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**QUALIFIED IMMUNITY—WHO NEEDS IT? EXPLORING THE OTHER
CONSTITUTIONAL, STATUTORY, AND COMMON LAW IMMUNITIES
AVAILABLE UNDER THE NEW MEXICO CIVIL RIGHTS ACT**

Mark D. Standridge*

In passing the New Mexico Civil Rights Act (NMCRA),¹ which is the “analogue” of the federal Civil Rights Act, 42 U.S.C. § 1983,² the New Mexico Legislature expressly forbade public bodies from raising the oft-maligned³ defense of qualified immunity for causing the deprivation of any rights, privileges, or immunities secured by the Bill of Rights of the constitution of New Mexico.⁴ However, the Legislature also preserved “judicial immunity, legislative immunity,⁵ and any other constitutional, statutory or common law immunity” for NMCRA defendants.⁶ Under a separate, long-standing statute, the Legislature has mandated that “the common law as recognized in the United States of America, shall be the rule of practice and decision” in the courts of New Mexico.⁷ This article explores the contours of various constitutional, statutory, and common law immunities that might be raised in NMCRA litigation, including immunities that may have existed when the New Mexico Constitution was ratified in 1911.

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

2. See *Griffin v. City of Artesia*, No. CV 23-215 GJF/JHR, 2023 WL 5337133, slip op. at 5 (D.N.M. Aug. 18, 2023).

3. See generally Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201 (2023); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665 (1986); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019); Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1 (2018); Alan Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006).

4. N.M. STAT. ANN. § 41-4A-4 (2021).

5. See N.M. CONST. art. IV, § 13; see also 1969 N.M. Op. Att’y Gen. No. 69-83 (July 31, 1969) (concluding that delegates to the state constitutional convention enjoy legislative immunity); *Lewis v. New Mexico Dep’t of Health*, 275 F. Supp. 2d 1319, 1327 (D.N.M. 2003) (stating that actions of the governor recommending state appropriations for Medicaid waivers and revamping the state personnel system and plan for growth in the Medicaid programs were legislative in nature and therefore the governor was entitled to legislative immunity).

6. N.M. STAT. ANN. § 41-4A-10 (2021).

7. N.M. STAT. ANN. § 38-1-3 (1876).

I. THE COMMON LAW AS THE RULE OF PRACTICE AND DECISION IN NEW MEXICO

In the 1848 Treaty of Guadalupe Hidalgo, the United States acquired the territory of New Mexico from Mexico, which did not recognize the common law.⁸ As it was not recognized by Mexico, common law was “not in existence in New Mexico prior to its cession to the United States.”⁹ Therefore, the adoption of common law within the territory required “a specific enactment by Congress or by the Territorial Legislature.”¹⁰ The Territorial Legislature “adopted the common law of England as the rule and practice in criminal cases” as early as 1851.¹¹ New Mexico adopted the common law “and such British statutes of a general nature that do not conflict with our Constitution or specific statutes as enforced at the time of America’s separation from England,” and determined that these laws and statutes are “binding as rules of practice and decision in the courts of this state.”¹²

This was codified in what is now Section 38-1-3 of the New Mexico Statutes, which states: “In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.”¹³ Thus, prior to statehood, the Territorial Legislature adopted the rule of common law, and “that rule remains in effect until changed by the Legislature.”¹⁴ Section 38-1-3 “is the modern codification of the principle that the ‘law of England, both statutory and decisional, as developed by Parliament and the courts as of 1776 [was] incorporated into New Mexico law by the Territorial Legislature in 1876.’”¹⁵ Of course, the common law may be modified by the Legislature, subject to constitutional requirements, but until such legislative action is taken, the common law “represent[s] the rules of decision of legal disputes unless and until changed by subsequent judicial overruling or modification.”¹⁶

Faced with the meaning of “as recognized” and “in the United States,” the New Mexico Territorial Supreme Court held in *Browning v. Estate of Browning* that:

the legislature intended, by the language used in that section, to adopt the common law, or *lex non scripta*, and such British statutes of a general nature not local to that kingdom, nor in conflict with

8. *Lopez v. Maez*, 1982-NMSC-103, ¶ 6, 98 N.M. 625, 651 P.2d 1269.

9. *Id.*

10. *Id.*

11. *See id.* (citing *Ex Parte DeVore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47).

12. *Id.* (citing *Boddy v. Boddy*, 1966-NMSC-242, ¶ 7, 77 N.M. 149, 420 P.2d 301) (stating that New Mexico adopted British decisions and non-local statutes “which were in force at the time of American separation from England, and made [them] binding as the rule of practice and decision in the courts of this State” through what is now Section 38-1-3).

13. *See* Act of Jan. 7, 1876, ch. 2, § 2, 1876 N.M. Laws 30–31 (codified as amended at N.M. STAT. ANN. § 38-1-3 (1876)).

14. *State v. Jensen*, 1998-NMCA-034, ¶ 21, 124 N.M. 726, 955 P.2d 195 (quoting *Deats v. State*, 1972-NMCA-155, ¶ 6, 84 N.M. 405, 503 P.2d 1183).

15. *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1241 (10th Cir. 2012) (alteration in original) (quoting *Torrance Cnty. Mental Health Prog., Inc. v. N.M. Health & Env’t Dep’t*, 1992-NMSC-026, ¶ 21, 113 N.M. 593, 830 P.2d 145).

16. *Id.* at 1242 (quoting *Torrance Cnty. Mental Health Prog.*, 1992-NMSC-026, ¶ 22, 830 P.2d at 151).

the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country.¹⁷

There is a presumption “that the Legislature enacts statutes that are consistent with the common law and that the common law applies unless it is clearly abrogated.”¹⁸ Therefore, “[a] statute will be interpreted as supplanting the common law only if there is an explicit indication” that the Legislature intended as much.¹⁹

When then, exactly, *is* the “common law” adopted in the nineteenth century? As noted by our state Supreme Court, “the term ‘common law’ has two meanings—a technical one, with historical and statutory roots, and a more general, popular meaning—a shorthand expression denoting the courts’ decisional law as developed in times both ancient and recent.”²⁰ The technical strand of the common law includes the body of English statutes and case law, as described above, that was incorporated by the Territorial Legislature in 1876.²¹ In other words, when the Legislature adopted the common law “as the rule of practice and decision, the *whole body of that law* . . . came into this jurisdiction.”²² Courts across the country, when referring to the “common law” at the time that the Constitution was adopted, “include the whole body of the common law of England as it stood at that time, influenced by statute.”²³ In California, it is well established that the common law of England includes “not only the *lex non scripta* but also the written statutes enacted by Parliament.”²⁴ This view finds vigorous support in *Perry v. Strawbridge*, in which

17. 1886-NMSC-022, ¶ 27, 3 N.M. (Gild.) 659, 9 P. 677; *see also* *Martinez v. Cook*, 1952-NMSC-034, ¶ 12, 56 N.M. 343, 244 P.2d 134; *Salazar v. St. Vincent Hosp.*, 1980-NMCA-051, ¶ 2, 95 N.M. 150, 619 P.2d 826.

18. *San Juan Agr. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 20, 150 N.M. 64, 257 P.3d 884 (citing *Sims v. Sims*, 1996-NMSC-078, ¶ 24, 122 N.M. 618, 930 P.2d 153).

19. *Id.* (quoting *Sims*, 1996-NMSC-078, ¶ 22, 930 P.2d at 158).

20. *Torrance Cnty. Mental Health Prog.*, 1992-NMSC-026, ¶ 21, 830 P.2d at 150.

21. *See id.*; *see also supra* notes 11–16 and accompanying text.

22. *Beals v. Ares*, 1919-NMSC-067, ¶ 36, 25 N.M. 459, 185 P. 780 (emphasis added).

23. *People v. Richardson*, 32 P.2d 433, 435 (Cal. Ct. App. 1934) (citing *Martin v. Superior Court*, 168 P. 135 (Cal. 1917)); *see also* *REVI, LLC v. Chicago Title Ins. Co.*, 776 S.E.2d 808, 819 n.13 (Va. 2015) (Kelsey, J., dissenting) (noting that “[t]he common law of England was the common law of Colonial Virginia, and after the Revolution became the common law of the Commonwealth,” and collecting cases to support this point); *Seay v. Bank of Rome*, 66 Ga. 609, 616 (1881) (“[T]he common law . . . was adopted by the act of 1784, which introduces into the jurisprudence of Georgia the whole body of the common law not inconsistent with our new frame of government, and subject, of course, to legislative modification.”); *State v. Bank of Md.*, 6 G. & J. 205, 209 (Md. 1834); *State v. ___*, 2 N.C. (1 Hayw. 28) 28, 33 (N.C. 1794) (“[T]he *lex terræ* of North Carolina at present is the whole body of law, composed partly of the common law, partly of customs, partly of the acts of the British Parliament received and enforced here, and partly of the acts passed by our own Legislature.”); *Herrin v. Sutherland*, 241 P. 328, 330 (Mont. 1925) (“The common law of England means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth; that time began with our first territorial Legislature.”); *Cannon v. Seyboldt*, 48 P.2d 406, 415 (Idaho 1935); *State v. Stewart*, 11 Del. (6 Houst.) 359, 371 (Sup. Ct. Del. 1881) (“[T]he whole body of the common law, both of right and remedy, was brought hither by our ancestors on their emigration from England. . . .”).

