

The Tarnished Shield of Qualified Immunity

THE TRAGIC KILLING OF DAUNTE WRIGHT at the hands of a Brooklyn Center, Minnesota, police officer, even as former Minneapolis officer Derek Chauvin stood trial nearby for the murder of George Floyd, has led to renewed calls for federal legislation aimed at reducing police violence. Efforts to enact such legislation stalled in Congress during the waning months of the Trump administration last year. Among activists' top priorities at that time, however, was the elimination of "qualified immunity," the legal doctrine that often shields police officers and other government officials—including educators—from financial liability for violating citizens' civil rights.

In this issue's cover story, Yale law professor Justin Driver examines the origins of qualified immunity and the case for reform, with special attention to the implications for K–12 education (see "Schooling Qualified Immunity," *features*). Readers may be surprised to learn that cases involving teachers, principals, and school board members have been central to the doctrine's evolution. Most notable was a 1975 Supreme Court case involving the suspension of three Arkansas students for spiking the punch at a high school social. It was in that case that the court first articulated the standard that plaintiffs cannot overcome the shield of qualified immunity unless they demonstrate that the government official in question violated "clearly established constitutional rights."

As Driver reports, this narrow standard has transformed qualified immunity from a sensible protection for officials carrying out their public duties in good faith into something approaching blanket immunity from legal accountability. If plaintiffs cannot identify a binding precedent involving a government official who violated the Constitution in a nearly identical manner to their own circumstances, they are doomed to lose. This standard has shielded educators who have engaged in "heinous conduct that, properly understood, contravenes clearly established law," Driver writes. Courts have even granted immunity to educators who have strip-searched students to look for minor contraband, simply because there was no previous case in which someone had infringed on a student's rights in precisely the same way.

In June 2020, in the aftermath of George Floyd's killing, the National Education Association and the American Federation of Teachers both signed onto a letter calling on Congress to enact police reform. Among their demands was to "end the qualified immunity doctrine which prevents police from being held legally accountable when they break the law." A bill that passed the House of Representatives last summer, the George Floyd Justice

in Policing Act, would have done just that by eliminating qualified immunity as a defense from liability for police officers only. A second bill introduced in both chambers, the Ending Qualified Immunity Act, would have curbed the defense for all government officials, including educators.

Driver points out that there are good reasons to think separately about police officers and educators when it comes to qualified immunity. Unlike the daily work of police officers, teachers' responsibilities are not "inherently imbued with legality and constitutionality." A teacher's infringement of her student's rights is far less likely to lead to the loss of life. Finally, the constitutional case law that applies to police is well developed, while the law pertaining to teachers is sparse—and riddled with thorny questions about, for example, the precise scope of students' free-speech rights both within and beyond school

settings (see "What Teachers Spy in Homes over Zoom Winds Up in Court," *legal beat*).

With Congress so far failing to act on calls to overhaul qualified immunity, some states are taking matters into their own hands. In April 2021, for example, the New Mexico legislature passed a law authorizing citizens to sue government employers under their state constitution if a state or local worker violates their rights. The measure applies equally to police departments and school districts, and it bans the use of qualified immunity as a defense. Nick Sibilla of the Institute for Justice, a libertarian law firm that testified in favor of the law, notes that the legislation's supporters spanned the ideological spectrum, from the liberal American Civil Liberties Union to the conservative Americans for Prosperity.

The impulse for sweeping reform is understandable, but there may be some benefit to delaying at the federal level to observe the effects, if any, of the state legal changes. Will these laws translate into measurably improved police or teacher behavior? Or will they just mean more expensive insurance premiums for local governments (that is, the taxpayers) and larger paydays for plaintiffs' lawyers? Like so many matters related to education policy, these are empirical questions to which experience will provide better answers.



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