

## Qualified Immunity's Boldest Lie

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*Qualified immunity shields government officials from damages liability—even if they have violated plaintiffs' constitutional rights—so long as they have not violated "clearly established law." The Supreme Court has explained that watershed cases describing legal requirements—like *Graham v. Connor* and *Tennessee v. Garner*—are alone insufficient to clearly establish the law. Instead, the plaintiff must find prior cases applying *Graham* and *Garner* to cases with facts virtually identical to their own case, explaining that such factually analogous cases are necessary to put officers on notice of the illegality of their conduct. But do officers actually know about the facts and holdings of these cases, and rely on them when taking action? Courts and commentators have been skeptical of this assumption, but it has never been tested.*

*This Article reports the findings of a study, the first of its kind, examining the role that circuit decisions applying *Graham* and *Garner* play in police officers' policies, trainings, and briefings. Having viewed hundreds of police policies, training outlines, and other briefing materials provided to California law enforcement officers, I describe unequivocal proof that officers are not notified of the facts and holdings of cases that clearly establish the law for qualified immunity purposes. Instead, officers are taught the general principles of *Graham* and *Garner* and then are trained to apply those principles in the widely varying circumstances that come their way.*

*Moreover, even if law enforcement agencies made more of an effort to educate their officers about court decisions analyzing the constitutional limits of force, the expectations of notice and reliance baked into qualified immunity doctrine would be obviously unrealistic. There could never be sufficient time to train officers about all the court cases that might clearly establish the law. And even if officers were trained about the facts and holdings of some portion of these cases, there is no reason to believe that officers would analogize or distinguish situations rapidly unfolding before them to the court decisions they once studied.*

*There is a growing consensus among courts, scholars, and advocates across the ideological spectrum that qualified immunity doctrine is legally unsound, unnecessary to shield government officials from the costs and burdens of litigation, and destructive to police accountability efforts. This Article reveals another reason to*

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*reconsider the doctrine and, especially, its requirement that plaintiffs find clearly established law.*

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## INTRODUCTION

In Greek myths, heroes are regularly sent off on extraordinary quests. King Pelias ordered Jason and the Argonauts to bring back the fleece of the golden-haired, winged ram so that Jason could claim the throne of Iolcus in Thessaly.<sup>1</sup> Hercules, cursed by Hera, and enslaved by Eurystheus, was ordered to perform

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<sup>1</sup> See generally EDITH HAMILTON, *The Quest of the Golden Fleece*, in MYTHOLOGY 117 (New American Library ed. 1953) (1942).

twelve labors—several of which required him to capture creatures that desperately did not want to get got, including the wild boar of Mount Erymanthus, the mad bull that terrorized the island of Crete, the man-eating mares of King Diomedes, the cattle of the three-bodied giant Geryon, and the triple-headed dog, Cerberus, from the underworld.<sup>2</sup>

The Supreme Court's qualified immunity doctrine sends plaintiffs off on similarly far-flung pursuits. Qualified immunity shields government officials from damages liability—even when they have violated the law—so long as the right was not “clearly established.”<sup>3</sup> The Court has said that, except in extraordinary circumstances, the law is clearly established only if a prior case has declared the conduct unconstitutional.<sup>4</sup> And that prior case must have facts that map neatly onto the facts of the plaintiff's case.<sup>5</sup> The Supreme Court has repeatedly emphasized that it is not enough simply to point to *Graham v. Connor*<sup>6</sup> and *Tennessee v. Garner*<sup>7</sup>—two Supreme Court cases that set out frameworks for assessing the constitutionality of uses of force—to show it was clearly established that a law enforcement officer's use of force was unconstitutional. Instead, the plaintiff must produce a case in which another law enforcement officer used a similar type and degree of force under similar circumstances, and was held to have violated the Constitution.<sup>8</sup>

To find a factually similar case is a challenge on its own—particularly given the unending number of ways government

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<sup>2</sup> See generally EDITH HAMILTON, *Hercules*, in MYTHOLOGY, *supra* note 1, at 159.

<sup>3</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>4</sup> Although the Court held, in *Hope v. Pelzer*, 536 U.S. 730, 739–45 (2002), and again in *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020), that a prior court decision is not necessary to clearly establish the law when the constitutional violation is “obvious,” the Court has interpreted this exception narrowly. See *infra* notes 34–38 and accompanying text.

<sup>5</sup> See *infra* notes 42–51 and accompanying text.

<sup>6</sup> 490 U.S. 386, 396–97 (1989) (holding that Fourth Amendment excessive force claims turn on whether the officer's conduct was “‘objectively reasonable’ in light of the facts and circumstances confronting them,” taking into consideration “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”).

<sup>7</sup> 471 U.S. 1, 3, 11–12 (1985) (holding that deadly force could not be used against “an apparently unarmed suspected felon . . . unless 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”).

<sup>8</sup> See *infra* notes 47–56 and accompanying text (describing Supreme Court cases setting out this requirement).

officials can violate people’s constitutional rights. But the Supreme Court has made the search for clearly established law even more formidable by allowing lower courts to grant qualified immunity without ruling on the merits of plaintiffs’ claims.<sup>9</sup> As Fifth Circuit Judge Don Willett put it: “No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.”<sup>10</sup> King Eurystheus couldn’t have divined a better riddle.

The Supreme Court’s qualified immunity doctrine has been criticized six ways from Sunday—for bearing no resemblance to common law protections in effect when 42 U.S.C. § 1983 became law, undermining government accountability, and failing to achieve the doctrine’s intended policy goals.<sup>11</sup> The Court’s definition of “clearly established law” has also received its fair share of criticism. Commentators have argued that the Court’s decisions have provided unclear and shifting guidance about how factually similar a case must be to clearly establish the law and which courts’ decisions can clearly establish the law.<sup>12</sup> Commentators have also argued that the “clearly established” standard protects officers who have outrageously abused their power simply because no prior decision has declared that conduct unlawful.<sup>13</sup> As Professor John Jeffries has observed, the existence of precedent is not a good indicator of the wrongfulness of conduct, and truly awful conduct can be shielded from liability so long as no court has previously declared that conduct unconstitutional.<sup>14</sup> “It is,”

<sup>9</sup> See *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

<sup>10</sup> *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante).

<sup>11</sup> See generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (describing these critiques); see also *infra* notes 244–46 and accompanying text (same).

<sup>12</sup> See, e.g., Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–56 (2013) (describing shifting standards for clearly established law); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1948–51 (2018) (describing confusion about how factually analogous prior court decisions must be to clearly establish the law); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–59 (2010) (describing confusion about which sources can clearly establish the law and how factually analogous prior cases must be to clearly establish the law).

<sup>13</sup> See Jeffries, *supra* note 12, at 854–58, 863–66; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256–58 (2013); see also Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 436–38 (2019).

<sup>14</sup> Jeffries, *supra* note 13, at 255–56.

Jeffries writes, “as if the one-bite rule for bad dogs started over with every change in weather conditions.”<sup>15</sup>

In this Article, I offer another reason that the “clearly established” standard is fundamentally flawed—it misunderstands the ways in which officers are educated about the scope of their constitutional authority. Qualified immunity’s requirement that plaintiffs produce clearly established law is intended to shield government officials from damages liability unless they had “fair warning”<sup>16</sup> or “fair notice”<sup>17</sup> of the unlawfulness of their conduct. The Court has instructed lower courts that watershed constitutional decisions like *Graham* and *Garner* do not provide officers with adequate warning or notice about the limits of their authority.<sup>18</sup> Instead, the Court’s qualified immunity decisions explain, officers have fair warning that their conduct is unconstitutional only if a court previously held that factually similar conduct exceeded constitutional bounds.<sup>19</sup> By holding that only factually similar precedent can put officers on notice of the unconstitutionality of their conduct—thereby clearly establishing the law—the Court appears to assume that officers are educated not only about watershed decisions like *Graham* and *Garner*, but also about the lower court decisions that apply *Graham* and *Garner* to a multitude of factual scenarios.<sup>20</sup>

Nowhere in the Court’s decisions is consideration given to how, exactly, police officers are expected to learn about the facts and holdings of the hundreds—if not thousands—of Supreme Court, circuit court, and district court opinions that could be used to clearly establish the law for qualified immunity purposes. Sustained consideration of this question is also absent from scholarly commentary, although some have made mention of the implausibility of the Court’s assumption that officers know about these court decisions.<sup>21</sup> Nor has much consideration been given to the likelihood that police officers recall the facts and holdings of these

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<sup>15</sup> *Id.* at 256.

<sup>16</sup> *Hope*, 536 U.S. at 740–41.

<sup>17</sup> *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

<sup>18</sup> *See infra* notes 47–52 and accompanying text.

<sup>19</sup> *See infra* notes 52–65 and accompanying text.

<sup>20</sup> *See infra* Part I.B.

<sup>21</sup> *See, e.g.*, John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1971 (2018) (“Appellate opinions are, not surprisingly, rarely read by government officers and, even when their substance is communicated to officers, they only comprise one of many factors that affect the blameworthiness of an officer.”).

hundreds or thousands of cases as they are making split-second decisions about whether to stop and frisk someone, search a car, or shoot their gun.<sup>22</sup>

In this Article, I show that—in addition to its many other flaws—the Supreme Court’s qualified immunity doctrine does not accurately reflect how officers are educated about court opinions or the role these opinions play in officers’ decisionmaking. I have examined hundreds of use-of-force policies, trainings, and other educational materials received by California law enforcement officers.<sup>23</sup> I find that police departments regularly inform their officers about watershed decisions like *Graham* and *Garner*. But officers are not regularly or reliably informed about court decisions interpreting those decisions in different factual scenarios—the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force.

California police department policy manuals reference or incorporate the constitutional standards from *Graham* and *Garner*, but rarely reference any cases in which *Graham* and *Garner* were applied.<sup>24</sup> California police officer trainings similarly focus primarily on the broad principles articulated in *Graham* and *Garner*.<sup>25</sup> More than three-fourths of the 329 training outlines I reviewed referenced no court decision applying *Graham* and/or *Garner*. Even when training outlines do reference such cases, the outlines suggest that trainers do not educate officers about their facts and holdings. Instead, these cases are introduced for broad principles that build on *Graham* and *Garner*: the notion, for example, that an officer does not need to use the least force possible, so long as the force used was reasonable.<sup>26</sup> Trainings do, regularly, incorporate hypotheticals as a way to help officers develop an understanding about whether force is appropriate in various

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<sup>22</sup> For one notable exception, see *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) (“It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: ‘Are the facts here anything like the facts in *York v. City of Las Cruces*?’”).

<sup>23</sup> For discussion of my reasons for focusing on use-of-force decisions, see *infra* notes 128–31 and accompanying text. For discussion of my reasons for focusing on California officers, see *infra* notes 118–21 and accompanying text.

<sup>24</sup> For further discussion of these findings, see *infra* Part III.B.

<sup>25</sup> For further discussion of these findings, see *infra* Part III.C.

<sup>26</sup> See *infra* notes 148–69 and accompanying text (discussing training outlines that use Ninth Circuit cases to illustrate this point).

scenarios. But the outlines offer no indication that these scenarios are drawn from court cases.

Police officers are not reliably learning about use-of-force cases applying *Garner* and *Graham* from other sources, either.<sup>27</sup> District attorneys and city attorneys do not appear to train officers about the facts and holdings of court decisions that clearly establish the law for qualified immunity purposes. There are a handful of e-mail newsletters available to law enforcement officers that describe court decisions relevant to law enforcement. But even these newsletters provide scattershot information about use-of-force cases, and there is no requirement that California officers subscribe to and read them. In sum, California police officers are not regularly or reliably given warning or fair notice of the facts and holdings of court decisions that apply *Graham* and *Garner*.

Moreover, even if law enforcement relied more heavily on court decisions to educate their officers about the constitutional limits of force, the expectations of notice and reliance baked into qualified immunity doctrine would still be unrealistic. There could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law for qualified immunity purposes. Moreover, even if an officer did somehow come to learn about the facts and holdings of court decisions applying *Graham* and *Garner*, there is no reason to believe that an officer would think about those cases during the types of high-speed, high-stress interactions that often lead to uses of force.<sup>28</sup> At best, court decisions are one of many sources of information that officers have about the limits of appropriate behavior. And all available evidence suggests that people cannot sort through the complex information contained in court decisions in the types of high-pressure circumstances that often precede police uses of force.

Qualified immunity doctrine is, rightfully, being attacked from all sides. When the Court or Congress does finally reconsider qualified immunity, it should keep this Article's findings in mind.<sup>29</sup> And, until Congress or the Supreme Court takes action,

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<sup>27</sup> See *infra* Part III.C–D.

<sup>28</sup> For further discussion, see *infra* Part IV.

<sup>29</sup> States should also keep these findings in mind, as state legislatures consider whether to enact causes of action that do not allow a qualified immunity defense, and state courts consider whether qualified immunity applies to existing state law causes of action.

lower courts should remember, when considering qualified immunity motions, that officers are not given notice of the cases that defendants argue are necessary to clearly establish the law. Police officers are put on notice of the Supreme Court's watershed decisions—like *Graham* and *Garner*—but not about the circuit and district court opinions that apply those decisions. It therefore makes no sense to require plaintiffs to plumb the depths of Westlaw for factually similar lower court decisions as proof that officers were on notice of the unconstitutionality of their conduct. Requiring plaintiffs to find factually similar cases sends them on extraordinary journeys comparable to heroes' quests, but does not advance the stated goals of qualified immunity.

The remainder of the Article proceeds as follows. Part I describes qualified immunity and the expectation embedded in the doctrine that officers know about the decisions that apply watershed cases like *Graham* and *Garner* to various factual scenarios. Part II offers an overview of the landscape of clearly established law in one area: Ninth Circuit Fourth Amendment excessive force cases interpreting *Graham* and *Garner*. As this Part shows, there are hundreds of cases interpreting the scope of constitutional rights in this one area, in this one circuit, suggesting that there could be thousands of cases that clearly establish the law regarding the constitutional bounds of California officers' conduct. Yet, as I show in Part III, the facts and holdings of these cases interpreting *Graham* and *Garner* play virtually no role in California police policies, trainings, and other educational materials. Moreover, as I show in Part IV, the expectations of notice upon which qualified immunity doctrine relies would not be met even if officers were better educated about these cases. Officers could never learn the facts and holdings of the hundreds or thousands of cases that clearly establish the law and, even if they learned about some of these cases, they would not reliably recall their facts and holdings while doing their jobs. Finally, in Part V, I consider the implications of these findings for the future of qualified immunity.

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*See, e.g.,* Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020), <https://perma.cc/5UKR-CZM4> (describing a Colorado law that creates a new “civil action for deprivation of rights” and states that “qualified immunity is not a defense to liability,” as well as court decisions that have limited qualified immunity’s applicability to state law claims (quotation marks omitted) (quoting Enhance Law Enforcement Integrity Act, S.B. 20-217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020))).



## I. QUALIFIED IMMUNITY'S EXPECTATION THAT OFFICERS KNOW "CLEARLY ESTABLISHED LAW"

Qualified immunity doctrine did not always require that plaintiffs identify circuit court or Supreme Court decisions with virtually identical facts before allowing them to recover. In this Part, I describe the evolution of qualified immunity doctrine from its inception to the present day, then describe two key assumptions underlying the doctrine: that officers know about Supreme Court and courts of appeals decisions applying broad constitutional principles set out in cases like *Graham* and *Garner* to various factual scenarios, and that officers recall and rely on the facts and holdings of those decisions while on the job.

### A. The Evolution of Qualified Immunity

In 1967, when the Supreme Court created the qualified immunity defense, it shielded officers from damages liability if they were acting in "good faith."<sup>30</sup> But today's qualified immunity doctrine has nothing to do with officers' good faith. In 1982, in a case called *Harlow v. Fitzgerald*,<sup>31</sup> the Court eliminated consideration of an officer's subjective intent, and instead instructed lower courts to grant officers qualified immunity if their conduct did not violate "clearly established law."<sup>32</sup> Current Supreme Court doctrine suggests that an officer violates clearly established law only if there is a prior court of appeals or Supreme Court decision holding virtually identical facts to be unconstitutional.<sup>33</sup> In this Section, I explain how the Court's definition of "clearly established law" has evolved from 1982 to the present day, both in terms of what sources can clearly establish the law and how factually similar prior court decisions must be to the case at hand.

The Court has offered shifting guidance about whether a court decision is necessary to clearly establish the law. In 2002, the Court held, in *Hope v. Pelzer*,<sup>34</sup> that a prior court opinion with similar facts was unnecessary to clearly establish that it was unconstitutional for prison guards to punish a prisoner by shackling

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<sup>30</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

<sup>31</sup> 457 U.S. 800 (1982).

<sup>32</sup> *Id.* at 818.

<sup>33</sup> *See infra* notes 42–56 and accompanying text.

<sup>34</sup> 536 U.S. 730 (2002).

him to a hitching post for seven hours under the Alabama sun.<sup>35</sup> In 2020, the Court, in *Taylor v. Riojas*,<sup>36</sup> ruled that a prior court opinion with similar facts was unnecessary to clearly establish that it was unconstitutional to confine a prisoner for six days in “shockingly unsanitary cells” covered in feces and sewage.<sup>37</sup> But—beyond these two decisions involving the torturous treatment of state prisoners—the Court’s decisions have paid only lip service to the notion that constitutional rights can be clearly established without a prior case on point and have repeatedly required that plaintiffs identify court decisions to overcome a qualified immunity motion.<sup>38</sup>

The Court has also offered shifting guidance about which courts can clearly establish the law. In 1999, the Court explained that a plaintiff must identify a case of “controlling authority in their jurisdiction at the time of the incident” or a “consensus of cases of persuasive authority” to defeat a qualified immunity motion.<sup>39</sup> In recent years, however, the Court has hinted—in opinions that only “[a]ssum[e] *arguendo*” that a decision by a court other than the Supreme Court can clearly establish the law—that not even courts of appeals cases will reliably do the trick.<sup>40</sup> Although neither the Supreme Court nor lower courts have

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<sup>35</sup> *Id.* at 738–46.

<sup>36</sup> 141 S. Ct. 52 (2020).

<sup>37</sup> *Id.* at 53.

<sup>38</sup> Beyond the Court’s decision in *Riojas*, and a citation to *Hope* when describing the qualified immunity standard in *Tolan v. Cotton*, 572 U.S. 650, 656 (2014), the Court’s invocations of *Hope*’s language have been in dissent. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., dissenting) (“[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” (citing *Hope*, 536 U.S. at 741)); *Mullenix v. Luna*, 136 S. Ct. 305, 314 (2015) (Sotomayor, J., dissenting) (“This Court has rejected the idea that ‘an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.’ Instead, the crux of the qualified immunity test is whether officers have ‘fair notice’ that they are acting unconstitutionally.” (first quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); and then quoting *Hope*, 536 U.S. at 739)).

