

The Washington Post

Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill.

Kimberly Kindy

October 7th, 2021

In the months after George Floyd's murder, state legislators across the country tried to undo a legal doctrine that makes it virtually impossible to sue police officers for violating a person's civil rights.

Fueled by outrage over the actions of former Minnesota officer Derek Chauvin, the efforts to eliminate "qualified immunity" seemed poised to usher in a new era empowering citizens who felt wronged by police.

But then, in state after state, the bills withered, were withdrawn, or were altered beyond recognition. At least 35 state qualified-immunity bills have died in the past 18 months, according to an analysis by The Washington Post of legislative records and data from the National Conference of State Legislatures.

The efforts failed amid multifaceted lobbying campaigns by police officers and their unions targeting legislators, many of whom feared public backlash if the dire predictions by police came true. Officers said they would go bankrupt and lose their homes. They said their colleagues would leave the profession in droves.

While advocates argued that qualified immunity allows rogue officers to brutalize citizens without paying a personal price, law enforcement officials countered that it protects police from being financially destroyed for the rapid life-or-death decisions they must make on the job. So far, police are winning the argument nearly everywhere.

Among at least four bills that are still alive, three initially called for a complete ban on qualified immunity. One of these, in Michigan, has since been amended to allow use of the legal defense in many instances. And among the seven qualified-immunity bills that have become law since last year, only Colorado has completely barred the legal defense for officers. Iowa actually strengthened qualified-immunity rights of its officers and Arkansas did so for its college and university police officers.

In New Mexico, changes were made so quietly that many advocates didn't know that the ability to sue individual officers had been taken out as they testified for the bill.

Stephanie Maez, a former state legislator, tearfully told lawmakers earlier this year in an online hearing how a court granted qualified immunity to an Albuquerque homicide detective she accuses of framing her 18-year-old son for murder.

"He was released and vindicated and the real murderers were caught and are serving time," the 41-year-old said of her son, "[but] there has been no accountability."

But Maez didn't know at the time that the bill she was supporting, the New Mexico Civil Rights Act, had been fundamentally altered days before to drop a provision allowing people to sue officers in state court. And new language was inserted that explicitly prohibited an accuser from naming an officer in a state civil rights lawsuit.

Now, she has little doubt why the Democratically controlled legislature — facing heavy pressure from police unions — assented to changing the bill, which was signed into law by Gov. Michelle Lujan Grisham (D) in April.

"If a lawmaker is concerned about police coming out and endorsing their opponent in the next election cycle, they will think twice before they do the right thing," Maez said. "With crime being such a huge issue here, lawmakers don't want to look soft on crime."

Such statehouse battles have become even more important as qualified-immunity changes have stalled out in Congress. The House has passed the George Floyd Justice in Policing Act, which would restrict the use of the legal doctrine nationwide. But bipartisan Senate talks broke down last month.

Police officials say they have a right to assert themselves to retool or defeat bills that they believe might weaken their ability to keep a strong force.

"If we are going to improve the criminal justice system, it is not going to be by scaring away the best and brightest," said Patrick Yoes, president of the National Fraternal Order of Police. "All of these attacks on law enforcement are not helping. Quality candidates can take a job anywhere." But these police victories are happening despite strong public sentiment in favor of changing the doctrine. A July study by the Pew Research Center found two-thirds of Americans are opposed to use of qualified immunity by police.

Experts say that new bills are likely to be introduced as most statehouses resume in January. However, because of police lobbying, any successful efforts are more likely to resemble the New Mexico law than the one enacted in Colorado.

"It would be better if officers had a little skin in the game, but that's the nature of legislation," said Barry Friedman, founding director of New York University School of Law's Policing Project. "It's too bad, but it's not always truth and justice. It is often just what's possible."

Stephanie Maez's son, Donovan, spent months in custody after being charged with murder. She later sought to sue a police detective she accused of framing him, but he was protected by qualified immunity. (Adria Malcolm for The Washington Post)

Floyd's death reignites debate

In 2017, police in Texas responded to a suicidal man who had doused himself with gasoline. One officer later said in a written report that he warned his colleagues, "If we Tase him, he's going to light on fire." Two officers used a Taser on him anyway, and then the man burst into flames and died, according to court records.

Yet this summer, a federal court ruled that the man's family couldn't sue the officers. They had qualified immunity.

Activists who seek to end the doctrine can point to a litany of similarly shocking cases. There's the 2019 federal court ruling granting immunity to a Georgia deputy who shot a 10-year-old boy lying face down on the ground while aiming at a nonthreatening family dog. Or the ruling that same year protecting California police who had been accused of stealing \$101,380 in cash and \$125,000 in rare coins in 2013 as they searched a local business and the owners' homes. While the police may have been "morally wrong," they were still protected from lawsuits by qualified immunity, the court found.

"People are holding up picket signs that say, 'End qualified immunity' because officers are doing things that we as a society agree are outrageous," said Joanna Schwartz, a qualified immunity expert and researcher at the University of California at Los Angeles. "They are getting by with it on a legal technicality and that really has people upset."