24. *Crouchman v. Superior Court*, 755 P.2d 1075, 1081 (Cal. 1988) (quoting *Moore v. Purse Seine Net*, 118 P.2d 1, 4 (Cal. 1941)). Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies in 1776 are included within the

the Missouri Supreme Court said: “[O]ur statutes of descents and distributions are so largely expressive of the common law that we must consider these maxims and the whole body of the applicable common-law doctrines; that we must read them together as parts and parcels of the same system”²⁵ That said, at least one court has held that purely “local” English law does not unquestionably apply here: “Our ancestors, on emigrating . . . brought the common law purified from its local dross. Every thing of a mere local origin was left on the other side of the ocean”²⁶ English immigrants brought the “folk law” only, as distinguished from “the *jus coronæ* and the local common law of England.”²⁷

Although the common law was adopted in New Mexico via Section 38-1-3, the New Mexico Supreme Court has held that “the common law does not apply to the extent the subject matter of the duty or right asserted is covered by constitution, statute, or rule.”²⁸ As explained by the Supreme Court in 1919:

When the Legislature in 1876 adopted the common law as the rule of practice and decision, the whole body of that law . . . came into this jurisdiction. Where it found a statute counter to its provisions, it yielded to the statute, but it gave way only in so far as the statute conflicted with its principles. In so far as it was possible[,] it operated in conjunction and harmony with the statutes. If the statutes conflicted with it, it bided its time, and upon repeal of the statute became again operative. In other words, the common law, upon its adoption, came in and filled every crevice, nook, and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment, in so far as it was applicable to our conditions and circumstances.²⁹

Additionally, the New Mexico appellate courts have repeatedly held that “if the common law is not ‘applicable to our condition and circumstances’ it is not to be given effect.”³⁰ New Mexico’s adoption, through Section 38-1-3, of the “‘common law’ of England as it existed in 1776 . . . does not prevent New Mexico from adopting new common law rules [or] dictate that new common law rules judicially created after the date of statehood should be applied retroactively.”³¹

English common law. *See, e.g.*, *Merritt v. Gibson*, 27 N.E. 136, 142 (Ind. 1891) (“[T]he whole body of statutory law, common law, and equity are, in our system of jurisprudence, construed as are construed the several provisions of a code,—as together constituting a harmonious whole.”).

25. 108 S.W. 641, 645 (Mo. 1908); *see also* *Price v. Hitaffer*, 165 A. 470, 473 (Md. 1933).

26. *Arnold v. Mundy*, 6 N.J.L. 1, 27–28 (N.J. 1821).

27. *Id.*

28. *See Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16, 350 P.3d 1221, 1225 (citing *State ex rel. Atty. Gen. v. First Jud. Dist. Ct.*, 1981-NMSC-053, ¶ 36, 96 N.M. 254, 629 P.2d 330, *abrogated on other grounds* by *Republican Party of N.M. v. New Mexico Tax’n & Revenue Dep’t*, 2012-NMSC-026, 283 P.3d 853).

29. *Beals v. Ares*, 1919-NMSC-067, ¶ 36, 25 N.M. 459, 185 P. 780; *see also* *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153.

30. *Abo Petroleum Corp. v. Amstutz*, 1979-NMSC-070, ¶ 15, 93 N.M. 332, 600 P.2d 278 (citing *Flores v. Flores*, 1973-NMCA-011, ¶ 14, 84 N.M. 601, 506 P.2d 345).

31. *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1242 (10th Cir. 2012).

“Since New Mexico’s incorporation of the common law of England and the United States in Section 38-1-3, numerous court decisions have announced new rules for the decision of cases.”³² In *Hicks v. State*, the New Mexico Supreme Court held that sovereign immunity, another doctrine of the common law, could be “put to rest by the judiciary . . . once it [had reached] a point of obsolescence.”³³

Thus, “the common law [is] the rule of practice and decision in New Mexico,” *except* if it has been “superseded or abrogated by statute or constitution, or held to be inapplicable to conditions in New Mexico.”³⁴ “Because a common law doctrine is judicially created,” the New Mexico Supreme Court has held that “it is within the court’s province to change a common law doctrine if it is unwise.”³⁵ Thus, a rule of the common law is not “invulnerable to judicial attack once it has reached a point of obsolescence” simply because it “has been in effect for many years.”³⁶ Indeed, since its decision in *Browning v. Estate of Browning*³⁷ the Supreme Court has “limited the operation of the common law and refused to follow it where its rules were not deemed suitable” to the conditions of the time.³⁸ For example, the Supreme Court has “never followed it in connection with [New Mexico’s] waters, but, on the contrary, [has] followed the Mexican or civil law, and what is called the Colorado doctrine of prior appropriation and beneficial use.”³⁹

II. ADOPTION AND INTERPRETATION OF THE NEW MEXICO STATE CONSTITUTION

The New Mexico Constitutional Convention met in Santa Fe between October and November 1910.⁴⁰ Voters approved the state constitution in January 1911, and it took effect upon New Mexico’s entry into statehood in January 1912.⁴¹ In interpreting any provision of the New Mexico Constitution, the “primary goal is to discern and give effect to the drafters’ intent.”⁴² In considering the intent of the

32. *Torrance Cnty. Mental Health Prog., Inc. v. New Mexico Health & Env’t Dep’t*, 1992-NMSC-026, ¶ 22, 113 N.M. 593, 830 P.2d 145 (reviewing New Mexico cases departing from common law rules).

33. 1975-NMSC-056, ¶ 6, 88 N.M. 588, 544 P.2d 1153.

34. *Ickes v. Brimhall*, 1938-NMSC-036, ¶ 6, 42 N.M. 412, 79 P.2d 942.

35. *Lopez v. Maez*, 1982-NMSC-103, ¶ 7, 98 N.M. 625, 651 P.2d 1269 (citing *Hicks*, 1975-NMSC-056, 544 P.2d 1153).

36. *Id.* (citing *Hicks*, 1975-NMSC-056, 544 P.2d 1153).

37. 1886-NMSC-022, 3 N.M. (Gild.) 659, 9 P. 677.

38. *Martinez v. Cook*, 1952-NMSC-034, ¶ 14, 56 N.M. 343, 244 P.2d 134 (reviewing cases in which the state Supreme Court diverged from common law).

39. *Id.*

40. *State v Gutierrez*, 1993-NMSC-062, ¶ 33, 116 N.M. 431, 863 P.2d 1052.

41. *Id.* (citing ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD 1846–1912*, 272–304 (1968); *PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF NEW MEXICO* (1910)); *see also State ex rel. League of Women Voters v. Advisory Comm. to the N.M. Compilation Comm’n*, 2017-NMSC-025, ¶ 34, 401 P.3d 734, 745.

42. *Pirtle v. Legis. Council Comm. of N.M. Legislature*, 2021-NMSC-026, ¶¶ 34, 47, 492 P.3d 586, 598 (citing *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830, 832 (“The most important consideration for us is that we interpret the constitution in a way that reflects the drafters’ intent.”); *see also State ex rel. Franchini v. Oliver*, 2022-NMSC-016, ¶ 13, 516 P.3d 156, 162 (“The primary goal of our interpretation of the Constitution is to identify and give effect to the intent of its framers and the electorate.”); *Bd. of Cnty. Comm’rs v. McCulloh*, 1948-NMSC-028, ¶ 15, 52 N.M. 210, 195 P.2d 1005).

drafters, New Mexico courts use similar rules of interpretation as those that apply in the context of statutory interpretation, including use of dictionary definitions in “ascertaining the ordinary meaning of words at issue.”⁴³ To resolve any ambiguity in a constitutional provision, a party must “identify independent indicia of the drafters’ intent” or identify “any canon of statutory or constitutional construction that would tip the scales . . . in [the party’s] favor.”⁴⁴ Further, the state Supreme Court has provided that courts may consider how changes in common usage impact the meaning of constitutional provisions:

Although a court may not broaden the scope of constitutional provisions beyond their intent . . . the Constitution, by its very nature, has some flexibility. Words employed are not necessarily fixed in meaning, but over the years may change and grow to reflect changes in the conditions and knowledge of modern society.⁴⁵

Under the “interstitial approach” to interpreting the New Mexico Constitution, the courts of this state “may diverge from federal precedent where [(1)] the federal analysis is flawed, . . . [(2)] there are structural differences between the state and federal governments, or [(3)] because of distinctive New Mexico characteristics.”⁴⁶ In *State v. Gutierrez*, the New Mexico Supreme Court rejected the “good faith” exception to the warrant requirement as “incompatible with the guarantees of the New Mexico Constitution.”⁴⁷ While the United States Supreme Court’s “exclusionary rule, in the context of the Fourth Amendment, was purposed solely on deterring police misconduct,” the *Gutierrez* court concluded that New Mexico’s “search and seizure provision was also directed at protecting the constitutional right to be free from unreasonable search and seizure, whether or not it resulted from police misconduct.”⁴⁸ The Court recognized that Article II, Section

43. *Pirtle*, 2021-NMSC-026, ¶ 34, 492 P.3d at 598 (citing *Boyse*, 2013-NMSC-024, ¶¶ 8–9, 202 P.3d at 832–33).

