duty behind for good.

III. PRACTICAL CONSIDERATIONS IN THE DEVELOPMENT OF A NEW JURISPRUDENCE OF CONSTITUTIONAL DUTY

It is one thing to herald the arrival of a "new jurisprudence of constitutional duty" as an academic matter. It is another thing to develop that jurisprudence in the trenches of litigation—case by case, issue by issue, inch by inch. This article cannot hope to give comprehensive treatment to that subject, or to predict how the development of any new jurisprudence will ultimately unfold. However, there are three practical considerations which will be of critical importance to the development of any new jurisprudence of constitutional duty in New Mexico, and it is worth addressing each briefly.

First, to allow this jurisprudence to develop organically, it will be important for practitioners to keep the longstanding federal framework of "fundamental rights" in perspective—as providing guidance where appropriate but by no means obviating the need for new and independent analytical frameworks drawn from New Mexico's laws and traditions. Second, it is critical for practitioners to decide how they wish to approach, adopt, or argue against New Mexico's traditional interstitial approach to state constitutional analysis, to which the New Mexico Supreme Court has recently invited challenge. Third, practitioners must be prepared to make distinctions—sometimes exceedingly fine distinctions—between the various culpable mental states of state agents which exist between the poles of negligence and specific intent, by reference to which breaches of constitutional duty under the NMCRA are likely to be determined.

A. Keeping Fundamental Rights in Perspective Under *Rodriguez* and the NMCRA

Adjudication of constitutional torts under the Federal Due Process Clause has historically relied upon analysis of "fundamental" rights, which are either rooted in the specific guarantees of the Bill of Rights or the "penumbras" thereof through the liberty interest enshrined in the Due Process Clause of the Fourteenth Amendment.[197] Under current United States Supreme Court precedent, fundamental rights and liberties must be "deeply rooted in this Nation's history and tradition."[198]

196. *Id*. ¶22, 326 P.3d at 473.

197. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (noting that "specific guarantees in the [federal] Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

198. *E.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

As a general proposition, a constitutional tort claim emerges from the existence and subsequent deprivation or violation of one of these fundamental rights. If a particular right is deemed "fundamental," government interference with that right is subject to strict scrutiny;[199] if the right is deemed neither fundamental nor important, government interference with that right is subject only to rational basis scrutiny.[200]

In addition to the textually rooted fundamental rights such as the freedom of speech, religion, and assembly under the First Amendment and freedom from unreasonable search and seizure under the Fourth Amendment, current penumbral rights arising from the Due Process Clause liberty interest include the right to marry, the right to reproductive autonomy, the rights to raise one's children and control their education, the right to privacy, and the right to bodily integrity.[201] At the federal level, failure-to-protect claims tend to be rooted in the right to bodily integrity.[202] This was the fundamental right unsuccessfully asserted by the petitioner in *DeShaney*.[203]

The due process clause of the New Mexico Constitution—article II, section 18—mirrors the language of the Federal Due Process Clause in stating that "[n]o person shall be deprived of life, liberty or property without due process of law."[204] While the status of the federal constitution as the supreme law of the land dictates that each state must protect *at least* those rights provided by the United States Constitution,[205] New Mexico's courts have occasionally found greater constitutional protections for certain fundamental rights under article II, section 18 of the State Constitution.[206]

The New Mexico Constitution also contains an inherent rights clause—article II, section 4—which recognizes that all persons have "certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."[207] While the inherent rights clause appears to have drawn its inspiration from the preamble of the U.S. Declaration of Independence,[208] it has no federal constitutional analogue. New Mexico courts have not fully defined the scope of article II, section 4, but they have declared that it stands for a "natural,

199. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson*,* 316 U.S. 535, 541 (1942).

200. *See, e.g.,* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022).

201. For a thorough examination of these fundamental rights and their development through Supreme Court caselaw*,* see Morris v. Brandenburg, 2015-NMCA-100, ¶¶ 76–85, 356 P.3d 564, 593–95 (Vanzi, J., dissenting).