The debate over whether Americans can sue individual police officers began more than a century ago. An 1871 statute first provided a legal path to collect damages from officers and other government employees who violate constitutional rights. The law was commonly referred to as the Ku Klux Klan Act because it was designed, in part, to protect freed enslaved people from racist government workers.

However, a 1967 U.S. Supreme Court ruling on a Freedom Riders bus desegregation case in Mississippi created qualified immunity, and the legal doctrine was strengthened in subsequent federal decisions, making it nearly impossible to challenge in court.

After Floyd's death, an eclectic mix of organizations came together to fight for a ban on qualified immunity, from the American Civil Liberties Union and Sierra Club to several libertarian groups including the Cato Institute.

But as dozens of state legislatures took up the issue last year, police responded swiftly with public and private lobbying campaigns.

Police unions bought ads in local newspapers warning that officers would hesitate to go after criminals for fear of lawsuits. In opinion pieces they claimed crime would run rampant.

Individual officers flooded inboxes of state legislators, saying officers would go bankrupt. They repeated these arguments as they testified before panels and committees.

In New Mexico, a sheriff last fall testified to a civil rights commission that ending qualified immunity would mean officers could “lose everything they have, including potentially losing their homes and displacing their families.” A retired deputy sheriff wrote an opinion piece for an Albuquerque newspaper that said the bill would make “policing the most undesirable job in America.”

In a full-page ad last summer in the Boston Globe, a police union appealed to readers to call Massachusetts legislators in opposition to the bill. The Connecticut Police Chiefs Association wrote a letter to legislators last summer, threatening to withdraw support for a 65-page bill if a ban on qualified immunity wasn’t removed, saying it “will destroy our ability to recruit, hire, and retain qualified police officers.”

The lobbying efforts worked. The Massachusetts bill was soon altered to allow qualified immunity in most circumstances. The Connecticut bill was rewritten to say qualified immunity would be allowed as long as officers had an “objectively good faith belief that [their] conduct did not violate the law.”

“It’s one of the many loopholes that were inserted,” said Nick Sibilla, a legislative analyst with the Institute for Justice. “You basically have to get inside the mind of the officer to make your case.”

Similar amendments were made to a bill in California, which passed the Democrat-dominated legislature and was signed by Gov. Gavin Newsom (D). Although qualified immunity isn’t used in the state, court rulings interpreting a 1987 state civil rights law there have created a legal threshold for plaintiffs that is similarly onerous.

In July, a California Peace Officers’ Association official boasted about how the group’s year-long effort was “able to chip away” at efforts to make it easier to sue.

In the online post, Deputy Director Shaun Rundle said that “until recently, the bill lowered the threshold for peace officer ‘misconduct’ to such a level that would open the floodgates of litigation ...” That all changed, he wrote, thanks to “law enforcement’s pushback.”

In New Mexico, proponents of that state’s bill said it became clear it would fail if law enforcement officers and other government employees were not indemnified from lawsuits. Instead, a compromise bill created a path for victims to recover monetary damages from cities and counties, rather than individual officers.

“It was the hardest legislative effort I have been engaged in since I’ve been a speaker,” said New Mexico House Speaker Brian Egolf (D), a lead advocate for the bill. “I certainly understand why some members or advocates wanted individual officers to be defendants, but my objective was to get the best bill possible. We have made the road to justice much shorter.”

In public comments, Grisham, New Mexico's governor, said she supported the bill because it would provide a path for victims to seek damages and make "our state agencies accountable for their actions ... and create a fairer state for everyone."

To observers, the compromise was a perfect illustration of how police shifted the narrative. While most bills began as efforts to directly punish and weed out "bad apples" in the force, pushback by police officers changed the debate.

"The rhetoric was all about individual responsibility, but that somehow got lost. It baffled me," said Grace Philips, an attorney for the New Mexico Association of Counties who lobbied against the bill in her state, arguing that the law could bankrupt counties. "This is taxpayer accountability, not law enforcement or officer accountability."

Colorado serves as test case

There's one state where the qualified-immunity push has played out differently: Colorado. The state is now serving as a litmus test for the alarming predictions by police nationwide that eliminating qualified immunity would severely hamper their profession.

So far, few negative effects on policing have been evident — and few lawsuits have actually been filed.

Colorado's legislation started last year, when state Rep. Leslie Herod (D) introduced a bill in response to the police killing of Elijah McClain. The 23-year-old died in 2019 after Aurora police detained him without cause, put him in a chokehold and injected him with a powerful sedative. The bill went nowhere.

But then Floyd was murdered in May 2020. Protesters filled the steps of the Colorado Capitol, invoking the names of Floyd and McClain and holding signs that said, "End Qualified Immunity."

Herod's bill was pulled from the shelf and given new life. A provision was added that banned qualified immunity as a defense for officers named in state civil lawsuits.

