

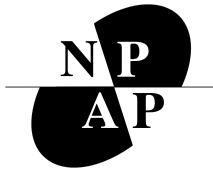
FREQUENTLY ASKED QUESTIONS *about the* NEW MEXICO CIVIL RIGHTS ACT

1. What does the New Mexico Civil Rights Act provide that is not provided by the New Mexico Constitution?

- a. The New Mexico Constitution provides New Mexicans with personal rights and privileges, but right now there is no direct way to enforce it. The Civil Rights Act would finally allow our Constitution and its protections to be enforced in every community, regardless of class, background, or zip code.
- b. Moreover, the New Mexico Civil Rights Act would act as an incentive for government entities to embrace the training, oversight and accountability policies that are necessary to protect our communities and prevent the abuse of authority.

2. What is qualified immunity?

- a. Qualified immunity is a judicial doctrine developed by the Supreme Court in the late 1960s, which shields state actors from liability for their misconduct, even when they break the law. Our primary federal civil rights statute—generally called “[Section 1983](#)” after its place in the U.S. code—says that any state actor who violates someone’s constitutional rights “shall be liable” to the party injured. But under the doctrine of qualified immunity, the Court has held that such defendants can’t be sued unless they violated “clearly established law.” In other words, it is entirely possible—and quite common—for courts to hold that government agents *did* violate someone’s rights, but that the illegality of their conduct wasn’t sufficiently obvious for them to be held liable to the victim of their misconduct.
- b. Qualified immunity only matters when a public official has, in fact, violated someone’s federally protected rights. If a police officer hasn’t committed any constitutional violation in the first place, then they don’t need qualified immunity, because they haven’t broken the law at all. Thus, the doctrine only comes into play when a constitutional right has been violated but a court determines this right was not “clearly established” (which often requires a prior case with functionally identical facts).

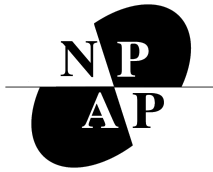


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3. Doesn't qualified immunity simply protect officers from being sued for doing their jobs in good faith?

- a. No. Qualified immunity does not protect the officers who acted in good faith or because they made a split-second decision; the Fourth Amendment protection provides that protection. Under qualified immunity, the injured person often never has an opportunity to prove that their rights were violated and that the employee was not acting in good faith.
- b. In practice, qualified immunity is used to shield defendants who commit even egregious misconduct. A review of case law demonstrates that the main practical effects of qualified immunity are to deny justice to victims whose rights are violated and to undermine accountability for public officials—especially in law enforcement.
- c. Qualified immunity doesn't even really protect the employee from exposure to lawsuits. To get qualified immunity, the employee is first sued and then raises qualified immunity as a defense and the issue has to be litigated in briefing, argument, and often appeals. So, qualified immunity doesn't necessarily protect the employee from suit but simultaneously cuts off the rights of the person who was hurt.
- d. Police officers already have ample legal protections because courts recognize that they work under dangerous, uncertain, and evolving conditions. The Fourth Amendment—which governs most on-the-street, police-citizen interactions—prohibits “unreasonable searches and seizures.” This “reasonableness” standard therefore already accounts for the kind of practical deference that police need to do their job effectively. Qualified immunity only comes into play when an officer has acted objectively unreasonably under all the circumstances. If we were to eliminate the doctrine tomorrow, reasonable officers would still be protected from “20/20 hindsight,” because that protection doesn't come from qualified immunity in the first place.
- e. Qualified immunity only matters when a public official has violated someone's constitutional rights. Police officers who are “legitimately performing their duties” — i.e., acting lawfully — do not need qualified immunity because, by definition, they're not violating anyone's rights in the first place.

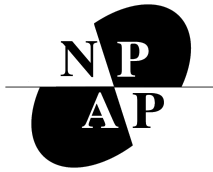


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4. Why is removing qualified immunity a component of the New Mexico Civil Rights Act?

- a. To begin with, qualified immunity is unfair to victims whose civil rights have been violated under the New Mexico Constitution.
- b. Beyond this, qualified immunity hurts the law enforcement community nearly as much as it does victims of police misconduct because the public views law enforcement as getting off easy, training opportunities are lost, and good officers are lumped together with bad actors.
- c. Moreover, qualified immunity often protects a government actor just because what they did has never been done before. If we don't review "new" bad conduct to decide if it violates rights, bad conduct is never addressed or punished.
 - i. One of the best examples of this legal "stagnation" is the sluggishness with which federal courts have come to recognize the First Amendment right to record police officers in public. Although the Supreme Court has yet to weigh in on this subject, every circuit court to address this issue on the merits has found that there is, in fact, such a right. But in the Third and Fourth Circuits, this right has long gone unprotected, precisely because these courts granted qualified immunity to officers who arrested people for exercising this right, without ruling on the merits question. And the Third Circuit even granted qualified immunity to officers in a second right-to-record case, on the grounds that, naturally, the right-to-record had yet to be clearly established in that circuit, so "it was not unreasonable for the officers to regard their conduct as lawful."
- d. There are innumerable cases in New Mexico and across the country that exemplify why removing qualified immunity is so crucial to genuine police accountability. A recent example in New Mexico is the case of Robert Lankford:
 - i. In October 2019, Robert Lankford used an extra set of shackles to hang himself in his holding cell after being arrested for an outstanding warrant. An internal affairs investigation found Albuquerque PD Officer Jonathan Franco violated department policy by failing to check on Lankford, failing to render any aid, and submitting a false police report. Four years prior, a federal judge found that Franco violated a man's constitutional rights by knocking him unconscious during arrest but granted Franco qualified immunity; a suit against the city settled for \$42,500. The initial discipline was termination, but eventually Franco