44. *See id.* at 600 (citing *Boyse*, 2013-NMSC-024, ¶ 8, 202 P.3d at 832 (noting that “the rules of statutory construction apply equally to constitutional construction”)).

45. *In re Generic Investigation into Cable Television Servs.*, 1985-NMSC-087, ¶ 10, 103 N.M. 345, 707 P.2d 1155 (citing *Bd. of Educ. v. Robinson*, 1953-NMSC-055, ¶ 14, 57 N.M. 445, 259 P.2d 1028; *Humana of N.M., Inc. v. Bd. of Cnty. Comm’rs*, 1978-NMSC-036, 92 N.M. 34, 582 P.2d 806); *see also Georgia O’Keefe Museum v. County of Santa Fe*, 2003-NMCA-003, ¶ 44, 133 N.M. 297, 62 P.3d 754 (stating that the rights granted in State constitutional exemption from tax for property used for educational/charitable purposes “are not to be frittered away by a construction so strict as to be unreasonable or harsh” nor are they “to be so enlarged as to create rights which the Constitution makers did not contemplate”) (citations omitted).

46. *State v. Garcia*, 2009-NMSC-046, ¶ 27, 147 N.M. 134, 217 P.3d 1032 (citing *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1). Recently, there has been a call for the New Mexico Supreme Court to reconsider the “interstitial approach” and to instead “develop a method for analyzing state constitutional issues that recognizes the independent legal significance of state constitutions in our system of dual sovereigns and also provides clarity and guidance to litigants and judges.” 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, 2 (2023).

47. 1993-NMSC-062, ¶ 1, 116 N.M. 431, 863 P.2d 1052.

48. *Garcia*, 2009-NMSC-046, ¶ 29, 217 P.3d at 1041 (discussing the Supreme Court’s rationale in *Gutierrez*).

10 “expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions,”⁴⁹ and “thus identified a broader protection to individual privacy under the New Mexico Constitution.”⁵⁰

By the time our state constitution was adopted in 1911, “over 100 years had elapsed since the national framers embodied their concerns” in the federal Bill of Rights, prompting consideration of whether the concerns underlying the Fourth Amendment had shifted by the time of the adoption of its state equivalent. In *Gutierrez*, the New Mexico Supreme Court “reviewed the proceedings of the constitutional convention” but found “no direct evidence establishing what the framers believed to be the scope, meaning, and effect of Article II, Section 10,”⁵¹ the state counterpart to the Fourth Amendment to the United States Constitution. For example:

[u]nlike the relatively clear evidence that American colonists were concerned with abusive British search and seizure practices, and the recorded debate and discussion by the federal framers concerning the Fourth Amendment, the transcriptions of the New Mexico Constitutional Convention of 1910 contain no debate or discussion of the New Mexico search and seizure provision.⁵²

In other words, Article II, Section 10 of the New Mexico Constitution “simply states a right—the right to be free from unreasonable searches and seizures,”⁵³ and does not, by itself, “provide any guidance on how to preserve [that right] or how to remedy its violations.”⁵⁴ Furthermore, while “British abuses of individual liberty carried out by execution of the general warrant and the writ of assistance that appear to have prompted response in the Fourth Amendment certainly are relevant” to New Mexico courts’ interpretation of Article II, Section 10 and likely “played a role” in its drafting,⁵⁵ the New Mexico Supreme Court in *Gutierrez* was unwilling to “label such factors the sole or primary indicia of our framers’ intent.”⁵⁶ While the Court found it to be “likely that the framers of the New Mexico Constitution still bore in mind the threats to individual liberty brought about by the general warrant and writ of assistance,” it also pointed out that “it is just as likely that the framers simply adopted Article II, Section 10 after having given little new contemplation to its scope, meaning, or effect.”⁵⁷ The Court found this “hypothesis [to be] supported by the dearth of debate or discussion in the constitutional proceedings and by the absence in early twentieth-century New Mexico of any

49. *Gutierrez*, 1993-NMSC-062, ¶ 46, 863 P.2d at 1065.

50. *Garcia*, 2009-NMSC-046, ¶ 29, 217 P.3d at 1041 (discussing the Supreme Court’s *Gutierrez* holding).

51. *Gutierrez*, 1993-NMSC-062, ¶ 33, 863 P.2d at 1062.

52. *Id.*

53. *Id.* ¶ 45, 863 P.2d at 1065.

54. *Id.*

55. *Id.* ¶ 34, 863 P.2d at 1062 (citations omitted).

56. *Id.*

57. *Id.*

evidence of the same abusive police and governmental practices that plagued American colonists.”⁵⁸

III. SECTION 1983 CLAIMS AND QUALIFIED IMMUNITY

The federal civil rights statute, 42 U.S.C. § 1983, provides that:

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

“Although the statutory language . . . excepts no person from its reach,” the federal courts have held that the drafters of § 1983 “intended to incorporate into the statute certain common law immunities ‘well grounded in history and reason.’”⁵⁹ Where the immunity claimed by a defendant was “well established at common law” at the time § 1983 was enacted, and “where its rationale was compatible with the purposes of the § 1983,” the United States Supreme Court has construed the statute to “incorporate that immunity.”⁶⁰

Qualified immunity shields government officials and employees “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.”⁶¹ Qualified immunity provides “immunity from suit rather than a mere defense to liability.”⁶² In § 1983 lawsuits, government employees are “entitled to a presumption that they are immune from lawsuits seeking damages for conduct they undertook in the course of performing their jobs.”⁶³ When a § 1983 defendant asserts qualified immunity, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established.⁶⁴ The plaintiff must “come forward with facts or allegations sufficient

58. *Id.*

59. *Briscoe v. LaHue*, 663 F.2d 713, 718 (10th Cir. 1981) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). *But see Reinert*, *supra* note 3, at 235–37 (suggesting that the “Notwithstanding Clause” of the original version of § 1983—language stating that a civil rights claim would be viable notwithstanding “any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary”—was “for unclear reasons” removed by the first Reviser of Federal Statutes); *see also Villareal v. City of Laredo*, 94 F.4th 374, 408 n.14 (5th Cir. 2024) (Willett, J., dissenting) (discussing recent scholarship on the Notwithstanding Clause); *Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J., concurring) (same).

60. *Owen v. City of Independence*, 445 U.S. 622, 637–38 (1980); *see also Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 179 n.6 (2023).

61. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Mark D. Standridge, Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit’s Peculiar Approach to Qualified Immunity*, 20 WYO. L. REV. 43, 46–47 (2020).

62. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted).

63. *Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011).

64. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 232 (2009)); *see also Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006); *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994).

to show both that the defendant’s alleged conduct violated the law and that that law was clearly established when the alleged violation occurred.”⁶⁵

In analyzing the qualified immunity defense, the United States Supreme Court has stated:

The better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.⁶⁶

“To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent” such that it is “settled law.”⁶⁷ “Ordinarily, this standard requires either that there is a Supreme Court or [binding federal circuit] decision on point, or that the ‘clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.’”⁶⁸ A “clearly established right”

is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right . . . existing precedent must have placed the statutory or constitutional question beyond debate. The dispositive question is whether the violative nature of the *particular conduct* is clearly established. . . . Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.⁶⁹

However, the plaintiff is not required to “engage in a scavenger hunt for a prior case with identical facts.”⁷⁰

Notably, the judicially-created⁷¹ defense of qualified immunity is qualitatively different from common law immunity or official immunity.⁷² In

65. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1998); *see also* *Warwick v. Snow*, 89 F.3d 852, 1996 WL 355570, *3 (10th Cir. 1996) (unpublished table decision) (“The plaintiff ‘initially bears a heavy’ burden and ‘must articulate the clearly established constitutional right and the defendant’s conduct which violated the right *with specificity*.’” (emphasis added) (quoting *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996))).

66. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *see also* *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998).

67. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018); *see also* *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (quoting *Albright v. Rodriguez*, 51 F.3d 1531, 1534–35 (10th Cir. 1995)).

68. *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (alteration in original) (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)).

69. *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (internal quotation marks and citations omitted).

70. *Shepherd v. Robbins*, 55 F.4th 810, 815 (10th Cir. 2022); *see also* *Cyeeff-Din v. Onken*, 586 F. Supp. 3d 1139, 1145 (D.N.M. 2022), *appeal dismissed*, No. 22-2037, 2022 WL 4451817 (10th Cir. 2022).

71. *See, e.g., Mack v. Yost*, 63 F.4th 211, 221 (3d Cir. 2023).