202. *See* Planned Parenthood of Se. Pa. v. Casey*,* 505 U.S. 833, 849 (1992), *overruled by Dobbs*, 597 U.S. 215.

203. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

204. Morris v. Brandenburg, 2016-NMSC-027, ¶ 18, 376 P.3d 836, 844.

205. U.S. CONST. art. VI, cl. 2.

206. *See, e.g.*, N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 29, 126 N.M. 788, 975 P.2d 841.

207. N.M. CONST. art. II, § 4.

208. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.").

inherent and inalienable right" in "seeking and obtaining safety." [209] At the same time, while the New Mexico Supreme Court has concluded that the provisions of the inherent rights clause create a "'more expansive' guarantee of obtaining safety" than the guarantees of the United States Constitution,[210] the Court has also stated its belief that the provisions of article II, section 4 do not afford more protection to victims of governmental torts than do the provisions of article II, section 18.[211] To confuse the matter further, the Court has at times characterized the inherent rights clause as more of an "overarching principle" than "an enforceable independent source of individual rights," and has noted that "the [i]nherent [r]ights [c]lause has never been interpreted to be the exclusive source for a fundamental or important constitutional right."[212] A fair summary of these various propositions might state that while the New Mexico Constitution enshrines a "right to safety" above and beyond the guarantees of the federal constitution, any characterization of that right as "fundamental" must still be rooted in an interstitial analysis of the state and federal due process clauses—which is problematic, as discussed below.

Even more problematic is the fact that the roster of fundamental rights shifts with the political composition of the U.S. Supreme Court. In her *Morris v. Brandenburg* dissent*,* New Mexico Court of Appeals Judge Linda Vanzi illustrated how the U.S. Supreme Court's methodology for identifying fundamental rights has vacillated drastically over the past forty years from a "deeply rooted in history and tradition" approach in *Bowers v. Hardwick* (1986) to a "right to self-definition" approach in *Lawrence v. Texas* (2003) to a "judicial exercise of reasoned judgment" approach in *Obergefell v. Hodges* (2015),[213] and finally back to a "deeply rooted in history and tradition" approach in *Dobbs v. Jackson Women's Health Organization* (2022). While the *Dobbs* majority went out of its way to disclaim that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[214] its unadorned reliance upon the "deeply rooted in history and tradition" approach casts intense doubt on the disclaimer's veracity. The *Dobbs* dissent noted its own intense doubts in this regard, stating that "[e]ither the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[215] In the shadow of *Dobbs*, the bulk of federal substantive due process jurisprudence—the jurisprudence of fundamental rights—is dangerously compromised: subject to impending attack by the servants of an unsound method or emptied of meaning by the lack of any method at all.[216]

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209. Reed v. State *ex rel.* Ortiz, 1997-NMSC-055, ¶ 105, 124 N.M. 129, 946 P.2d 86, , *rev'd on other grounds*, New Mexico *ex rel.* Ortiz v. Reed, 524 U.S. 151 (1998).

210. *Id.*

211. Morris v. Brandenburg, 2016-NMSC-027, ¶ 50, 376 P.3d 836, 855 (citing Trujillo v. City of Albuquerque, 1990-NMSC-083, ¶¶ 22–23, 110 N.M. 621, 798 P.2d 571).

212. *Id.* at ¶¶ 49, 51, 376 P.3d at 854–55.

213. Morris v. Brandenburg, 2015-NMCA-100, ¶¶ 85–89, 356 P.3d 564, 595–96 (Vanzi, J., dissenting).

214. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022).

215. *Id.* at 363 (Breyer, J., Sotomayor, J. & Kagan, J., dissenting).

216. *Cf.* APOCALYPSE NOW (Omni Zoetrope 1979) (wherein Kurtz asks Willard "Are my methods unsound?" and Willard replies "I don't see any method at all, sir.").