<sup>39</sup> *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

<sup>40</sup> *Reichle v. Howards*, 566 U.S. 658, 665 (2012); *see also, e.g.*, *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (“Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, *Marasco* does not clearly establish that Carroll violated the Carmans’ Fourth Amendment rights.” (citation omitted)); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (“[E]ven if ‘a controlling circuit precedent could constitute clearly established federal law in these circumstances,’ it does not do so here.” (citation omitted) (quoting *Carroll*, 135 S. Ct. at 350)); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (“Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity . . .”).

limited their qualified immunity analyses to Supreme Court decisions, the Court's musings about which courts can clearly establish the law have created uncertainty on this point.<sup>41</sup>

The Court has also gotten stricter about how factually analogous prior precedent must be in order to clearly establish the law. In 1999, the Court explained that law was clearly established if it was "sufficiently clear that a reasonable official would understand that what he is doing violates that right."<sup>42</sup> But then, in 2011, in *Ashcroft v. al-Kidd*,<sup>43</sup> the Court substituted "every" for "a," such that "every 'reasonable official'" would now need to understand that their conduct violates the law.<sup>44</sup> Although the Court has repeatedly assured plaintiffs that it "do[es] not require a case directly on point," it has also repeatedly instructed lower courts "not to define clearly established law at a high level of generality" when considering a qualified immunity motion.<sup>45</sup> "The dispositive question," the Court has written, "is 'whether the violative nature of *particular* conduct is clearly established'" and "[t]his inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"<sup>46</sup>

In the use-of-force context, this has come to mean that, in the Supreme Court's words, "*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'"<sup>47</sup> For example, the Supreme Court made clear in *Brosseau v. Haugen*<sup>48</sup> that it was not enough to ask whether it was clearly established that a police officer may use deadly force only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."<sup>49</sup> Instead, the correct inquiry, according to the Court, is

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<sup>41</sup> See, e.g., Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 70–71 (2016) (describing these decisions and resulting uncertainty about which courts' decisions can clearly establish the law).

<sup>42</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>43</sup> 563 U.S. 731 (2011).

<sup>44</sup> *Id.* at 741 (emphasis added) (quoting *Anderson*, 483 U.S. at 640).

<sup>45</sup> *Id.* at 741–42.

<sup>46</sup> *Mullenix*, 136 S. Ct. at 308 (emphasis in original) (quotation marks omitted) (first quoting *al-Kidd*, 563 U.S. at 742; and then quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

<sup>47</sup> *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

<sup>48</sup> 543 U.S. 194 (2004).

<sup>49</sup> *Id.* at 203 (Stevens, J., dissenting) (quotation marks omitted) (quoting *Garner*, 471 U.S. at 11).

whether clearly established law prohibited the officer's conduct under the "situation [ ] confronted": whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."<sup>50</sup> The Court concluded in *Brosseau* that the officer was entitled to qualified immunity because none of the circuit cases cited by the plaintiff "squarely govern[ed]" the facts of the case.<sup>51</sup>

In recent years, the Court has reversed a spate of qualified immunity denials, and repeatedly criticized lower courts for not fully appreciating how factually similar prior cases must be to clearly establish the law.<sup>52</sup> For example, in *White v. Pauly*,<sup>53</sup> the Court observed that it had, over the past five years, "issued a number of opinions reversing federal courts in qualified immunity cases," and that it was "again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'"<sup>54</sup> The Court criticized the Tenth Circuit for misunderstanding the qualified immunity analysis and relying on "*Graham, Garner*, and their Court of Appeals progeny, which . . . lay out excessive-force principles at only a general level,"<sup>55</sup> and reversed the circuit court's decision denying the officer qualified immunity because "[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like [those in the case] from assuming that proper procedures, such as officer identification, have already been followed."<sup>56</sup>

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<sup>50</sup> *Id.* at 199–200 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

<sup>51</sup> *Id.* at 201.

<sup>52</sup> See, e.g., *White*, 137 S. Ct. at 552 ("[W]e have held that *Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'" (quoting *Brosseau*, 543 U.S. at 199)); *Sheehan*, 135 S. Ct. at 1775–76 ("*Graham* holds only that the 'objective reasonableness' test applies to excessive-force claims under the Fourth Amendment. That is far too general a proposition to control this case." (quotation marks and citation omitted) (quoting *Graham*, 490 U.S. at 388)); *Emmons*, 139 S. Ct. at 503 (quoting *Emmons v. City of Escondido*, 716 F. App'x 724, 726 (9th Cir. 2018)):

The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established.

<sup>53</sup> 137 S. Ct. 548 (2017).

<sup>54</sup> *Id.* at 551–52 (quoting *al-Kidd*, 563 U.S. at 742).

<sup>55</sup> *Id.* at 552.

<sup>56</sup> *Id.*

Lower courts appear to have gotten the message.<sup>57</sup> Recent circuit courts' qualified immunity decisions have repeatedly invoked the Supreme Court's instruction that clearly established law should not be defined "at a high level of generality" when assessing officers' entitlement to qualified immunity.<sup>58</sup> And circuit courts have granted officers qualified immunity even when prior precedent held that almost identical conduct was unconstitutional. For example, in *Baxter v. Bracey*,<sup>59</sup> the Sixth Circuit granted qualified immunity to officers who released their police dog on a burglary suspect who was sitting down with his hands up.<sup>60</sup> Although a prior Sixth Circuit decision had held that it was unconstitutional to release a police dog on a suspect who was lying down, the Sixth Circuit granted qualified immunity because, it held, that decision did not clearly establish the

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<sup>57</sup> See *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293–94 n.10 (D.N.M. 2018) (citation omitted):

Although still stating that there might be an obvious case under *Graham* that would make the law clearly established without a Supreme Court or Circuit Court case on point, the Supreme Court has sent unwritten signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established, and the Tenth Circuit is now sending these unwritten signals to the district courts.

<sup>58</sup> *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) (first citing *Sheehan*, 135 S. Ct. at 1775–76; and then citing *White*, 137 S. Ct. at 552); see also, e.g., *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017) (“[G]eneral standards [like those in *Graham*] are only the starting point [when assessing whether the law is clearly established]. The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’ This question must be answered ‘not as a broad general proposition,’ but with reference to the facts of specific cases.” (emphasis in original) (citation omitted) (quoting *Mullenix*, 136 S. Ct. at 308)); *McCoy v. Alamu*, 950 F.3d 226, 233 n.8 (5th Cir. 2020) (finding a constitutional violation but granting qualified immunity, noting that “[s]ome might find this a puzzling result,” but explaining that “[t]he Supreme Court has repeatedly reversed courts of appeals for failing to define established law narrowly, and we must follow that binding precedent”); *Francis v. Fiacco*, 942 F.3d 126, 145–46 (2d Cir. 2019) (finding a constitutional violation but granting qualified immunity, observing that “the Supreme Court has ‘repeatedly told courts . . . not to define clearly established law at a high level of generality,’ instead emphasizing that ‘clearly established law must be “particularized” to the facts of the case’” (alteration in original) (citation omitted) (first quoting *Sheehan*, 135 S. Ct. at 1775–76; then quoting *White*, 137 S. Ct. at 552)); *Garcia v. Escalante*, 678 F. App'x 649, 654–60 (10th Cir. 2017) (noting the Supreme Court's repeated admonitions to lower courts that they define clearly established law narrowly, observing that the Tenth Circuit was “recently faulted” by the Court for “fail[ing] to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment,” and granting qualified immunity (alterations in original) (quotation marks omitted) (quoting *White*, 137 S. Ct. at 552)).

<sup>59</sup> 751 F. App'x 869 (6th Cir. 2018).

<sup>60</sup> See *id.* at 871–72.

unconstitutionality of the officers' decision to release a police dog on a person who was seated with their hands in the air.<sup>61</sup>

In another case, *Kelsay v. Ernst*,<sup>62</sup> the Eighth Circuit held that an officer who slammed a woman to the ground—breaking her collarbone and knocking her unconscious—was entitled to qualified immunity.<sup>63</sup> Prior Eighth Circuit cases had held that, “where a nonviolent misdemeanor poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully.”<sup>64</sup> But, the Eighth Circuit held, the officer was entitled to qualified immunity because this precedent did not clearly establish that “a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy’s instruction to ‘get back here’ and continued to walk away from the officer.”<sup>65</sup>

#### B. Officers’ Assumed Notice of and Reliance on Clearly Established Law

The Supreme Court’s demand that there be prior factually analogous circuit court precedent to clearly establish the law is not simply a way of making it more difficult to sue government officers.<sup>66</sup> Instead, this requirement is explicitly tied to an assumption that officers know about these court decisions and rely on them when doing their jobs.<sup>67</sup> As the Court explained in *Harlow*, qualified immunity shields government officials “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.”<sup>68</sup> In *Anderson v. Creighton*,<sup>69</sup> the Court explained that the protections of qualified

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<sup>61</sup> *See id.*

<sup>62</sup> 933 F.3d 975 (8th Cir. 2019).

<sup>63</sup> *Id.* at 980–82.

<sup>64</sup> *Id.* at 980.

<sup>65</sup> *Id.*

<sup>66</sup> That may, however, be part of the Court’s motivation. As the Court has written, if the law could be clearly established at a high level of generality, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Anderson*, 483 U.S. at 639.

<sup>67</sup> *See, e.g.,* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2103 (2018) (explaining that qualified immunity doctrine “relies on principles of notice”).

<sup>68</sup> *Harlow*, 457 U.S. at 818 (emphasis added).

<sup>69</sup> 483 U.S. 635 (1987).

immunity are “intended to provide government officials with the ability ‘*reasonably [to] anticipate* when their conduct may give rise to liability for damages.”<sup>70</sup> And the Court explained, in *Brosseau*: “Because the focus is on whether the officer had *fair notice* that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.”<sup>71</sup>

The Court does not appear to be referring to constructive notice here; instead, its decisions articulate an expectation that qualified immunity actually causes government officials to assess, before acting, whether prior court decisions clearly establish that their conduct would violate the Constitution. In *Mitchell v. Forsyth*,<sup>72</sup> the Court wrote that the limited protections of qualified immunity meant the U.S. Attorney General “may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States.”<sup>73</sup> That pause was, the Court explained, “precisely the point of the *Harlow* standard: ‘Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . .’”<sup>74</sup> The Attorney General, when deciding to take some national security measure, would presumably have sufficient time to research—or have someone else research—the constitutionality of possible courses of action. But the Supreme Court also appears to assume that police officers will pause to consider the facts and holdings of prior court decisions when making split-second decisions on the job.

In fact, the Supreme Court has written that the factual variation associated with cases involving the Fourth Amendment makes it especially important that there be a prior case on point—so that the officer would know how the law applies to the circumstances at hand. For example, in *Kisela v. Hughes*,<sup>75</sup> the Court explained, when instructing lower courts “not to define clearly established law at a high level of generality”:<sup>76</sup>

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<sup>70</sup> *Id.* at 646 (alteration in original) (emphasis added) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

<sup>71</sup> *Brosseau*, 543 U.S. at 198 (emphasis added).

<sup>72</sup> 472 U.S. 511 (1985).

<sup>73</sup> *Id.* at 524.

<sup>74</sup> *Id.* (emphasis and alteration in original) (quoting *Harlow*, 457 U.S. at 819).

<sup>75</sup> 138 S. Ct. 1148 (2018).

<sup>76</sup> *Id.* at 1152 (citing *Sheehan*, 135 S. Ct. at 1775–76).

“[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” Use of excessive force is an area of the law “in which the result depends very much on the facts of each case,” and thus police officers are entitled to qualified immunity unless existing precedent “squarely governs” the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise “hazy border between excessive and acceptable force” and thereby provide an officer notice that a specific use of force is unlawful.<sup>77</sup>

Note what the Court’s statement presumes about police officers’ knowledge of court decisions applying *Graham* and *Garner* and consideration of those decisions when on the job: the Court writes that factually similar precedent is important to clearly establish the law because “it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts,”<sup>78</sup> and that “[p]recedent involving similar facts can . . . provide an officer notice that a specific use of force is unlawful.”<sup>79</sup> In other recent qualified immunity decisions concerning police officers’ Fourth Amendment powers, the Court has used almost identical language to press home the point.<sup>80</sup>

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<sup>77</sup> *Id.* at 1152–53 (alteration in original) (citations omitted) (quoting *Mullenix*, 136 S. Ct. at 308–09, 312).

<sup>78</sup> *Id.* at 1152 (quoting *Mullenix*, 136 S. Ct. at 308).

<sup>79</sup> *Id.* at 1153 (emphasis added).

<sup>80</sup> *See, e.g., Mullenix*, 136 S. Ct. at 308 (explaining that factually specific precedent is necessary to clearly establish the law, and “[s]uch specificity is especially important in the Fourth Amendment context, where the Court has recognized that ‘[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.’” (alteration in original) (quoting *Saucier*, 533 U.S. at 205)); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (alteration in original) (citation omitted) (first quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017); and then quoting *White*, 137 S. Ct. at 552):

Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in “the precise situation encountered.” Thus, we have stressed the need to “identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.”

*See also Emmons*, 139 S. Ct. at 503 (“Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.” (quoting *Kisela*, 138 S. Ct. at 1153)). The Court has also expressed



Lower courts appear to have embraced the notion that officers are notified of the substance and holdings of court opinions and rely on those decisions before taking action.<sup>81</sup> Take, for example, *Bryan v. United States*,<sup>82</sup> in which the Third Circuit granted qualified immunity to Customs and Border Inspection officers who had searched a cruise ship cabin.<sup>83</sup> Although the Third Circuit had ruled on the constitutionality of such searches in an almost identical case a few days before the searches at issue took place, the court held that its decision did not clearly establish the law because “it is beyond belief that within two days the government could determine . . . what new policy was required to conform to the ruling, much less communicate that new policy to the CBP officers.”<sup>84</sup> The Third Circuit’s decision not only expects that government officials are educated about court decisions clearly establishing the law in various contexts, but also shields officers from liability because superiors would not have trained officers about a relevant decision in just a few days.

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its belief that police officers are knowledgeable about circuit court decisions regarding the scope of the Fourth Amendment in the exclusionary rule context. *See Davis v. United States*, 564 U.S. 229, 241 (2011) (alteration, quotation marks and citation omitted) (first quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006); and then quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)):

Responsible law enforcement officers will take care to learn “what is required of them” under Fourth Amendment precedent and will conform their conduct to these rules. . . . An officer who conducts a search in reliance on binding appellate precedent does no more than “act as a reasonable officer would and should act” under the circumstances.

<sup>81</sup> *See, e.g., Corbitt v. Vickers*, 929 F.3d 1304, 1311–12 (11th Cir. 2019) (explaining that a right is clearly established for qualified immunity purposes only if a prior factually similar case so held “because ‘officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases,’ and an ‘official’s awareness of the existence of an abstract right . . . does not equate to knowledge that *his* conduct infringes the right” (alteration and emphasis in original) (quoting *Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011))); *Hedgpeth v. Rahim*, 893 F.3d 802, 809 (D.C. Cir. 2018) (explaining that the “pertinent question” for the qualified immunity analysis “is whether ‘any competent officer,’ in light of ‘[p]recedent involving similar facts,’ would consider it unlawful to use a takedown maneuver” under the circumstances in the case (alteration in original) (citation omitted) (quoting *Kisela*, 138 S. Ct. at 1153)); *Mason-Funk v. City of Neenah*, 895 F.3d 504, 508, 510 (7th Cir. 2018) (quoting *Kisela* in support of the proposition that “police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue” and finding that “the facts in this case and existing precedent failed to put Officers Hoffer and Ross on notice that their use of deadly force . . . was unlawful.” (quotation marks omitted) (quoting *Kisela*, 138 S. Ct. at 1153)).

<sup>82</sup> 913 F.3d 356 (3d Cir. 2019).

<sup>83</sup> *Id.* at 363.

<sup>84</sup> *Id.*

It follows from the *Bryan* court's rationale—and the rationale in recent Supreme Court decisions like *Kisela*—that officers will learn of the facts and holdings of court decisions that clearly establish the law given sufficient time, and will rely on those decisions on the job. But, as I show in the next Part, for this to be true, officers would need to learn of hundreds or even thousands of court decisions that might clearly establish the law in various contexts.

## II. “CLEARLY ESTABLISHED LAW” ON POLICE USE OF FORCE

The Supreme Court's qualified immunity doctrine relies on the assumption that officers are educated not only about watershed decisions like *Graham* and *Garner* but also about decisions applying *Graham* and *Garner* to various factual scenarios. The Court's qualified immunity jurisprudence also appears to expect that officers consider these court decisions when deciding whether and how to take action. Before describing the role these types of decisions actually play in California police departments' use-of-force policies and trainings as well as officers' decisions on the street, it is worth considering the number and range of court decisions that officers would need to know about if these assumptions underlying qualified immunity were accurate.

In this Part, I offer an overview of just one subgroup of decisions that might clearly establish the law for California officers—decisions from the Ninth Circuit interpreting *Graham* and *Garner* in the context of Fourth Amendment excessive force cases.<sup>85</sup> This overview does not reflect all use-of-force cases that could clearly establish the law for California officers; the Ninth Circuit has held that decisions issued by other circuits and district courts can also clearly establish the law.<sup>86</sup> In addition, these decisions represent only a fraction of the total cases that could clearly establish the law for California officers because they do not address the constitutionality of other types of police behaviors—searches, arrests, surveillance, and the like. But even this subset of cases

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<sup>85</sup> For further discussion of my decision to focus on use-of-force cases, see *infra* notes 128–31 and accompanying text.

<sup>86</sup> See *Prison Legal News v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005) (explaining that the Ninth Circuit will “look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent” when determining whether the law is clearly established); *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002) (“[U]npublished decisions of district courts may inform our qualified immunity analysis.”).

indicates the vast body of law about which qualified immunity doctrine assumes officers are aware.

As of July 10, 2020, I found 284 Supreme Court and Ninth Circuit decisions on Westlaw applying *Graham* and/or *Garner* to a use-of-force incident and articulating one or more holdings regarding the constitutionality of defendants' alleged conduct.<sup>87</sup> Of those 284 cases, 7 are Supreme Court decisions and 277 are Ninth Circuit decisions. Among the 277 Ninth Circuit decisions, 171 are unpublished and 106 are published. Although this distinction matters in some circuits, it does not in the Ninth: the Ninth Circuit has regularly stated that unpublished decisions from circuit and district courts can clearly establish the law.<sup>88</sup>

The manner in which these Ninth Circuit decisions clearly establish the law depends in some part on the procedural posture

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<sup>87</sup> On Westlaw, I used the "citing references" function to find the 595 Supreme Court and Ninth Circuit decisions that cite *Graham*, and the 247 Supreme Court and Ninth Circuit decisions that cite *Garner*. There were, unsurprisingly, a significant number of cases citing both *Graham* and *Garner*, and so after removing duplicate case references, this Westlaw search captured a total of 55 Supreme Court and 554 Ninth Circuit decisions that cited *Graham* and/or *Garner* since *Garner*. I read and hand-coded each of these 609 decisions, but excluded more than half of these cases from the dataset for various reasons. First, I excluded from my dataset decisions that cite *Graham* or *Garner* but are focused on other issues—jury instructions, for example—and so do not analyze the applicability of *Graham* and *Garner* to the facts of the case and do not explicate clearly established law about the use of force. I also omitted court decisions that are too vague about the facts underlying the case to clearly establish the law as that phrase is defined by the Court. Finally, because my focus is on Ninth Circuit decisions that would clearly establish the law for § 1983 excessive force cases brought under the Fourth Amendment against law enforcement officers, I omitted cases that concern substantive due process claims and claims against prison officials. For a description of these 284 decisions, see the Supreme Court and Ninth Circuit Use of Force Decisions Appendix [hereinafter Appendix], available at <https://perma.cc/5BQR-AFEQ>.