72. *See Ysais v. Richardson*, 603 F.3d 1175, 1179 (10th Cir. 2010) (noting that “official immunity is inherently constitutional”) (citing *Christensen v. Ward*, 916 F.2d 1462, 1465, 1472-73 (10th Cir.1990) (described by *Ysais* as “affirming district court rationale upholding constitutionality of common law doctrine of immunity”); *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir.1987) (“The Constitution does not create a fundamental right to pursue specific tort actions. States may create immunities which

Pierson v. Ray, which concerned common-law and § 1983 claims against police officers, the Court held that because “the defense of good faith and probable cause” was “[p]art of the background of tort liability . . . in the case of police officers making an arrest,” it was available to the officers in the § 1983 action as well as the common-law action.⁷³ In this way, “the Court [has] generalized [the qualified immunity] defense without regard to its common-law moorings.”⁷⁴ In *Harlow v. Fitzgerald*,⁷⁵ for example, “the Court completely reformulated qualified immunity along principles not at all embodied in the common law.”⁷⁶ Indeed, “scholars have demonstrated that there was no common law background that provided a generalized immunity that was anything like qualified immunity.”⁷⁷ Outside of qualified immunity, the “general approach” to immunity remains the same: a court must first determine “whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts”; if a sufficiently analogous counterpart exists, the court is then to “consider[] whether § 1983’s history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.”⁷⁸ Personal immunities are “immunities derived from common law which attach to certain governmental officials in order that they not be inhibited from ‘proper performance of their duties.’”⁷⁹ One example is judicial immunity, in which judges and others engaging in “judicial or ‘quasi-judicial’ functions enjoy absolute immunity” with respect to those functions.⁸⁰

effectively eliminate causes of action, subject only to the requirement that their action not be arbitrary or irrational.”).

73. 386 U.S. 547, 556–57 (1967).

74. *Diamond v. Pennsylvania State Educ. Ass’n*, 972 F.3d 262, 275 (3d Cir. 2020) (Fisher, J., concurring in the judgment) (citing *O’Connor v. Donaldson*, 422 U.S. 563, 577 (1975)).

75. 457 U.S. 800 (1982).

76. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

77. *McKinney v. City of Middletown*, 49 F.4th 730, 757 (2d Cir. 2022) (Calabresi, J., dissenting) (citing Baude, *supra* note 3, at 55–61; Schwartz, *supra* note 3, at 1802; William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. 115, 124–25 (2022)); *see also* *Wearry v. Foster*, 33 F.4th 260, 272 (5th Cir. 2022) (“The common law has never granted police officers an absolute and unqualified immunity[.]” (alteration in original) (citing *Pierson*, 386 U.S. at 555)); *id.* at 279 (“[T]he ‘clearly established’ requirement lacks any basis in either the text or original understanding of §1983.”); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1388 (2021) (“The Supreme Court’s largest departure from the common law of officer immunities occurred when *Harlow v. Fitzgerald* replaced the subjective good-faith defense for qualified immunity with a clearly-established-law test.”).

78. *Malley v. Briggs*, 475 U.S. 335, 339–40 (1986) (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)).

79. *Russ v. Uppah*, 972 F.2d 300, 302–03 (10th Cir. 1992) (quoting *Forrester v. White*, 484 U.S. 219, 223 (1988)).

80. *Id.* at 303 (citing *Forrester*, 484 U.S. at 225–29; *Valdez v. City & County of Denver*, 878 F.2d 1285, 1287–88 (10th Cir. 1989)). *See also* *Venckus v. City of Iowa City*, 930 N.W.2d 792, 802 (Iowa 2019) (contrasting “judicial process immunity,” which is a common law immunity, with constitutional immunity for government official who “proves ‘that he or she exercised all due care to conform with the requirements of the law’”); 63C AM. JUR. 2d *Public Officers and Employees* § 293 (“[T]he immunity afforded public officers with respect to the performance of their official functions is a substantive limitation of their personal liability for damages.”).

IV. THE ADOPTION OF THE NEW MEXICO CIVIL RIGHTS ACT

For events occurring prior to July 1, 2021, there was no remedy under the New Mexico State Constitution for alleged violation of civil rights.⁸¹ This is because “[u]nlike federal law, New Mexico [had] no statute analogous to § 1983 that would provide for damages against government entities or their officials for past violations of . . . the state Constitution.”⁸² Thus, prior to 2021, “the only possibility for New Mexicans seeking redress against state government officials” who allegedly violated their constitutional rights was to bring a § 1983 action for the analogous federal right—for instance, a plaintiff seeking recompense for a state official’s violation of the prohibition against cruel and unusual punishment in Article II, Section 13 of the state Constitution was to bring a § 1983 claim for a violation of the Eighth Amendment.⁸³

During its 2020 Special Session, the New Mexico Legislature created the New Mexico Civil Rights Commission to address one specific option for holding public officials accountable when they engage in misconduct.⁸⁴ The Commission noted that, over 100 years after statehood, “New Mexico still [did] not have a statute that allow[ed] the victims of state constitutional violations to recover in court.”⁸⁵ A majority of the Commission recommended “that the Legislature fix that problem by enacting a New Mexico Civil Rights Act” that, *inter alia*, “[p]rovides a cause of action allowing people to enforce the fundamental rights the New Mexico Constitution guarantees and recover for the deprivation of those rights”⁸⁶ and “[s]pecifies that qualified immunity will not be a defense to claims brought under the Act.”⁸⁷ The following year, the New Mexico Civil Rights Act was passed.⁸⁸

Under the New Mexico Civil Rights Act:

[A] public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall not subject or cause to be subjected any . . . person within [New Mexico] to [the] deprivation of any rights, privileges or

81. See, e.g., *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 11, 124 N.M. 479, 952 P.2d 474; *Lucero v. Salazar*, 1994-NMCA-066, ¶ 7, 117 N.M. 803, 877 P.2d 1106 (“Waiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the [New Mexico] Tort Claims Act.” (quoting *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 20, 117 N.M. 217, 870 P.2d 755)); *Ford v. New Mexico Dep’t of Pub. Safety*, 1994-NMCA-154, ¶ 26, 119 N.M. 405, 891 P.2d 546; *Price v. Whitten*, No. CIV 20-1099 RB/KRS, 2021 WL 3663851, at *11 (D.N.M. Aug. 18, 2021).

82. *Carter v. City of Las Cruces*, 1996-NMCA-047, ¶ 13, 121 N.M. 580, 915 P.2d 336; see also Linda M. Vanzi, Andrew G. Schultz, & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302, 307–08 (2018).

83. See Carson Thornton González, *A Deliberate Difference?: The Rights of Incarcerated Individuals Under the New Mexico State Constitution*, 52 N.M. L. REV. 548, 559 (2022); see also *Denewiler v. Santa Fe Cnty. Det. Facility*, No. 22-CV-631-DHU-KRS, 2023 WL 2991068, at *3 (D.N.M. Apr. 18, 2023).

84. See H.B. 5, 54th Leg., 1st Spec. Sess. (N.M. 2020); see also González, *supra* note 83, at 560.

85. See N.M. C.R. COMM’N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, at 1 (2020).

86. *Id.*

87. *Id.*; see also *id.* at 20–29 (explaining why qualified immunity should not be a defense under the Act).

88. See H.B. 4, 55th Leg., 1st Sess. (N.M. 2021).

immunities secured pursuant to the bill of rights of the constitution
of New Mexico.⁸⁹

The Act 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.”⁹⁰ The NMCRA has a “purely prospective effect”⁹¹: “Claims arising solely from acts or omissions that occurred prior to July 1, 2021 may not be brought pursuant to the New Mexico Civil Rights Act.”⁹² The Act further provides that claims “shall be brought exclusively against a public body,” and provides that a public body is liable for the “conduct of individuals acting on [its] behalf or under color of or within the course and scope” of its authority.⁹³ The NMCRA waives the sovereign immunity of the State of New Mexico and its public bodies, provided that any action against the state is brought in a New Mexico district court.⁹⁴

The NMCRA eliminates the defense of qualified immunity for any “public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body.”⁹⁵ However, this “prohibition on the use of the defense of qualified immunity . . . and the waiver of sovereign immunity pursuant to” Section 41-4A-9 of the NMCRA, “shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.”⁹⁶ Notably, the immunities identified in Section 41-4A-10 are typically considered to be “personal” immunities, to be raised by individual persons named as defendants⁹⁷ and ostensibly

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

90. N.M. STAT. ANN. § 41-4A-2 (2021).

91. *New Mexico Horsemen’s Ass’n v. Bregman*, 639 F. Supp. 3d 1209, 1214 (D.N.M. 2022).

92. N.M. STAT. ANN. § 41-4A-12 (2021); *see also* *Hand v. County of Taos*, No. 1:21-cv-00784, 2023 WL 2682328, at *4 (D.N.M. Mar. 29, 2023) (concluding that alleged acts giving rise to claim preceded adoption of the NMCRA, and dismissing the claims on that basis).

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

94. *See* N.M. STAT. ANN. § 41-4A-9 (2021); N.M. STAT. ANN. § 41-4A-3(B) (2021); *see also* *Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1181 (D.N.M. 2021).

95. *See* N.M. STAT. ANN. § 41-4A-4 (2021).