With only 20 days left in the legislative session, the protests created a synergy inside the Capitol that helped Herod's efforts, according to six people involved in the negotiations.

The bill's final version called for officers to pay 5 percent of damages awarded by a court, but no more than \$25,000. Their employers would pay the remainder.

Fifteen months after the Colorado bill was signed into law, there is so far little evidence to support any widespread negative effects on police retention or recruitment.

Data from Colorado Peace Officer Standards and Training actually shows a slight decline in the number of officers who have retired, resigned or were fired from their jobs in the past two years.

However, there is no way to know how many left the profession in response to the new law since the group does not collect information regarding why an officer retires or resigns.

The number of police cadets in Colorado the year the bill passed also did not significantly change, the records show, and data for this year is not yet available.

Nick Rogers, president of the Denver Police Protective Association, said his department has seen a slight uptick in retirements and a downturn in applications, but it is impossible to isolate the cause to a single factor. He said morale, in general, is down after political efforts to overhaul policing left officers feeling under attack.

“There is no way you can corollate what is going on based on one state law that passed,” said Rogers, a 30-year veteran of the city’s police department who is opposed to the qualified-immunity law. “That was just another form of degradation of this profession. It’s not just one thing.”

Rogers said most officers — at least for now — have little fear of the financial implications of the new law because Colorado law requires that state and local governments indemnify their employees in lawsuits.

Predictions by police of a deluge of lawsuits have not come true so far. But some victims of police violence are using the new law. After Brittney Gilliam was wrongly accused of driving a stolen vehicle in August 2020, Aurora officers held her 6-year-old daughter, 12-year-old sister and two teenage nieces at gunpoint as they lie face down on the hot pavement of a parking lot, records and video show.

Gilliam has sued the involved officers in state court in what’s believed to be the first case brought under the new law.

The city of Aurora declined to comment on the pending litigation. However, city spokesman Ryan Luby said police have received new training for high-risk traffic stops and noted that city officials have condemned the incident.

Gilliam, 30, said she wants the police to be held to account.

“I still remember the officers’ faces,” Gilliam said. “My little girl — all of us are still traumatized.”

Widespread changes unlikely

Although most police organizations are steadfast in fighting attempts to end qualified immunity, some national law enforcement organizations are campaigning in favor of the idea.

The Law Enforcement Action Partnership, a nonprofit group of police, prosecutors and correctional officers, asked Congress in a March 23 letter to pass a law that will ban the doctrine from being used as a legal defense, saying it had eroded faith in police.

Ronald L. Davis, an official with the National Organization of Black Law Enforcement Executives, also called for an end to qualified immunity when he testified before a congressional committee last year. Davis said the doctrine “prevents police from being held legally accountable when they break the law.”

And the Major Cities Chiefs Association in May modified its long-standing position in favor of qualified immunity to say there are circumstances in which it should not apply.

Still, widespread changes on qualified immunity are unlikely to happen anytime soon. In Congress, even a proposal to take qualified immunity off the table wasn’t enough to bring Democrats and Republicans together last month on a package to overhaul policing.

The political climate also has changed since 2020. Violent crime rates have risen, causing many lawmakers to step back from legislative efforts that might allow them to be cast as soft on crime. The momentum that followed Floyd’s death also has waned. Proponents of the measures worry it might take another tragedy — as it did in Colorado — to give qualified-immunity bills a second political life.

“Legislation usually gets passed when things are salient,” said Friedman, the qualified-immunity expert. “Especially now with high homicide rates there is a lot of worry that this moment will pass.”

Wisconsin state Rep. Jonathan Brostoff, a Democrat who has a qualified-immunity bill pending, said most civil rights laws have required multiyear efforts and he believes this will be no different. “I cannot promise it will happen this legislative session,” he said. “But I will see this through.”

But in other states, supporters of the movement are discouraged. Like many advocates, Maez began fighting to end qualified immunity after the doctrine touched her own life. Her son, Donovan, was arrested on murder charges months after a teenager was killed in a 2015 drive-by shooting at a house party. Donovan had threatened to shoot up the same home when he was kicked out of a party there weeks earlier, witnesses claimed.

But he was released 10 months later after three other men were charged instead. Several witnesses who had pointed to Maez’s son later recanted their statements and said they lied “out of fear and intimidation,” Maez’s family later said in a lawsuit. The lawsuit also alleged that video showed a detective “coercing witnesses” during interrogations.

The Albuquerque city attorney’s office, which represented the detective, declined to comment. It pointed toward portions of a ruling that said the court did not find sufficient evidence to show the detective coerced witnesses. The ruling also granted the detective qualified immunity.

Although Maez can’t use New Mexico’s new law to file a second lawsuit in state courts — since the incident predates the law’s passage — she believed when she testified that the bill would help future victims by eliminating qualified immunity.

Now, she said she has little doubt that lawmakers caved to police opposition.

“It’s really disappointing and frustrating. For me it was less about the money and more about a means to hold individual officers accountable,” she said. “If there are no consequences for them, how can we expect change?”