In light of these problems, practitioners interested in advancing the new constitutional duty jurisprudence should resist the temptation to voluntarily adopt the "fundamental rights" taxonomy. While cases like *DeShaney* illustrate that the characterization of a given right as "fundamental" or "important" was historically a necessary precursor to the analysis of constitutional duty, that is no longer the case. The new jurisprudence of constitutional duty honors *Rodriguez* and the plain language of the NMCRA by acknowledging a rebuttable presumption of constitutional duty whenever there is an alleged violation of "*any* rights, privileges, or immunities secured pursuant to the bill of rights of the constitution of New Mexico." Simply put, the NMCRA does not adopt the fundamental rights framework and there is no reason for proponents of the NMCRA to adopt that framework—or its attendant mountains of federal baggage—without a fight.

Of course, practitioners bringing claims under the NMCRA should still be *prepared* to address the arguments of public bodies that the rights invoked in a given claim are not "fundamental." Such arguments must be anticipated, particularly where a relatively novel right or interpretation of the State bill of rights is being advanced. The important thing is to be disciplined in reminding the courts that inquiries regarding "fundamental rights" are traditionally a means of invoking constitutional duty. The NMCRA does not distinguish between "fundamental" and "non-fundamental" rights, and the concepts of "duty" and "constitutional duty" should be analyzed in a manner consistent with with *Rodriguez*. A *Rodriguez*-style analysis will most often entail policy arguments for or against a constitutional duty determination, and this is where precedent regarding fundamental rights will frequently come into play. However, so long as the inquiry is properly framed under *Rodriguez*, rather than state or federal cases protecting fundamental rights at the expense of all others, the reminder that a "no-constitutional-duty" determination may only be made in "exceptional circumstances" should carry significant rhetorical force.

B. Living Within or Moving Beyond the Interstitial Approach

In the 1997 case of *State v. Gomez*, the New Mexico Supreme Court adopted a method of analyzing state constitutional issues known as the interstitial approach.[217] Under *Gomez*, use of the interstitial approach was limited to the analysis of state constitutional provisions which "[have] a parallel or analogous provision in the United States Constitution."[218] The court described the interstitial 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

217. 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

218. *Id.* ¶¶ 20–22, 932 P.2d at 7.

> flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.[219]

The interstitial approach is one of several commonly utilized approaches to state constitutional analysis. It exists in the middle ground between the "lockstep approach" (whereby "a state constitutional provision that has a counterpart in the Federal Bill of Rights is interpreted to mean whatever the United States Supreme Court has concluded the federal counterpart means") and the "primacy approach" (whereby "[state] courts must always look first to the state constitution before considering whether a provision of the Federal Constitution provides relief").[220] In expressly adopting the interstitial approach in *Gomez*, the Court noted that New Mexico had utilized the lockstep approach for many years before abandoning it in the 1976 case of *State ex rel. Serna v. Hodges*[221] in favor of "providing broader protection where we have found the federal analysis unpersuasive."[222] The Court further noted that the adoption of the interstitial approach was in keeping with "the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions."[223]

While contemporaneous legal scholars applauded the *Gomez* Court's shift from the lockstep approach to the interstitial approach as "reinforc[ing] New Mexico's commitment to an independent jurisprudence of state constitutional rights," they simultaneously noted that the approach "could easily lead litigants and future courts to fall prey to a perverse federal supremacy fallacy" due to "its presumption in favor of the established federal jurisprudence."[224] Recently, other legal scholars have noted that this state of affairs did in fact materialize, as "post-*Gomez* decisions in civil cases involving claims under the state constitution . . . reflect an apparent presumption that the New Mexico Constitution should reach no further than federal precedent would allow."[225] These scholars have argued persuasively that "'*Gomez* interstitialism' has hindered the development of a principled body of state constitutional jurisprudence" and that there are "compelling[] reasons to replace the current mode of analysis . . . with a more independent approach to claims of protection under the state constitution."[226]

An interstitial approach that hinders the development of a principled body of state constitutional jurisprudence is detrimental to the legislative aims of the

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219. *Id*. ¶ 19, 932 P.2d at 7 (citation omitted).