96. N.M. STAT. ANN. § 41-4A-10 (2021) (emphasis added). Notably, the Legislature’s prohibition against the use of qualified immunity in state civil rights cases cannot prohibit the use of that defense in federal civil rights actions. *See* *Nidiffer v. Lovato*, 22-cv-00374, 2023 WL 5337129, at *4 (D.N.M. Aug. 18, 2023). Qualified immunity continues to apply in § 1983 actions, even those brought in state court. *See* *State v. Snyder*, 1998-NMCA-166, ¶ 9, 126 N.M. 168, 967 P.2d 843 (“In applying federal law, [New Mexico courts] follow the precedent established by the federal courts, particularly the United States Court of Appeals for the Tenth Circuit.” (citation omitted)); *Johnson v. Lally*, 1994-NMCA-135, ¶ 8, 118 N.M. 795, 887 P.2d 1262 (“[A] Section 1983 action brought in state court is subject to federal remedies in order to promote uniformity and to protect federally created interests.” (citing Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation* § 4.03, at 275 (3d ed. 1991))); *Kennedy v. Dexter Consol. Schs.*, 1998-NMCA-051, ¶ 51, 124 N.M. 764, 955 P.2d 693 (“Because Plaintiffs seek recovery under a federal statute, federal law governs the standard for awarding punitive damages.” (citations omitted)); *Martin v. Duffie*, 463 F.2d 464, 467 (10th Cir. 1972) (“[T]he vindication of federal civil rights guaranteed by the Constitution is peculiarly subject to federal substantive law.” (citations omitted)); *see also* *Skidgel v. Hatch*, 2013-NMSC-019, ¶ 16, 301 P.3d 854, 856–57 (citing U.S. CONST. art. VI, cl. 2) (overruling prior state Supreme Court decision to the extent that it was inconsistent with later federal Tenth Circuit decision “in recognition of the supremacy of the federal court ruling”).

97. *See, e.g., supra* notes 79–80 and accompanying text; *Beedle v. Wilson*, 422 F.3d 1059, 1069 (10th Cir. 1978) (noting that individual defendants in § 1983 actions may assert the defense of qualified

not by public agencies or bodies. However, under New Mexico law, “[a]n entity or agency can only act through its employees”— “[w]ithout its employees, the entity is an empty shell.”⁹⁸ Thus, there was an initial question about whether or not public bodies could actually raise the statutorily-reserved immunities as defenses in NMCRA actions.

In *Bolen v. New Mexico Racing Commission*,⁹⁹ the New Mexico Court of Appeals resolved this issue. In that case, the racing commission argued that it had absolute quasi-judicial immunity from suit for its decision to initiate and prosecute an administrative disciplinary proceeding against the plaintiff, given that “judicial immunity is expressly preserved under Section 41-4A-10 of the CRA.”¹⁰⁰ The Court of Appeals, “[r]eading Sections 41-4A-10, -2, and -3(C) together,” held that “a public body that is sued under the CRA may raise judicial immunity, as well as quasi-judicial immunity, as a defense.”¹⁰¹ As public bodies are indeed allowed to raise the various immunities reserved by Section 41-4A-10,¹⁰² the courts of this state must define the contours of those immunities.

V. LOOKING BACKWARD TO DEFINE CONSTITUTIONAL AND COMMON-LAW TERMS AND IMMUNITIES

The Courts of this state have repeatedly looked back to the year 1911 in analyzing claims made under the provisions of the New Mexico Constitution. In *Skaggs Drug Center v. General Electric Co.*, the appellant asserted that the state’s Fair Trade Act violated the restraint-of-trade provision (Article IV, Section 38) of the New Mexico Constitution.¹⁰³ The appellant argued that the Fair Trade Act was unconstitutional because it used price-fixing measures similar to the federal Sherman Act, which had already been ruled unconstitutional by the United States Supreme Court at the time the restraint of trade provision of our state constitution was adopted in 1911.¹⁰⁴ The appellant thus reasoned that the members of the New Mexico Constitutional Convention “had in mind the Sherman Act and the decisions of the Supreme Court of the United States with respect thereto” when writing the state Constitution.¹⁰⁵ The New Mexico Supreme Court rejected the appellant’s argument that, in 1911, the drafters of our Constitution “intended to include the words ‘price

immunity against their personal liability); *see also* Bd. of Comm’rs v. Briggs, 337 N.E.2d 852, 860 (Ind. Ct. App. 1975) (identifying judicial immunity and legislative immunity as “personal immunities”).

98. *Abalos v. Bernalillo Cnty. Dist. Atty’s Off.*, 1987-NMCA-026, ¶ 18, 105 N.M. 554, 734 P.2d 794 (discussing claims made under the New Mexico Tort Claims Act).

99. No. A-1-CA-41120 (N.M. Ct. App. Apr. 16, 2024) (slip op.).

100. *Bolen*, No. A-1-CA-41120, slip op. at 2–3.

101. *Id.* at 8.

102. *Cf. Abalos*, 1987-NMCA-026, ¶¶ 19, 23, 734 P.2d at 799 (“To name a particular entity in an action under the Tort Claims Act requires two things: (1) a negligent public employee who meets one of the waiver exceptions under Sections 41–4–5 to –12; and (2) an entity that has immediate supervisory responsibilities over the employee. If a public employee meets an exception to immunity, then the particular entity that supervises the employee can be named as a defendant in an action under the Tort Claims Act.”); *see also* Sanders v. New Mexico Corr. Dep’t, 2023-NMCA-030, ¶ 29, 528 P.3d 716, 726.

103. 1957-NMSC-083, ¶ 8, 63 N.M. 215, 315 P.2d 967 (“The legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade.” (citing N.M. CONST. art. IV, § 38)).

104. *Id.*

105. *Id.*

control.”¹⁰⁶ Another example can be found in *Mountain View Homes, Inc. v. State Tax Commission*, in which the New Mexico Supreme Court required, for interpretation of the terms “charity” and “charitable use,” a determination of how those terms were understood by members of the state constitutional convention, as well as “by the ordinary voter who participated in” the adoption of the state constitution in 1911.¹⁰⁷

Even with some equivocation,¹⁰⁸ in *State v. Gutierrez*, the New Mexico Supreme Court noted search and seizure law as it existed in 1911 (*i.e.*, “the milieu from which the New Mexico search and seizure provision emerged”) was “[a]lso relevant to [the Court’s] interpretation of Article II, Section 10” of the state constitution.¹⁰⁹ While the Court was not aware of any “territorial judicial opinions concerning search and seizure law antedating the New Mexico Constitution,” the Court looked extensively at state and federal case law from “the latter part of the nineteenth century and into the first decade of the twentieth century” to consider whether “evidence obtained in violation of the constitutional right to be free from unreasonable searches and seizures” was inadmissible,¹¹⁰ including “the prevalent view, often attributed to *Commonwealth v. Dana* . . . that a trial court would not pause to consider collateral issues concerning the legality of the method by which evidence was seized.”¹¹¹ The Court further noted that “the turn of the century surge in the number of challenges to the admissibility of illegally obtained evidence suggests that the issue loomed large in the legal community at the time the New Mexico Constitution was under consideration.”¹¹² Based on this history, the New Mexico Supreme Court surmised that Article II, Section 10 “need do no more than proscribe unreasonable searches and seizures and state the probable cause requirements for a warrant.”¹¹³

That said, even with the benefit of “historical context,” the Supreme Court found that it was “difficult to draw any definitive conclusion about the framers’ intent.”¹¹⁴ The Court could, on the one hand, “speculate, based on the weight of authority in place at the time, that the framers determined that the *Dana* rule was well settled.”¹¹⁵ While it had, in 1917, “acknowledged ‘the general doctrine that, where evidence is secured by means of process of the court, in whatever form, it is inadmissible,’” the Supreme Court also “noted the majority doctrine [that] [e]vidence that ‘is the result of an unlawful search or seizure . . . not under sanction

106. *Id.* ¶ 10.

107. 1967-NMSC-092, ¶ 11, 77 N.M. 649, 427 P.2d 13.

108. *See supra* notes 56–57 and accompanying text; *see also* *State v. Gutierrez*, 1993-NMSC-062, ¶ 34, 116 N.M. 431, 863 P.2d 1052 (“[W]e would be blind to the progress of our national history and to the historical context in which New Mexico achieved statehood to label such factors the sole or primary indicia of our framers’ intent.”).

109. *Id.* ¶ 35.

110. *See id.* ¶¶ 35–42.

111. *Id.* ¶ 35 (citing *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841)).

112. *Id.* ¶ 42.

113. *Id.* ¶ 43.

114. *Id.*

115. *Id.*

of judicial process, ordinarily has no effect whatever upon its admissibility.”¹¹⁶ In 1993, the Court found that it could “assume that the framers either were unaware of the controversy surrounding the constitutional guaranty or that the framers were aware of the controversy and simply deemed it insignificant.”¹¹⁷ The Court found that it was also possible “that the framers were aware of the controversy and left interpretation to the courts rather than address the exclusion issue directly in the text of the constitution.”¹¹⁸ This, the Court believed, was “the most reasonable inference to be drawn from the history of the adoption of Article II, Section 10”, and thus it concluded “that the people of New Mexico left to the courts the task of interpreting the language of Article II, Section 10.”¹¹⁹

In *State ex rel. Udall v. Public Employees Retirement Board*, the New Mexico Supreme Court reversed the Court of Appeals’ determination that legislative retirement benefits constituted “compensation” in violation of Article IV, Section 10 of the New Mexico Constitution.¹²⁰ The Court noted that, “[a]lthough the per diem and mileage allowances have periodically been increased, the prohibition against receiving other compensation ha[d] remained unchanged since its initial adoption by the framers of our Constitution in 1911.”¹²¹ Both parties to the case “presented competing historical arguments as bolstering their respective interpretations of the term ‘compensation.’”¹²² However, the Supreme Court found that it “need not consider the historical context of Article IV, Section 10 to determine the intent of the framers with respect to the term ‘compensation.’”¹²³ The Court opined that the state “Constitution is not a static document; it is a living work intended to endure,” and that the Court was not required to “confine [itself] to an examination of the working conditions . . . of 1911 to properly interpret the framers’ intent regarding the application of the constitutional limitation on receiving ‘other compensation, perquisite or allowance.’”¹²⁴

Nonetheless, nearly two decades later, in *State v. Boyse*, the New Mexico Supreme Court again revisited Article II, Section 10, this time interpreting the provision’s requirement of a written “showing” of probable cause.¹²⁵ The defendants in *Boyse* had argued that a “written showing” could not be made over the telephone.¹²⁶ However, the Supreme Court looked to multiple dictionary definitions to illustrate that “placing something into sight or view is just one of multiple definitions for ‘show’ and ‘showing.’”¹²⁷ Indeed, the 1910 edition of Black’s Law Dictionary defined “[to] show” as “to make apparent or clear by evidence; to

116. *Id.* (emphasis omitted) (citing *State v. Barela*, 1917-NMSC-066, ¶¶ 12–13, 23 N.M. 395, 168 P. 545).