<sup>88</sup> In 2005, the Ninth Circuit explained that, when assessing whether the defendant violated clearly established law, it could "look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent." *Prison Legal News*, 397 F.3d at 702; see also *Hopkins v. Bonvicino*, 573 F.3d 752, 775 (9th Cir. 2009) (explaining that "unpublished opinions 'can be considered in determining whether the law was clearly established'" (quoting *Bahrampour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004)). Note, though, that the Ninth Circuit has cautioned that "it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only." *Hines v. Youseff*, 914 F.3d 1218, 1230 (9th Cir. 2019) (quotation marks omitted) (quoting *Sorreles*, 290 F.3d at 971). Although circuits vary in whether and to what extent unpublished decisions can clearly establish the law, at least six appear to rely on unpublished decisions to some degree. See generally David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIA. L. REV. 45 (2015) (surveying circuits' treatment of unpublished decisions in their qualified immunity analyses).

of the cases. The vast majority of decisions are appeals of lower court summary judgment decisions, although some are appeals of decisions on motions to dismiss or judgments as a matter of law. Some decisions—particularly appeals of judgments as a matter of law during or after trial—rule on whether the evidence presented by the parties supported a jury’s conclusions about the constitutionality of officers’ conduct. Decisions on summary judgment motions may find that no reasonable jury could find officers violated the Constitution, or may find a material factual dispute such that the plaintiff’s version of facts would establish a constitutional violation and defendant’s version of facts would establish no violation. Regardless of the procedural posture and form of the ruling, each type of decision could be used to clearly establish the law for qualified immunity purposes—and many of these 284 decisions have been cited in other qualified immunity decisions for just this purpose.<sup>89</sup>

These 284 Supreme Court and Ninth Circuit decisions explicate the constitutionality of various types of force—punching, handcuffs, batons, pepper spray, tasers, shootings, and more—under a whole range of circumstances.<sup>90</sup> Shooting cases are the most common, representing 108 (38%) of all 284 Ninth Circuit and Supreme Court use-of-force decisions. Other common types of force adjudicated in these decisions are uses of force without weapons (91 decisions), pointing guns (21 decisions), tasers (18 decisions), handcuffs (27 decisions), pepper spray (18 decisions), and police dogs (13 decisions). Within these broad categories, there are clusters of cases involving similar applications of the same type of force. For example, in 10 of the 108 decisions involving shootings, officers shot at people in cars. In 6 of the 91 decisions involving force without a weapon, officers used chokeholds or control holds. There are also clusters of cases involving similar circumstances in which force was used. For example, several cases involve tasers during stops of motorists, and several cases involve officers’ decisions to handcuff residents during searches of their homes. There are also clusters of cases in which the people against whom force was used acted in similar ways—cases in

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<sup>89</sup> See *infra* text accompanying notes 96–111 (describing how three Ninth Circuit decisions—two of which were consolidated, resulting in a single opinion—were used to assess defendants’ entitlement to qualified immunity in a Ninth Circuit case).

<sup>90</sup> For a description of these decisions, including the underlying facts and the manner in which they clearly establish the law, see Appendix, *supra* note 87.

which people tried to use a gun, a knife, or another weapon; displayed but did not try to use a weapon; were suspected of having a weapon; engaged in some form of resistance; or engaged in no resistance at all.

A description of the holdings and rationales of each of these 284 decisions is far beyond the scope of this Article. But discussion of just a few of these decisions in one area—tasers—illustrates just how fine the factual distinctions can be between cases, and the importance of those distinctions to the qualified immunity analysis. Take, for example, *Isayeva v. Sacramento Sheriff's Department*,<sup>91</sup> a Ninth Circuit decision reversing the district court's denial of qualified immunity.<sup>92</sup> Sacramento County Sheriff's deputies responded to a domestic disturbance call, and were told someone at the home had possible drug and mental health issues.<sup>93</sup> There was evidence that the person, Paul Tereschenko, may have been under the influence of methamphetamine and had been hearing voices. The deputies told Tereschenko that they were going to take him to a hospital for evaluation. As the Ninth Circuit explains:

Tereschenko initially complied, but kept turning back around. Fearing that Tereschenko was reaching for something, Deputy [Sean] Barry grabbed one of his arms. Deputy [Corbin] Gray grabbed the other. Tereschenko stiffened his arms and tried to get his hands free by pushing the officers and resisting Deputy Gray's attempt at a control hold. Both deputies told Tereschenko to stop resisting. The deputies struggled with the resisting Tereschenko, who was tossing them around. Then, Deputy Barry tased Tereschenko in drive-stun mode for a five-second cycle.<sup>94</sup>

In determining whether Deputy Barry was entitled to qualified immunity, the Ninth Circuit considered the similarity of these facts to three other Ninth Circuit decisions involving tasers. First, the court compared the facts to *Bryan v. McPherson*,<sup>95</sup> a case in which the Ninth Circuit found an officer's taser deployment

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<sup>91</sup> 872 F.3d 938 (2017).

<sup>92</sup> *See id.* at 953.

<sup>93</sup> *See id.* at 942.

<sup>94</sup> *Id.* at 948. One of the deputies later shot and killed Tereschenko. This discussion focuses on the court's analysis of the use of the taser.

<sup>95</sup> 630 F.3d 805 (9th Cir. 2010).

violated the Fourth Amendment.<sup>96</sup> The court observed that the facts in *Bryan* and *Isayeva* were similar in many respects: “Both Tereschenko and the plaintiff in *Bryan* were unarmed and were tased without warning. Both were possibly mentally ill, were agitated, and failed to comply with at least one law enforcement command. And neither had committed a serious crime.”<sup>97</sup> Yet, according to the *Isayeva* court, the decision in *Bryan* did not clearly establish that Deputy Barry’s conduct violated clearly established law because there were factual distinctions between the cases: while Deputy Barry used his taser in “drive-stun” mode, the officer in *Bryan* used his taser in “dart mode”; Tereschenko’s tasing did not result in injury while the tasing in *Bryan* led to the loss of four teeth and facial abrasions; and while Tereschenko struggled with the deputies, the plaintiff in *Bryan* was fifteen to twenty-five feet away when he was tased.<sup>98</sup>

Next, the *Isayeva* court compared the constitutionality of Deputy Barry’s conduct with the facts of two other Ninth Circuit cases that were consolidated and heard together en banc—*Brooks v. City of Seattle* and *Mattos v. Agarano*<sup>99</sup>—in which the Ninth Circuit found the officers’ taser use violated the Constitution.<sup>100</sup> In *Brooks*, a seven-month-pregnant woman was pulled over for speeding and would not sign a traffic citation or exit her car.<sup>101</sup> When an officer forcibly tried to remove her from her vehicle, she “stiffened her body and clutched the steering wheel,” and an officer tased her in drive-stun mode three times in less than a minute.<sup>102</sup> In *Mattos*, officers responded to a domestic dispute and the plaintiff got between the officers and her husband, extending her arms to prevent the officer from coming closer.<sup>103</sup> The officer

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<sup>96</sup> See *id.* at 832. In *Bryan*, the Ninth Circuit reversed the district court’s grant of summary judgment, holding that—viewing the facts in the light most favorable to the plaintiff—the officer’s use of the taser was unconstitutional.

<sup>97</sup> *Isayeva*, 872 F.3d at 948.

<sup>98</sup> *Id.* at 948–49.

<sup>99</sup> *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc) (consolidated), *cert. denied*, 566 U.S. 130, 130–31 (2012).

<sup>100</sup> *Id.* at 452. In this consolidated opinion, the Ninth Circuit ruled that the facts—viewed in the light most favorable to both of the plaintiffs—established constitutional violations, but that the officers in both cases were entitled to qualified immunity.

<sup>101</sup> See *id.* at 436–37.

<sup>102</sup> *Id.* at 437.

<sup>103</sup> *Id.* at 439.

tased the plaintiff once in dart mode.<sup>104</sup> The *Isayeva* court again found factual similarities between the cases:

Tereschenko was not armed. Nor were the plaintiffs in *Brooks* and in *Mattos*. None of these plaintiffs had committed a serious crime. And none was given an adequate warning. Tereschenko and the plaintiff in *Brooks* both resisted the officers by stiffening up. And all three plaintiffs tried to frustrate the officers by plaintiffs' physical efforts.<sup>105</sup>

Despite these similarities, the *Isayeva* court concluded that *Brooks* and *Mattos* did not clearly establish the unconstitutionality of Deputy Barry's conduct.<sup>106</sup> Tereschenko was a "very big man," and larger than the officers, while the plaintiffs in *Brooks* and *Mattos* were female and one was pregnant.<sup>107</sup> Tereschenko "was strong enough to toss the deputies around and frustrate their physical efforts to constrain him" while the plaintiff in *Mattos* "merely extended her arms."<sup>108</sup> Tereschenko was "likely under the influence of drugs" while available evidence suggests the plaintiffs in *Brooks* and *Mattos* were sober.<sup>109</sup> And Tereschenko was tased only once in drive-stun mode, while the *Brooks* plaintiff was tased three times in less than a minute, and the *Mattos* plaintiff was tased in the more severe dart mode.<sup>110</sup> Thus, the Ninth Circuit concluded, the factual distinctions between *Isayeva* and *Bryan*, *Brooks*, and *Mattos* meant that these decisions did not "put the constitutionality of Deputy Barry's actions 'beyond debate.'"<sup>111</sup> For these reasons, the court granted Deputy Barry qualified immunity.

In granting Deputy Barry qualified immunity, the *Isayeva* court did not address the district court's decision that a reasonable jury could find Deputy Barry violated the Constitution. But it is perhaps useful to take a moment to appreciate the distinction between an analysis of the constitutionality of Deputy Barry's conduct and his entitlement to qualified immunity, and the distinct roles that cases like *Bryan*, *Brooks*, and *Mattos* would play

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<sup>104</sup> *Mattos*, 661 F.3d at 439.

<sup>105</sup> *Isayeva*, 872 F.3d at 949.

<sup>106</sup> *See id.* at 950.

<sup>107</sup> *Id.* at 949.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 950.

<sup>110</sup> *See Isayeva*, 872 F.3d at 950.

<sup>111</sup> *Id.* (quoting *al-Kidd*, 563 U.S. at 741).

in these analyses. To determine the constitutionality of Deputy Barry's conduct, the Ninth Circuit would assess whether, under the totality of the circumstances, and viewing the evidence in the light most favorable to the plaintiff, Officer Barry's decision to tase Tereschenko for five seconds in drive-stun mode was objectively reasonable. In reaching its conclusion, the *Isayeva* court would consider the *Graham* factors, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>112</sup> The court might analogize or distinguish to other cases, including *Bryan*, *Brooks*, and *Mattos*, when deciding whether a jury could reasonably find for the plaintiff. But the key question would be whether the deputy's conduct was objectively reasonable given the facts apparent to the officer at the time.

In a qualified immunity analysis, in contrast, the focus is not on whether the Constitution was violated, but on whether prior court decisions are sufficiently similar to put the defendant on notice of the unconstitutionality of his behavior. In granting Deputy Barry qualified immunity, the *Isayeva* court concluded that the factual distinctions between the events that unfolded between Deputy Barry and Paul Tereschenko on the one hand, and *Bryan*, *Brooks*, and *Mattos* on the other hand—including differences in the taser mode used, the number of times the people were tased, the injuries suffered by the people tased, the distance of the officers to the people tased, the relative size of the people tased to the officers who tased them, and the nature of the resistance—meant that Deputy Barry would not have had fair notice of the unconstitutionality of his conduct. Thus, the qualified immunity analysis assumes that Deputy Barry knew the precise details of the facts underlying *Bryan*, *Brooks*, and *Mattos* and considered the distinctions between those facts and the situation with Tereschenko as it was unfolding before him.

But *did* Deputy Barry actually know about the facts in *Bryan*, *Brooks*, and *Mattos*? Did he recall these decisions while deciding whether to tase Paul Tereschenko, what taser mode to use, and how long to apply the force? Would any law enforcement officer, in Deputy Barry's situation, know about and recall these cases? When considering the likelihood of these prospects, keep in mind

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<sup>112</sup> *Graham*, 490 U.S. at 396.



that discussion in this Part has focused on 3 of 18 (22.2%) Ninth Circuit cases addressing the constitutionality of taser use, just a miniscule portion (1.4%) of the 284 Ninth Circuit and Supreme Court use-of-force decisions I found that could be used to clearly establish the law, and an even smaller percentage of Ninth Circuit decisions involving other types of constitutional claims and circuit court decisions around the country that could clearly establish the law.

Courts and commentators have suggested in passing that officers could not possibly know about the facts of all these cases or consider them during their work.<sup>113</sup> But neither the Supreme Court's assumption of notice—nor courts' and commentators' skepticism about that notice—has been empirically tested until now.

### III. WHAT POLICE KNOW ABOUT “CLEARLY ESTABLISHED LAW”

In order to better understand whether police officers know about the types of court decisions that clearly establish the law for the purposes of qualified immunity, I examined policies, trainings, and other materials provided to California law enforcement officers about Ninth Circuit decisions interpreting *Graham* and *Garner*. In this Part, I describe my findings.

In sum, I find California officers appear to be regularly informed about the general principles in *Graham* and *Garner*. This finding is consistent with other evidence that police departments incorporate information about watershed decisions and statutory requirements into their policies and trainings.<sup>114</sup> Indeed, in my

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<sup>113</sup> See *supra* notes 21–22 and accompanying text.

<sup>114</sup> See, e.g., POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 18 (2016) (explaining that, after the Fourth Circuit held that using a taser repeatedly in drive-stun mode was unconstitutional, “several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies” in response to the decision); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 543 (2013) (citations omitted):

After the Court prohibited random stops of motorists to check their licenses and registration in *Delaware v. Prouse*, the District of Columbia Police Department almost immediately overhauled its policies to comply with the new ruling. More recently, after the Court held that the installation and subsequent use of a GPS device to monitor a vehicle's movements was a “search” within the meaning of the Fourth Amendment in *United States v. Jones*, the FBI's general counsel reported that the decision caused the agency to turn off nearly 3,000 monitoring devices.

See also David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580–81 (2008) (observing that California law enforcement agencies stopped training

review, I found instances in which new legal requirements—including a California statute that changed the definition of excessive force and a California Supreme Court decision that clarified the negligence standard as it applies to law enforcement—were communicated to officers.<sup>115</sup> But my review of California police department policies and trainings, advice from government attorneys, and other sources makes clear that officers are not educated about the facts and holdings of cases applying *Graham* and *Garner* to various factual scenarios—precisely the types of cases that the Supreme Court says are necessary to give fair notice to officers and clearly establish the law for the purposes of qualified immunity.

To be clear, this Article should not be read to endorse California law enforcement agencies' reliance on *Graham* and *Garner*. Instead, I agree with scholars, government agencies, civil rights groups, and some law enforcement officials that have criticized *Graham* and called for the decision to play less of a role in police department policies.<sup>116</sup> This Article should also not be read to

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their officers not to conduct warrantless searches of trash—a requirement of California constitutional law—after the U.S. Supreme Court rejected this prohibition); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1135–54 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)); *LAPD Commission Adds to Guidelines for Review of Police Use of Force*, NBC L.A. (Feb. 18, 2014), <https://perma.cc/6CX7-SKL5> (reporting that *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013), a decision by the California Supreme Court that “tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability” caused the Los Angeles Police Commission to change the ways in which it evaluates whether force used by its officers was proper).

<sup>115</sup> See, e.g., SAN BERNARDINO CNTY. SHERIFF'S DEPT REG'L TRAINING CTR., FORCE OPTIONS SIMULATOR—PSP: EXPANDED COURSE OUTLINE 3–4 (on file with author) (describing the ways in which California Assembly Bill 392 changed the definition of excessive force, and indicating that officers watched a video produced by California Police Officer Standards and Training that outlined the details of the new law); see also *infra* note 203 (describing a newsletter disseminated to Los Angeles Sheriff's Department officials that describes the facts and holding of *Hayes v. County of San Diego*).

<sup>116</sup> See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505 (2016) (explaining that the Fourth Amendment, including the *Graham* and *Garner* frameworks as well as the Court's interpretation of the power of police to stop, search, and arrest, amounts to a “Privileges and Immunities Clause for police officers—it confers tremendous power and discretion to police officers with respect to *when* they can engage people (the ‘privilege’ protection of the Fourth Amendment) and protects them from criminal and civil sanction with respect to *how* they engage people (the ‘immunities’ protection of the Fourth Amendment)” (emphasis in original)); Rachel Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008) (arguing

suggest that police should be educated about the hundreds or thousands of court decisions that apply *Graham* and *Garner* to various factual scenarios. Although I believe law enforcement could make better use of the insights about police power contained in court decisions, I do not believe it would be a productive use of time for officers to study every court decision that might clearly establish the law.<sup>117</sup>

My focus in this Article is not on what form police use-of-force policies and trainings should take. It is, instead, on the extent to which the Supreme Court's expectation that officers have notice of decisions applying *Graham* and *Garner*—an expectation that underlies the Court's qualified immunity doctrine and definition of “clearly established law”—has basis in reality. For the reasons that follow, I find that it does not.

#### A. Methodology

Before describing my findings, it makes sense to answer a few possible questions about my methodological choices.

First, why California? California is the nation's most populous state and has more than five hundred law enforcement agencies; for those reasons alone it is a worthwhile subject of study.<sup>118</sup>

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that Supreme Court doctrine on use of force is “deeply problematic” because “[i]t provides unprincipled, indeterminate, and sometimes simply misleading guidance” by failing “to articulate a systematic conceptual framework for assessing police uses of force.”); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 291 (2017) (“To the extent that police agencies rely on Supreme Court rulings to inform use-of-force and tactics training, we view such approaches as ill advised.”); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 526 (2021) (explaining that the *Graham* factors “have limited analytical value” and “[a]t best, [ ] serve as weak and potentially misleading proxies for the governmental interests that can justify the use of force by police, offering no guidance on what type of force or how much force officers can legitimately use in any given situation”); see also POLICE EXEC. RSCH. F., *supra* note 114, at 35–36 (recommending that police agencies “continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor*” in order to “provide more concrete guidance to officers” and to “help prevent officers from being placed in situations where they have no choice but to make split-second decisions that may result in injuries or death to themselves or others”).

<sup>117</sup> For further discussion of the ways in which police might benefit from closer attention to court decisions, see *infra* notes 223–24 and accompanying text.

<sup>118</sup> See Weisselberg, *supra* note 114, at 1123 (studying police policies and trainings in California, and noting that “California is the nation's most populous state and has the largest criminal justice system of all the states” such that “what happens in California is therefore significant in its own right”); see also BRIAN A. REAVES, U.S. DEP'T OF JUST.,

But I focused on California for another reason: a recently passed law requires law enforcement agencies to “conspicuously” post all policies and training materials that would be subject to disclosure under public records requests.<sup>119</sup> Not all departments appear to have fulfilled their obligations under the law. But many have, and those policies and training outlines offer valuable information with which to understand law enforcement policies and trainings in the state, and the role that court decisions play in each. Although California is unique in its number of law enforcement agencies and officers as well as in its transparency regarding policies and trainings, there is no reason to believe that California’s use-of-force policies and trainings are categorically different from those in other states,<sup>120</sup> or that its departments are outliers in the manner and extent to which they educate their officers about court decisions.<sup>121</sup>

Second, has my study captured all the ways a police officer might come to learn about the facts and holdings in court decisions applying *Graham* and *Garner*? I share Professor Charles Weisselberg’s view that “[m]ost police officers are not lawyers and they do not usually read legal newspapers; thus, judicial opinions will not have an impact in the stationhouse unless sworn personnel are formally instructed about them.”<sup>122</sup> The Supreme Court appears to agree that officers will not be “familiar with the

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BUREAU OF JUST. STAT., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 15 (2011) (reporting that, in 2008, California had 509 law enforcement agencies).

<sup>119</sup> CAL. PENAL CODE § 13650 (West 2018). For further description of these obligations, see Bulletin No. 2019-29, Manuel Alvarez, Jr., Comm’n on Peace Officer Standards and Training, Action Required: Senate Bill 978 Requires Publication of All Non-Exempt Education and Training Materials, Including Presenter Course Content, on POST’s Website by January 1, 2020 (Sept. 24, 2019), <https://perma.cc/P64S-BRT9>.

<sup>120</sup> For a description of California departments’ use-of-force policies as compared to use-of-force policies across the country, see *infra* note 134 and accompanying text. For the number of training hours and requirements in California, as compared to the national average, see *infra* note 148 and accompanying text.