220. Jack L. Landau, *"First-Things-First" and Oregon State Constitutional Analysis*, 56 WILLAMETTE L. REV. 63, 68–71 (2020).

221. 1976-NMSC-033, ¶ 22, 89 N.M. 351, 552 P.2d 787, *overruled by* State v. Rondeau, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688.

222. *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d at 7.

223. *Id.* ¶ 21, 932 P.2d at 7–8.

224. Michael B. Browde, State v. Gomez *and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387, 387, 393–94, 409 (1998).

225. 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, 9 (2023) (providing a thorough overview of the interstitial approach, its application in New Mexico from 1997 to the present date, and its implications for the development (or hindrance) of an "independent jurisprudence of state constitutional rights.").

226. *Id*. at 16.

NMCRA and the new jurisprudence of constitutional duty that the NMCRA facilitates. It should be the goal of any practitioner bringing claims under the NMCRA to resist the gravitational pull of rights-restrictive federal holdings and analytical frameworks at every juncture. If this is the goal, arguments over the interstitial approach—whether it is implicated or whether an exception applies—should be anticipated and meticulously prepared. Preservation of the New Mexico Supreme Court's exclusive jurisdiction over appellate questions arising under the NMCRA, and development of independent state constitutional law under the NMCRA, requires that trial court rulings rest upon "adequate and independent state grounds."[227] This reality should be highlighted for New Mexico trial courts early and often. In any given case, there will be at least three opportunities to carve out the adequate and independent state grounds for protection of constitutional rights, and each of these opportunities is discussed briefly below.

First, practitioners should combat application of the interstitial approach at the pleading stage, through the invocation of New Mexico Bill of Rights provisions for which there are no federal analogues. Application of the interstitial approach is only appropriate where there is "a parallel or analogous provision in the United States Constitution," and seven of the twenty-four sections of the New Mexico Bill of Rights have no parallel or analogous provision in the United States Constitution.[228] While one of those sections—the inherent rights clause—has broad language and an ostensibly broad and versatile scope, practitioners should nonetheless be cognizant of its treatment in *Morris v. Brandenburg* as an overarching principle more or less coextensive with article II, section 18. Any court that is desperately reluctant to address and ascribe independent constitutional meaning to the inherent rights clause may point to *Morris v. Brandenburg* as precedential justification for a frustrating sleight-of-hand: first finding that the inherent rights clause is essentially equivalent to the New Mexico due process clause, then finding that the New Mexico due process clause has a federal analogue, and then reverting to analysis of the Federal Due Process Clause in service to the interstitial approach. In instances where a lower court sets itself on this path, it will fall upon practitioners to preserve their appellate arguments that the state constitution must be construed such that no part of it, including the inherent rights clause, is "rendered surplusage or superfluous."[229]

Second, in any case where inquiry into a parallel or analogous provision in the United States Constitution appears inevitable, practitioners should nonetheless begin advocating for use of the primacy approach to state constitutional analysis rather than the interstitial approach. While the NMCRA unmistakably declares the independent significance and actionability of the State Bill of Rights, the interstitial

227. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("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."). Conversely, the Supreme Court noted that "[when] 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." *Id.* at 1040–41.

228. Vanzi & Baker, *supra* note 225, at 24.

229. Hannett v. Jones, 1986-NMSC-047, ¶ 13, 104 N.M. 392, 722 P.2d 643.

approach declares that the State Bill of Rights plays second fiddle to its federal counterpart. The primacy approach, which "abjures any notion that courts should begin their constitutional analysis by considering federal caselaw,"[230] better honors the legislative intent expressed through the NMCRA. As *Gomez* itself acknowledges, the primacy approach dictates that "if a [party]'s rights are protected under state law, the court need not examine the federal question."[231] The same could be said of the NMCRA, and the fit between the NMCRA and the primacy approach appears to be an intuitive one. In its recent decision in *Grisham v. Van Soelen*, the New Mexico Supreme Court noted that "*Gomez* does not bind this Court as to our analysis of state constitutional questions" and explicitly encouraged practitioners to develop "thoughtful and reasoned argument[s] . . . addressing whether the interstitial approach is the proper method to ensure the people of New Mexico the protections promised by their constitution."[232] The green light has been given. While practitioners advocating for the primacy approach over the interstitial approach should not expect immediate success at the district court level, there is value in preserving the issue for the attention of the appellate courts whenever possible.

