COMMENTS

Stating the Obvious: Departmental Policies as Clearly Established Law

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Qualified immunity is a judge-made doctrine originally created to shield officers from liability only when they could not have been on notice that their actions were wrongful. In the four decades since the Supreme Court first articulated this justification for qualified immunity, the doctrine has become unmoored from its roots and has expanded to protect officers even in the face of clear evidence that the officers should have known better.

The test for qualified immunity states that officers are immune from liability in the absence of clearly established law that previously condemned their conduct, but the Supreme Court has not defined exactly what "clearly established law" means. In a set of conflicting cases, the Court has both repudiated the consideration of departmental policies as clearly established law and, subsequently, cited departmental policies as evidence of clearly established law. As a result of this ambiguity, lower courts have been inconsistent—even within circuits—about whether departmental policies count as clearly established law.

This Comment addresses this gap in the doctrine by proposing a solution that ameliorates the legal fiction at the heart of the clearly-established-law inquiry. Using Hope v. Pelzer*'s obviousness exception to the clearly-established-law requirement, this Comment proposes incorporating departmental policies into the qualified immunity doctrine as an objective measure for determining when an officer's rights violation was obvious. This solution shifts the application of qualified immunity to align with the original justification for the doctrine without requiring a change in precedent from the Supreme Court. Ultimately, it closes a loophole in the doctrine by offering a method through which officers can be held accountable for their conduct when they clearly should have known that their actions were wrong.*

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INTRODUCTION

State and federal government officers carry weapons and are authorized to use force—including deadly force[1]—with few safeguards to prevent mistakes and bad actions. When a government officer violates an individual's rights, the individual can sue for damages.[2] While this does not undo the harm the individual experienced, a successful claim can provide a monetary remedy for the harm and hold the officer accountable. However, there are significant legal obstacles to successfully bringing a case against a government officer. One of the most contentious barriers to accountability is qualified immunity.

Qualified immunity is an affirmative defense that was created to protect state and federal government officials from meritless or harassing lawsuits for performing their jobs.[3] Before a court will hear the merits of a case, it must first determine that the official is not immune from liability. Even if an officer violates a person's constitutional rights, the officer is entitled to qualified immunity when the violated right was not "clearly established."[4]

Officers undergo training and are guided by departmental policies that aim to instruct officers about proper conduct and prevent rights violations. These policies operate prospectively, and while they cannot reasonably prepare officers for every possible circumstance, they provide a rough code of conduct to which

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1 *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 3 (1985) (holding that deadly force may be used when "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others").

2 *See* 42 U.S.C. § 1983; *see also* Monroe v. Pape, 365 U.S. 167, 187 (1961) (holding that § 1983 creates a cause of action to enforce constitutional rights against state government officials).

3 Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

4 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

officers should adhere. But what happens when officers do not abide by their own department's policies?

This is not a hypothetical question. In New York City, for example, the Civilian Complaint Review Board substantiated allegations of misconduct against nearly four thousand New York Police Department officers between 1985 and 2020.[5] Seattle's Office of Police Accountability received 703 complaints of policy violations about Seattle Police Department officers from 2020 to 2021.[6]

For individuals, such as the family of Brian Drummond, this question is personal. Drummond had a history of mental illness, and one night he ran out of his medication.[7] His neighbor called the police to prevent him from injuring himself.[8] Drummond was unarmed and hallucinating, and the officers called an ambulance to transport him to get medical care.[9] But instead of waiting for the ambulance, the officers decided to take him into custody: they knocked him to the ground and cuffed his arms behind his back.[10] Although Drummond was not resisting, two officers kneeled on his back and neck.[11] Drummond complained to the officers that he could not breathe. One witness said that Drummond was obviously having trouble breathing, but the officers were laughing.[12] An additional officer arrived, and they bound Drummond's ankles, too.[13] At this point, about twenty minutes after they first restrained him, Drummond lost consciousness.[14] As a result of the officers' actions, Drummond fell into a permanent vegetative state.[15]

The officers should have known that their actions violated Drummond's rights.[16] Their own police department specifically

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[5] Derek Willis, Eric Umansky & Moiz Syed, *The NYPD Files: Search Thousands of Civilian Complaints Against New York City Police Officers*, PROPUBLICA (July 26, 2020), https://perma.cc/F6GA-TZFB. There is reason to believe the actual number of misconduct incidents is much higher, as the review board only substantiates a small fraction of complaints it receives, and the police department is not always forthcoming with crucial evidence needed to investigate the complaints.

[6] Off. of Police Accountability, *Closed Case Summaries*, SEATTLE, https://perma.cc/Z8P7-KUHQ.

[7] Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1054 (9th Cir. 2003).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Drummond*, 343 F.3d at 1054–55.

[13] *Id.* at 1055.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1061 ("*Any* reasonable officer should have known that such conduct constituted the use of excessive force." (emphasis in original)).

trained them not to kneel on a person's back or neck for restraint, as doing so can be deadly.[17] Additionally, the risks of such actions were reported in a local newspaper less than two months earlier.[18] Despite clear evidence that the officers should have known not to restrain Drummond in the dangerous way that they did, the district court judge granted the officers qualified immunity and dismissed the case.[19]

When an officer asserts qualified immunity, the plaintiff has to overcome the defendant's immunity defense before the case is assessed on the merits.[20] There is a two-part test for determining whether qualified immunity applies: "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[21] Courts have the discretion to decide either prong of the test first.[22]

The second part of the qualified immunity test—the clearly established prong—is the more ambiguous of the two.[23] Its inclusion in the qualified immunity test is intended to protect officials from liability unless they were on notice that their conduct could

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17 *Drummond*, 343 F.3d at 1061–62 ("[T]he officers received training from their *own police department* explaining specifically that 'when one or more [officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia can result [t]hat may be a precipitating factor in causing death.'") (second and third alterations in original) (emphasis in original) (quotation marks omitted)).

18 *Id.* at 1061.

19 *See* Drummond *ex rel.* Drummond v. City of Anaheim, 8:00-cv-00243, Dkt. No. 102 (C.D. Cal. Jan. 17, 2002). The dismissal on the basis of qualified immunity was overturned at the Ninth Circuit on the grounds that the department's policies and training program provided the officers "'fair warning' that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts." *Drummond*, 343 F.3d at 1061. On remand, the jury rendered a verdict for the officers and dismissed the case. Drummond *ex rel.* Drummond v. City of Anaheim, 8:00-cv-00243, Dkt. No. 393 (C.D. Cal. May 14, 2009).

20 *See* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 145 (2012) (finding a circuit split on the burden of proof for qualified immunity, with five circuits placing the burden on the defendant, five circuits placing the burden on the plaintiff, and two circuits splitting the burden of persuasion by step); Aisha Green, *Comparing* Dadd v. Anoka County *with* Corbitt v. Vickers*: Why Defendants Should Bear the Burden of Establishing Qualified Immunity in a Motion to Dismiss*, 70 AM. U. L. REV. 2091, 2108–13 (2021) (describing a circuit split between the Eighth Circuit and the Eleventh Circuit with regard to allocating the burden of establishing qualified immunity).

21 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (citing *Harlow*, 457 U.S. at 818).

22 Pearson v. Callahan, 555 U.S. 223, 236 (2009).

23 Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653 (2013) ("[T]he more difficult task is figuring out what is required to make the law 'clearly established.'").

clearly violate constitutional rights.[24] Although the Court has been clear that general constitutional principles cannot clearly establish law for the purpose of the test[25]—a higher level of factual specificity is required—it has not explicitly determined what makes law "clearly established." As a result, lower courts have been left to model their clearly-established-law analysis after the Supreme Court's sporadic and sometimes conflicting qualified immunity jurisprudence.[26]

There is substantial uncertainty about the role that departmental policies can have, if any, in the clearly-established-law analysis. The policies at issue in this Comment are any rules or training materials that provide guidance to officers, as "police policies and training have [long] been understood as a means of limiting officer discretion."[27]

This Comment proposes that courts consider these nonbinding mechanisms for limiting discretion as clearly established law for the purpose of qualified immunity.[28] Departmental policies offer a prospective, informed assessment of how reasonable officers should act. For this reason, courts should consult them as indicators of what conduct is clearly established to be wrongful.

Part I discusses the origins and justifications of the qualified immunity doctrine. Part II describes the current consideration of departmental policies in the clearly-established-law analysis. It provides an overview of the conflicting messages about the use of policies from the Supreme Court and details how lower courts apply policies when evaluating qualified immunity. Additionally, it describes the legal fiction inherent in the clearly established law

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[24] *Creighton*, 483 U.S. at 639–40 (explaining that officials must reasonably be able to "'anticipate when their conduct may give rise to liability for damages' . . . [I]n the light of pre-existing law the unlawfulness must be apparent") (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)).