<sup>121</sup> See Telephone Interview with Roger Clark, Police Pracs. Expert (Aug. 28, 2020) (on file with author) (reporting that use-of-force policies and trainings “always cite *Graham* and *Garner*, and that’s about it”); E-mail from Jack Ryan, Att’y, Legal & Liab. Risk Mgmt. Inst., to Joanna C. Schwartz (Sept. 1, 2020, 3:36 PM) (on file with author) (“To the extent there is legal training, it is mostly done in the basic academy before the pre-service recruits have any field experience to give them a frame of reference with respect to application. . . . [W]ith respect to use of force, most trainings cover *Garner* and *Graham* but little else.”); Interview with Lou Reiter, Police Consultant, Lou Reiter and Assocs. (May 5, 2020) (one file with author) (“We have interesting case law out there, but it’s not getting out there to people in the street.”).

<sup>122</sup> Weisselberg, *supra* note 114, at 1135.

constitutional constraints on the use of deadly force” except through training.<sup>123</sup> Accordingly, I have focused my study on California law enforcement agencies’ use-of-force policies and use-of-force training outlines that guide basic training, in-service training, and the training of instructors who teach these basic and in-service training courses.

But I did not limit my research to policies and trainings. I also submitted public records requests to district attorneys and city attorneys to determine whether they provided officers with any additional information about court decisions, and I researched other subscription services that might provide legal information relevant to law enforcement officers.

In addition, I corresponded with representatives from two entities that play an outsized role in California police policies and trainings, to make sure I was getting a comprehensive lay of the land. The first is Lexipol LLC, a private, for-profit provider of police department policies and trainings that counts approximately 95% of California law enforcement agencies—and over 3,500 public safety agencies in 35 states across the country—as its clients.<sup>124</sup> The second is the State of California Commission on Peace Officer Standards and Training (California POST), which sets minimum standards for police officers’ basic and in-service training—including the subjects covered and the amount of time spent on various areas—and approves training outlines as sufficient to satisfy those requirements.<sup>125</sup> Finally, I consulted with three police-practices experts who offered insights about the extent to which

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<sup>123</sup> *Connick v. Thompson*, 563 U.S. 51, 64 (2011) (“There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require.”).

<sup>124</sup> For an overview of Lexipol’s role in police policymaking, see generally Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018). For the number of law enforcement agency subscribers to Lexipol, see Press Release, *Lexipol and Praetorian Digital Merge, Creating Comprehensive Content, Training and Policy Platform for Public Safety*, GLOBALNEWSWIRE (Feb. 8, 2019), <https://perma.cc/T3XQ-MVJS>. Because Lexipol provides policies to so many agencies, their practices and perspectives have a disproportionate impact not only on California agencies, but also on agencies nationwide.

<sup>125</sup> For an overview of the role of California POST in police policies and trainings, see Weisselberg, *supra* note 114, at 1136–40; *About POST*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/SVB9-9VKW>. For more information and access to training outlines, see POST, <https://post.ca.gov/>.

California policies and trainings are reflective of practices nationwide.<sup>126</sup>

It is certainly possible that an officer might come to learn about a court decision through some informal means not captured in this study. But by exploring hundreds of police policies, training outlines, and other briefing materials received by California law enforcement officers, I have examined the primary mechanisms by which law enforcement officers would learn about court decisions that clearly establish the law.<sup>127</sup>

Third, why examine officers' understanding of use-of-force cases? Focusing on cases interpreting *Graham* and *Garner*—and the extent to which officers know about those cases—makes sense for a few reasons. The Supreme Court has repeatedly emphasized that *Graham* and *Garner* on their own do not clearly establish the law—instead, plaintiffs need to point to decisions applying *Graham* and *Garner* to the particular factual circumstances confronted by the officers.<sup>128</sup> In addition, standards for the use of force play a predominant role in police department policies and trainings.<sup>129</sup> As Professor Chris Slobogin has observed, “[t]he single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force.”<sup>130</sup>

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<sup>126</sup> See Telephone Interview with Roger Clark, *supra* note 121 (reporting that he has consulted in more than two thousand cases and testified in more than one thousand cases in twenty-seven states); *Attorneys/Expert Witness*, LEGAL & LIAB. RISK MGMT. INST., <https://perma.cc/F6P9-U8US> (describing Jack Ryan's experience training police officers around the country and his role as a codirector of the Legal and Liability Risk Management Institute, “which provides services relating to risk management for law enforcement agencies nationwide.”); Biography of Lou Reiter (on file with author) (explaining that Reiter trains more than 1,000 police practitioners each year, conducts police agency management audits and liability assessments, including eight investigations of law enforcement agencies undertaken by the U.S. Department of Justice, and has served as an expert witness in more than 1,100 civil suits involving the police).

<sup>127</sup> *Accord* Weisselberg, *supra* note 114, at 1135–36 (examining the impact of court cases interpreting *Miranda* on police practices by analyzing law enforcement agencies' in-service training manuals and instructional materials produced by California POST and district attorneys' offices).

<sup>128</sup> See *supra* notes 47–51 and accompanying text (describing Supreme Court decisions setting out this requirement).

<sup>129</sup> See Garrett & Stoughton, *supra* note 116, at 250–52 (explaining that virtually all training academies instruct on firearms and use of force, and that recruits spend more time on these topics than any other area of training); see also *infra* note 132 and accompanying text.

<sup>130</sup> Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 396 (noting that this area also “happens to be one of the few domains where the police are successfully sued for large sums of money”).

So, both the Supreme Court's decisions and the structure of police department policies and trainings suggest that if there is any area of the law about which officers would learn about the facts and holdings of court decisions, that area would concern the use of force. Moreover, there is no reason to believe that trainings or educational materials in other areas of the law rely more heavily on the facts and holdings of court opinions interpreting watershed cases.<sup>131</sup>

## B. Policies

Virtually every law enforcement agency has a policy manual—a document that is often hundreds of pages long and sets out general standards for police officer conduct.<sup>132</sup> And virtually all of these policy manuals contain policies—which can themselves be many pages long—regarding the use of force by officers.<sup>133</sup>

The Supreme Court's decisions in *Graham* and *Garner* play an outsized role in law enforcement use-of-force policies nationwide.<sup>134</sup> *Graham* also plays a starring role in most California agencies' use-of-force policies. More than 95% of California's law enforcement agencies have use-of-force policies designed by

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<sup>131</sup> See Telephone Interview with Roger Clark, *supra* note 121 (reporting that trainings in other areas—including arrests, for example—may include more references to state statutes but are no more likely than use-of-force policies and trainings to incorporate references to court decisions that would clearly establish the law).

<sup>132</sup> See SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 97 (2020) (explaining that, “[a]s of 2000, the most recent year for which data [was] available, . . . over 93 percent of police agencies had written rules related to the use of deadly force and 87 percent had written rules related to the use of less-lethal force”).

<sup>133</sup> See, e.g., CONTRA COSTA CNTY. OFF. OF THE SHERIFF, POLICY AND PROCEDURES MANUAL: USE OF FORCE POLICY 575–90 (June 25, 2020) (on file with author) (16 pages); S.F. POLICE DEP'T, GENERAL ORDER 5.01: USE OF FORCE POLICY (Dec. 21, 2016) (on file with author) (19 pages); UPLAND POLICE DEP'T, POLICY AND PROCEDURES MANUAL CH. 8: WEAPONS SYSTEMS AND USE OF FORCE POLICY (on file with author) (54 pages); DAVIS POLICE DEP'T, USE OF FORCE POLICY (Sept. 2020) (on file with author) (28 pages); SAN JOSE POLICE DEP'T, DUTY MANUAL § L 2600: USE OF FORCE POLICY, PUBLIC VERSION (on file with author) (30 pages).

<sup>134</sup> See Garrett & Stoughton, *supra* note 116, at 219, 285 (finding that “[a]bout half” of the policies for the fifty largest police departments “relied upon language from *Graham* and the Supreme Court's Fourth Amendment cases”); Stoughton, *supra* note 116, at 568–72 (describing the ways in which *Graham* is integrated into police policies); Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J.L. & MED. 279, 286–87 (2017) (arguing that agency policies “over-rely on reciting the basic constitutional standard for police engagements . . .”).

Lexipol LLC.<sup>135</sup> And Lexipol’s use-of-force policy—which instructs that officers “shall use only that amount of force that reasonably appears necessary given the facts and totality of the circumstances known to or perceived by the officer at the time of the event,” and that “[t]he reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident”—is drawn almost verbatim from the language in *Graham*.<sup>136</sup>

Although Lexipol’s use-of-force policy relies heavily on the language in *Graham*, cases applying *Graham*—that clearly establish the law for qualified immunity purposes—appear nowhere in the policy. Lexipol’s policy manual includes no examples of how its use-of-force policy might apply to various factual scenarios. Instead, Lexipol’s policy explains, “no policy can realistically predict every possible situation an officer might encounter,” and so “officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.”<sup>137</sup>

More generally, Lexipol’s representatives reported to me that they “rarely, if ever, utilize appellate decisions as a basis for policy change.”<sup>138</sup> Indeed, in the view of Bruce D. Praet, a government defense attorney who cofounded Lexipol, there are no circuit court decisions that have clearly established the law with any more specificity than *Graham* provides. He writes:

I [ ] have not really yet seen a circuit court decision which clearly identifies new circumstances sufficient to establish a new rule beyond good old “objective reasonableness” under the “totality of the circumstances” in each case. . . . This is why our policies reinforce this [*Graham*] standard and attempt to provide officers with guidance on how to assess and

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<sup>135</sup> See Eagly & Schwartz, *supra* note 124, at 893–94.

<sup>136</sup> See, e.g., ANAHEIM POLICE DEP’T, POLICY MANUAL § 300.3: USE OF FORCE 49 (2020) (on file with author). Lexipol’s national use of force policy has slightly different wording, but still hews closely to the language in *Graham*. LEXIPOL, USE OF FORCE POLICY, ANYTOWN POLICE DEPARTMENT (2020). Lexipol explains on its web page that its national model policy “is intended as a starting point for local governments and agencies preparing policies for dealing with use of force. This is a national-level policy and references holdings from federal case law but does not include applicable state or local requirements.” *Id.*

<sup>137</sup> ANAHEIM POLICE DEP’T, *supra* note 136, at § 300.3, 49.

<sup>138</sup> E-mail from Bruce D. Praet, Co-Founder, Lexipol, to Joanna C. Schwartz (May 5, 2020 2:43 PM) (on file with author).



articulate the totality of each set of circumstances when making the often split-second decision to use force.<sup>139</sup>

In sum, police officers employed by 3,500 agencies in 35 states across the country—including officers employed by the 95% of California law enforcement agencies that subscribe to Lexipol—are highly unlikely to have any guidance from their policy manuals about the facts or holdings of any court decisions applying *Graham* and *Garner*.<sup>140</sup>

Among the two hundred largest law enforcement agencies in California, there are twenty-five that do not subscribe to Lexipol. I found more variation in these departments' use-of-force policies, but minimal attention to court decisions beyond *Graham* and *Garner*.<sup>141</sup> Like the Lexipol policies, these jurisdictions' use-of-force policies appear to rely generally on the principles set out in *Graham* and *Garner*. Some explicitly mention *Graham* and, less frequently, *Garner*.<sup>142</sup> Among them, only three—the Alameda

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<sup>139</sup> E-mail from Bruce D. Praet, Co-Founder, Lexipol, to Joanna C. Schwartz (May 5, 2020, 3:49 PM) (on file with author).

<sup>140</sup> Lexipol subscribers can modify their policies, but those changes will revert as soon as there is a policy update. See Eagly & Schwartz, *supra* note 124, at 935–36. In reviewing Lexipol policy manuals, I have not seen a manual that adjusts use-of-force policies in ways that incorporate the facts or holdings of court decisions beyond *Graham* and *Garner*.

<sup>141</sup> As of 2018, among the largest two hundred law enforcement agencies in California, twenty-six did not contract with Lexipol and another eight did subscribe with Lexipol but published their own policy manuals that drew in some manner on Lexipol's materials. See Eagly & Schwartz, *supra* note 124, at 960–76. I reviewed the current use-of-force policies for these thirty-four independent and hybrid jurisdictions for this Article, and found that nine of the thirty-four jurisdictions have adopted Lexipol's standard use-of-force policy. See, e.g., RIVERSIDE CNTY. SHERIFF'S DEP'T, DEPARTMENT STANDARDS MANUAL POLICY 300: USE OF FORCE 55–60 (2020) (on file with author); TORRANCE POLICE DEP'T, *supra* note 136; IRVINE POLICE DEP'T, POLICIES: POLICY 310 USE OF FORCE 180–86 (2020) (on file with author); SANTA CLARA POLICE DEP'T, S.C.P.D. POLICY MANUAL: POLICY 300 USE OF FORCE (2019) (on file with author); BEVERLY HILLS POLICE DEP'T, B.H.P.D. POLICY MANUAL: POLICY 300 USE OF FORCE 31–37 (2018) (on file with author); EL CAJON POLICE DEP'T, E.C.P.D. POLICY MANUAL: POLICY 300 USE OF FORCE 40–47 (2019) (on file with author); SOLANO CNTY. SHERIFF'S OFF., POLICY MANUAL: POLICY 300 USE OF FORCE 34–41 (2020) (on file with author); BUTTE CNTY. SHERIFF'S OFF., POLICY MANUAL: POLICY 300 USE OF FORCE 39–45 (2020) (on file with author); INDIO POLICE DEP'T, INDIO P.D. POLICY MANUAL: POLICY 300 USE OF FORCE (2020).

<sup>142</sup> See, e.g., L.A. POLICE DEP'T, 556.10 POLICY ON THE USE OF FORCE (on file with author):

Pursuant to the opinion issued by the United States Supreme Court in *Graham v. Connor*, the Department examines the reasonableness of any particular force used: a) from the perspective of a reasonable Los Angeles Police Officer with similar training and experience, in the same situation; and b) based on the facts and circumstances of each particular case.

County Sheriff's Office, the Kern County Sheriff's Office, and the Marin County Sheriff's Department—referenced a case applying *Graham* and *Garner* but included no detail about the cases' facts or holdings.

For example, the Alameda County Sheriff's Office's use-of-force policy instructs officers that they are “to follow all legal authority and standards in the application of force when dealing with arrestees or detainees,”<sup>143</sup> and then includes hyperlinked references to two California penal statutes and three court decisions: *Graham*, *Garner*, and *Forrester v. San Diego*.<sup>144</sup> The other two manuals that reference court decisions are similarly opaque about the nature of the cases referenced or their relevance to officers' use-of-force analyses.<sup>145</sup>

Perhaps it is no surprise that police policy manuals do not describe the details of cases applying *Graham* and *Garner*. After all, policy manuals are intended to set out the general terms of

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L.A. SHERIFF'S DEP'T, MANUAL OF POLICY AND PROCEDURES: CHAPTER 10—FORCE POLICY 2 (on file with author) (“The basis in determining whether force is ‘unreasonable’ shall be consistent with the Supreme Court decision of *Graham v. Connor*, 490 U.S. 386 (1989)”) (emphasis in original); KERN COUNTY SHERIFF'S DEPARTMENT USE OF FORCE POLICY 2 (“‘Reasonableness’ of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident.” (quoting *Graham*, 490 U.S. at 396)); PLACER CNTY. SHERIFF'S OFFICE, GENERAL ORDERS MANUAL OPERATIONAL ORDER 1: USE OF FORCE 3 (2020) (on file with author) (Any interpretation of “reasonableness” must allow for the fact that law enforcement officers, in circumstances that are tense, uncertain and rapidly evolving, are often forced to make split-second decisions about the amount of force that is necessary in a particular situation under *Graham v. Connor*.); ESCONDIDO POLICE DEP'T, CRITICAL CORE POLICY TASKS: 1.24 USE OF FORCE AND USE OF FORCE REVIEW COMMITTEE 2 (2020) (on file with author) (“Any analysis of the use of force in the course of an arrest . . . shall be analyzed under the Fourth Amendment and its ‘objective reasonableness’ standard.” (citing *Graham*, 490 U.S. at 395–98)).

<sup>143</sup> ALAMEDA CNTY. SHERIFF'S OFF., GENERAL ORDER 1.05: USE OF FORCE 2 (2020) (on file with author).

<sup>144</sup> 25 F.3d 804 (9th Cir. 1994). For further discussion of the role played by *Forrester* in police trainings, see *infra* notes 174–75 and accompanying text.

<sup>145</sup> Marin County's use-of-force policy lists several cases as “related standards” in its thirty-page policy without descriptions of the cases or any contextualization. MARIN CNTY. SHERIFF'S OFF., PATROL SERVICES POLICY AND PROCEDURE MANUAL, GENERAL POLICY: USE OF FORCE (on file with author). The cases include *Graham*, *Garner*, *Forrester*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (which sets out the standard for standing in cases seeking injunctive relief), and *Burns v. Honolulu* (an unpublished 1979 district court decision unavailable on Westlaw). The Kern County Sheriff's Office policy referenced a Second Circuit case and Supreme Court case in support of the proposition that “[f]orce used within the Sheriff's Office Facilities shall never be for the purpose of maliciously or sadistically causing harm.” KERN CNTY. SHERIFF'S OFF., *supra* note 142, at F-100-2 (first citing *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973); and then citing *Whitley v. Albers*, 475 U.S. 312 (1986)). There is no description of the facts of the cases.

engagement, with the application of those principles illuminated through procedures and trainings.<sup>146</sup> One might expect that cases applying *Graham* and *Garner* would not be included in police use-of-force policies but would, instead, be described to officers in the course of their trainings.<sup>147</sup> Yet, as I describe in the next Section, the types of use-of-force cases that clearly establish the law for qualified immunity purposes play a minimal role in California officers' trainings as well.

### C. Trainings

In California, the Commission on Police Officer Standards and Training sets the minimum hours and requirements for California law enforcement officers' basic and continuing training.<sup>148</sup> California POST also certifies law enforcement agencies' and private companies' detailed training outlines as sufficient to satisfy these training hours, and is required by California law to post those training outlines on their website.<sup>149</sup>

I searched on California POST's website to find trainings regarding uses of force by searching terms like "force," "arrest," and "firearm." Each of these terms revealed dozens of course names, and many courses with the same name were offered by several or even dozens of departments and educational providers. I focused on those trainings that included legal updates or the state of the

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<sup>146</sup> For one description of the distinction between policies and procedures, see Eagly & Schwartz, *supra* note 124, at 903 n.59 (describing Lexipol representatives' views that "a policy manual '[a]nswers majority organizational issues,' is '[u]sually expressed in broad terms,' has '[w]idespread application,' and '[c]hanges less frequently'" (alterations in original)); see also Garrett & Stoughton, *supra* note 116, at 249–52 (describing the differences between police use-of-force policies and tactics).

<sup>147</sup> Weisselberg, *supra* note 114, at 1135 ("[I]n-service training makes the most significant contribution to officers' understanding of search and seizure law.").

<sup>148</sup> See Minimum Standards for Training, CAL. CODE REGS. tit. 11, § 1005 (2020). Training practices vary widely around the country. Each state has different requirements about the minimum training hours required for law enforcement officers who serve in their state. For a description of training requirements across the country, see *State Law Enforcement Training Requirements*, INST. FOR CRIM. JUST. TRAINING REFORM, <https://perma.cc/4NRY-6H4Y>. Note that, nationwide, states require an average of 647 basic training hours and 21 yearly in-service training hours. California requires 664 basic training hours and 12 yearly in-service training hours.