Third, in cases where a court has firmly indicated its intent to utilize the interstitial approach, practitioners must be prepared to make their arguments regarding flawed federal analyses or (more uniformly) "distinctive state characteristics" warranting departure from federal precedent. The "distinctive state characteristics" most readily highlighted in the context of NMCRA claims may be drawn from the text of the NMCRA itself. The NMCRA requires claims against "public bodies," whereas § 1983 requires claims against "persons" (in the absence of a distinct *Monell* claim). The NMCRA prohibits use of the qualified immunity defense, which is integral to the litigation of § 1983 claims and which has come to disproportionately dominate litigation in the federal civil rights arena. The NMCRA requires indemnification of state agents by the public bodies that control their work, while there is no equivalent indemnification requirement for § 1983 claims. Each of these characteristics of the NMCRA may be fairly characterized as "distinctive" from the federal approach to constitutional torts. Beyond being merely distinctive, these characteristics may also be framed as deliberate *departures* from the federal approach—departures intended to maximize evaluation of constitutional deprivation claims on their merits, rather than disposing of them through procedural threshold inquiries. If the Legislature intended for the NMCRA to allow departure from overly-restrictive federal analyses, there is a natural argument to be made that the judiciary should allow that same departure—which necessarily entails heightened protections of constitutional rights—when applying the interstitial approach to claims made under the NMCRA.

230. Landau, *supra* note 220, at 71.

231. State v. Gomez, 1997-NMSC-006 ¶ 18, 122 N.M. 777, 932 P.2d 1.

232. 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272, 281 n.7.

C. Importation of Intentionality Standards in Assessing Breach of Constitutional Duty

As noted in Section I.D, a tort is commonly defined as "a breach of a duty that the law imposes on persons who stand in a particular relation to one another."[233] This definition makes no structural distinction between intentional torts and the tort of negligence. What essentially distinguishes intentional torts from the tort of negligence is the nature of the culpable mental state underlying the breach. For the tort of negligence—which denotes "culpable carelessness"[234]—a failure to behave as a reasonable person in the same or similar circumstances will generally constitute a breach of duty.[235] For intentional torts, a culpable mental state beyond mere carelessness is required to breach the duty.

What "culpable mental state" must be proven to support a finding that a public actor has breached their constitutional duty under the NMCRA? The statute itself does not definitively answer this question, or even provide much guidance as to what the answer might be, so the answers reached by courts will likely vary from case to case as law develops under the statute. Until a clear legal standard is developed, no colorable argument should be deemed off-limits by practitioners.

In the context of "failure-to-protect" claims, New Mexico courts have held that misconduct by public actors that is merely negligent does not generally rise to the level of a freestanding constitutional violation.[236] However, those same courts have held that the negligent conduct of law enforcement officers is actionable under Section 41-4-12 when that negligence is the proximate cause of an intentional tort committed by a third party.[237] With the passage of the NMCRA, the NMTCA cases interpreting Section 41-4-12 provide strong authority for the proposition that the negligent conduct of *any* public actor gives rise to a constitutional tort when that negligence is the proximate cause of an intentional tort committed by a third party. This proposition alone would give rise to a viable NMCRA cause of action under the facts of *DeShaney*.

In cases where there is no intentional tort committed by a third-party private actor, the focus of the culpability inquiry will be fully directed to the mental state of the public actors involved in the alleged constitutional tort. Cases interpreting § 1983 have devoted considerable time to parsing the differences between culpable mental states such as gross negligence, recklessness (or reckless disregard), deliberate indifference, and purpose or knowledge. The U.S. Supreme Court has described a spectrum of culpable mental states "[w]ith deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other," while adding that "acting or failing to act with deliberate indifference to a substantial

233. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019).