[25] *Id.* at 639 (explaining that, for example, the Due Process Clause does not serve to clearly establish the right to due process because "if the test of 'clearly established law' were to be applied at this level of generality . . . [qualified immunity] would be transformed from a guarantee of immunity into a rule of pleading").

[26] Blum et al., *supra* note 23, at 653 (explaining that "[o]ne problem with negotiating the clearly-established-law terrain" is the Court's "mixed signals as to what is sufficient to give officials notice that certain conduct is unconstitutional").

[27] Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 IND. L.J. 1, 4 (2022).

[28] This Comment's definition of policies does not include rules or regulations that create binding obligations or carry the force of law, such as statutes. Additionally, this Comment solely concerns individual-officer liability under § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). An in-depth analysis of the effect that considering policies in the qualified immunity analysis could have on claims against local governments under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), is outside the scope of this Comment.

inquiry and posits that some lower courts cite policies as a way to address this legal fiction. Part III offers a solution that incorporates policies into the current doctrinal framework—without requiring a change in precedent—as an objective measure for determining when an officer's violation of a person's rights was obvious. Officers who obviously violate rights and should have known better are not entitled to qualified immunity.[29] Ultimately, this Comment explains how departmental policies can be informative in resolving close cases where "obviousness" may be up for debate.

Qualified immunity has come under fire from both judges[30] and scholars[31] across the ideological spectrum. There have been national calls to rethink the doctrine and even a bill introduced in Congress to override qualified immunity.[32] Although qualified immunity was designed to allow for accountability when officers act in ways they should know are wrong, it has become such a barrier against accountability that it allows officers to "shoot first and think later."[33] This Comment proposes a narrow consideration of departmental policies that can realign the doctrine with its stated purpose and allow plaintiffs to overcome immunity when officers violate their rights and should have known better.

I. ORIGINS AND JUSTIFICATIONS OF QUALIFIED IMMUNITY

Qualified immunity is a judge-made doctrine that began as a good faith exception to liability under 42 U.S.C. § 1983, which allows individuals to bring cases against state actors who violate their constitutional rights.[34] In 1967, the Supreme Court read a good faith exception into the statute, holding that officials acting

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29 Hope v. Pelzer, 536 U.S. 730, 741 (2002).

30 *See, e.g.*, Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part) (stating his "broader unease with the real-world functioning of the modern immunity practice," and describing qualified immunity as "[a]n Escherian Stairwell. Heads government wins, tails plaintiff loses"); Jamison v. McClendon, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) ("Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity.").

31 *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023).

32 Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021). The bill was never put to a vote.

33 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

34 42 U.S.C. § 1983.

in good faith are immune from liability.[35] The good faith exception protects officers who reasonably believe they are acting in accordance with a valid law, even if it is later held that their actions were unconstitutional.[36] Underlying this decision was the notion that officers should be protected from legal repercussions when they could not have feasibly been on notice that their actions were unconstitutional—otherwise they might be too focused on the risk of incurring liability to effectively do their jobs.[37]

Fifteen years later, the Court held that this good faith exception did not go far enough to immunize government officials from lawsuits that might impair their ability to work effectively. According to the Court, the subjective good faith test allowed "bare allegations of malice" to proceed to trial, thereby "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery."[38] Because an official's subjective good faith is a question of fact that requires resolution from a jury, these claims could not be resolved on summary judgment. As a result, the Court was concerned that meritless claims would go to trial and cause "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[39]

To address this concern, the Court abandoned the subjective good faith test and replaced it with an objective qualified immunity test. Government officials' immunity against § 1983 lawsuits is now evaluated objectively: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable* person would have known."[40]

Rather than necessitating a subjective inquiry into whether the particular officer was on notice that their actions were illegal, this objective reasonableness test only asks whether a reasonable officer would have known their actions to be unlawful. This objective test is not only a defense to liability, but also an immunity

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35 Pierson v. Ray, 386 U.S. 547, 557 (1967).

36 Baude, *supra* note 31, at 52–53.

37 Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

38 Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

39 *Id.* at 816.

40 *Id.* at 818 (emphasis added).

from the burdens of litigation.[41] Because objective factors can be decided by a judge on a motion for summary judgment, a qualified immunity test based only on objective determinations "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[42]

Although the good faith exception is no longer a part of the doctrine, the sentiment of protecting officers from liability who believe they are acting in accordance with the law remains. Qualified immunity is still predicated on the idea of notice.[43] It no longer matters what the particular officer intended or knew was lawful at the time of their actions; if a reasonable officer in that officer's position would have been on notice of the illegality of their actions, the officer should not be immune from liability.[44] As the Court framed it in one case, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[45] This "fair warning"[46] requirement underlies the clearly established law prong of the qualified immunity test.[47]

II. CURRENT STATE OF THE LAW

While the purpose of the clearly established law prong is clear, the application of this test is unsettled.[48] The test asks whether the constitutional right was clearly established at the time of the conduct, but the Supreme Court has never definitively

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41 Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("The entitlement [recognized in *Harlow*] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (emphasis in original)).

42 *Harlow*, 457 U.S. at 818.

43 Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))).

44 *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638 (1987) (explaining that qualified immunity "shield[s officers] from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated").

45 Malley v. Briggs, 475 U.S. 335, 341 (1986).

46 *Hope*, 536 U.S. at 740 (quotation marks omitted).

47 *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful . . . If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.").

48 *See* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 290 (2006) ("Applying standards to a particular set of facts, however, may be as difficult or important as articulating the standard itself. But sometimes it appears that the Court does not want to be bothered to do the hard work of showing how the standard operates in application.").

determined what counts as clearly established law.[49] The Court has given conflicting information concerning the use of policies in this analysis; it has both disavowed the use of policies as clearly established law and used policies to support its holdings.[50] Because of this contradictory treatment at the Supreme Court, there is no consensus in lower courts about how to consider policies in the qualified immunity analysis.[51] Part II.A discusses the Supreme Court's treatment of policies as clearly established law, and Part II.B provides an overview of whether and how district and appellate courts include policies in their qualified immunity analyses. This Part describes the outer bounds of where policies can fit into the existing qualified immunity doctrine and details where along this spectrum different courts have deemed policies to apply.

A. The Supreme Court's Conflicting Guidance

The Supreme Court has never conclusively defined what sources of law can be considered as clearly established law under the second prong of the qualified immunity test.[52] Despite the lack of clarity, it is generally accepted that Supreme Court precedent and binding in-circuit precedent constitute clearly established law.[53] But the Supreme Court's commentary on whether non-case-law sources—namely, departmental policies—can be considered clearly established law is sparse and conflicting.

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[49] Blum et al., *supra* note 23, at 653 ("One problem with negotiating the clearly-established-law terrain is that the Supreme Court, in earlier cases, sent mixed signals as to what is sufficient to give officials notice that certain conduct is unconstitutional.").

[50] *See infra* Part II.A.

[51] *See infra* Part II.B.

[52] For example, some Supreme Court cases contain language that calls into question whether circuit court precedent even counts as clearly established law for the purpose of qualified immunity. *See, e.g.*, Carroll v. Carman, 574 U.S. 13, 17 (2014) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances . . ."); Reichle v. Howards, 566 U.S. 658, 665–66 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . .").

[53] *See, e.g.*, Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 433 (2d Cir. 2009) ("We look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation to determine whether the conduct violated a clearly established right."); Wilson v. Layne, 526 U.S. 603, 617 (1999) (stating that "cases of controlling authority in [the petitioners'] jurisdiction at the time" in question can "clearly establish[ ] the rule").

1. The Court's repudiation of policies: *Davis v. Scherer*.

The first time the Supreme Court directly addressed the use of policies in the context of qualified immunity, it rejected their inclusion in clearly established law. In *Davis v. Scherer*,[54] a state highway patrol employee, Gregory Scherer, applied for permission from his employer to work part-time for the sheriff's office, pursuant to a state order that patrol members seeking outside employment obtain approval from the department in order to avoid conflicts of interest.[55] Scherer's supervisors found that the part-time work created a conflict of interest, and after Scherer refused to quit his part-time job, his employment with the highway patrol was terminated.[56] Scherer sued, alleging his former employer had violated the Due Process Clause of the Fourteenth Amendment by terminating his employment without a formal pre-termination or post-termination hearing.[57]

The district court found in favor of Scherer on the issue of qualified immunity based on the employer's violation of its own policies. Scherer's supervisors "followed procedures contrary to the department's rules and regulations" when they terminated his employment.[58] According to the district court, this violation of the regulations signaled that Scherer's termination was unreasonable: "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable."[59] Therefore, the officials who terminated Scherer's employment were "'not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable.'"[60] The court of appeals affirmed this decision on the basis of the district court's reasoning.[61]

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54 468 U.S. 183 (1984).