117. *Id.*

118. *Id.*

119. *Id.* ¶¶ 43–44.

120. 1995-NMSC-078, ¶ 1, 120 N.M. 786, 907 P.2d 190.

121. *Id.* ¶ 3.

122. *Id.* ¶ 30 n.5.

123. *Id.*

124. *Id.*

125. 2013-NMSC-024, ¶ 1, 303 P.3d 830.

126. *Id.* ¶ 10.

127. *Id.* ¶ 14 (citing multiple dictionary definitions).

prove.”¹²⁸ As noted by the Supreme Court, “this definition was available when the New Mexico Constitution was adopted in 1911.”¹²⁹ The New Mexico Supreme Court concluded that:

Based on the plain meaning of the term [particularly as it existed in 1911] . . . a “showing” of probable cause required under Article II, Section 10 is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of “showing” as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible or other sensory means.¹³⁰

In early 2021, the Supreme Court of the United States, in *Torres v. Madrid*,¹³¹ employed a similar approach, looking to decisions issued prior to ratification of the Bill of Rights in 1791 to define the word “seize” as used in the Fourth Amendment. In *Torres*, the Court looked to the common law in ruling that plaintiff was “seized.”¹³² The Court found that the common law considered “the application of physical force to the body of a person” with the intent to restrain to be “an arrest—not an attempted arrest—even if the person does not yield.”¹³³ The “closest decision” cited by the Court was *Countess of Rutland’s Case*, in which English officers declared an arrest to be made “at the time they touched” the subject.¹³⁴ The *Torres* Court found that “[e]arly American courts adopted this mere-touch rule from England, just as they embraced other common law principles of search and seizure.”¹³⁵ Thus, the majority reached as far back as early English common law to determine what “seizure” meant at the time of the Ratification of the Bill of Rights.¹³⁶

Pursuant to the decision in *Torres v. Madrid*, as well as prior similar cases decided by the United States Supreme Court, the terms used in the Fourth Amendment are analyzed by reference to the common law in existence at or around 1791.¹³⁷ Originally, the word “unreasonable” meant “against reason,” or “against the

128. *Id.* (citing *Show*, BLACK’S LAW DICTIONARY 1086 (2d ed. 1910)).

129. *Id.*

130. *Id.*

131. 592 U.S. 306 (2021).

132. *Id.* at 311–23.

133. *Id.* at 311–15.

134. *Id.* at 314–15 (citing *Countess of Rutland’s Case* (1605) 77 Eng. Rep. 332; 6 Co. Rep. 52 b (serjeants tracked down Countess to execute a writ of debt; touched her with a mace and said “we arrest you”)).

135. *Id.* at 314–15.

136. *See id.* at 312–20; *see also* *Carpenter v. United States*, 585 U.S. 296, 304–06 (2018) (Fourth Amendment analysis is “informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted’” (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925))).

137. *See* *Wilson v. Arkansas*, 514 U.S. 927, 931–32 (1995) (relying on common-law antecedents to define a “reasonable search”); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (“[W]e inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”); *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (“In determining whether a search or seizure is unreasonable, we begin with history.”); *Carroll*, 267 U.S. at 149 (“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when

reason of the common law.”¹³⁸ Contrary to the “modern relativistic meaning of ‘reasonableness,’” the late eighteenth-century concept of “‘unreasonable’ connoted illogic or inconsistency in the form of a violation of a rule or principle.”¹³⁹ As one scholar has noted, “unreasonable was a pejorative synonym for gross illegality or unconstitutionality;” and thus “‘unreasonable searches and seizures’ simply meant searches and seizures that were inherently illegal at common law.”¹⁴⁰ Therefore, while “[t]he framers aimed the Fourth Amendment precisely at banning Congress from authorizing use of general warrants; they did not mean to create any broad reasonableness standard for assessing warrantless searches and arrests.”¹⁴¹

Notably, as it had previously done in *State v. Boyse*, and as the United States Supreme Court had later done in *Torres v. Madrid*, the New Mexico Supreme Court in *Pirtle v. Legislative Council Committee of the New Mexico Legislature* looked to “dictionary definitions reflecting the ordinary and accepted meaning of relevant terms” in attempting to ascertain the intent of the drafters of the state constitution.¹⁴² In *Pirtle*, the petitioners challenged the “constitutionality of a June 9, 2020, directive promulgated by the New Mexico Legislative Council” that, *inter alia*, “banned in-person attendance at a then-impending special legislative session that was called to address COVID-19-related and other issues.”¹⁴³ The petitioners cited Article IV, Section 12 of the state Constitution; as the Court noted, petitioner’s argument was “tethered tightly” to a “plain-language, *textual* analysis of the term ‘public.’”¹⁴⁴ The Court found, however, that the petitioners’ argument was “incompatible with the multiple meanings of the term ‘public’ as reflected in dictionary definitions in use at the time [the] state Constitution was adopted and ratified.”¹⁴⁵ The New Mexico Supreme Court reaffirmed that “[d]efinitions from dictionaries that were in use at the time the New Mexico Constitution was adopted are a relevant source.”¹⁴⁶

it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”); *Florida v. White*, 526 U.S. 559, 563 (1999); Thomas K. Clancy, *The Role of History*, 7 OHIO ST. J. CRIM. L. 811, 819 (2010) (when “[u]sing the common law as the measure of what the Fourth Amendment requires . . . the common law rule as of 1791 defines Fourth Amendment terms, such as reasonableness” (emphasis omitted)).

138. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270–76 (2016); see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 686–93 (1999); Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL’Y 105, 123 (2023) (citing Donohue, *supra*, at 1275); cf. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment) (collecting cases suggesting that confusion regarding warrant requirements could be resolved “by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”).

139. Davies, *supra* note 138, at 686–87.

140. *Id.* at 693.

141. *Id.* at 724.

142. 2021-NMSC-026, ¶ 47, 492 P.3d 586, 600–01 (first citing *State v. Boyse*, 2013-NMSC-024, 303 P.3d 830; and then *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (described by *Pirtle* as “surveying ‘relevant dictionaries’ in determining the ordinary or common meaning of an undefined statutory term”).

143. *Id.* ¶ 1, 492 P.3d at 588.

144. *Id.* ¶ 7, 492 P.3d at 590; see also N.M. CONST. art. IV, § 12 (“All sessions of each house shall be public.”).

145. *Pirtle*, 2021-NMSC-026, ¶ 7, 492 P.3d at 590.

146. *Id.* ¶ 47, 492 P.3d at 601 (citing *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 283–84 (2018) (described by *Pirtle* as “articulating the ‘fundamental canon of statutory construction that words

If it is true, as suggested by much of the case law above, that analysis of constitutional terms is controlled in the first instance by the common law and its contemporary definitions, civil rights defendants may be entitled to other official immunities that attached at common law, which (as noted above) can be understood as “the whole body of law extant at the time of the framing”¹⁴⁷ of the Constitution.¹⁴⁸ Officer immunities at the time of the Founding were “robust.”¹⁴⁹ For example, under the Fraud Act of 1662, an official could avoid liability by demonstrating that he had been sued for an act “done in the due and necessary performance” of his office.¹⁵⁰

Officer immunities are also evident in English cases that were influential to the framing of the Fourth Amendment, including *Entick v. Carrington*.¹⁵¹ In *Entick*, Lord Camden “conducted an extended discussion of officer immunity,”¹⁵² including the Constables Protection Act of 1750, which regulated actions “brought against any constable . . . or other officer . . . for any thing done in obedience to any warrant under the hand or seal of any justice of the peace.”¹⁵³ It also provided that officers “should be (as far as is consistent with justice, and the safety and liberty of the subjects over whom their authority extends) rendered safe in the execution of the said office and trust.”¹⁵⁴ That sentiment was “part of a broader trend of English statutes ‘being made to change the course of the common law’ to better protect and immunize officers.”¹⁵⁵ “[T]he common law that existed at the Founding brought with it a series of protections for officers who were charged with executing searches and

generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute” (alteration in original)); see also *Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d at 832 (“[T]he rules of statutory construction apply equally to constitutional construction” (internal quotation marks and citation omitted)).

147. *Atwater v. City of Lago Vista*, 532 U.S. 318, 327 (2001).