<sup>149</sup> See Telephone Interview with Meagan Catafi, Pub. Info. Officer, Cal. Comm'n on Peace Officer Standards and Training (May 7, 2020) (explaining that the training outlines they approve are "an expanded course outline to the third degree" and that "[b]asically, what are you teaching and tell us everything down to that third level of detail").

law as one of the course objectives.<sup>150</sup> Based on this review, I found twenty-four course titles with training outlines that referenced legal updates among their objectives—one regular basic training course, nineteen in-service training courses, and four courses designed for instructors. On California POST’s website, there were a total of 329 courses with these titles offered by local law enforcement agencies and educational institutions.<sup>151</sup> In the subsections that follow, I describe these courses and the extremely limited role that Supreme Court and Ninth Circuit decisions applying *Graham* and *Garner* appear to play in them.<sup>152</sup>

### 1. Basic training.

All California law enforcement officers must go through basic training, including training about use of force. California POST has designated forty-three “learning domains” that regular basic training must contain, ranging from “leadership, professionalism, and ethics” to “controlled substances” to “investigative report writing,” to “cultural diversity/discrimination.”<sup>153</sup> “Use of force/deescalation”—domain 20—includes among its learning objectives the “Fourth Amendment standard for determining objective reasonableness as determined by the U.S. Supreme Court” and the “legal framework establishing a peace officer’s authority during a legal arrest.”<sup>154</sup>

California POST appears to intend that *Graham* and *Garner* play the predominant role in officers’ regular basic training about

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<sup>150</sup> There are numerous types of courses—in, for example, firearm tactics, takedown techniques, and racial bias—that do not include legal updates among their aims. Accordingly, I have not included those courses in this discussion.

<sup>151</sup> Some departments have submitted multiple versions of the same training; I have reviewed all available versions, but am treating these multiple versions as a single training when counting the total number of trainings in this study.

<sup>152</sup> Note that, even when training outlines include references to cases, it is not certain that these cases are included in the actual trainings provided to officers. See Interview with Roger Clark, *supra* note 121:

Even when outlines are loaded with case law as reference it doesn’t get discussed in the classroom. There will be a general comment about this that or the other thing and the citation. But there will never be a discussion of the court cases in the trainings. I don’t think that any training is ever presented in terms of case law.

<sup>153</sup> CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, *Regular Basic Course Training Specifications*, POST.CA., <https://perma.cc/MQ4H-VK4K>.

<sup>154</sup> CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, TRAINING AND TESTING SPECIFICATIONS FOR LEARNING DOMAIN #20: USE OF FORCE/DEESCALATION 1 (2020) (on file with author).

the constitutional bounds of uses of force. California POST has created a student workbook that basic training programs use, and its section on Use of Force/Deescalation describes the Supreme Court’s holdings in *Graham* and *Garner* in some detail.<sup>155</sup>

FIGURE 1: CALIFORNIA POST’S REGULAR BASIC TRAINING WORKBOOK (DISCUSSION OF *GRAHAM* AND *GARNER*)<sup>156</sup>

**Considerations Regarding the Use of Deadly Force, continued**

**Use of deadly force** In 1989, the United States Supreme Court decided the case of *Graham v Connor*.  
A peace officer may use deadly force against an individual if that officer reasonably believes that the individual, who deadly force is used against:

- intended to commit a crime which would result in serious bodily injury or death;
- there was imminent danger of such crime being accomplished; and
- the peace officer acted under the belief that such force was necessary to save themselves or another from death or a serious bodily injury crime.

**Use of deadly force on fleeing subject** In 1985, the United States Supreme Court decided the case of *Tennessee v. Garner*.  
The Court applied the following points regarding when it would be reasonable for an officer to use deadly force against a fleeing subject in this particular set of circumstances (e.g., using a firearm to stop a fleeing suspect escaping on foot).

Components of the Garner decision...	
1	“...if the subject threatens the officer with a weapon or there is <i>probable cause</i> to believe that he has committed a crime involving the infliction of serious physical injury [or death]...”
2	“... <i>probable cause</i> to believe that the subject poses a threat of death or serious physical harm, either to the officer or others...”
3	“... <i>probable cause</i> to believe that the use of deadly force is <i>reasonably necessary</i> ...”[to prevent escape]
4	“... <i>some warning</i> be given prior to the use of deadly force <i>where feasible</i> ...”

NOTE: This US Supreme Court decision of *Tennessee v. Garner* is only the baseline for use of deadly force in this particular set of circumstances. Peace officers must know the applicable law and agency policies. Officers should comply with agency policy and federal and state law.

*Continued on next page*

After describing the holdings in *Graham* and *Garner*, the basic training workbook offers a series of examples that set out situations in which force would be appropriate and when it would

<sup>155</sup> See CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, BASIC COURSE WORKBOOK SERIES: LEARNING DOMAIN 20 USE OF FORCE 1-3 to -6, 3-4 (2018).  
<sup>156</sup> *Id.* at 3-4.

not. None are identified as court opinions, and do not appear to resemble particular cases.

FIGURE 2: CALIFORNIA POST'S REGULAR BASIC TRAINING WORKBOOK (FORCE EXAMPLES)<sup>157</sup>

**Resistance**, Continued

**Examples**

The following chart presents examples of situations involving a reasonable and unreasonable use of force based on the level of resistance/actions that is being offered by the subject:

Situation	Subject's Action(s)	Officer's Response(s)
During a traffic stop an officer discovered that the driver had several outstanding traffic warrants.	The driver offered no resistance, was cooperative, and responded immediately to the verbal commands of the officer.	<i>Reasonable:</i> The officer's presence and verbal commands controlled the situation.
		<i>Unreasonable:</i> The officer used a physical control hold immediately before giving verbal commands. The driver became fearful of the officer's actions and began to struggle with the officer. Absent other mitigating factors, the officer's use of force was unreasonable and may have escalated the threat.

The basic training materials also make clear that these examples should serve only as guideposts. As the student workbook explains:

Peace officers are often forced to make split-second judgments about the correct course of action to take in a given circumstance in conditions that are tense, uncertain and rapidly evolving. The actions described [in the use-of-force workbook] should not be considered as the only reasonable options available to an officer to effectively handle a given situation. Unless it is specifically stated as such, actions do not necessarily need to occur in the order that they are written. It is incumbent on the officer to select and use a response

<sup>157</sup> *Id.* at 2-11.

that is objectively reasonable under the totality of the facts and circumstances confronting the officer at the time.<sup>158</sup>

In other words, the workbook provides an overview of the *Graham* and *Garner* holdings, and then emphasizes that officers are not intended to memorize the examples in the workbook, but to use the examples as a means of getting comfortable with exercising judgment consistent with *Graham* and *Garner* in innumerable scenarios not captured in its pages.

The twenty-one Regular Basic Training outlines available on California POST's website—reflecting the substance of trainers' instruction while recruits complete the POST workbook—similarly appear to focus primarily on *Graham* and *Garner* with limited reference to Supreme Court or Ninth Circuit decisions that could clearly establish use-of-force law.

TABLE 1: COURT DECISIONS REFERENCED IN REGULAR BASIC TRAINING OUTLINES

Case References	Number of Outlines (%)
No cases referenced	3 (14.3%)
Reference to “case law”	6 (28.6%)
Reference to “case law” and/or <i>Graham</i> and/or <i>Garner</i>	7 (33.3%)
Reference to one other Supreme Court or Ninth Circuit use-of-force case (with or without other references to “case law,” <i>Graham</i> and/or <i>Garner</i> )	5 (23.8%)
Reference to two Ninth Circuit/Supreme Court cases other than <i>Graham</i> and/or <i>Garner</i>	0
Reference to three or more Ninth Circuit/Supreme Court cases other than <i>Graham</i> and/or <i>Garner</i>	0
Total basic training courses	21

These outlines, which can span hundreds of pages, all include some training on use of force/deescalation. Of the twenty-one outlines, sixteen (76.2%) reference no cases in their discussion of use of force, “case law” generally, or “case law” plus *Graham* and/or *Garner*. Five (23.8%) of the twenty-one basic training outlines reference one of four additional Supreme Court or Ninth

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<sup>158</sup> *Id.* at iii.

Circuit use-of-force cases in addition to *Graham* and/or *Garner* and/or “case law.”<sup>159</sup> No trainings reference more than one Ninth Circuit or Supreme Court use-of-force decision beyond *Graham* and/or *Garner*.

## 2. In-service training.

California POST also requires that officers certify they have completed at least twenty-four hours of additional training every two years. Of those twenty-four hours, twelve must concern “perishable skills,” including four hours on each of three topics: “arrest and control,” “driver training/awareness or driving simulator,” and “tactical firearms or force options simulator.”<sup>160</sup> Legal issues are among the required topics of perishable skills trainings regarding tactical firearms and arrest and control.<sup>161</sup> California POST also recommends that various legal topics be covered in the remaining twelve hours of biannual officer training.<sup>162</sup>

I reviewed 267 detailed training outlines approved by California POST to satisfy in-service training requirements, including firearms, force options, and arrest and control perishable training requirements, and training materials covering other optional topics that include the use of force.<sup>163</sup> Although legal issues are

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<sup>159</sup> OAKLAND POLICE DEPT., EXPANDED COURSE OUTLINE: REGULAR BASIC COURSE 5-23, 35-190 to 35-200 (2020) (on file with author) (referencing “case law,” *Graham*, and *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002) (en banc)); SAN JOSE POLICE ACAD., EXPANDED COURSE OUTLINE: REGULAR BASIC COURSE 26, 296 (2016) (on file with author) (referencing “case law” and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) (en banc)); SANTA CLARA CNTY. SHERIFF’S OFF., EXPANDED COURSE OUTLINE: REGULAR BASIC COURSE (2020) (on file with author) (referencing “case law,” *Graham*, *Garner*, and *Bryan*); STANISLAUS CNTY. REG’L TRAINING DIV., REGULAR BASIC COURSE: EXPANDED COURSE OUTLINE 125–26 (referencing “case law” and *Graham*); VENTURA CNTY. CRIM. JUS. TRAINING CTR., EXPANDED COURSE OUTLINE: REGULAR BASIC COURSE 27, 103 (2019) (on file with author) (referencing “case law,” *Garner*, and *Scott v. Harris*, 550 U.S. 372 (2007)). For descriptions of the facts and holdings in these referenced cases, see Appendix, *supra* note 87.

<sup>160</sup> *Perishable Skills Program*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/6XQY-TW77>.

<sup>161</sup> *Continuing Professional Training and Perishable Skills*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/Y98Z-TYY4>.

<sup>162</sup> Although those twelve hours can concern any topic, the Commission recommends training on “new laws,” “recent court decisions and/or search and seizure refresher,” and “civil liability—causing subjects” among other topics. *See id.*

<sup>163</sup> Of these outlines, 44 concerned “arrest and control,” 47 concerned “force options” and driving, 164 concerned firearms, and 12 concerned miscellaneous topics related to force but not apparently required as part of the perishable skills program.



covered in most of these trainings, court decisions beyond *Graham* and *Garner* play a limited role.

The overwhelming majority (75.2%) of in-service training outlines regarding force offer no description of any Supreme Court or Ninth Circuit cases interpreting *Graham* and *Garner*.<sup>164</sup> Another 18% of training outlines reference one or two Ninth Circuit or Supreme Court cases other than *Graham* or *Garner*. Just 6.7% of the training materials reference three or more such cases.

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<sup>164</sup> As Table 2 notes, there are sometimes references to “case law,” and so it is possible that instructors are teaching additional cases beyond those referenced here. But instructors can only teach officers about these additional cases if they, in turn, are educated about these cases. As I describe in Part III.B.3, instructor training is similarly sparse on coverage of court opinions.

TABLE 2: COURT DECISIONS REFERENCED IN IN-SERVICE TRAINING OUTLINES

Case References	Arrest and Control Training	Force Options Training	Firearms Training	Misc. Training	Total
No cases or “case law” referenced	10	2	33	6	51 (19.1%)
Reference to “case law”	4	1	5	0	10 (3.7%)
Reference to “case law” and/or <i>Graham</i> and/or <i>Garner</i>	6	5	126	3	140 (52.4%)
Reference to one Ninth Circuit/ Supreme Court case other than <i>Graham</i> and/or <i>Garner</i>	7	21	0	1	29 (10.9%)
Reference to two Ninth Circuit/ Supreme Court cases other than <i>Graham</i> and/or <i>Garner</i>	13	4	0	2	19 (7.1%)
Reference to three or more Ninth Circuit/ Supreme Court cases other than <i>Graham</i> and/or <i>Garner</i>	4	14	0	0	18 (6.7%)
Total	44	47	164	12	267 (100%)

Among the 66 training outlines that do reference one or more cases applying *Graham* and/or *Garner*, just 19 of the 284 Ninth Circuit and Supreme Court cases that interpret *Graham* and/or *Garner*—described in Part II—make an appearance. Just 6 cases

account for the vast majority of case references in these 66 training outlines: *Forrester v. San Diego*, *Forrett v. Richardson*,<sup>165</sup> *Reed v. Hoy*,<sup>166</sup> *Headwaters Forest Defense v. City of Humboldt*,<sup>167</sup> *Bryan v. McPherson*, and *Scott v. Henrich*.<sup>168</sup> So, of the 267 in-service training outlines that include coverage of the legal standards for use of force among their objectives, more than three-quarters include no reference to Ninth Circuit or Supreme Court cases that apply *Graham* and/or *Garner*, and among the 66 trainings that do include cases other than *Graham* and *Garner*, just over 2% of the Ninth Circuit and Supreme Court cases applying *Graham* and *Garner* are referenced.

TABLE 3: IN-SERVICE TRAININGS REFERENCING CASES OTHER THAN *GRAHAM* AND *GARNER*

	One additional Ninth Circuit or Supreme Court case	Two additional Ninth Circuit or Supreme Court cases	Three+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
<i>Forrester v. San Diego</i>	23	18	14	55 (83.3%)
<i>Forrett v. Richardson</i>	2	3	10	15 (22.7%)
<i>Reed v. Hoy</i>	1		14	15 (22.7%)
<i>Headwaters Forest Defense v. County of Humboldt</i>		11	2	13 (19.7%)
<i>Bryan v. McPherson</i>	1	3	9	13 (19.7%)
<i>Scott v. Henrich</i>			13	13 (19.7%)

<sup>165</sup> 112 F.3d 416 (9th Cir. 1997).

<sup>166</sup> 909 F.2d 324 (9th Cir. 1989).

<sup>167</sup> 276 F.3d 1125 (9th Cir. 2002).

<sup>168</sup> 39 F.3d 912 (9th Cir. 1994). For further discussion of these cases, see *infra* notes 173–81 and accompanying text. See also Appendix, *supra* note 87.

	One additional Ninth Circuit or Supreme Court case	Two additional Ninth Circuit or Supreme Court cases	Three+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
<i>Brooks v. Seattle</i>			7	7 (10.6%)
<i>Deorle v. Rutherford</i>		1	5	6 (9.1%)
<i>Smith v. Hemet</i>	1	0	5	6 (9.1%)
<i>Saman v. Robbins</i>		1	4	5 (7.6%)
<i>Reynolds v. County of San Diego</i>			4	5 (7.6%)
<i>Vera Cruz v. City of Escondido</i>			3	3 (4.5%)
<i>Chew v. Gates</i>			3	3 (4.5%)
<i>Scott v. Harris</i>		1	1	2 (3%)
<i>Glenn v. Washington</i>			2	2 (3%)
<i>Billington v. Smith</i>			1	1 (1.5%)
<i>Saucier v. Katz</i>			1	1 (1.5%)
<i>Alexander v. County of Los Angeles</i>			1	1 (1.5%)
<i>Young v. County of Los Angeles</i>	1			1 (1.5%)
Total trainings	29	19	18	66

Moreover, among the modest group of in-service training outlines that describe cases other than *Graham* or *Garner*, the

case descriptions are inconsistent in several ways with the Supreme Court's expectations about the ways in which officers are educated about decisions that clearly establish the law. First, although the Court expects that officers are on notice of the underlying facts of the cases and the type of force used, cases are used in in-service trainings to communicate general legal principles. Take, for example, the training outline for a "Force Option Simulator" course offered at the Allan Hancock Community College Public Safety Training Complex.<sup>169</sup>

FIGURE 3: FORCE OPTION SIMULATOR TRAINING OUTLINE, ALLAN HANCOCK COLLEGE<sup>170</sup>

**III. Case law**

- a. *Graham vs. Conner* (reasonable force)
  - i. Force evaluation considerations
    1. Judged from the perspective of a reasonable officer
      - a. Officer with same or similar training and experience
      - b. Facing similar circumstances
      - c. Act the same way or use similar judgment
    2. Examined through the eyes of an officer on the scene at the time the force was applied
    3. Based on the facts and circumstances confronting the officer without regard to the officer's underlying intent or motivation
    4. Based on the knowledge that the officer acted properly under the established law at the time
  - ii. Factors
    1. The severity of the crime
    2. The threat of the suspect to officers and citizens
    3. The active resistance of the suspect to arrest/escape
  - iii. Reasonableness see also - *Scott v. Harris* (2007) Vehicle pursuit – objective reasonableness is the standard
- b. *Scott vs. Henrich* (39 F.3d 912 (9th Cir. 1994))
  - i. Officers do not necessarily need to use the least intrusive force
  - ii. Force must be reasonable and justified
  - iii. Example (from *Forrester v. San Diego*)
    1. Officers don't have to carry protesters, they can use pain compliance or other means to effect arrest
- c. *Bryan vs. McPherson* (F.3d---, 2009 WL 5064477 (C.A.9 (Cal.)), December 28, 2009)
  - i. Electronic Weapon on traffic stop
  - ii. Need to articulate an immediate threat to officer or others
  - iii. Electronic weapons constitute an "intermediate or medium, though not insignificant, quantum of force"
  - iv. Duty to warn

<sup>169</sup> Allan Hancock Community College offers basic and advanced officer training, and cosponsors some trainings with local law enforcement agencies. For further information about their training programs, see *Law Enforcement Training*, ALLAN HANCOCK COLL., <https://perma.cc/S58K-CMEX>.

<sup>170</sup> ALLAN HANCOCK COLL., SELF-DEFENSE FIREARMS TRAINING: FORCE OPTION SIMULATOR OUTLINE 2–3 (on file with author).

The outline discusses several cases—including *Graham*, *Henrich*, *Forrester*, and *Bryan*. But none of these descriptions concern the courts' application of *Graham* to the facts of the cases. In *Henrich*, the Ninth Circuit concluded that officers had not used excessive force when they shot a man after he pointed a gun at them. But the underlying facts of the case are not included in Allan Hancock Community College's in-service training outline; instead, the case is invoked for the principle that "officers do not necessarily need to use the least intrusive force."<sup>171</sup> Similarly, facts about the injuries to the plaintiff and the distance between the plaintiff and officer when he was tased were among the reasons the Ninth Circuit concluded in *Isayeva* that *Bryan* did not clearly establish the unlawfulness of Deputy Barry's conduct.<sup>172</sup> But Allan Hancock Community College's course outline contains none of those factual particularities about *Bryan*, upon which Deputy Barry is assumed to have had notice.

In addition, the cases selected for attention during trainings—and the ways in which those cases are used—do not appear to illuminate the boundaries of officers' constitutional power to use force. The Supreme Court has explained that "[p]recedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful."<sup>173</sup> But many of the cases most frequently invoked during trainings—including *Forrester*, *Forrett*, *Henrich*, and *Reed*—are used to communicate the notion that officers can constitutionally use more force than necessary, so long as it was reasonable.<sup>174</sup> For example, *Forrester* is referenced in trainings for the proposition that the "[l]evel of force used does not have to be least intrusive, only reasonable."<sup>175</sup> *Forrett* is described in trainings as standing for the proposition that "[d]eadly force may be used to prevent the escape of an individual when an officer has 'probable cause to believe that the infliction or threatened infliction of serious harm is

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<sup>171</sup> *Id.* at 2.

<sup>172</sup> *Isayeva*, 872 F.3d at 948.

<sup>173</sup> *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015)).

<sup>174</sup> The other two most often-cited cases are *Bryan* and *Headwaters*, described *infra* text accompanying notes 180–81.