55 *Id.* at 185.

56 *Id.* at 185–86.

57 *Id.* at 187.

58 *Id.* at 188–89 (quoting Scherer v. Davis, 543 F. Supp. 4, 20 (N.D. Fla. 1981) (explaining that "the personnel regulations of the Florida Highway Patrol clearly required 'a complete investigation for the charge and an opportunity [for the employee] to respond in writing'" (alteration in original)).

59 *Davis*, 468 U.S. at 188 (alteration in original) (quoting *Scherer*, 543 F. Supp. at 19). The regulation at issue here was adopted by the Department of Highway Safety and Motor Vehicles and signed by its Executive Director, which gave the policy the force of state law. *Scherer*, 543 F. Supp. at 7–8, 19. While in this case, the regulation conferred obligations on officials, this Comment applies more broadly and includes informal policies that do not create any binding obligations on officials who are subject to them.

60 *Davis*, 468 U.S. at 189 (quoting *Scherer*, 543 F. Supp. at 20).

61 *Davis*, 468 U.S. at 189 (referencing Scherer v. Graham, 710 F.2d 838 (11th Cir. 1983)).

The Supreme Court reversed. Scherer argued that "a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions."[62] The Court acknowledged that this argument was "not without some force," but declined to adopt it.[63] Instead, the Court stated that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[64] The Court expressed concern that denying qualified immunity when plaintiffs show a "clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights" would untenably expand the qualified immunity analysis.[65] It would give judges too much discretion to select from policies they deem relevant, increase the difficulty for officials to anticipate legal consequences for their actions, and frustrate trial courts' ability to dismiss frivolous lawsuits.[66] For these reasons, the Court declined to consider the employer's policy in its analysis and held that there was no clearly established rights violation.[67]

2. The Court's embrace of policies: *Hope v. Pelzer*.

Despite *Davis*'s seemingly unequivocal statement barring consideration of non-case-law sources of clearly established law, the Supreme Court itself has cited policies when determining whether a right is clearly established. The most significant example of this application is *Hope v. Pelzer*.[68] This case concerned the Alabama Department of Corrections (ADOC) and its use of a "hitching post" as a behavioral punishment.[69] The plaintiff, Larry Hope, was incarcerated and traveling to the chain gang's worksite.[70] He fell asleep during the bus ride and was slow to get off the bus when ordered.[71] Words between him and a guard escalated to fighting, and other guards intervened to restrain Hope and transport him back to the prison, "where he was put on the

62 *Davis*, 468 U.S. at 193.
63 *Id.* at 194.
64 *Id.*
65 *Id.* at 195.
66 *Id.* at 195–96.
67 *Davis*, 468 U.S. at 197.
68 536 U.S. 730 (2002).
69 *Id.* at 733.
70 *Id.* at 734.
71 *Id.*

hitching post."[72] The guards left him there for seven hours in the sun with his shirt off, and he was only given water once or twice.[73] Hope sued the guards, arguing that they violated the Eighth Amendment's prohibition against cruel and unusual punishment.[74]

The Eleventh Circuit granted the guards immunity, holding that Hope failed to meet the second prong of the qualified immunity test. Although the court found that the guards had violated the Eighth Amendment by using the hitching post for punishment, it determined that "the facts in the two precedents on which Hope primarily relied" were not "materially similar," and therefore they were insufficient to show that the violation was clearly established.[75] The Supreme Court reversed. Rather than find that the precedents cited by Hope were materially similar, the Court instead held that material similarity is not necessary for the law to be clearly established.[76] The Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[77] Here, "the Eighth Amendment violation [was] obvious," and that finding alone makes the right clearly established.[78]

In its reasoning, the Court also pointed to several policies as sources of clearly established law. Notwithstanding the finding of obviousness, it held that there were several other sources clearly establishing the right at issue:

> [I]n light of binding Eleventh Circuit precedent, an Alabama Department of Corrections [ ] regulation, and a [Department of Justice] report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the [guards'] conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[79]

Two years before Hope was handcuffed to the hitching post, the ADOC created a regulation authorizing the use of the hitching

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72 *Id.*

73 *Id.* at 734–35.

74 *Hope*, 536 U.S. at 735.

75 *Id.* at 736 (internal quotation marks omitted) (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)).

76 *Id.* at 741 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts.").

77 *Id.*

78 *Id.* at 738.

79 *Id.* at 741–42 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

post in certain situations and requiring "that an activity log should be completed for each [ ] inmate [on the hitching post], detailing his responses to offers of water and bathroom breaks every 15 minutes."[80] The Court noted that the guards' lack of such log in this case "provides [ ] strong support for the conclusion that [the guards] were fully aware of the wrongful character of their conduct."[81] Additionally, the Court's holding that "'a reasonable person would have known' [ ] of the violation is buttressed by the fact that the DOJ specifically advised the ADOC of the unconstitutionality of its practices before the incidents in this case took place."[82] Because the guards in this case had "fair and clear warning" of the wrongful nature of their conduct, the Court held that they violated clearly established law and denied their defense of qualified immunity.[83]

Hope stands for the proposition that clearly established law is not limited only to case law in which the specific facts of the case have previously been found to violate rights; rather, an officer's conduct can be so obviously violative of rights that the officer is denied qualified immunity even without a precedential case on point.[84] In other words, there is an obviousness exception to the clearly established law prong of the qualified immunity test.[85] This obviousness exception means that an officer can be denied qualified immunity even in factually novel circumstances. It also provides an additional legal argument for plaintiffs to challenge qualified immunity: they can argue—either in addition to

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80 *Hope*, 536 U.S. at 744.

81 *Id.*

82 *Id.* (citing *Harlow*, 457 U.S. at 818). "[T]he DOJ advised the ADOC to cease use of the hitching post in order to meet constitutional standards." *Id.* at 745. Notably, the Court did not require that these particular guards knew about the DOJ's recommendations:

> Although there is nothing in the record indicating that the DOJ's views were communicated to [the guards], this exchange lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment.

Id.

83 *Hope*, 536 U.S. at 746 (quoting *Lanier*, 520 U.S. at 271).

84 *Id.* at 741.

85 Benjamin S. Levine, *"Obvious Injustice" and Qualified Immunity: The Legacy of* Hope v. Pelzer, 68 UCLA L. REV. 842, 862 (2021). Since the Court decided *Hope*, it has given very little guidance about how exactly to apply the obviousness exception. For several years after *Hope*, "the Supreme Court [ ] appeared to retreat substantially from the decision." *Id.* at 863. But in 2020, the Court decided *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020), in which it relied explicitly on *Hope*'s obviousness exception to deny qualified immunity. *Id.* at 870. Attorney Benjamin Levine commented that in *Taylor*, "the Court clearly answered the question of whether *Hope* remains good law, [but] it provided little insight regarding when courts should apply it." *Id.* at 871.

pointing to analogous case law or in the alternative—that the officer's actions were so obviously wrong that no prior case law is necessary to have put the officer on notice that their actions were wrongful.[86]

Hope belies *Davis*'s assertion that only case law qualifies as clearly established law. *Hope* was decided after *Davis*—and did not mention *Davis* at all—but there is no indication that *Hope* overturned *Davis* or that *Davis* is no longer good law. In fact, the Court has cited *Davis* in the years since *Hope*.[87] While the Court has not provided a definitive answer for the role that policies should have in the second prong of the qualified immunity test, *Hope* suggests there is room in the analysis for their consideration.

B. Discord and Disagreement in the Lower Courts

Predictably, the Supreme Court's ambiguity concerning the use of policies as clearly established law has created confusion and inconsistency among the lower courts. There is no discernable principle controlling when courts consider policies in the qualified immunity analysis and when they reject them as irrelevant. Sometimes courts cite *Davis* or *Hope* to support their rejection[88] or consideration[89] of policies; sometimes courts reject or consider policies without any justification.[90] Part II.B.1 provides examples

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86 Levine found that circuit courts follow one of two approaches to the clearly established law analysis: some circuits "default to a search for reasonably similar precedent and treat the possibility of obvious violations as something of an outlier," while others follow a "multitrack" approach in which "the possibility of obvious violations [is] baked into . . . the clearly established analysis," which "obligate[s] judges at minimum to acknowledge the possibility that any given case that c[omes] before them could present an obvious violation." Levine, *supra* note 85, at 899–900.

87 *See* Ziglar v. Abbasi, 582 U.S. 120, 151–52 (2017) (quoting *Davis*, 468 U.S. at 195) (noting that clearly established law must be narrowly interpreted, because "[t]o subject officers to any broader liability would be to 'disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties'").