148. See *supra* notes 20–30 and accompanying text; see also *Atwater*, 532 U.S. at 333 (“[T]he legal background of any conception of reasonableness the Fourth Amendment’s Framers might have entertained would have included English statutes, some centuries old. . . .”); *Virginia v. Moore*, 553 U.S. 164, 168 (“We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.”); *State v. Gutierrez-Perez*, 2014 UT 11, ¶ 14, 337 P.3d 205, 209 (providing that, when interpreting the meaning of a constitutional requirement, “it is appropriate to interpret the requirement’s import by beginning with history, and, in particular, the statutes and common law of the founding era” (internal marks and citation omitted)); *State v. Wright*, 961 N.W.2d 396, 409 (Iowa 2021) (surveying Supreme Court cases that have “moved toward a more historical approach to the Fourth Amendment”).

149. See Oldham, *supra* note 138, at 112.

150. *Id.* at 116 (citing *An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes 1662*, 14 Car. 2 c. 11, § 16, reprinted in 8 THE STATUTES AT LARGE 78–94 (Danby Pickering ed., Cambridge, Joseph Bentham 1763)).

151. *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 19 How. St. Tr. 1029; see generally Oldham, *supra* note 138, at 119–22 (describing *Entick* as a “foundational” case “influential . . . to the framing of our Fourth Amendment”); see also *State v. Dillon*, 1929-NMSC-078, 34 N.M. 366, 281 P. 474, 476 (noting that *Entick* was “[t]he case to which jurists have looked as the historical foundation for the guaranty” against conviction of a crime based upon “evidence obtained in whole or in part by unreasonable searches and seizures”).

152. Oldham, *supra* note 138, at 120 (citing *Entick*; 19 How. St. Tr. at 1060–62).

153. *Constables Protection Act 1750*, 24 Geo 2 c. 44, § 6, reprinted in 20 THE STATUTES AT LARGE 279–80 (Danby Pickering ed., Cambridge, Joseph Bentham 1765).

154. *Id.*, 20 THE STATUTES AT LARGE at 279.

155. Oldham, *supra* note 138, at 121.

seizures.”¹⁵⁶ “[T]he first Congress . . . understood the immunities that [officials] enjoyed at the Founding,” and “it appears the Fourth Amendment prohibited searches and seizures that ran against that common law—taking account of the officers’ preexisting immunities.”¹⁵⁷ “[A]t common law, a private person could [execute an] arrest for a breach of the peace committed in this presence, as well as for a felony,” and “a person who had made such an arrest could assert a privilege if later sued for damages.”¹⁵⁸ Additionally, the privilege of individual police officers to fire in self-defense was recognized at common law.¹⁵⁹

VI. STATUTORY IMMUNITIES IN NEW MEXICO

In addition to the various constitutional, personal, and common law immunities discussed above, a number of statutorily-based immunities may come into play in claims brought under the New Mexico Civil Rights Act,¹⁶⁰ though some are more qualified than others. Perhaps unsurprisingly, there are a great number of immunities for healthcare providers, boards, and other related individuals and

156. Oldham, *supra* note 138, at 124; *see also id.* at 125–26 (discussing various early American statutes with immunity provisions that mirrored prior English statutes).

157. *Id.* at 127–28.

158. Downs v. Garay, 1987-NMCA-108, ¶ 14, 106 N.M. 321, 742 P.2d. 533 (citing RESTATEMENT (SECOND) OF TORTS § 119 (AM. L. INST. 1965); *see also* Commonwealth v. Corley, 491 A.2d 829, 830 (1985)).

159. *See* Burton v. Waller, 502 F.2d 1261, 1274 (5th Cir. 1974) (“We entertain no doubts that the privilege of individual police officers to fire in self defense or to quell a riot are . . . common law defenses.”); *see also* Taylor v. Withrow, 288 F.3d 846, 852 (6th Cir. 2002) (“The right to claim self-defense is deeply rooted in our traditions.” (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *4 (referring to self-defense as “the primary law of nature”))); Haigh v. Bell, 23 S.E. 666, 668 (W.Va. 1895) (“The common law of self-defense . . . stands as it did 600 years ago. . . .”); Oldham, *supra* note 138, at 124 (“It was only when officers’ searches and seizures transgressed the reason of the common law — including the common law immunities . . . —that those seizures became unreasonable.”); *cf.* People v. Shorter, 4 Barb. 460, 480 (N.Y. Gen. Term 1848) (“The English statutes, from which ours are taken, and consequently our statutes, are said to be in affirmance of the common law. Thus the common law right of necessary self defence is declared and upheld by those statutes.” (citation omitted)), *aff’d* 2 N.Y. 193 (1849)).

160. *See* N.M. STAT. ANN. § 41-4A-10 (2021) and discussion *supra* note 96 and accompanying text.

entities.¹⁶¹ Similarly, there are several immunities related to healthcare reporting.¹⁶² There are also several immunities pertaining to the collection and release of

161. See N.M. STAT. ANN. § 12-10A-14 (2003) (“During a state of public health emergency, the state, its political subdivisions, the governor, the secretary of health, the secretary of public safety, the director or any other state or local officials or personnel who assist during the public health emergency are liable for the death of a person, injury to a person or damage to property, only to the extent permitted in the Tort Claims Act, as a result of complying with the provisions of the Public Health Emergency Response Act or a rule adopted pursuant to that act.”); N.M. STAT. ANN. § 24-7A-9(A) (2000) (providing that “[a] health-care provider or health-care institution acting in good faith and in accordance with generally accepted health-care standards applicable to the health-care provider or health-care institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for” various actions pertaining to health-care decisions and directives); N.M. STAT. ANN. §§ 24-7B-11(A), (B) (2006) (similar immunity relating to mental health treatment decisions and directives); N.M. STAT. ANN. § 24-22-8 (2013) (“A safe haven site and its staff are immune from criminal liability and civil liability for accepting an infant in compliance with the provisions of the Safe Haven for Infants Act but not for subsequent negligent medical care or treatment of the infant.”); N.M. STAT. ANN. § 24-26-7(B) (2004) (“Compliance with the provisions of the Patient Care Monitoring Act shall be a complete defense against any civil or criminal action brought against the patient, surrogate or facility for the use or presence of a monitoring device.”); N.M. STAT. ANN. § 26-1-3.2(C)(4)(c) (2011) (“[A]ny person who exercises reasonable care in donating, accepting or redistributing [prescription drugs] pursuant to this section shall be immune from civil or criminal liability or professional disciplinary action of any kind for any related injury, death or loss.”); N.M. STAT. ANN. § 27-14-6 (2004) (“Notwithstanding any other law, a person is not civilly or criminally liable for providing access to documentary material pursuant to the Medicaid False Claims Act to a person identified in Subsection B of Section 5 of that act.”); N.M. STAT. ANN. § 28-4-6(C) (1997) (“[a]ny employee or contractor of the state agency on aging . . . who participates in . . . an evaluation shall be immune from liability in any civil action related to the evaluation, provided it is conducted in good faith.”); N.M. STAT. ANN. § 28-17-17 (1989) (“No representative of the office shall be liable under state law for the good faith performance of official duties pursuant to the Long-Term Care Ombudsman Act.”); N.M. STAT. ANN. § 29-16-7(C) (2003) (“A person authorized to collect samples and his employer shall be immune from liability in any civil or criminal action with regard to the collection of samples, if the collection is performed without negligence.”); N.M. STAT. ANN. § 30-31A-15 (1983) (“No civil or criminal liability shall be imposed by virtue of the Imitation Controlled Substances Act on any person registered under the Controlled Substances Act who manufactures, distributes or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.”); N.M. STAT. ANN. § 41-5-20(E) (1976) (“Panelists and witnesses shall have absolute immunity from civil liability for all communications, findings, opinions and conclusions made in the course and scope of duties prescribed by the Medical Malpractice Act.”); N.M. STAT. ANN. § 61-9-5.1(A) (2003) (“A member of the [state board of psychologist examiners] or person working on behalf of the board shall not be civilly liable or subject to civil damages for any good faith action undertaken or performed within the proper functions of the board.”); N.M. STAT. ANN. § 61-9A-7.1(A) (2005) (“No member of the [counseling and therapy practice] board or person working on behalf of the board shall be civilly liable or subject to civil damages for any good-faith action undertaken or performed within the proper functions of the board.”); see also N.M. STAT. ANN. § 24-12A-3 (2023) (“Absent a showing of bad faith or malicious intent, the official ordering the cremation [of an unclaimed body] and the person or establishment carrying out the cremation shall be immune from liability related to the cremation.”).