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was instead suspended without pay for 360 hours. Had qualified immunity not been granted to Franco in the first case, APD would have had to take steps to properly train or dismiss Officer Franco, and Robert Lankford might still be alive today.

5. Will government employees have to pay out of pocket for settlement agreements or judgments reached under the New Mexico Civil Rights Act?

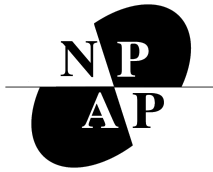
- a. No.

6. How do potential or realized costs of expensive litigation prevent misconduct?

- a. The potential costs of expensive litigation are an incentive for the state and municipalities to address potential constitutional violations *before* they occur, through better training and oversight.
- b. Lawsuits provide visibility into government agencies, because if cities are experiencing high costs associated with multiple constitutional rights violations, then clearly there are serious problems within that agency that need to be addressed.

7. What if municipalities can't afford the cost of this litigation?

- a. It should first be acknowledged that continuing to force communities to contend with qualified immunity will not *save* costs but *shift* them to the people injured by police misconduct. Victims of police brutality experience tangible consequences. For instance, they may have medical costs, be forced to miss work, or be injured so severely that their earning potential is permanently reduced. Barring suits through the doctrine of qualified immunity forces victims to bear the cost of police misconduct rather than the officers and law enforcement agencies responsible for their suffering.
- b. Even if we evaluate cost from a litigation defense standpoint, qualified immunity still does not save government defendants money. First, asserting qualified immunity does not automatically dispose of a lawsuit. While a government actor can move to dismiss a case on qualified immunity grounds in the initial stages of litigation, many cases proceed to discovery and even trial before the defense is granted.



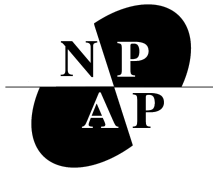
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- c. Additionally, qualified immunity has the effect of *increasing* costs in some cases due to the multiple interlocutory appeals a defendant can pursue challenging the district court's denial of the defense.
- d. Fears that state and local governments will face insurmountable expenses related to an influx of new claims currently precluded by qualified immunity have no concrete basis. Indeed, other states have already eliminated qualified immunity for state civil rights claims. Montana also eliminated qualified immunity defenses for state constitutional actions against law enforcement officers over a decade ago in *Dornat v. Caraway*. In the years following the *Dornat* decision, the number of reported cases against employees in their individual capacity only marginally increased.

8. Will this bill make it harder to recruit, retain, and train good government employees and law enforcement officers? Won't it discourage law enforcement from vigorously carrying out their duties?

- a. There is no evidence to suggest potential government employees consider immunity from suit when considering a job. A great deal of research indicates that many law enforcement officers agree that officers should be subject to civil suits and that lawsuits could deter unlawful behavior by government employees. (Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *Notre Dame L. Rev.* 1797, 1811-1813 (2018).
- b. According to a 2017 Pew Research Center survey of more than 8,000 police officers, 72% disagreed with the statement that "officers who consistently do a poor job are held accountable."
- c. Moreover, qualified immunity is far from the only protection available for government employees. For example, the government agency generally pays any judgment entered against the employee.
- d. The whole point behind civil liability is that we want public officials to expect to face legal consequences when they violate constitutional rights. The New Mexico Civil Rights Act is intended not just to provide redress to individual victims, but to ensure accountability at a structural level. Another way of rephrasing this concern is that civil liability may encourage police officers or other government employees to think twice before taking actions on the edge of violating constitutional liberties. That's a feature, not a bug, of our civil rights laws.



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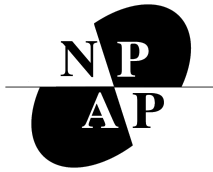
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9. Why is the New Mexico Civil Rights Act necessary given the broad and recently expanded waiver in the New Mexico Tort Claims Act (TCA)?