88 *See, e.g.*, Verret v. Ala. Dep't. of Mental Health, 511 F. Supp. 2d 1166, 1176 (M.D. Ala. 2007) ("[T]his Court will follow the binding precedent established by *Davis* and hold that [the defendant's] violation of policy 20–16 does not forfeit her right to qualified immunity.").

89 *See, e.g.*, Furnace v. Sullivan, 705 F.3d 1021, 1027–28 (9th Cir. 2013) (observing that "in *Hope*, for example, the Supreme Court looked to rules promulgated by the Alabama Department of Corrections to aid it in determining whether a prison guard was on notice of constitutional limitations on the use of force," and therefore evaluating the prison's policy in this case as "relevant to determining whether the officers could have thought their conduct was reasonable and lawful").

90 *See, e.g.*, Stamps v. Town of Framingham, 813 F.3d 27, 42 (1st Cir. 2016) (explaining that "police officers are customarily taught not to do what [the officer] did. . . . Not only

of internal inconsistency within circuits. It shows that, even within a single circuit, different cases take opposite stances on whether to consider policies in the qualified immunity analysis. Part II.B.2 discusses why courts choose to cite policies in their analyses. It suggests that courts use policies because of qualified immunity's underlying rationale of notice: officers are more likely to be on notice of their department's policies than on notice of case law, and judges are responding to this reality by citing information that officers realistically should have known. Although it is clear that the lower courts have taken positions on whether policies should factor into the qualified immunity analysis, they have not grappled with the rationales for these positions. The result is a fractured and unreasoned application of policies that can depend on the location of the alleged conduct or the particular panel of judges hearing the case.

1. Internal inconsistency.

The inconsistency in lower courts' consideration of policies cannot accurately be described as a circuit split because there is inconsistency even *within* circuits. For example, the Tenth Circuit has both approved and renounced the consideration of policies in the qualified immunity analysis. In *Weigel v. Broad*,[91] the Tenth Circuit placed significant emphasis on officer training in a case in which highway patrol officers killed Bruce Weigel by asphyxiation, restraining his hands and feet and applying pressure on his back while he was on the ground.[92] The Tenth Circuit held that the officers were not entitled to qualified immunity because they should have known not to restrain the decedent in that way.[93] The court detailed that officers were trained precisely not to do what they did to Weigel: "Numerous training materials provided to the troopers addressed the risks of putting weight on an individual's back when the person is lying on his stomach. During the troopers use-of-force training . . . they were provided with extensive written materials, oral lectures, and audiovisual presentations regarding the dangers of . . . positional asphyxiation."[94] The Tenth Circuit's clearly established law finding did not rely on

had the unreasonableness of [the officer's] alleged conduct been clearly established as a legal matter, but it had also been well established in a manner that is actually useful to police officers" through policy and training).

91 544 F.3d 1143 (10th Cir. 2008).

92 *Id.* at 1148–49.

93 *Id.* at 1153.

94 *Id.* at 1149–50.

case law at all[95] and was unequivocal that the department's policies alone served as clearly established law: "The defendants' training informed them that the force they used upon Mr. Weigel produced a substantial risk of death. Because it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect . . . defendants' unnecessary use of deadly force violated clearly established law."[96]

However, the Tenth Circuit's assertion in *Weigel* that police training is relevant to the qualified immunity analysis is not consistent across all its cases. In *Frasier v. Evans*,[97] the Tenth Circuit explicitly rejected consideration of police training as clearly established law in a case about First Amendment rights.[98] This case arose when Levi Frasier recorded a video of police officers using force while arresting a suspect, and the officers responded by seizing his tablet and searching for the video without his consent.[99] The district court found that the defendant officers "were not entitled to qualified immunity because they actually knew from their training that such a First Amendment right purportedly existed."[100] The Tenth Circuit reversed, unequivocally stating that the officers' training could not be considered in the analysis: "judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry."[101] According to the Tenth Circuit in this case—and despite *Weigel*—training can never provide the basis for clearly established law.[102]

The Tenth Circuit is not the only circuit to display internal inconsistency regarding the consideration of policies as clearly

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95 Interestingly, the Tenth Circuit also discussed the facts of a similar precedential case, but not for the purpose of finding a court case that clearly established the law. Rather, the court found this precedent noteworthy because of its relation to the officers' training program: "[The prior case] turns out to be highly relevant to this case, but not for its legal teaching. Rather, the opinion was apparently the reason for the extensive [ ] training on positional asphyxia that we describe above." *Id.* at 1154.

96 *Weigel*, 544 F.3d at 1155.

97 992 F.3d 1003 (10th Cir. 2021).

98 *Id.* at 1015.

99 *Id.* at 1008.

100 *Id.* at 1015.

101 *Id.*

102 *Frasier*, 992 F.3d at 1019 ("[I]t is beyond peradventure that judicial decisions concretely and authoritatively define the boundaries of permissible conduct in a way that government-employer training never can. Thus, irrespective of the merits of the training that the officer defendants received concerning the First Amendment, it was irrelevant to the clearly-established-law inquiry here.").

established law,[103] and yet, courts have not grappled with this irregularity. In none of these cases did the court distinguish or even acknowledge the discrepancy in the use of policies within the circuit. The dichotomy between *Hope* and *Davis* does not explain the disparity either: *Frasier* did not cite *Davis*, and while *Weigel* cited *Hope*, it did not mention *Hope*'s own use of policies in its reasoning.

2. Policies as providing realistic notice.

As a general matter, when courts do consider policies to determine whether a reasonable officer would have been on notice that their actions were wrongful, they are more likely to find that clearly established law was violated and deny qualified immunity. This may be because policies add to the collection of clearly established law, making it more likely that a court finds an analogous situation to the conduct at issue.[104]

When courts rely on policies to deny qualified immunity, typically they cite policies in addition to case law as clearly established law.[105] In these cases, courts could have denied qualified immunity without any reference to policies, but instead chose to include a discussion of relevant policies to show why officers should have known their actions were improper. For example, in *Nelson v. Correctional Medical Services*,[106] the Eighth Circuit denied qualified immunity to a corrections officer who shackled an

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[103] *Compare* Nelson v. Corr. Med. Servs., 583 F.3d 522, 533–34 (8th Cir. 2009) (denying qualified immunity to officers who shackled an incarcerated pregnant woman in labor in violation of the prison's regulations) *with* Anderson v. City of Minneapolis, 934 F.3d 876, 884 (8th Cir. 2019) (granting qualified immunity to first responders who failed to properly treat a person with hypothermia in violation of department regulations); Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005) (denying qualified immunity to a police officer who violated a plaintiff's Fourth Amendment rights by shooting him in the head with "less lethal" munitions in violation of the department's policy) *with* Knight *ex rel.* Kerr v. Miami-Dade County, 856 F.3d 795, 813 (11th Cir. 2017) (granting qualified immunity to police officers who violated their pursuit policy, which led to the police shooting into the decedent's car, wounding one person, and killing two others).

[104] *See Notable Findings*, INST. FOR JUST., https://perma.cc/M39F-5PN5 ("The larger the federal circuit population, the easier it is to overcome qualified immunity. That's because larger circuits have more cases; more cases result in more SOCELs [Statements of Clearly Established Law]; and more SOCELs provide more opportunities to overcome qualified immunity.").

[105] This is much like the Supreme Court's opinion in *Hope*: "Even if there might once have been a question regarding the constitutionality of this practice, [circuit precedent] as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful." *Hope*, 536 U.S. at 745–46.

[106] 583 F.3d 522 (8th Cir. 2009).

incarcerated pregnant woman while she was in labor.[107] The Eighth Circuit found that "[the plaintiff]'s protections from being shackled during labor had thus been clearly established by decisions of the Supreme Court and the lower federal courts before [the conduct at issue]. The [Arkansas Department of Corrections] administrative regulations in effect also reflected the constitutional protections recognized in these judicial decisions."[108] The court could have concluded that the law was clearly established merely by precedential court cases, but it instead held that policies also clearly established the law.

Much like the Eighth Circuit in *Nelson*, many courts use policies to buttress an already determined conclusion—the case would come out the same way if policies were not considered.[109] So why include a discussion of policies at all? The answer may lie in qualified immunity's basis in notice. As explained above, the justification for qualified immunity is rooted in the idea that officers should be liable only when they had fair warning that their conduct was unlawful.[110] The clearly established law prong of the test is meant to protect officers when they could not have known of the illegality of their conduct.[111] However, relying on case law as clearly established law assumes that case law actually provides notice to police officers. Empirically, this assumption is false: Professor Joanna Schwartz found that police officers are not taught the holdings of cases or trained based on what the courts find constitutes clearly established law.[112] And even if there were efforts to regularly inform officers of developments in case law, Professor Schwartz points out that "[t]here could never be sufficient time to train officers about all the court cases that might clearly establish the law for qualified immunity purposes," and regardless, officers would be extremely unlikely to actually recall those court decisions at the moment they take action.[113] In this

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107 *Id.* at 533–34.