234. *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

235. *Id.* (defining "negligence" as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.").

236. *E.g.*, Lessen v. City of Albuquerque, 2008-NMCA-085, ¶ 30, 144 N.M. 314, 187 P.3d 179 ("Plaintiff's allegations of conduct that is merely negligent are insufficient to establish such a constitutional violation.").

237. *See supra* text accompanying notes 132–37.

risk of serious harm . . . is the equivalent of recklessly disregarding that risk."[238] "Between the poles lies 'gross negligence' too, but the term is a 'nebulous' one, in practice typically meaning little different from recklessness as generally understood in the civil law."[239] For their part, New Mexico courts faced with this parsing task have also equated deliberate indifference with "reckless disregard of [a] plaintiff's rights."[240] Generally speaking, constitutional tort plaintiffs need not show that a government official acted with the specific intent to cause harm.[241]

With the two ends of the spectrum most often eliminated from consideration—simple negligence being an insufficient showing in most circumstances and "purpose or knowledge" being a sufficient but unnecessary showing in almost all circumstances—the focus of the inquiry into culpable mental states will most often remain between the poles, and practitioners will be tasked with arguing for the application of gross negligence, recklessness, or deliberate indifference standards for the breach of constitutional duty on a case by case basis. Given that the three terms overlap substantially, serious thought should be given to uniform jury instructions and special verdict forms which treat them indistinguishably and disjunctively.[242] This method will serve the twin purposes of broadening the jury's consideration of culpable mental states while also better preserving the trial court record, allowing the appellate courts to clarify which of these three characterizations should be utilized moving forward.

CONCLUSION

DeShaney showcases two schools of thought on the subject of constitutional duty—the Rehnquist and Brennan Schools. The Rehnquist School regards constitutional duty as heavily constrained by threshold inquiries regarding "special relationships" and "state-created dangers," while the Brennan School regards "constitutional duty" as a more omnipresent phenomenon subject to breach when government officials act with certain "culpable mental states" beyond a mere lack of care.

With its holding in *Rodriguez*, the New Mexico Supreme Court created a rebuttable presumption of duty and eliminated the threshold inquiry of foreseeability-driven duty analysis. Since the Court has rejected this approach in the context of common-law torts, it should reject this approach for constitutional torts. Moreover, to maintain consistency between common-law and constitutional torts, the Court should adopt a rebuttable presumption of constitutional duty whenever deprivations of state constitutional rights are plausibly implicated. The focus, in both contexts, should shift to the analysis of breach, and the manner in which a presumptive constitutional duty may be breached by government officials who act or fail to act with a sufficiently culpable mental state.

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238. Farmer v. Brennan, 511 U.S. 825, 836 (1994).

239. *Id.* at 836 n.4.

240. Gallegos v. State, 1987-NMCA-150, ¶ 20, 107 N.M. 349, 758 P.2d 299.

241. *See, e.g.*, Phillips v. Roane County, 534 F.3d 531, 540 (6th Cir. 2008).

242. *Cf.* UJI 13-1827 NMRA (treating the culpable mental states of "malicious," "willful," "reckless," "wanton," "fraudulent," and "bad faith" as indistinguishable and disjunctive for purposes of a punitive damages instruction).

The passage of the NMCRA paves the way for this new jurisprudence of constitutional duty in New Mexico. The new jurisprudence is consistent with the New Mexico Supreme Court's rejection of threshold inquiries in the analysis of duty but is consistent with the approach championed by Justice Brennan in his *DeShaney* dissent and decades of appellate decisions interpreting Section 41-4-12 of the NMTCA. Insofar as certain provisions of the NMCRA (including its prohibition of the qualified immunity defense) demonstrate a desire to depart from rights-restrictive federal precedent in the constitutional sphere, this new jurisprudence will unify the efforts of our state's legislative, executive, and judicial branches and serve to protect the constitutional rights of all New Mexicans at a time when those same rights are under severe threat in other parts of the country.