<sup>175</sup> SAN BERNARDINO CNTY. SHERIFF'S DEP'T, DRIVING/FORCE OPTIONS SIMULATOR TRAINING PROGRAM—PSP: EXPANDED COURSE OUTLINE 8 (on file with author); *see also* ALLAN HANCOCK COLL., *supra* note 169, at 3; CORONA POLICE DEP'T, FORCE OPTIONS SIMULATOR COURSE OUTLINE 2 (on file with author).

involved” and “[o]fficers are not required to exhaust every alternative before using justifiable deadly force.”<sup>176</sup> *Henrich* is referenced in trainings for the proposition that “[o]fficers do not necessarily need to use the least intrusive force” and that the “[f]orce must be reasonable and justified.”<sup>177</sup> And *Reed* is described in trainings as standing for the proposition that “[p]olice need not retreat.”<sup>178</sup>

Moreover, qualified immunity doctrine assumes that officers are aware of multiple cases involving similar force under similar circumstances, and are able to distinguish between the facts and holdings of those cases when deciding what force is appropriate.<sup>179</sup> But the in-service training outlines I reviewed never used multiple cases to illuminate the limits of constitutionally acceptable force. *Bryan* is used in some trainings to illustrate the proposition that tasers are an “intermediate or medium level of force, and officers must give a warning when feasible.”<sup>180</sup> *Headwaters* is used in some trainings to explain that police “[c]annot use [pepper spray] against non-violent protestors.”<sup>181</sup> But I found no in-service training describing multiple cases involving one type of force and the ways in which those decisions clarified the scope of officers’ power.

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<sup>176</sup> VENTURA CNTY. SHERIFF’S OFF., FORCE OPTION SIMULATOR EXPANDED COURSE OUTLINE 3 (on file with author); *see also* SAN JOSE POLICE DEP’T, SAN JOSE P.D. FIREARMS INSTRUCTOR COURSE: EXPANDED COURSE OUTLINE 10 (2020) (on file with author) (explaining *Forrett* stands for the proposition that “[i]t is not necessary that the suspect be armed at the time of the deadly force application, or threatened an officer with a weapon” and that deadly force can be used to prevent escape when an officer has “probable cause to believe that the infliction or threatened infliction of serious harm is involved” (quotation marks omitted)).

<sup>177</sup> *See* SELF-DEFENSE FIREARMS TRAINING, FORCE OPTIONS SIMULATOR COURSE OUTLINE 2 (on file with author); *see also* TULARE CNTY. SHERIFF’S OFF., FORCE OPTION SIMULATOR OUTLINE: T.I. TRAINING SIMULATOR 3 (2020) (on file with author); RIVERSIDE CNTY. SHERIFF’S DEP’T, FORCE OPTIONS SIMULATOR INSTRUCTOR COURSE: EXPANDED COURSE OUTLINE 10 (2009–2010) (on file with author).

<sup>178</sup> *See* SELF-DEFENSE FIREARMS TRAINING, *supra* note 177, at 3 (on file with author); *see also* RIVERSIDE CNTY. SHERIFF’S DEP’T, *supra* note 177, at 10 (citing *Reed* for the proposition that “[o]fficers *cannot*, while using lawful (reasonable) force, lose their right to self defense: in making an arrest, overcoming resistance, and preventing escape” (emphasis in original)).

<sup>179</sup> *See, e.g., Kisela*, 138 S. Ct. at 1152–53 (explaining that cases can help clarify for officers the “hazy border between excessive and acceptable force” (quotation marks omitted) (quoting *Mullenix*, 136 S. Ct. at 312)).

<sup>180</sup> SANTA ANA POLICE DEP’T, FORCE OPTION SIMULATOR PSP: EXTENDED COURSE OUTLINE 5 (on file with author).

<sup>181</sup> S.F. SHERIFF’S DEP’T, FORCE OPTIONS SIMULATOR COURSE: EXPANDED COURSE OUTLINE 7 (2019) (on file with author).

Finally, when officers are taught through examples about the limits of their authority to use force, those examples do not appear to be drawn from court decisions. Consider, for example, a training outline provided by the Hermosa Beach Police Department about officers' options when using force. The training outline describes the holdings of *Graham* and *Garner*. Then, it describes a portion of the training where time is spent with officers in small groups considering a series of hypotheticals that read, in part, as follows:

**DOMESTIC VIOLENCE:** You watch a female slap a male's face during an argument. The male tells you he wants to press "full charges" against her. She tells you, "You're not taking me to jail," while clenching her fists and taking a fighting stance. No weapon is seen. What do you do?

**BURGLARY:** Officers respond to a residential burglary in-progress. During a building search, they find a male in the kitchen. As soon as officers enter the kitchen, the suspect grabs a cheese grater and assaults one of the officers. What do you do?

**BLOCK PARTY:** Units are assigned to watch a block party because two neighbors had a heated argument on social media. While you're watching the party, a shooting occurs with several victims. The shooting pauses as the gunman is reloading. What do you do?

**INTOXICATED PERSON:** An uninvited guest at a party is refusing to leave, and appears to be under the influence of an intoxicating substance. He is naked and spraying himself with a water hose. He has a blank stare and is pacing back and forth. He is 6 feet tall, 250 pounds and there are many potential weapons in the area around him. He is not agitated, but he also doesn't notice you are present. What do you do?<sup>182</sup>

I found several similar training outlines in which officers are asked how they would respond to various situations that might

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<sup>182</sup> See HERMOSA BEACH POLICE DEP'T, FORCE OPTION SIMULATOR PSP CATEGORY 1: EXTENDED COURSE OUTLINE 6 (2018) (on file with author).



lead to the use of force. In none of these in-service training outlines were the scenarios identified as based on court decisions.<sup>183</sup>

Overall, these outlines suggest that during in-service training—as during basic training—officers are taught general legal principles drawn from *Graham* and/or *Garner* and, infrequently, a few additional cases. To the extent that officers are given the opportunity to explore the limits of their power to use force, hypotheticals are used instead of the facts and holdings of court decisions applying *Graham* and *Garner*, with no guidance about courts' adjudication of the constitutionality of force under the circumstances.

### 3. Instructor training.

In addition to reviewing basic training and in-service training outlines, I also reviewed forty-one instructor training outlines regarding use of force—the outlines used to train the trainers who then conduct in-service trainings. Understanding what trainers know about cases interpreting *Graham* and *Garner* is important to gain a complete picture of the role these decisions might play in officers' in-service trainings. It could be, for example, that trainers know about additional use-of-force cases and then instruct officers about these cases, even if they are not referenced by name in the in-service training outlines. But the outlines used for instructor training are similarly sparse on court decisions applying *Graham* and *Garner*.

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<sup>183</sup> For further discussion of the ways in which law enforcement officers are trained about their authority to use force, see generally Ion Meyn, *Police Use of Force and Resisting Accountability*, 2021 WIS. L. REV. (forthcoming) (draft on file with author).

TABLE 4: COURT DECISIONS REFERENCED IN INSTRUCTOR TRAINING OUTLINES

Cases Referenced	Number of Outlines (%)
No cases or “case law” referenced	12 (29.3%)
Reference to “case law”	5 (12.2%)
Reference to “case law” and/or <i>Graham</i> and/or <i>Garner</i>	11 (26.8%)
Reference to one Ninth Circuit/Supreme Court case applying <i>Graham</i> and/or <i>Garner</i>	1 (2.4%)
Reference to two Ninth Circuit/Supreme Court cases applying <i>Graham</i> and/or <i>Garner</i>	5 (12.2%)
Reference to three or more Ninth Circuit/Supreme Court cases applying <i>Graham</i> and/or <i>Garner</i>	7 (17.1%)
Totals	41 (100%)

A higher percentage of instructor trainings (31.7%) than in-service trainings (24.7%) included a reference to cases applying *Graham* and *Garner*. But the vast majority of cases referenced in the thirteen instructors’ training outlines that did reference use-of-force cases other than *Graham* and *Garner* were the same as those cases referenced in the in-service trainings. Just 5 cases referenced in the instructor training outlines were not also referenced in the in-service training, and each of these cases were referenced in fewer than 5% of the 41 instructor trainings I reviewed.

TABLE 5: CASE COVERAGE IN THE INSTRUCTOR TRAININGS  
REFERENCING CASES OTHER THAN *GRAHAM* AND *GARNER*

	One additional Ninth Circuit or Supreme Court case	Two additional Ninth Circuit or Supreme Court cases	Three+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
<i>Scott v. Henrich</i>		3	8	11 (84.6%)
<i>Forrett v. Richardson</i>		3	4	7 (53.8%)
<i>Reed v. Hoy</i>			7	7 (53.8%)
<i>Forrester v. San Diego</i>			6	6 (46.2%)
<i>Reynolds v. County of San Diego</i>			4	4 (30.8%)
<i>Smith v. City of Hemet</i>			3	3 (23.1%)
<i>Brooks v. Seattle</i>			3	3 (23.1%)
<i>Bryan v. McPherson</i>			3	3 (23.1%)
<i>Young v. County of Los Angeles</i>		2		2 (15.4%)
<i>City &amp; County of San Fran- cisco v. Sheehan</i>		2		2 (15.4%)
<i>LaLonde v. County of Riverside</i>			2	2 (15.4%)

	One additional Ninth Circuit or Supreme Court case	Two additional Ninth Circuit or Supreme Court cases	Three+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
<i>Saman v. Robbins</i>			2	2 (15.4%)
<i>Tatum v. City &amp; County of San Francisco</i>			2	2 (15.4%)
<i>Deorle v. Rutherford</i>			2	2 (15.4%)
<i>Mattos v. Agarano</i>			2	2 (15.4%)
<i>Headwaters Forest Defense v. County of Humboldt</i>			2	2 (15.4%)
<i>Saucier v. Katz</i>			2	2 (15.4%)
<i>Scott v. Harris</i>			2	2 (15.4%)
<i>Chew v. Gates</i>			1	1 (7.7%)
<i>Ting v. United States</i>	1			1 (7.7%)
Total trainings	1	5	7	13 (100%)

Moreover, as with the basic trainings and in-service trainings, the instructor trainings used court decisions to describe general principles related to the constitutionality of uses of force,

then used hypotheticals not drawn from cases to illustrate the boundaries of constitutional conduct.<sup>184</sup>

#### 4. Supplemental trainings and videos.

Apart from the trainings set out in the outlines on California POST's website, there are various supplemental training materials about the constitutionality of uses of force that California officers may be able to access. Yet these materials reflect similar inattention to court decisions applying *Graham* and *Garner*.

For example, Lexipol has daily training bulletins that it provides its subscribers in California and across the country. It also has longer training videos that it markets through a website called Police1.<sup>185</sup> Lexipol informed me that, in creating those bulletins and videos, it “rarely, if ever, develops training as a result of case decisions from district or appellate courts.”<sup>186</sup> Instead, Lexipol appears to use various hypothetical factual scenarios—not drawn from cases—to have officers consider the limits of reasonable force.<sup>187</sup>

Lexipol's failure to include court decisions in their daily training bulletins and videos is not an oversight—it is a choice. My request for information from Lexipol specifically asked whether they train officers based on a series of Ninth Circuit summary judgment decisions published between 2017 and 2019 that applied *Graham* and concluded that the plaintiff has offered evidence sufficient to establish a constitutional violation in a variety of circumstances—precisely the types of decisions that the Supreme Court says can clearly establish the law. The Vice President of Product Management responded unequivocally that Lexipol does not create trainings based on these types of cases. He

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<sup>184</sup> See, e.g., L.A. POLICE DEP'T, FORCE OPTION SIMULATOR INSTRUCTOR 6 (on file with author) (containing hypotheticals about the use of force against a motorist whose license plate suggests the driver is armed and dangerous, a member of a “gang party” who points a handgun at an officer, a “possible mentally ill person” and a burglary suspect who has “a shiny object in his hand.”).

<sup>185</sup> *Police1 Landing Page*, LEXIPOL, <https://perma.cc/7WRF-SVBL>.

<sup>186</sup> E-mail from Tim Kensok, Vice President of Prod. Mgmt., Lexipol, to Joanna C. Schwartz (May 4, 2020, 2:46 PM); see also E-mail from Tim Kensok, *supra* note 138 (clarifying that his descriptions of their trainings, and the lack of appellate case law in those trainings, applies both to their two-minute trainings and to their Police1 Academy library).

<sup>187</sup> See, e.g., Torrance Police Dep't, Daily Training Bulletin, Canines, (May 18, 2020) (describing a use-of-force hypothetical involving a canine) (on file with author); see also Meyn, *supra* note 183 (manuscript at 24–30) (describing Lexipol's training videos).

wrote, after consulting with Bruce D. Praet, the cofounder of Lexipol, that:

[W]e base our training on Supreme Court precedent (currently *Graham v. Connor*) and any statutory law applicable in a particular state. . . . The bottom line is that, while Lexipol will continue to consider regional case laws with respect to updating policy, Lexipol has not based any of its training on any of the Ninth Circuit cases cited [in my request].<sup>188</sup>

In other words, in the view of Lexipol's vice president for product development and its cofounder, police officers need no further judicial guidance beyond *Graham* regarding the constitutional bounds of their power to use force. Instead, the *Graham* framework is sufficient for officers to learn and then apply in the factually distinct circumstances they invariably confront.

Finally, California POST has online trainings that they have certified to meet their in-service requirements. Although I was not given access to these videos, I was informed by the organization that “[t]he vast majority of the online courses do not rely on case law decisions.”<sup>189</sup>

#### D. Government Attorneys

California law enforcement officers might also learn about use-of-force cases from government attorneys. But, based on my correspondence with two district attorneys' offices and seven city attorneys' offices in California, it appears that these government offices are not regularly educating officers about the facts and holdings of use-of-force cases that the Supreme Court deems necessary to clearly establish the law.

When Professor Charles Weisselberg examined how officers are instructed about their requirements under *Miranda v. Arizona*,<sup>190</sup> he found that district attorneys' offices sometimes offered legal briefings or trainings.<sup>191</sup> But the district attorneys I contacted reported that they do not offer briefings on use-of-force cases. The Office of the Alameda County District Attorney's Office has an

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<sup>188</sup> E-mail from Tim Kensok, *supra* note 186.

<sup>189</sup> E-mail from Phil Caporale, Bureau Chief, Strategic Commc'ns & Rsch. Bureau, Comm'n on Peace Officer Standards and Training, to Joanna C. Schwartz (Feb. 20, 2020, 9:34 AM).

<sup>190</sup> 384 U.S. 436 (1966).

<sup>191</sup> See Weisselberg, *supra* note 114, at 1143–48.

online collection of “recent cases,” but my review of these cases and notes suggest that the District Attorney is only reporting on cases describing the constitutionality of interrogations, searches, and seizures.<sup>192</sup> Similarly, the Los Angeles District Attorneys’ office produces one-minute briefings on legal topics, but reported in response to my public records request that those briefings “don’t generally cover force law cases or topics.”<sup>193</sup>

City or county attorneys—whose offices represent government defendants in civil suits—could also advise law enforcement agencies and officers about the facts and holdings of court decisions applying *Graham* and *Garner*. Of the seven city and county attorneys’ offices I queried, three reported that any communications they have with their police department clients are privileged,<sup>194</sup> two provided me with use-of-force briefing materials that included no references to or descriptions of court opinions,<sup>195</sup> and two—the Los Angeles County Attorney’s office and the San Diego City Attorney’s office—provided me with materials that

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<sup>192</sup> See *Recent Cases*, OFF. OF THE ALAMEDA CNTY. DIST. ATTY, <https://perma.cc/8L92-U37L>. Note also that these online posts concern only a subset of cases that might clearly establish the law regarding interrogations, searches, and seizures, as well.

<sup>193</sup> See E-mail from William Frayeh, Captain, L.A. Cnty. Dist. Att’y Admin. Div., to Joanna C. Schwartz (May 1, 2020, 1:02 PM) (on file with author) (“Since the 1MB [One-minute Briefings] are primarily designed to provide prosecutorial and investigative training to our prosecutors and investigators (though 1MBs are also shared by email with about 4500 outside agencies/individuals who have asked to receive them), use of force by officers is not within the mission.”).

<sup>194</sup> See, e.g., E-mail from Bethelwel Wilson, L.A. City Att’y’s Off., to Joanna C. Schwartz (May 15, 2020, 9:06 AM) (on file with author) (reporting that the Los Angeles City Attorney’s office does not produce publicly available briefings, but does “have a few advice letters to LAPD that would be responsive to [my] request but they fall under the attorney work product and attorney-client privileges”); E-mail from Susana Alcala Wood, City Att’y, City of Sacramento, to Joanna C. Schwartz (May 20, 2020, 3:07 PM) (claiming “a confidential attorney-client relationship in every aspect of the interactions between the police department and the city attorney’s office” such that “every writing prepared by this office in the service of the confidential attorney-client relationship, is a confidential, privileged document”); E-mail from Carmen O. Merino, Gen. Couns.—Police, City of Glendale, to Joanna C. Schwartz (June 10, 2020, 12:35 PM) (“[T]he City Attorney’s Office does write case summaries for the Command Staff. These records are protected by attorney-client privilege.”).

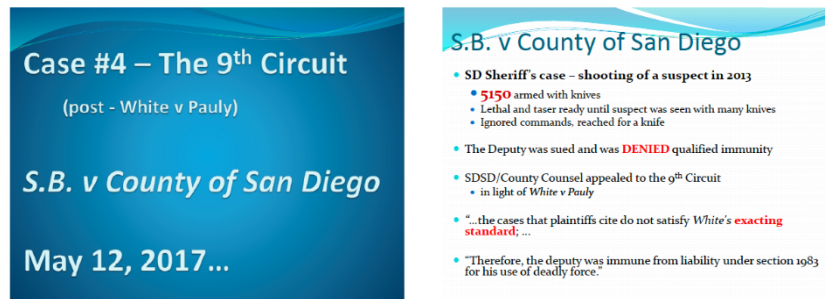
<sup>195</sup> See, e.g., E-mail from Viridiana Gallardo-King, Deputy City Att’y, City Att’y of Bakersfield, to Joanna C. Schwartz (May 18, 2020, 9:05 AM) (explaining that her office does “provide summaries of cases,” but that she “was unable to locate any regarding use of force”); E-mail from Diane Grant, Senior Off. Assistant, City of San Bernardino City Clerk’s Off., to Joanna C. Schwartz (May 21, 2020, 12:15 PM) (confirming that the City Attorney’s Office “do[es] not have any documents that are responsive” to my request for case summaries or other materials regarding court decisions).

referenced use-of-force cases. But even the materials from Los Angeles County and San Diego would not educate officers about the facts and holdings of decisions that clearly establish the law for qualified immunity purposes.

PowerPoint presentations provided to me by the San Diego City Attorney's Office included references to a handful of cases, primarily from the Supreme Court, but did not offer details about the uses of force in these decisions that would be relevant to qualified immunity analyses. Instead, these discussions focused on the importance of qualified immunity for government attorneys and general language in recent Supreme Court and Ninth Circuit cases about the qualified immunity standard.

For example, in one presentation about civil liability for supervisors, the City Attorney's Office referenced a recent Ninth Circuit case, *S.B. v. County of San Diego*,<sup>196</sup> in which qualified immunity was granted.<sup>197</sup> The slide quotes language from the Ninth Circuit decision, noting that the court granted qualified immunity because the plaintiff had not met the "exacting standard" set by the Supreme Court's recent qualified immunity decisions.

FIGURE 4: SAN DIEGO CITY ATTORNEY'S OFFICE SLIDE PRESENTATION<sup>198</sup>



But the slide presentation does not reference the Ninth Circuit's holding in *S.B.* that a reasonable jury could find that the

<sup>196</sup> 864 F.3d 1010 (9th Cir. 2017).

<sup>197</sup> *See id.* at 1017.