108 *Id.* at 533; *see also id.* ("Since these rules were in effect when [the officer] was hired, trained, and retrained and remained in effect when she accompanied [the plaintiff] to the hospital, her knowledge of them is presumed and they applied to her decisions and actions.").

109 *See, e.g.*, *Stamps*, 813 F.3d at 42 (denying qualified immunity to a police officer who accidentally shot and killed an unarmed and nonthreatening man during the execution of a search warrant because both precedent and policies clearly established the constitutional violation).

110 *See supra* Part I.

111 Anderson v. Creighton, 483 U.S. 635, 640 (1987).

112 Joanna C. Schwartz, *Qualified Immunity's Boldest Lie,* 88 U. CHI. L. REV. 605, 672–73 (2021) [hereinafter Schwartz, *Qualified Immunity's Boldest Lie*].

113 *Id.*

sense, qualified immunity is based on a legal fiction: it is designed to protect only officers who could not have known that their conduct violated case law, while assuming those officers actually are informed about that case law.

It is possible that courts cite policies in addition to case law as a means of rectifying this legal fiction at the heart of qualified immunity. While courts can deny qualified immunity based on case law alone, they sometimes choose to additionally confirm that a reasonable officer in the defendant's position would have *actually* been on notice that their conduct was unlawful because their own department's policies advised them not to take those actions. When an officer is explicitly trained not to put weight on a person's back while they are handcuffed on the ground to prevent unnecessary deaths, and the officer violates those policies while killing a person,[114] the court can confidently state that a reasonable officer in their position would have been on notice of the clearly established law they violated.[115] The black-letter qualified immunity doctrine does not require such analysis, but it satisfies the original justifications of the doctrine to ensure that a reasonable officer would have had actual notice of the clearly established law. As the First Circuit put it, policies can clearly establish law "in a manner that is actually useful."[116]

On the other side, judicial disregard of policies that inform officers of potential constitutional violations creates a qualified immunity paradox: courts are granting immunity to officers who actually knew their actions violated rights based on the legal fiction that those officers would not have known of case law determining that their actions violated rights. Without on-point precedent, if an officer's own department's policies explain that an action would violate the law—and the officer performs that action anyway—the officer is entitled to qualified immunity because they were not on notice that their actions would violate "clearly established law." The doctrine's reliance on an objective reasonable officer is the reverse of reality: this "reasonable officer" is assumed to have encyclopedic knowledge of all their circuit's qualified immunity case law but does not know their own department's policies.

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114 *Weigel*, 544 F.3d at 1150.

115 Often, when policies are used to bolster denials of qualified immunity that can be reached only by citing case law, the facts are particularly egregious. From a legal realist perspective, it is possible that judges are also citing departmental policies in these cases to support their intuition that these plaintiffs should get their days in court.

116 *Stamps*, 813 F.3d at 42.

This paradox was on display in the case of the officers who forcibly took Frasier's tablet to delete a video without his consent, which the officers were told in training was a First Amendment violation.[117] The court said that the officers' actual knowledge of the illegality of their actions was not enough to deny them qualified immunity: "even if the officers subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights," they were still entitled to qualified immunity because the fictional reasonable officer who gets information about constitutional rights from case law could not have known that such actions would violate Frasier's rights.[118] If qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law,"[119] why should an officer with actual notice of the illegality of their actions still get immunity?

III. INCORPORATING POLICIES AS CLEARLY ESTABLISHED LAW

Departmental policies currently occupy a problematic gap in the qualified immunity doctrine. Because of the absence of a clear statement from the Supreme Court about the applicability of policies as clearly established law, lower court consideration of policies has been inconsistent and arbitrary. This practice is worrisome because it reveals that judges make decisions about whether to consider policies without reasoned analysis. This lack of explanation invites the criticism that judges are acting like policymakers, which threatens the institutional legitimacy of the courts.[120] Additionally, the lack of uniformity has troubling theoretical implications. Qualified immunity relies on a theory of notice, so it is doctrinally inconsistent that officers who are sued for their actions cannot reliably know whether their department's policies will play a role in the determination of their immunity.

This Part discusses how and to what extent departmental policies should be considered in the qualified immunity analysis. Part III.A examines the potential consequences of considering policies in the qualified immunity analysis and offers reasons why those potential consequences are not likely to transpire.

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117 *Frasier*, 992 F.3d at 1011–12.

118 *Id.* at 1019.

119 Malley v. Briggs, 475 U.S. 335, 341 (1986).

120 *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 39–40 (2008) ("[T]he [judiciary's] influence depends in large part on the reasoning in its written decisions. When that reasoning suffers from obvious inconsistencies or other shortcomings, the [judiciary] itself suffers as an institution.").

Part III.B describes the spectrum for considering policies that lies within the Supreme Court's prior qualified immunity jurisprudence by following first *Hope* and then *Davis* to their logical conclusions. Within this spectrum, policies can be considered as clearly established law without requiring any change in precedent from the nation's highest Court. Part III.C proposes a method for limiting which policies can serve as clearly established law based upon a theory of attenuation. Finally, Part III.D presents a middle-ground solution that considers policies as an objective factor in the obviousness analysis. This solution situates policies as having a limited role that assists judges in determining when conduct obviously violates clearly established law.

A. Pragmatic Implications of Considering Policies

If there is to be any increased consideration of departmental policies in the qualified immunity analysis, it is crucial to examine the consequences that this change might create. The most concerning impact of considering policies in the qualified immunity analysis is that it may disincentivize the implementation of new policies. The Constitution serves as a floor protecting people's rights, and policies can offer a higher level of protection by prospectively discouraging police conduct that would not per se violate constitutional rights but is still harmful. Departments might respond to this change in clearly established law by refraining from implementing new policies, or even repealing their existing policies that serve to protect people and guard against misconduct. This would undermine the very purpose of the new approach by further limiting remedies for victims of rights violations.

However, there is reason to be skeptical that departments would respond in this way. Professor Schwartz has found that police departments are simply not responsive to lawsuits. Police departments do not monitor litigation against their own officers: "[Police] departments do not keep track of which officers have been named as defendants, the nature of allegations made against them, the information developed during litigation, or cases' outcomes."[121] Strangely, some departments have even intentionally ignored information from lawsuits.[122] Likewise, "governments do not appear to be collecting enough information about

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[121] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 956 (2014) [hereinafter Schwartz, *Police Indemnification*].

[122] Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045 (2010).

lawsuits to make educated decisions about whether or how to reduce the police activities that prompt these suits."[123] Additionally, departmental policies do not accord with case law. When police trainings use hypothetical scenarios to teach officers the limits of their power, they do not draw on facts or holdings from court decisions, and they offer no guidance about what courts have found constitutional.[124] Given this widespread lack of attention to judicial decisions, it is unlikely that the inclusion of departmental policies in clearly established law would result in any substantial change in departmental policies.

Moreover, even if the consideration of departmental policies as clearly established law actually deterred the development of departmental policies, the threat of municipal liability would serve as an incentive to continue promulgating robust policies for officers.[125] When individual officers are sued, police departments and local governments are not held accountable via vicarious liability.[126] However, plaintiffs can bring an additional "failure to train" claim against the municipality under § 1983.[127] A failure-to-train claim requires showing that the "municipality's failure to train its [officers] in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants."[128] As the Supreme Court noted, this claim turns on the "adequacy of the training program in relation to the tasks the particular officers must perform."[129] Given this additional form of liability, refusing to implement policies that inform officers of proper conduct would open the municipality up to increased risk of liability; it would invite claims that the municipality acted with deliberate indifference by refusing to implement policies for its officers. This exposure to liability would disincentivize municipalities from refusing to implement new policies for police departments. Because most police

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123 Schwartz, *Police Indemnification*, *supra* note 121, at 956.

124 *See, e.g.*, Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 112, at 653.

125 *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1835–36 (2016).

126 City of Canton v. Harris, 489 U.S. 378, 386–87 (1989) (holding that "a city [is not] automatically liable under § 1983 if one of its employees happened to apply [its] policy in an unconstitutional manner"). However, almost all police officers who are found liable for their conduct and ordered to pay damages are indemnified by their local government. Schwartz, *Police Indemnification*, *supra* note 121, at 912. As explained above, it is not clear that this indemnification actually incentivizes municipalities to take steps to reduce such payments. *See supra* text accompanying notes 121–24.