- a. The new waiver to the Tort Claims Act essentially broadened the definition of “law enforcement officer.” Under the TCA, a person can bring an action for negligence against a law enforcement officer for (1) personal injury or (2) property damage resulting from certain identified negligence, statutory, or constitutional violations.
- b. Governmental entities continue to argue that the TCA does not waive immunity for state constitutional violations, resulting in costly litigation over whether the TCA applies and the risk that the court will decide that the TCA does not waive immunity for the claim.
- c. The TCA applies only to personal injury or property damage.
- d. To fit under the TCA, there must be a specific listed waiver of governmental immunity. For example, the recent TCA amendment was about the waiver of immunity for law enforcement. If the violation of rights was not caused by law enforcement, claims are shoehorned into categories -- for example, claims for child sex abuse or deliberately indifferent social works must be litigated as “negligent maintenance of a building.” The governmental abuse of authority in violation of citizens’ rights is too important to be brought as claims for negligent operation of a building.
- e. The new amendments to the TCA are just that—new. It is inevitable that a great deal of litigation will be required to figure out what it means, how it applies, and whether it covers the broad ranges of rights and government actors that a Civil Rights Act would straight-forwardly encompass.
- f. The Civil Rights Act would acknowledge and address New Mexican’s constitutional rights with purpose and intention. Forcing civil rights claimants sideways into an act designed to address governmental negligence is disrespectful to our citizens and our constitution.

10. How will this bill increase individual law enforcement officer/government employee accountability, considering the taxpayers rather than officers will foot the bill for any settlement or judgment?

- a. This bill will incentivize governmental agencies to address the serious civil rights issues happening with their agencies. With the threat of targeted litigation that won’t be hindered by qualified immunity challenges or other immunity issues, agencies will be forced to address the risk of lawsuits and



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proactively respond to problems and eliminate individuals who cause repeated exposure.

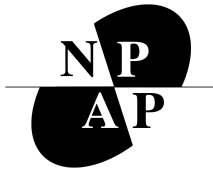
- b. We've already seen examples of litigation resulting in systemic change, such as the recent changes to solitary confinement policies in state jails and prisons after multi-million dollar settlements made the problem too large to ignore.
- c. There are complicated policy questions at play in determining the best overall system for ensuring accountability for law enforcement. But until qualified immunity is eliminated (or at least, substantially revised), there's no real incentive for state and municipal governments to even consider these ideas.

11. Will this bill make it harder for state, county, and municipal governments to get insured?

- a. This is an opportunity to explore alternative insurance solutions and to carefully and directly address risk mitigation.
- b. Governmental agencies should address with their insurers any risk mitigation policies and programs that could be implemented to reduce the risk of large verdicts or settlement—not just to reduce premiums, but also to reduce the risk to citizens that their rights will be violated.
- c. If insurers view our state and local governments to be such a high risk of civil rights violations that they would not provide a policy, what does that say about us?
- d. Other states that have limited or eliminated qualified immunity, including California, Connecticut, and Colorado, have either seen no adverse impacts on insurance, or found little evidence to suggest cities will lose coverage.

12. Could this bill lead to the closure of small rural police departments, thereby making the public as a whole less secure?

- a. No evidence suggests that. Of the nearly 1700 civil rights lawsuits filed in federal court between 2015 and September 2020, 27% were filed against counties and 29% were filed against the state.
 - i. Only 17% were filed against cities, towns, or villages
 1. Of those cases, 34% were filed against the City of Albuquerque (99 out of 290).
 2. The next highest concentration was 7% against Las Cruces (23 out of 290)
 - ii. The only verdicts from cases filed in this time period were against the State, the City of Albuquerque, and San Miguel County.



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13. Is the New Mexico Civil Rights Act too broad? Shouldn't it be focused solely on the law enforcement community?

- a. Non-law enforcement actors also lack public oversight. Other agencies must be required to protect citizens' rights. There is no principled reason to require only law enforcement to be liable when authority is abused.
- b. The New Mexico Constitution promises rights and protections to citizens and does not limit those rights according to the government agency for which the government actor works.

14. Won't the New Mexico Civil Rights Act just attract frivolous lawsuits from folks looking for a pay day?

- a. The justice system has mechanisms for weeding out frivolous lawsuits, which can be dismissed in the early stages if they have no basis in law or fact.
- b. Qualified immunity often does not result in the early dismissal of lawsuits, frivolous or otherwise.
 - i. A 2017 study by Joanna Schwartz examined all Section 1983 claims brought against law enforcement officials in a sample of five federal judicial districts. Out of a total of 979 cases in which qualified immunity could, in principle, be raised, only seven (0.6 percent) were dismissed because of qualified immunity prior to discovery. Courts were much more likely to dismiss cases based on qualified immunity at the summary judgment stage. But even at summary judgment, those courts dismissed only 31 (2.6 percent) total cases. In other words, despite qualified immunity's purported value in sparing defendants from having to litigate non-meritorious cases, the doctrine almost never achieves this intended goal.
- c. Moreover, so long as qualified immunity remains in place, all civil rights lawsuits are treated as "frivolous" without the opportunity for a jury to decide if the injured person's rights were violated or the government actor abused their authority.

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