<sup>198</sup> San Diego City Att'y's Office, Civil Division, PowerPoint on Civil Liability (May 26, 2020).



officer's "use of deadly force was not objectively reasonable," or include the Ninth Circuit's detailed description of the underlying facts that supported its conclusion.<sup>199</sup>

Materials provided by the Los Angeles County Counsel include several PowerPoint presentations that reference *Graham*, *Garner*, and a handful of Ninth Circuit decisions that appear in training materials.<sup>200</sup> Like the training outlines I reviewed, these PowerPoint presentations describe the holdings of court decisions without detailed descriptions of their underlying facts, and emphasize expansive descriptions of officers' authority.<sup>201</sup>

The Los Angeles County materials also include newsletters disseminated by the Los Angeles Sheriff's Department Field Operations Support Services. One of these newsletters describes in detail the facts and holdings of a Ninth Circuit decision, *Thompson v. Rahr*,<sup>202</sup> which held that it was objectively unreasonable to point a loaded gun at an unarmed suspect's head but granted qualified immunity because there was not a prior case with

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<sup>199</sup> *S.B.*, 864 F.3d at 1014:

[A] reasonable jury could conclude that: (1) the three officers, responding to a call about a mentally ill and intoxicated individual 'acting aggressively,' entered Brown's house and saw that he had knives in his pockets; (2) after Brown complied with the officers' orders to kneel, Brown grabbed a knife with a six-to-eight-inch blade from his back pocket; (3) Moses shot Brown as soon as his hand touched the knife; (4) Brown was on his knees when he was shot; (5) when he grabbed the knife, Brown was approximately six to eight feet away from Vories; (6) Moses could not see the other officers at the time Brown grabbed the knife; (7) after Brown went for the knife, the officers did not order him to drop the knife or warn that he was about to be shot; and (8) Vories had a non-lethal option—a Taser gun.

<sup>200</sup> See E-mail from Jahel Saucedo, Sheriff's Servs. Div. Legal Advisory Unit, L.A. Cnty., to Joanna C. Schwartz (Sept. 22, 2020, 4:23 PM) (providing dozens of attachments in response to my request for materials provided by County Counsel's office to the Los Angeles Sheriff's Department, including PowerPoint presentations describing the holdings of *Graham*, *Garner*, and a selection of Ninth Circuit cases).

<sup>201</sup> See, e.g., L.A. Cnty. Couns., PowerPoint on Training and Instructing (describing the holdings of several cases including *Forrester*, *Young v. County of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), and *Headwaters*) (on file with author); L.A. Cnty. Couns. & L.A. Sheriff's Dep't, PowerPoint on Force Training Unit (on file with author) (setting out various bases for "reasonable suspicion for pat down" based on prior court decisions, and emphasizing "[w]e must have at least grounds to detain in order to use reportable force!"). One PowerPoint does go into detail about the facts and holding of *Graham*. See L.A. Cnty. Couns., PowerPoint on Use-of-Force Training on Federal and State Law (on file with author).

<sup>202</sup> 885 F.3d 582 (9th Cir. 2018).

sufficiently similar facts.<sup>203</sup> The newsletter explains that force under the circumstances was not objectively reasonable because “the deputy had an unarmed felony suspect under control, the suspect could have been easily handcuffed while he was sitting on the bumper of the patrol vehicle, and the suspect was not in close proximity to an accessible weapon,” and emphasizes that, although the officer in this case received qualified immunity, “qualified immunity would be in jeopardy should a similar incident occur today.”<sup>204</sup> This is the sort of case analysis that would, conceivably, educate officers about the scope of clearly established law—assuming they were given this newsletter or told about its contents.<sup>205</sup> But this is the only Ninth Circuit decision applying *Graham* and *Garner* that appears with this type of detail in Los Angeles County Counsel’s materials or, for that matter, in the materials I received from any law enforcement or government agency.

#### E. Legal Updates

Law enforcement officers might also learn about cases clearly establishing the law from newsletters or video broadcasts. California POST used to conduct “a monthly satellite video broadcast with case law updates” that could be downloaded by law enforcement agencies across the state<sup>206</sup> and published a legal update

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<sup>203</sup> See *Thompson v. Copeland: Excessive Force and Qualified Immunity*, FIELD OPERATIONS SUPPORT SERVS. NEWSL. (L.A. Cnty. Sheriff’s Dep’t, Los Angeles, C.A.), at 1–3 (on file with author). Note that the newsletter references this case as *Thompson v. Copeland*, but the case is actually *Thompson v. Rahr*. For further information about *Rahr*, see Appendix, *supra* note 87. The Field Operations Support Services Newsletter described one additional case—*Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013)—that established for the first time that “liability for negligence may arise from tactical conduct and decisions employed by law enforcement officers preceding the use of deadly force when viewed as part of the totality of circumstances.” *Hayes v. County of San Diego*, TRAINING BUREAU NEWSL. (L.A. Cnty. Sheriff’s Dep’t, Los Angeles, C.A.), June 18, 2014, at 1. This case does not interpret *Graham* and *Garner* but, instead, should be understood as a watershed case that established a new standard for negligence claims under California law. For evidence that other California agencies have instructed their officers about *Hayes* and changed policies and trainings as a result, see Healy, *supra* note 114.

<sup>204</sup> FIELD OPERATIONS SUPPORT SERVS. NEWSL., *supra* note 203, at 2.

<sup>205</sup> See E-mail from Roger Clark, Police Pracs. Expert, to Joanna C. Schwartz (Oct. 10, 2020, 3:02 PM) (on file with author) (explaining that Los Angeles Sheriff’s Department Field Operations Support Services newsletters “relay information to the department about training changes/issues” and that “[c]opies are given to Sgt’s and Lt’s (and in the briefing book) at stations and they would brief the troops at briefing”).

<sup>206</sup> Weisselberg, *supra* note 114, at 1136.

each January.<sup>207</sup> These broadcasts and publications might have provided information about the facts and holdings of use-of-force cases.<sup>208</sup> But California POST stopped creating the monthly video series and discontinued the annual legal updates in 2018.<sup>209</sup>

In recent years, there has been a proliferation of websites with information of interest to police department officials, including, sometimes, summaries of court decisions.<sup>210</sup> These sites do at times describe the facts and holdings of use-of-force cases. But these sites make no effort to educate subscribers about the hundreds or thousands of decisions that might clearly establish the law for qualified immunity purposes. And there is no way to know the extent to which California officers actually take advantage of these resources. There is no requirement that California officers subscribe to these newsletters, and no way to know how often those who subscribe to the newsletters actually read them.

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Qualified immunity shields officers from liability unless prior court cases have held factually analogous conduct to be unconstitutional. The Supreme Court's insistence that only factually analogous cases can clearly establish the law is premised on the notion that officers know about the facts and holdings of these cases. But, as this Part has shown, the hundreds of Supreme Court and Ninth Circuit cases interpreting *Graham* and *Garner* play a very limited role in California law enforcement policies and trainings. Just a handful of use-of-force cases other than *Graham* and *Garner* are ever discussed with officers or included in trainings or other educational materials. And, when these cases are referenced, officers are almost never provided with information about the precise nature of force used or the underlying circumstances in these cases. Instead, use-of-force decisions are invoked

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<sup>207</sup> E-mail from Phil Caporale, Bureau Chief, Strategic Commc'ns & Rsch. Bureau, Comm'n on Peace Officer Standards and Training, to Joanna C. Schwartz (Feb. 18, 2020, 2:31 PM) (on file with author).

<sup>208</sup> Weisselberg, *supra* note 114, at 1137–39 (describing information in the videos about court decisions relevant to *Miranda* requirements).

<sup>209</sup> Caporale, *supra* note 198.

<sup>210</sup> See, e.g., *The Monday Morning Memo*, ASS'N OF DEPUTY DIST. ATT'YS, <https://perma.cc/83P2-GPN9>; James R. Touchstone, *CPOA Case Summaries – March 2020*, CAL. PEACE OFFICERS' ASS'N (Apr. 15, 2020), <https://perma.cc/BG28-XM8G>; *Legal Update – August 2019 Case Summaries*, DAIGLE L. GRP. (Sept. 10, 2019), <https://perma.cc/WB6Y-KYUP>.

for general principles that build on *Graham* and *Garner*, and generally describe officers' power to use force in expansive terms. Training outlines may include various scenarios that can help officers understand the boundaries of constitutional conduct—but these scenarios do not appear to be based on court decisions.

#### IV. THE ROLE OF CASE LAW IN OFFICERS' DECISIONMAKING

I have shown that California police officers are not taught about the facts of the hundreds or thousands of cases that can be used to clearly establish the law. These findings undermine a key assumption underlying the Supreme Court's qualified immunity jurisprudence. One might conclude, based on these findings, that officers simply need to be better educated about the facts and holdings of court opinions. Yet, as I explain in this Part, even if law enforcement relied more heavily on court decisions to educate their officers about the constitutional limits of force, the expectations of notice and reliance baked into qualified immunity doctrine would still be unrealistic. First, it would be impossible to educate officers about the facts and holdings of all of the cases that could clearly establish the law. Second, even if officers were educated about more court decisions, those decisions would remain but one small part of officers' understanding about the scope of their authority. And, third, even if officers were educated about and retained the facts and holdings of these court decisions, it is highly unlikely that officers would actually reflect on those court opinions when deciding whether and how to use force.

##### A. The Challenge of Learning Clearly Established Law

Currently, California officers learn little to nothing about the facts and holdings of court decisions applying *Graham* and *Garner* that clearly establish the law for the purposes of qualified immunity. But even if significantly more time were taken to educate officers about these court decisions, it is unrealistic to imagine that officers could be trained about the hundreds or thousands of court decisions that clearly establish the law.

Consider how long it would take to educate officers about the 284 Supreme Court and Ninth Circuit decisions applying *Graham* and *Garner* described in Part II. If trainers spent just 5 minutes describing the facts and holdings of each case, it would take 1,420 minutes—almost 24 hours—to educate officers about these Ninth

Circuit use-of-force cases. At least as much time would need to be spent learning about use-of-force cases from other circuits and district courts. Then, officers would need to learn about other types of cases—analyzing the scope of officers' constitutional authority to stop, frisk, search, and arrest, among other powers. And the number of cases clearly establishing the law in all of these jurisdictions and in all of these types of cases increases by the year. California officers could dedicate every minute of their currently required in-service training hours to learning about court decisions, and still not have enough time to spend five minutes on each court decision that could clearly establish the law for qualified immunity purposes.

One might conclude that the answer is simply for police departments to dedicate significantly more time to in-service training.<sup>211</sup> But even if significantly more time were dedicated to studying court opinions, it is inconceivable that officers could retain the facts and holdings of all of the hundreds or thousands of cases that clearly establish the law. Any law student or litigator knows how difficult it is to keep in mind the facts and holdings of dozens of court opinions before an exam or oral argument. Indeed, the reader might find it difficult to remember the taser cases described just a few pages ago that were analyzed by the Ninth Circuit in *Isayeva*, and the factual distinctions between them—regarding the taser mode used, the number of times the people were tased, the injuries suffered by the people tased, the distance of the officers to the people tased, the relative size of the people tased to the officers who tased them, and the nature of the resistance.<sup>212</sup> Now imagine keeping in mind the facts and holdings of hundreds or thousands of opinions that could clearly establish the law. No matter how much time is dedicated to the study of court decisions, it is unrealistic to imagine that law enforcement

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<sup>211</sup> For arguments that police need additional training and suggestions for the types of topics to cover, see, for example, Kirk Burkhalter, *Retired Officer: Give Police a Real Education Before Putting Them on the Streets*, USA TODAY (June 11, 2020), <https://perma.cc/KA55-5D7L> (arguing that “police academies should replace the standard five to six months of training with a two-year curriculum” and describing the components of the proposed training); POLICE EXEC. RSCH. F., *supra* note 114, at 9 (reporting, based on a national survey, that “agencies spend a median of 58 hours of recruit training on firearms and another 49 hours on defensive tactics” but “spend only about 8 hours of recruit training each on the topics of de-escalation, crisis intervention, and Electronic Control Weapons” and that “[a] similar imbalance was noted with in-service training”).

<sup>212</sup> See *supra* notes 91–111 and accompanying text.

officers—or anyone, for that matter—could keep in mind hundreds or thousands of cases at the level of detail that guides courts’ qualified immunity analysis in decisions like *Isayeva*.<sup>213</sup>

## B. The Limited Role of Case Law in Police Education

The implausibility of the Court’s assumption that officers could know about the facts and holdings of cases that clearly establish the law becomes even more obvious when one considers the many types of information—beyond court opinions—that police officers regularly receive about the scope of their authority.

Police policies regarding the legal bounds of force account for just one small portion of police department manuals that are hundreds of pages long and cover a wide range of subjects. Lexipol’s manual, for example, is over five hundred pages long and has ten chapters concerning general operations, patrol operations, traffic operations, and investigation operations.<sup>214</sup> In the general operations chapter of Lexipol’s manual, which includes its use-of-force policy, there are dozens of additional topics including search and seizure, domestic violence, report preparation, identity theft, biological samples, and more. Currently, references to *Graham* and *Garner*—and for a handful of jurisdictions, one or two additional cases—make up just one small part of the policies officers must internalize. Even if departments incorporated more court opinions into their use-of-force policies, those decisions would still constitute just one small part of the policies guiding officer behavior.

Legal restrictions on officers’ power to use force currently play a similarly limited role in police trainings. California POST requires that recruits undergo at least 664 hours of basic training, with just 16—2.4% of those hours—dedicated to the use of force and de-escalation.<sup>215</sup> Moreover, just a small portion of the 16 hours dedicated to the use of force and de-escalation focus on legal restrictions—trainers also cover principles of de-escalation,

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<sup>213</sup> In the Supreme Court’s view, this challenge would be even more difficult for police officers who have not been trained in the law. See *Connick v. Thompson*, 563 U.S. 51, 70 (2011) (explaining that “attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles”).

<sup>214</sup> See generally, e.g., ELK GROVE POLICE DEP’T, ELK GROVE POLICE DEPARTMENT POLICY MANUAL (on file with author).

<sup>215</sup> See *Regular Basic Course Training Specifications: Regular Basic Course Minimum Hourly Requirements*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/MQ4H-VKKK>.

decision-making, the range of force options, and reporting use-of-force incidents, among other topics.<sup>216</sup> Legal restrictions on the use of force play a similarly modest role in in-service trainings. Officers are required to receive 24 hours of training every 2 years, including a minimum of 12 hours of “perishable skills” training.<sup>217</sup> Legal issues related to the use of force are required topics for some “perishable skills” trainings.<sup>218</sup> But these trainings cover many other topics in tactics and skills that are unmoored to legal standards.

The time allotted to discussion of legal requirements and court decisions during police officers’ trainings must also be considered against the backdrop of the many hundreds of hours each year police are not receiving trainings or education—hours spent in the station house, on patrol, and responding to calls for service.<sup>219</sup> As others have observed, these on-the-job experiences and interactions may be more influential than the guidance disseminated in training facilities.<sup>220</sup> Indeed, some field studies of police behavior have noted that officers are given the message that what occurs during training has little relevance to their conduct on the street.<sup>221</sup> Regardless of whether officers are given that message, officers are likely to log many more hours considering the “hazy

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<sup>216</sup> *Regular Basic Course Training Specifications: LD 20 Use of Force/Deescalation*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/MQ4H-VK4K>.

<sup>217</sup> *Required Updated or Refresher Training Requirements*, CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://perma.cc/AQ6X-B8TQ>.

<sup>218</sup> See *supra* note 161 and accompanying text.

<sup>219</sup> See Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://perma.cc/67TB-57P4> (discussing how the time police spend on violent crime is quite small relative to “complaints, traffic accidents and non-criminal disturbances”).

<sup>220</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 514 (2004) (explaining that, based on the advice of their field training officers, “[r]ookies are quickly led to believe that . . . the training they received [at the academy] was irrelevant to the realities of policing, and that they will learn what they need to know on the street” (quotation marks omitted) (quoting Robert W. Worden, *The Causes of Police Brutality*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 29 (William A. Geller & Hans Toch eds., 1996)); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 833–34 (2013) (explaining how police culture involves unique informal norms that determine police conduct on the streets); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 213–23 (3d ed. 1994) (describing observational field data that suggests “norms located within police organization are more powerful than court decisions in shaping police behavior”); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 21–29 (2005) (describing the failures of law enforcement to implement their own standards in the context of the police professionalization movement).

<sup>221</sup> See Armacost, *supra* note 220, at 514 nn.376, 377 (citing studies).

border between excessive and acceptable force” on the job rather than in the classroom.<sup>222</sup>

Police department trainings and educational materials could certainly make better use of the facts and holdings of court decisions. In other fields, including medicine, closed court cases are regularly used as training tools.<sup>223</sup> I have argued that police departments should similarly use information revealed in lawsuits brought against them and their officers as a means of learning about error and improving policies and trainings.<sup>224</sup> Court decisions could also be used by policy makers and trainers to provide guidance to officers about the scope of their power.<sup>225</sup> But even if significantly more time was spent educating police officers about the facts and holdings of court decisions that clearly establish the law, those decisions would continue to be just one source of information communicated to officers about the limits of their authority.

### C. Officers’ Ability to Recall Court Decisions on the Job

Even if officers were somehow taught about the facts and holdings of all the cases that could clearly establish the law, and even if officers could somehow retain information about the details of these cases, there is no reason to believe that officers could analogize to and distinguish from the facts and holdings of these cases when deciding whether to use force. Decades of research about the causes of human error make clear that it is difficult for people to process complex information when making decisions in times of high speed and stress.<sup>226</sup> For that reason, those seeking to reduce error in aviation, medicine, and other fields have relied on checklists and other interventions that reduce the number of variables people have to consider on the job.<sup>227</sup>

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<sup>222</sup> *Kisela*, 138 S. Ct. at 1153.

<sup>223</sup> See Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1056, 1058, 1082–83 (2015).

<sup>224</sup> See *id.* at 1101–03.

<sup>225</sup> For these and other benefits of litigation as a source of information and transparency, see generally ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 56–83 (2017). See also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683–90 (2016).

<sup>226</sup> For discussion of this research, see Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 538–45 (2018).

<sup>227</sup> See, e.g., Atul Gawande, *The Checklist*, NEW YORKER (Dec. 3, 2007), <https://perma.cc/RV5A-MJ3A> (describing the role of checklists in medicine to reduce line infections in intensive care units). For a discussion of the ways in which checklists could be used to reduce error in policing, see Schwartz, *supra* note 226, at 550–52.



In the moments leading up to a use of force, police officers must process dizzying amounts of information about the circumstances unfolding around them and the possible approaches and tactics they could employ.<sup>228</sup> As one illustration of the complexity of this analysis, Lexipol's use-of-force policy has a nonexhaustive<sup>229</sup> list of nineteen different factors that an officer should keep in mind when deciding whether to use force, and supervisors should consider when determining whether an officer's use of force was reasonable:

- (a) The apparent immediacy and severity of the threat to deputies or others (Penal Code § 835a).
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time (Penal Code § 835a).
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer leading up to the use of force (Penal Code § 835a).
- (e) The effects of suspected drugs or alcohol.
- (f) The individual's apparent mental state or capacity (Penal Code § 835a).
- (g) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a).
- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
- (k) Seriousness of the suspected offense or reason for contact with the individual prior to and at the time force is used.
- (l) Training and experience of the officer.

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<sup>228</sup> See Schwartz, *supra* note 226, at 545 (describing these pressures on law enforcement decision-making).

<sup>229</sup> See, e.g., ANAHEIM POLICE DEPT, POLICY MANUAL § 300.3.3: FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE, *supra* note 136, at 50 (explaining that the factors deputies should take into consideration "include but are not limited to" this list).