127 *Harris*, 489 U.S. at 386–87.

128 *Id.* at 389.

129 *Id.* at 390.

departments are agents of municipal governments,[130] municipalities and departmental policies are inextricably intertwined.[131] Therefore, municipal liability acts as a potential deterrent to circumscribing departmental policies in response to their consideration in the qualified immunity analysis.

An additional concern stemming from considering policies as clearly established law is that it would localize the qualified immunity analysis such that an officer's location could determine their susceptibility to liability. Currently, the scope of clearly established law is different in each appellate circuit. For example, an officer who works in Washington, D.C., is much more likely to be granted qualified immunity for lack of precedent clearly establishing the law than an officer who commits an identical rights violation in California due to the size of the circuits and the breadth of clearly established precedent in each one.[132] This location-based disparity would be amplified if the department policies were included in clearly established law. Two officers who committed identical constitutional violations across county borders from each other could result in opposite immunity decisions based on their respective department's policies.[133]

However, localizing the qualified immunity analysis may provide positive effects that outweigh the potential costs. Any consideration of departmental policies in the qualified immunity analysis gives local governments more agency over the judicial accountability process. When courts consider policies as clearly established law, they are effectively giving local governments prospective input into determining what notice reasonable police officers actually have. Local governments that are in favor of greater accountability for officers could exert some increased control in ensuring this accountability by creating policies that

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130 For example, the Chicago Police Department is a department of the City of Chicago. *See Police*, CITY OF CHI., https://perma.cc/ZH2D-3D86.

131 *See* Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMIN. ONLINE 111, 126–27 (2022) (finding that "large municipalities tend to restrict police use of the chokehold through police department procedural manuals" (or their equivalent) and that "forty-three [of the fifty largest municipalities in the country by population] regulate police chokeholds through administrative regulations established by the police department" while other "municipalities regulate the police chokehold by way of city ordinance").

132 *See Notable Findings*, INST. FOR JUST., *supra* note 104.

133 It is not always the case that different police departments will have different policies. For example, Lexipol LLC—a private, for-profit corporation—writes manuals and training modules for many law enforcement agencies. As of 2019, Lexipol "writes police policies and trainings for over 3500 law enforcement agencies in thirty-five states." Eagly & Schwartz, *supra* note 27, at 4.

inform officers not to take specific actions the government deems wrongful. Professor Adam Davidson suggests this outcome would not be atypical: the federal judiciary is largely antagonistic to civil rights plaintiffs, whereas local government officials can be more sympathetic and amenable to accountability.[134] Moreover, shifting some of the power of making qualified immunity determinations from the courts to local governments—by allowing government-made policies in addition to case law to be considered as clearly established law—has a democratizing effect. Local governments are elected by constituents who are directly impacted by police conduct, whereas federal judges are largely insulated from community dynamics.[135] For this reason, local governments are more responsive to citizen demands for police accountability than the federal judiciary. Using departmental policies as clearly established law would give citizens a greater influence in that accountability.

While increasing consideration of departmental policies in the qualified immunity analysis may raise questions about collateral consequences, there is little reason to believe that it would deter the creation of new departmental policies altogether. In fact, it might even empower local governments to implement departmental policies that would increase the likelihood of accountability. The consideration of policies may make qualified immunity results deviate across jurisdictions, but clarity from appellate courts that policies are relevant to the analysis will give local governments within each circuit notice of the impact that their policy decisions may have and allow them to respond accordingly. For these reasons, if courts were to consider departmental policies as clearly established law in a more uniform manner, there is little reason to believe it would create harmful unintended consequences.

B. Within the Spectrum that Precedent Allows: From *Hope* to *Davis*

The Supreme Court's conflicting use of policies as clearly established law in *Hope* and *Davis* provides the bookends between

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[134] *See* Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1468 (2022) (explaining that the relief attained by many civil rights plaintiffs comes from settlement agreements with local and state governments, which "suggests that state and local governments may be more willing to expand the relief given to civil rights plaintiffs and to discipline bad-acting officers than the federal courts").

[135] *Id.* at 1527–28.

which lower courts can consider policies without requiring a change in precedent from the Supreme Court. Any incremental consideration of policies between *Davis*'s skeptical rejection and *Hope*'s expansive incorporation is permissible. Therefore, any solution situated within the logical conclusions of *Hope* and *Davis* can be implemented by lower courts without requiring the Supreme Court to explicitly adopt the approach. This Section examines the two ends of the spectrum between the Court's implications in *Hope* and *Davis*.

One end of the spectrum takes *Hope* to its logical conclusion and makes policies dispositive of the clearly established law analysis. Under this approach, officers who contravene their own policies while committing constitutional violations are not entitled to qualified immunity because they violated clearly established law by acting contrary to their department's policy. The first prong of the qualified immunity test would proceed with no change: the court would determine whether the officer's action was a constitutional violation. However, the second prong of the qualified immunity test could be met by pointing to a departmental policy that the officer violated.[136] While this would be a change from the current practice of applying the qualified immunity test, it remains aligned with the doctrine's justification. It preserves qualified immunity's protection for officers who had no notice that their conduct could violate constitutional rights, while providing a remedy for those whose constitutional rights were violated by an officer who should have known better—either because their department's policies prohibited their conduct or because their conduct was so violative of constitutional rights that it was obvious.

This use of policies also aligns with the doctrine's requirement that qualified immunity be judged objectively and be capable of resolution on summary judgment.[137] In *Hope*, the Court found that reasonable officers in the defendants' position "should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment," even though there was no evidence that those officers were aware of the DOJ findings advising against any use of the hitching post.[138]

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[136] Of course, the court would still perform the traditional analysis of the clearly established law prong, by analogizing to prior case law, in addition to analyzing the department's policies. Either case law or departmental policies could serve to fulfill the second prong of the qualified immunity test.

[137] *See supra* Part I.

[138] Hope v. Pelzer, 536 U.S. 730, 745 (2002).

Because a reasonable officer would have been aware and acted in accordance with the DOJ report, it is irrelevant whether the particular defendant officers knew about the DOJ report. Under this conception of policies in the clearly established law prong, a policy prohibiting an officer's conduct is enough to determine that a reasonable officer should have been on notice that the right in question was clearly established, even absent a showing that the officer had actual knowledge of the policy. This is because a reasonable officer would know and act in accordance with their own department's policies.

The other end of the spectrum takes *Davis* to its logical conclusion and forbids courts from considering policies in the clearly established law analysis. Under this approach, judges could no longer use policy violations as a means of "buttress[ing]"[139] a finding that a violation was clearly established. Departmental policies would be irrelevant to determining whether an officer should be granted qualified immunity.

This approach, in practice, would not change the qualified immunity analysis very much, as many courts that point to departmental policies to deny qualified immunity also cite case law as a reason why the clearly established law prong of the test is met. Yet this approach would also fail to address two current problems with the application of qualified immunity. First, in cases like *Frasier*, where a departmental policy explicitly informed an officer that their actions might violate the Constitution but where there is no on-point case law, rejecting policies as part of the clearly established law analysis would still result in the paradox in which officers who are clearly on notice of the illegality of their actions are still granted immunity.[140] Second, the courts' ability to choose which prong of the qualified immunity analysis to perform first has led to a stagnation in constitutional decisions, which leaves many plaintiffs with no remedy for their rights violations.[141] This approach would fail to provide additional sources of clearly established law, continuing the lack of accountability for officers who violate constitutional rights despite guidance warning them against taking such actions.

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139 *Id.* at 744.

140 *See supra* Part II.B.2.

141 *See generally* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015) (finding that after the Supreme Court ruled that lower courts have discretion to choose which prong of the qualified immunity test to decide first, courts decided the clearly established law question at lower rates, leading to less clearly established law available for the next plaintiff to cite).

The Supreme Court's case law both indicates that departmental policies may not be considered in the qualified immunity analysis in *Davis* and implies that they can be dispositive of the clearly established law prong in *Hope*. Ultimately, taking either *Hope* or *Davis* to its logical conclusion creates adverse consequences: following *Hope*'s approval for an expansive consideration of policies may create disincentives for the creation of policies,[142] while *Davis*'s rejection of policies would fail to address the legal fiction at the heart of qualified immunity.[143] The Court's hesitance to commit to a single approach suggests that a middle-ground solution that situates the consideration of policies within the spectrum of *Hope* to *Davis* is preferable.