162. See N.M. STAT. ANN. § 61-3-29.1(F) (2018) (“A person making a report . . . regarding a nurse suspected of practicing nursing while habitually intemperate or addicted to the use of habit-forming drugs or making a report of a nurse’s progress or lack of progress in rehabilitation shall be immune from civil action for defamation or other cause of action resulting from such reports if the reports are made in good faith and with some reasonable basis in fact.”); N.M. STAT. ANN. § 61-5A-23(B) (1994) (“No hospitals, health care entities, insurance carriers or professional review bodies required to report under this section, which provide such information in good faith, shall be subject to suit for civil damages as a result thereof.”); N.M. STAT. ANN. § 61-6-16(B) (2008) (“The hospitals required to report under this section, health care entities or professional review bodies that provide such information in good faith shall not be subject to suit for civil damages as a result of providing the information.”).

records,¹⁶³ as well as immunities relating to employers.¹⁶⁴ Good Samaritans and volunteers may be able to claim certain statutory immunities,¹⁶⁵ as might persons who are ordered to perform community service.¹⁶⁶ Of course, arbitrators and quasi-judicial actors are also entitled to immunity by law.¹⁶⁷

Additionally, there are a number of statutory immunities granted to law enforcement officers and persons who report crimes.¹⁶⁸ Of particular note is Section 31-23-1 of the New Mexico Statutes, which provides that:

163. N.M. STAT. ANN. § 14-6-1(B) (1977) (“A custodian of information classified as confidential . . . may furnish the information upon request to a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities, and the custodian furnishing the information shall not be liable for damages to any person for having furnished the information.”); N.M. STAT. ANN. § 29-15-8(D) (2010) (“A dentist or physician who releases dental records pursuant to this section is immune from civil liability or criminal prosecution for the release of the dental records.”); N.M. STAT. ANN. § 48-1A-7(D) (1999) (“A filing officer shall not be liable for damages arising from a refusal to record or file or a failure to disclose any claim of a nonconsensual common law lien of record pursuant to this section.”).

164. N.M. STAT. ANN. § 40-6A-504 (2016) (“An employer that complies with an income-withholding order issued in another state . . . is not subject to civil liability to an individual or agency with regard to the employer’s withholding of child support from the obligor’s income.”); N.M. STAT. ANN. § 50-12-1 (1995) (“When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee’s job performance. . . .”). *But see id.* (“The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.”) (emphasis added); *see also* Davis v. Bd. of Cnty. Comm’rs of Doña Ana Cnty., 1999-NMCA-110, ¶ 30, 127 N.M. 785, 987 P.2d 1172 (noting that Section 50-12-1 “appear[s] to track much of the common-law privilege relating to defamation and good-faith comments in the employment context”); Brock v. Presbyterian Healthcare Servs., 220 F. App’x 842, 845–46 (10th Cir. 2007).

165. *See* N.M. STAT. ANN. § 12-12-28(A) (2005) (“[N]o person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened release of hazardous materials, or in preventing, cleaning up or disposing or attempting to prevent, clean up or dispose of such release, shall be subject to civil liabilities or penalties of any type.”); N.M. STAT. ANN. § 61-23-31.1(A) (2005) (“A professional engineer or professional surveyor who voluntarily . . . provides aircraft structure, structural, aeronautical, electrical, mechanical, other engineering services or surveying at the scene of a declared national, state or local emergency . . . shall not be liable for any personal injury, wrongful death, property damage or other loss caused by the engineer’s or surveyor’s acts, errors or omissions. . . .”).

166. N.M. STAT. ANN. § 31-12-3(B) (2023) (“Any person performing community service pursuant to court order shall be immune from civil liability arising out of the community service other than for gross negligence. . . .”); N.M. STAT. ANN. § 31-20-6(D) (2007) (“A person receiving community service shall be immune from any civil liability other than gross negligence arising out of the community service. . . .”); N.M. STAT. ANN. § 35-15-14(A)(2) (1987) (codifying similar immunity for community service ordered by municipal court).

167. *See* N.M. STAT. ANN. § 40-4-7.2(E) (1999) (“An arbitrator appointed pursuant to this section is immune from liability in regard to the arbitration proceeding to the same extent as the judge who has jurisdiction of the action that is submitted to arbitration.”); N.M. STAT. ANN. § 44-7A-15(a) (2001) (“An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.”); N.M. STAT. ANN. § 52-5-2(D) (2004) (“Workers’ compensation judges shall have the same immunity from liability for their adjudicatory actions as district court judges.”).

168. *See* N.M. STAT. ANN. § 29-11A-8 (2009) (“Nothing in the Sex Offender Registration and Notification Act creates a cause of action on behalf of a person against a public employer, public employee or public agency responsible for enforcement of the provisions of that act, so long as the public employer, public employee or public agency complies with the provisions of that act.”); N.M. STAT. ANN. § 29-12A-6 (2003) (“A person who in good faith communicates a report of criminal activity to a crime stoppers

No person shall be liable to a plaintiff in any civil action for damages if by a preponderance of the evidence the damages were incurred as a consequence of: (A) the commission, attempted commission or flight subsequent to the commission of a crime by the plaintiff; and (B) the use of force or deadly force by the defendant which is justified pursuant to common law or the law of the state.¹⁶⁹

As noted above, the privilege of individual police officers to fire in self-defense was recognized at common law.¹⁷⁰ “Officers, within reasonable limits, are the judges of the force necessary to enable them to make arrests or to preserve the peace.”¹⁷¹ An officer may successfully defend against a civil claim for improper use of force by demonstrating that (1) the officer used no more force than reasonably was necessary, and (2) the officer acted in good faith.¹⁷² A police officer is permitted a privilege under New Mexico law for the use of force, so long as the force is not in excess of that which the actor reasonably believed to be necessary.¹⁷³

program or who in good faith receives, forwards or acts upon such a report is immune from civil liability for any act or omission resulting in the arrest, filing of criminal charges or trial of a person who is later exonerated or acquitted of a criminal charge.”); N.M. STAT. ANN. § 32A-4-5(B) (2009) (“Anyone reporting an instance of alleged child neglect or abuse or participating in a judicial proceeding brought as a result of a report . . . is presumed to be acting in good faith and shall be immune from liability, civil or criminal, that might otherwise be incurred or imposed by the law, unless the person acted in bad faith or with malicious purpose.”); N.M. STAT. ANN. § 32A-3A-3(D) (2019) (“A person who refers a child or family for family services is presumed to be acting in good faith and shall be immune from civil or criminal liability, unless the person acted in bad faith or with malicious purpose.”); N.M. STAT. ANN. § 40-13-7(D) (2008) (“Any law enforcement officer responding to a request for assistance under the Family Violence Protection Act is immune from civil liability to the extent allowed by law. Any jail, detention center or law enforcement agency that makes a reasonable attempt to provide notification that an alleged perpetrator is released from custody is immune from civil liability to the extent allowed by law.”); N.M. STAT. ANN. § 63-9D-10 (2017) (“In contracting for such services or the provisioning of an enhanced 911 system, except for intentional acts, the local governing body, public agency, equipment supplier, communications service provider and their officers, directors, vendors, employees and agents are not liable for damages resulting from installing, maintaining or providing enhanced 911 systems or transmitting 911 calls.”); *Leyba v. City of Santa Fe*, 198 F. Supp. 3d 1254, 1261–62 (D.N.M. 2016) (finding that 911 call center and its dispatchers were immune from liability under Section 63-9D-10).

169. See N.M. STAT. ANN. § 31-23-1 (1985).

170. See cases and sources cited *supra* note 159.

171. *Mead v. O'Connor*, 1959-NMSC-077, ¶ 4, 66 N.M. 170, 344 P.2d 478.

172. See *id.*

173. *Bledsoe v. Garcia*, 742 F.2d 1237, 1240 (10th Cir. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 118 (AM. L. INST. 1965)); see also *State v. Ellis*, 2008-NMSC-032, ¶¶ 18–32, 144 N.M. 253, 186 P.3d 245 (adopting federal objective reasonableness standard for excessive force in context of self-defense claim); *Johnson v. City of Roswell*, 2017 WL 4083568, at *11 (D.N.M. Sept. 13, 2017) (citing *State v. Gonzales*, 1982-NMCA-043, ¶ 16, 97 N.M. 607, 642 P.2d 210; *Jonas v. Bd. of Comm’rs*, 699 F. Supp. 2d 1284, 1297 (D.N.M. 2010)), *aff’d*, 752 F. App’x 646 (10th Cir. 2018); *Reynaga v. County of Bernalillo*, 64 F.3d 670, 1995 WL 503973, at *2 (10th Cir. 1995) (unpublished table decision); *Martin v. County of Santa Fe*, 2014 WL 11398752, at *10–11 (D.N.M. 2014), *aff’d*, 626 F. App’x 736 (10th Cir. 2015).

VII. CONCLUSION

Given that “innumerable rights, privileges, and immunities were conferred, recognized, protected, preserved, and enforced by the common law,” it is “hardly imaginable that the legislative assembly, when it adopted the common law in the territory [of New Mexico], had in mind each particular right or privilege which [w]ould be claimed under that law.”¹⁷⁴ In any given case under the New Mexico Civil Rights Act, the first task should be to identify the specific constitutional right at issue.¹⁷⁵ Public bodies seeking to raise an immunity defense should be looking expansively at any constitutional, statutory, or common law defenses underpinning the constitutional right. However, many of the immunities identified in this article are highly qualified or fact-specific: several require an affirmative showing of good faith on the part of the individual actor. Moreover, even if an NMCRA defendant can point to some arcane immunity that existed at common law, it would ultimately fall to the state Supreme Court to determine whether any such immunity is compatible with the conditions and circumstances of our times.

174. *State v. De Armijo*, 1914-NMSC-021, ¶ 42, 18 N.M. 646, 140 P.3d 1123.

175. *Cf. Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017) (discussing identification of “the specific constitutional right at issue” as the “threshold inquiry of a § 1983 claim”) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)).