C. Which Policies Should Apply

Officers are subject to many policies, and not all of them are related to constitutional questions. In order to efficiently incorporate policies into the qualified immunity analysis while maintaining the justifications for the doctrine, it is important to clarify which departmental policies could be considered as clearly established law. The consideration of policies in the clearly established law analysis should be confined to policies that directly protect constitutional rights as a matter of law.[144]

A policy directly protects constitutional rights when the relationship between the policy and the constitutional violation is not attenuated.[145] If compliance with the policy would have necessarily aligned a reasonable officer's actions with constitutional rights, then the policy directly protects those rights.[146] If a

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142 *See supra* Part III.A.

143 *See supra* Part II.B.2.

144 Professor Avidan Cover has argued that policies should play a role in the clearly established law analysis for qualified immunity but asserted that a policy becomes relevant if the plaintiff "show[s] that the policy was *intended* to protect constitutional rights or significant liberty interests." Cover, *supra* note 125, at 1831 (emphasis added). However, this may implicate factual questions of departmental intent that cannot be determined by the court in a motion for summary judgment.

145 *See* Est. of Gaither *ex rel.* Gaither v. District of Columbia, 833 F. Supp. 2d 110, 123 n.7 (D.D.C. 2011) (explaining that the policy at issue in *Hope* was relevant because "the relationship between the regulations and the constitutional violation in that case was far less attenuated than it is in this case: if the defendants in *Hope* followed the regulation at issue, that would have transformed" the defendants' conduct from a constitutional violation to an ordinary—and constitutional—correctional measure).

146 This inquiry is more clearly resolved when the policy at issue is in the form of a rule, rather than a standard. However, policies that take the form of a standard can also directly protect constitutional rights. Judges are well positioned and practiced at applying such tests to standards, and the typical procedures of litigation are appropriate for raising and challenging arguments concerning the attenuation of standard-like policies.

reasonable officer could have committed the same action while complying with the policy, then the policy is attenuated from the constitutional violation.[147] For example, a policy that bans applying pressure to a person's back while they are handcuffed on the ground[148] directly protects a constitutional right because, if a reasonable officer had complied with the policy, they would not have used excessive force in violation of the Fourth Amendment. But a policy requiring officers to keep their body cameras on would be attenuated from a Fourth Amendment excessive force violation because reasonable officers could comply with the body camera policy and still use excessive force in violation of the Fourth Amendment.[149]

Limiting the scope of policies in this way ensures that their consideration does not overexpand the qualified immunity analysis. First, it preserves qualified immunity's protection against the burdens of litigation.[150] Courts must be able to evaluate qualified immunity in motions for summary judgment in order to protect officers from frivolous claims. Deciding whether a policy is relevant as a matter of law allows judges to resolve these issues without involving a trier of fact. Second, this approach to the consideration of policies does not abrogate the Supreme Court's mandate that judges have discretion to decide qualified immunity's two prongs in either order.[151] Because policies can protect

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Additionally, a violation of a policy in the form of a standard is probably less likely to be deemed "obvious." *See infra* Part III.D.

147 This approach could also apply to qualified immunity defenses arising from statutory claims. In those cases, the relevant inquiry would be whether the policy is attenuated from the statutory right, rather than the constitutional right. For example, the Eleventh Circuit found that an incarcerated Santeria priest was not entitled to damages under the Religious Freedom Restoration Act (RFRA) despite a Bureau of Prisons Program Statement requiring prison officials to have reasonable methods for obtaining religious items, because the statement did not make clear what types of religious accommodations are mandated by RFRA. *See* Davila v. Gladden, 777 F.3d 1198, 1211 (11th Cir. 2015). Put in terms of this Comment's approach, this would likely be grounds for finding that the policy is too attenuated from RFRA to be informative in qualified immunity's clearly established law analysis.

148 Weigel v. Broad, 544 F.3d 1143, 1149 (10th Cir. 2008).

149 In this hypothetical scenario, where an officer uses unconstitutionally excessive force and their body camera is turned off, the body camera policy violation is attenuated from the Fourth Amendment violation because the officer could have still violated the victim's Fourth Amendment rights with the body camera on. This is not to say that every body camera violation is necessarily attenuated from the constitutional violation; there may be edge cases where a court could find that wearing a body camera would have almost certainly deterred the officer from committing the constitutional violation, for example. Attenuation is not a bright-line rule, and courts are properly situated to resolve edge cases such as this one.

150 *See supra* Part I.

151 Pearson v. Callahan, 555 U.S. 223, 236 (2009).

constitutional rights independently of whether an officer violated those rights, the consideration of policies can be performed before and unrelated to the question of whether a constitutional right was violated in the particular case.[152] This restricted scope of what policies may be considered as clearly established law will not change the nature of the qualified immunity analysis nor create an impermissible burden on courts' ability to adjudicate such cases.

D. Policies as an Objective Factor in Judging Obviousness

A measured way to standardize the use of policies in the qualified immunity analysis is to allow for their consideration in a limited capacity to facilitate the finding of clearly established law for cases in which there is not already on-point case law. The Supreme Court has established two methods for fulfilling the second prong of the qualified immunity test: on-point case law or a finding that the violation was obvious.[153] Of the two, the obviousness method stands out as more ambiguous.[154] The use of policies in order to bolster a finding of clearly established law by in-circuit precedent may provide an alternative to relying on the legal fiction at the heart of the clearly established law inquiry, but it is largely symbolic. In contrast, policies can play a functional role in cases of obviousness by inserting greater objectivity into the analysis.

Although *Hope* addressed a problematic loophole in the qualified immunity doctrine by introducing the obviousness exception, it created its own challenges. Prior to *Hope*, if an officer committed a constitutional violation in a creative or especially egregious

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[152] To provide an example of separation between the consideration of policies in the qualified immunity analysis and their applicability to the merits of a constitutional question, consider the Fourth Amendment. The Supreme Court has explicitly rejected the consideration of policies in its Fourth Amendment jurisprudence: "[T]he Fourth Amendment's meaning d[oes] not change with local law enforcement practices—even practices set by rule." Virginia v. Moore, 553 U.S. 164, 172 (2008). However, it does not follow from this holding that policies cannot be considered in evaluating qualified immunity, which is a procedural, rather than substantive, inquiry. The Court's justification for finding that a restrictive policy—one that sets the range of permissible action above the constitutional floor—does not change the evaluation of whether the Fourth Amendment was violated is based on the principle that the Fourth Amendment must be a national standard, not one that varies based on local practices. *See id.* This reasoning does not apply to policies in the qualified immunity domain, as clearly established law regularly differs across circuits.

[153] *See supra* Part II.A.2.

[154] Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope's Legacy, Neither Clear nor Established*, 29 AM. J. TRIAL ADVOC. 563, 584 (2006) (explaining that "*Hope* applied a hopelessly ambiguous fair warning standard" to the qualified immunity test).

way, they would be entitled to qualified immunity because of the lack of any factually analogous precedent in the case law.[155] *Hope* ensured that escalating the atrocity of the constitutional violation would not raise the probability of immunity in court. However, some criticized *Hope* for departing from the justifications for qualified immunity by undermining the requirement of notice.[156] Obviousness is in the eye of the beholder, and the Court did not offer any guidance on how to define obviousness. In the absence of a clearly articulated standard, *Hope*'s obviousness test "amounts to the equivalent of Justice [Potter] Stewart's 'I know it when I see it.'"[157]

Considering departmental policies in the obviousness analysis mitigates these criticisms. First, as discussed at length above, relying on policies substantially increases the likelihood that officers will have actual notice of conduct that will likely violate constitutional rights. This addresses the concern that the obviousness test is entirely retrospective and that it eradicates the fair notice upon which qualified immunity is justified. In fact, this approach improves upon qualified immunity's basis in fair notice because officers are more likely to be on notice about their policies than they are about case law.[158]

Second, it brings objectivity to the obviousness analysis. Judges' freedom to determine obviousness however they see fit and apply that determination retrospectively to cold facts creates "a situation where it is the judge's emotional reaction to the facts that determines whether a claim will be successful."[159] Policies offer a factually informed and democratically instituted position on what a reasonable officer should do in a particular situation.[160] Rather than relying on a judge to decide with the benefit of hindsight what a reasonable officer would obviously have done, a

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[155] *See* Levine, *supra* note 85, at 908 (emphasizing that qualified immunity denials based on obviousness "are indicative of judges recognizing the untenability of requiring relevant precedent in circumstances when the injustice present in a case is palpable" and stating that those denials "overwhelmingly have been decided that way for good reason, [because] a grant of qualified immunity in these cases would truly be unjust . . . a deep social harm would be done by the dismissal of these § 1983 actions on the basis of a technicality").

[156] Allen H. Denson, *Neither Clear nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 761 (2008) ("The state of the law is less certain when many cases will turn on whether a particular conclusion seems 'obvious' to a judge or not.").

[157] Golden & Hubbard, *supra* note 154, at 584 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

[158] Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 112, at 672–73.

[159] Denson, *supra* note 156, at 761–62.

[160] *See supra* Part III.A.

judge could instead look to policies created prospectively to determine how a reasonable officer would have acted. In other words, courts could rely on what officers' own departments believe are lawful and proper actions for their officers to take. Considering policies as a benchmark for obviousness constrains judges' subjective opinions with prospective information on how officers should act.

The consideration of policies would not replace other indicators of obviousness that courts sometimes use, such as general constitutional principles,[161] but provide an additional objective factor. Cases that are so clearly obvious that there would never be a written policy forbidding the action would still be resolved under the *Hope* doctrine—when the obviousness is so apparent, a policy is not needed.[162] Rather, this approach is informative for determining edge cases within the obviousness exception. When judges reasonably disagree over whether an action was obviously unconstitutional, the existence of a prospective policy that is written by those with expertise on proper officer conduct that prohibits the action serves as an objective indicator that the action was, in fact, obviously wrong. Rather than relying on a judge's instinct for what obviousness means, the consideration of policies inserts objectivity into these edge cases.

Additionally, it is especially important to consider policies in obviousness cases. When there is a specific policy on the books that prohibits an action, it is logically less likely that an officer will commit that conduct. Because officers are less likely to act in ways that violate their policies, it is less likely that there will be a prior case that clearly establishes those actions as constitutional violations. In other words, "[t]he easiest cases don't even arise."[163] Since there is a lack of case law addressing actions that policies prohibit, it is especially important to refer to a different source of clearly established law. In this way, policies provide a signaling function (by showing that actions prohibited by policies are obvious) and an accountability function (by ensuring that officers who commit those actions in spite of their departments' own policies are not more likely to be granted immunity).

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[161] Golden & Hubbard, *supra* note 154, at 585 (explaining that after *Hope*, "notice may depend on more generalized notions of constitutional rights that are not tied to specific circumstances but that emanate from the text of the Constitution itself").

[162] *See, e.g.*, K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) ("There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.").

[163] United States v. Lanier, 520 U.S. 259, 271 (1997).

The Ninth Circuit essentially adopted this approach when it reversed the district court's grant of qualified immunity in *Drummond*.[164] Recall that Drummond was a mentally ill man who fell into a permanent vegetative state after officers restrained him and kneeled on his back for upward of twenty minutes.[165] There was considerable evidence that the officers should have known their actions would violate his rights, including the fact that "the officers received training from their *own police department*" warning against putting pressure on a person's back or neck to restrain them.[166] The Ninth Circuit did not point to case law to hold that a clearly established right was violated in this case.[167] Instead, the Ninth Circuit said this violation was obvious and cited *Hope* as the reason to deny qualified immunity.[168] Although not stated explicitly, the policies that the officers violated served as an objective indication that the rights violation was indeed obvious. Because a reasonable officer in the defendants' position would have been on notice of and followed their own department's policies, these officers committed an obvious rights violation and were rightfully denied qualified immunity.

CONCLUSION

Qualified immunity doctrine has strayed far from its roots as a protection against liability only for officers who could not have known their actions would violate constitutional rights.[169] The narrow interpretation of what constitutes clearly established law has led to absurd results—for instance, officers granted immunity despite flagrantly violating their own department's policies—simply because there is no prior, on-point case law holding that the officers' actions were unconstitutional. The reliance on case

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[164] Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1054 (9th Cir. 2003).

[165] *Id.* at 1054–55.

[166] *Id.* at 1061–62 (emphasis in original).

[167] *See id.* at 1062:

> We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case.

[168] *Id.* at 1061.

[169] *See, e.g.*, Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 65–68 (2016) (describing the shift in the Supreme Court's qualified immunity cases which have "place[d] a thumb on the scales favoring public officials . . . and justif[ied] dismissing an even greater majority of § 1983 suits on qualified immunity grounds").

law is nothing more than a legal fiction, as officers are not actually informed about case law in their jurisdiction.[170]

Moreover, the doctrine's reliance on case law as clearly established law is underinclusive: not every constitutional violation makes it into a circuit court opinion.[171] The most notable example of this is the very publicized killing of George Floyd. Three police officers knelt on his back and neck for over nine minutes.[172] These officers should have known their actions were wrong: not only because Floyd repeatedly told them he could not breathe; not only because bystanders pleaded with the officers to stop; not only because what they were doing was "obvious[ly]"[173] a rights violation; but also because their own police department's policies forbid kneeling on Floyd's neck in that way.[174]

Although there was plenty of litigation after Floyd's death—criminal convictions of all four officers involved in his murder[175] and a civil lawsuit brought against the officers and the city of Minneapolis—there was no qualified immunity case law created. Qualified immunity does not apply in criminal cases, and the civil lawsuit was settled before any defendants even responded to the complaint.[176] Therefore, Floyd's highly publicized murder created no "clearly established law." Under the logic that only prior case law can clearly establish a right, the next officer to kneel on someone's neck may be granted qualified immunity on the basis that there were no prior cases with analogous facts, so therefore the officer could not have had fair warning that their action was wrongful. This conclusion defies reality by ignoring that George Floyd's murder put every police officer in the country on notice of that wrongful conduct.[177]

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170 *See* Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 112.

171 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 46 (2017) (finding in a study of 1,183 Section 1983 lawsuits that 490 cases were resolved via settlement or Rule 68 judgment).

172 Amy Forliti, *Prosecutors: Officer Was on Floyd's Neck for About 9 Minutes*, AP NEWS (Mar. 4, 2021), https://perma.cc/D5NQ-NSXV.

173 Hope v. Pelzer, 536 U.S. 730, 741 (2002).

174 Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

175 Jeffrey C. Kummer & Nicholas Bogel-Burroughs, *Last 2 Officers Involved in George Floyd's Death Are Sentenced to Prison*, N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/us/george-floyd-j-alexander-kueng.html.

176 Steve Karnowski & Amy Forliti, *Floyd Family Agrees to $27M Settlement Amidst Ex-Cop's Trial*, AP NEWS (Mar. 12, 2021), https://perma.cc/UYS6-FGU4.

177 This Comment is cabined to specifically proposing the use of departmental policies as clearly established law, in order to precisely delineate the potential consequences and benefits such a change would create. *See supra* Part III.A. But the logic underlying this

A reasonable officer in the position of the officers who killed George Floyd would have acted in accordance with their department's policies and not knelt on the back and neck of an unresisting man for over nine minutes. Just as a reasonable officer would have followed their training and not have put pressure on Brian Drummond's back until he became permanently unconscious.[178] The doctrine of qualified immunity must be flexible enough to account for these sources of clearly established law, even though they are not case law. In all the jurisdictions that implemented policies banning chokeholds following the protests over Floyd's murder,[179] officers who use chokeholds should not be able to claim that a lack of case law means they could not have known their actions were wrong and should be granted immunity. If the purpose of qualified immunity is to protect "all but the plainly incompetent or those who knowingly violate the law,"[180] it must be expansive enough to consider the sources that actually give notice to officers about what violates the law.

Qualified immunity no longer resembles the good faith defense to liability that the Supreme Court first created a half-century ago. In *Davis*, the Supreme Court acknowledged the logic that officers who do not act in accordance with their department's applicable regulations should not be immune from liability,[181] but the Court chose not to incorporate policies in the qualified immunity analysis because "once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner."[182] This Comment provides that principled manner. It shows that policies can be incorporated into qualified immunity's clearly established law analysis in a way that clarifies *Hope*'s obviousness test and provides actual notice to officers prior to litigation. This both aligns the doctrine with its underlying purpose and provides

proposed solution—that departmental policies are significantly more likely to provide officers with actual notice than case law—also applies to mass movements and other political phenomena that could serve to put all officers on notice of wrongful conduct. In *Hope* itself, the consideration of policies was not limited only to Department of Corrections internal policies, but also national DOJ policies. *Hope*, 536 U.S at 741–42. This suggests that clearly established law could be expanded to encapsulate current events and other activities that provide notice to officers. This is a potential area for future research.

178 *See supra* text accompanying notes 7–19.

179 Jon Kamp & Scott Calvert, *More Cities Ban Chokeholds, Similar Restraints in Wake of George Floyd Protests*, WALL ST. J. (June 10, 2020), https://perma.cc/2ZAD-APT8.

180 Malley v. Briggs, 475 U.S. 335, 341 (1986).

181 Davis v. Scherer, 468 U.S. 183, 195 (1984) ("[I]t is an appealing proposition that the violation of such provisions is a circumstance relevant to the official's claim of qualified immunity.").

182 *Id.*

a greater likelihood of accountability for individuals whose rights were violated by officers who should have known better.