- (m) Potential for injury to officers, suspects, bystanders, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the deputy.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.<sup>230</sup>

Lexipol's policy has the proviso that deputies should take these nineteen factors into consideration "as time and circumstances permit."<sup>231</sup> But given all we know about human decision-making under high-pressure, high-stress circumstances, it would seem nearly impossible for officers to remember all of these factors, much less give proper credence to them when deciding whether to use force and how much force is reasonable. It seems even less likely that officers could additionally bring to mind the facts and holdings of prior court decisions at the level of detail described in *Isayeva* when deciding whether and how to act.<sup>232</sup>

But one need not delve deep into human-error research to reach the conclusion that officers are unlikely to consult the facts and holdings of prior court decisions when deciding whether to use force. As Judge James Browning has written, this assumption underlying the Supreme Court's qualified immunity doctrine defies common sense. As he wrote, "It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: 'Are the facts here anything like the facts

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<sup>230</sup> *Id.* at 50–51. For another list of possible considerations, see STOUGHTON ET AL., *supra* note 132, at 52–53 (describing twenty-four factors relevant in analyzing the appropriateness of the use of force).

<sup>231</sup> ANAHEIM POLICE DEP'T, *supra* note 136, at 50.

<sup>232</sup> See *supra* notes 111–12 and accompanying text.

in *York v. City of Las Cruces*?"<sup>233</sup> Instead, Judge Browning imagined:

It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case."<sup>234</sup>

Even the Supreme Court has suggested—in contexts other than qualified immunity—that officers cannot effectively engage in intricate analyses of legal rules when making fast-moving decisions on the job.<sup>235</sup> For example, in *Atwater v. City of Lago Vista*,<sup>236</sup> the Court gave police broad power to conduct warrantless arrests for misdemeanors, rejecting the plaintiff's argument that such arrests should be limited to certain circumstances in part on the ground that the proposed "distinctions between permissible and impermissible arrests for minor crimes strike us as 'very unsatisfactory line[s]' to require police officers to draw on a moment's notice."<sup>237</sup>

The Supreme Court has also observed—again, in contexts other than qualified immunity—that generalized tests are more conducive to the realities of police decisionmaking than are precise rules. For example, when describing the standard for "particularized suspicion," the Court explained:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars,

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<sup>233</sup> *Manzanares v. Roosevelt Cnty. Adult Det.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018).

<sup>234</sup> *Id.* at 1294 n.10.

<sup>235</sup> For discussion of the Supreme Court's forgiveness of police errors, see generally Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69 (2011).

<sup>236</sup> 532 U.S. 318 (2001).

<sup>237</sup> *Id.* at 350 (quoting *Carroll v. United States*, 267 U.S. 132, 157 (1925)).

but as understood by those versed in the field of law enforcement.<sup>238</sup>

Similarly, in *Illinois v. Gates*,<sup>239</sup> the Court rejected a “rigid demand that specific ‘tests’ be satisfied by every informant’s tip” instead of a more generalized “totality-of-the-circumstances approach” because probable cause is, like particularized suspicion, “a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”<sup>240</sup> As the Court explained, officers deciding whether probable cause exists are faced with greatly varying facts and circumstances, and “[r]igid legal rules are ill-suited to an area of such diversity.”<sup>241</sup>

In these decisions, the Supreme Court has assumed that police officers are best guided by generalized tests that allow them to make “common sense conclusions about human behavior,” and rejected the notion that officers should be required to parse precise legal tests while on the job.<sup>242</sup> The Court’s descriptions of officers’ limited ability to make fine-tuned distinctions in *Atwater*, *Cortez*, and *Gates* resonates with human-error research and common sense. Yet, in the qualified immunity context, the Court has unjustifiably taken the opposite approach—rejecting the notion that officers will be on notice of the reasonableness of their conduct by dint of their familiarity with *Graham*’s totality of circumstances approach and, instead, expecting that officers know about court decisions applying *Graham* and will parse the factual distinctions between cases when deciding whether to use force.

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Part III showed that officers are not educated about the facts and holdings of court opinions that clearly establish the law for qualified immunity purposes. As this Part has shown, the expectations of notice and reliance upon which qualified immunity doctrine depends would not be satisfied even if law enforcement officers spent significantly more time learning about the law. There could never be sufficient time to train officers about all the court

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<sup>238</sup> *United States v. Cortez*, 449 U.S. 411, 418 (1981).

<sup>239</sup> 462 U.S. 213 (1983).

<sup>240</sup> *Id.* at 230–32.

<sup>241</sup> *Id.* at 232.

<sup>242</sup> *Cortez*, 449 U.S. at 418.

cases that might clearly establish the law for qualified immunity purposes. Even if officers were trained about the facts and holdings of more cases, they would only constitute one small part of officers' understanding about the scope of their authority. And, even if officers were able to learn about and retain information about the factual distinctions between these cases, they would be exceedingly unlikely to analogize or distinguish a situation rapidly unfolding before them to the court decisions they once studied.

## V. MOVING FORWARD

This Article has shown that foundational assumptions underlying the Supreme Court's qualified immunity jurisprudence are false. The Supreme Court expects that officers know about court decisions applying *Graham* and *Garner* and consider the facts and holdings of those decisions when deciding whether to use force. Yet California law enforcement officers are infrequently taught about Ninth Circuit and Supreme Court cases applying *Graham* and *Garner*, and are highly unlikely to learn anything about the facts and holdings of these cases even when they are. Moreover, even if significantly more time were spent teaching law enforcement officers about the law, the notion that officers would consider the facts and holdings of these cases in the moments leading up to a use of force defies human-error research, common sense, and the Supreme Court's own assertions about law enforcement officers' ability to apply intricate rules while doing their jobs. In this Part, I consider the implications of these findings for ongoing debates about the failures of qualified immunity doctrine to achieve its intended goals, ways in which Congress or the Supreme Court might reform the doctrine, and the ways in which lower courts should approach qualified immunity motions going forward.

### A. The Case Against Qualified Immunity

This Article strengthens the already strong case against qualified immunity. When the Supreme Court created qualified immunity, it described the doctrine as reflecting the common law

when § 1983 was enacted.<sup>243</sup> But Professor William Baude and others have shown that there was no defense comparable to qualified immunity in existence when § 1983 became law.<sup>244</sup>

The Court later justified qualified immunity on policy grounds, as necessary to shield government officials from financial liability and the costs and burdens of defending themselves in insubstantial cases.<sup>245</sup> But qualified immunity is unnecessary to shield government officials from the burdens of defending themselves in “insubstantial lawsuits.”<sup>246</sup> Instead, there are many other barriers to relief for insubstantial cases—and substantial ones as well—including the challenges of getting a lawyer, pleading plausible claims, proving constitutional violations, and convincing sometimes skeptical juries of the merits of the plaintiff’s allegations.<sup>247</sup>

Even when officers are found to have violated the Constitution, qualified immunity is unnecessary to shield officers from financial liability because they are virtually always indemnified by their government employers. In the rare instances in which officers are denied indemnification, they remain unlikely to be held personally liable because plaintiffs and their attorneys have little financial incentive to press their claims against an officer with

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<sup>243</sup> See *Pierson v. Ray*, 386 U.S. 547, 555 (1967); see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (asking whether immunities “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them” (quoting *Pierson*, 386 U.S. at 554–55)); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (“[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress’ intent by the common-law tradition.”).

<sup>244</sup> See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501–07 (2010); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51–61 (2018); JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 16–17 (2017); Smith, *supra* note 67, at 2100; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987).

<sup>245</sup> See *Pierson*, 386 U.S. at 555 (describing qualified immunity as necessary to shield officers from financial liability); *Harlow*, 457 U.S. at 814 (describing qualified immunity as necessary to protect against “the diversion of official energy from pressing public issues, [ ] the deterrence of able citizens from acceptance of public office,” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties’” (second alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

<sup>246</sup> *Harlow*, 457 U.S. at 814.

<sup>247</sup> See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 338–60 (2020) (describing these hurdles).

limited personal resources.<sup>248</sup> For all of these reasons, qualified immunity has proven unnecessary and ill-suited to achieve its intended policy goals.

The fact that qualified immunity does not achieve its intended goals does not mean the doctrine is harmless. If qualified immunity were simply an ineffective appendage of § 1983, then courts, congresspeople, protestors, and advocacy groups across the political spectrum would not be calling for its abolition. Instead, growing calls to end qualified immunity are fueled by concerns that the doctrine undermines government accountability. The Supreme Court's definition of "clearly established law"—and requirement that plaintiffs can defeat qualified immunity only if they can identify prior court decisions holding unconstitutional virtually identical facts—is the primary focus of these critiques.<sup>249</sup> Because courts can grant officers qualified immunity simply because plaintiffs cannot find a prior similar case, qualified immunity can deny relief to plaintiffs whose constitutional rights have been violated and can shield officers from liability even when they have behaved maliciously or recklessly.<sup>250</sup> Court opinions granting qualified immunity can also harm government accountability—by sending the message to officers that they can "shoot first and think later" and sending the message to people that their rights do not matter.<sup>251</sup>

This Article shows that the Supreme Court's definition of "clearly established law," which leads to these harmful results, is based on a false premise. The Supreme Court has made clear its view that the law is not clearly established by watershed decisions like *Graham* and *Garner* but, instead, by decisions applying those general principles to similar factual circumstances. The Court has repeatedly explained that the need for factually similar

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<sup>248</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–17 (2014) (describing the prevalence of indemnification); see also Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 333–35 (2020) (describing the disinclination of plaintiffs to seek money from officers who are not indemnified).

<sup>249</sup> The Court's definition of "clearly established law" is not, however, the only way in which qualified immunity doctrine undermines government accountability. Qualified immunity increases the costs, complexity, and risk of civil rights litigation—which may cause attorneys not to accept low damages cases or decline to bring civil rights cases altogether. See Schwartz, *supra* note 247, at 338–44. Qualified immunity also leads to constitutional uncertainty and stagnation, because courts can grant qualified immunity without ruling on the merits of plaintiffs' constitutional claims. See *id.* at 358.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.* at 313 (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)).

court decisions is based upon principles of fair notice, and has repeatedly maintained that officers do, in fact, know about and rely on those court decisions before taking action.<sup>252</sup>

Yet all available evidence makes clear that officers are not on notice of these court decisions. There are hundreds or thousands of cases that could be used to clearly establish the law regarding the constitutional bounds of uses of force, searches, seizures, arrests, and other types of police behavior. If we take seriously the Supreme Court's assertion that qualified immunity is about fair notice, then officers should presumably be educated about all of these decisions. But most California police officer trainings do not include information about the facts and holdings of *any* cases that apply *Graham* and *Garner*. Instead, police policies and trainings focus primarily on the broad rules in *Graham* and *Garner*—precisely the broad rules that the Supreme Court has said are insufficient to clearly establish the law. When officers are educated about other Supreme Court or Ninth Circuit use-of-force decisions applying *Graham* and *Garner*, those decisions are most often used to articulate other broad principles—like the notion that officers do not need to use the least intrusive force available, so long as their use of force is reasonable. And, to the extent that trainings concern the application of *Graham* and *Garner* to various factual scenarios, those scenarios are not based on court decisions.

Moreover, even if officers were informed about cases applying *Graham* and *Garner* to various factual scenarios, all available evidence about decision-making under conditions of stress makes clear that officers would not recall or rely on these decisions when deciding whether to use force.<sup>253</sup> Instead, it is far more likely, as Judge Browning observed, that officers would consider the general principles they have been taught, and then apply those principles to the circumstances they are facing—precisely the type of exercise in which officers engage during their basic and in-service trainings.<sup>254</sup> In contexts other than qualified immunity, the Supreme Court has embraced this understanding of how law enforcement officers make decisions on the job.<sup>255</sup> And this is, in fact, the very approach that California POST and Lexipol have reiterated in their policy and training materials; that officers should

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<sup>252</sup> See *supra* Part I.B (describing the Court's assumption).

<sup>253</sup> See *supra* Part IV.C.

<sup>254</sup> See *supra* note 233 and accompanying text.

<sup>255</sup> See *supra* notes 235–36 and accompanying text.



learn the general “totality of the circumstances” framework for the use of force, and get comfortable applying that framework to the unending variation in factual scenarios officers are destined to confront.<sup>256</sup>

Qualified immunity doctrine has no basis in the law, fails to achieve its intended policy goals, and undermines government accountability. And, as this Article shows, among the most pernicious aspects of the doctrine—its requirement that plaintiffs identify cases in which courts have held unconstitutional nearly identical conduct—is based on a misunderstanding of the role court decisions play in law enforcement policies and trainings, and officers’ decisions on the street. What, then, should be done?

## B. Possible Reforms

In my view, the Supreme Court or Congress should do away with qualified immunity. But if they choose, instead, to reform the doctrine, they should adjust their definition of “clearly established law” to comport with evidence about what officers actually know about the law.

### 1. End qualified immunity.

Mounting evidence of qualified immunity’s failures offers ample justification for Congress or the Supreme Court to abolish qualified immunity. Defenders of qualified immunity offer terrifying predictions about a world without the doctrine: as a Republican congressman stated in support of a bill he introduced that would codify qualified immunity, “[e]nding qualified immunity is another way of saying abolish the police” because “criminals” would bring “endless frivolous lawsuits” and police officers would be “forced to quit, because they couldn’t afford to serve any longer.”<sup>257</sup> But, as I have predicted in prior work, these horrors would not come to pass. Police officers would continue to be indemnified, and frivolous cases would continue to be weeded out of court.<sup>258</sup>

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<sup>256</sup> See *supra* Part III.B–C.

<sup>257</sup> Rep. Banks Introduces Qualified Immunity Act, U.S. CONGRESSMAN JIM BANKS (Aug. 7, 2020), <https://perma.cc/WF9R-WSVX>.

<sup>258</sup> See generally Schwartz, *supra* note 247 (describing these predictions with regards to frivolous cases); Schwartz, *supra* note 248 (describing these predictions with regards to indemnification).

Of particular relevance to this discussion, in a world without qualified immunity and the insistence on “clearly established law,” there would still be legal protections for officers who act reasonably. Courts would still assess whether officers’ decisions to use force were reasonable under the framework supplied by *Graham*—which requires that courts consider the totality of the circumstances not “with the 20/20 vision of hindsight” but with the recognition that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>259</sup>

Courts, in assessing whether an officer’s use of force was reasonable, would also continue to rely on prior court decisions. Courts’ analyses could still be guided by court decisions that clarify the *Graham* framework, by, for example, stating that officers do not have to use the least force available so long as they act reasonably.<sup>260</sup> And courts would still be able to analogize to and distinguish from the facts and holdings of prior court decisions when determining whether an officer’s use of force violated the Constitution.<sup>261</sup> The key difference would be that, in a world without qualified immunity, courts could not dismiss a case simply because there was not a prior decision in which a court held virtually identical conduct to be unconstitutional.

I have previously argued that qualified immunity should be eliminated because it has no basis in the common law, is ill-suited and unnecessary to achieve its intended policy goals, and undermines government accountability.<sup>262</sup> The findings in this Article add more fuel to the flame.

## 2. Redefine “clearly established law.”

If Congress or the Supreme Court decides to amend qualified immunity instead of ending it, the definition of “clearly established law” should be at the top of the list for adjustment. The argument in favor of some form of qualified immunity is that it

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<sup>259</sup> *Graham*, 490 U.S. at 396–97.

<sup>260</sup> See, e.g., *supra* notes 173–78 and accompanying text.

<sup>261</sup> See *supra* notes 91–112 and accompanying text (describing the ways in which the Ninth Circuit in *Isayeva* could have analogized to and distinguished from the facts and holdings in *Bryan*, *Brooks*, and *Mattos* to determine whether Officer Tereschenko’s conduct was reasonable).

<sup>262</sup> See generally Schwartz, *supra* note 11.

limits liability to cases where officers had notice that their conduct was unconstitutional and so “gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”<sup>263</sup> But this Article has shown that police officers do not actually know about the facts and holdings of the cases that the Supreme Court says are necessary to clearly establish the law.

One might counter that, even if officers are not actually on notice of these cases, the existence or absence of a prior court decision holding similar conduct unconstitutional is an adequate proxy for whether an officer should be held liable. But by what logic should the extent of an officer’s “breathing room” depend on whether another officer has been successfully sued for similar conduct in the past? The current definition of “clearly established law” protects officers who have behaved in an outrageous manner—and officers who have intentionally engaged in misconduct—so long as: (1) no officer did something similar in the past; or (2) an officer did something similar in the past but that conduct did not, for any number of reasons, produce a court decision explicating the unconstitutionality of that officer’s conduct.<sup>264</sup> Even if one believes that officers need some extra liability protection beyond that already offered by the Constitution, the existence of a prior court decision with similar facts does not create a rational buffer.

What, then, should be the standard for qualified immunity, if it continues to exist? To my mind, a more sensible definition of “clearly established law” would reflect how officers are actually educated about the scope of their authority. If the goal of qualified immunity is to give officers fair warning or fair notice, and they are on notice of watershed decisions like *Graham* and *Garner*—but not educated about the facts and holdings of court decisions applying *Graham* and *Garner*—then clearly established law should be defined at that higher level of generality. Officers could still have some form of immunity for conduct that did not clearly violate the standards set out in *Graham* and *Garner*, but that

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<sup>263</sup> *al-Kidd*, 563 U.S. at 743; see also Rep. Banks Introduces Qualified Immunity Act, *supra* note 257 (quoting the National President of the Fraternal Order of Police as saying that qualified immunity gives “reasonable officer[s] . . . a certain degree of discretion to make split-second decisions in situations that could put lives, including their own, at risk”).

<sup>264</sup> See *supra* notes 13–15 and accompanying text.

immunity would be disentangled from the absence or existence of court decisions holding similar conduct unconstitutional.<sup>265</sup>

An alternative would be to condition qualified immunity on proof that officers were acting in accordance with governing laws, policies, and training they received about the constitutional limits of their power. By following this approach, courts would assess the reasonableness of officers' behavior based on what they were actually taught about the scope of their authority.<sup>266</sup> This proposal would also address concerns that, absent qualified immunity, officers could be held liable for following the law as it existed at the time they acted.<sup>267</sup> And this approach would place the burden on the defendant to identify what laws, policies, or trainings justified their conduct. Given that qualified immunity is an affirmative defense, placing this burden on the defendant makes sense.

These possibilities capture some—but surely not all—of the ways in which qualified immunity doctrine might be adjusted to comport with evidence that officers are not, in fact, on notice of the decisions that the Supreme Court asserts are necessary to clearly establish the law. These alternatives would also reflect the ways in which officers are actually educated about the scope of their power.

Some reading this Article might reach a very different conclusion—that qualified immunity's protections should be made even stronger. After all, the Supreme Court has confidently and repeatedly asserted that watershed cases like *Graham* and *Garner* do not adequately clarify the “hazy border between excessive and acceptable force.”<sup>268</sup> If prior court decisions are necessary to clarify that border, and officers are not educated about those cases, then one might conclude officers should be held liable even less frequently than they now are.

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<sup>265</sup> For similar recommendations, see Jeffries, *supra* note 13, at 263 (recommending that the “clearly established law” standard be replaced with a rule that qualified immunity be granted absent “clearly unconstitutional” behavior); see also Wells, *supra* note 13, at 436–38 (arguing against qualified immunity in situations in which general principles support liability but there is not a prior case holding similar facts to be unconstitutional).

<sup>266</sup> For discussion of the Supreme Court's and lower courts' view about the relevance of police policies and trainings to the determination of whether the law is clearly established, see generally Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773 (2016).

<sup>267</sup> See Smith, *supra* note 67, at 2108–09 (expressing this concern).

<sup>268</sup> *Kisela*, 138 S. Ct. at 1153 (quotation marks omitted) (quoting *Mullenix v. Luma*, 136 S. Ct. 305, 312 (2015)).

But reaching this conclusion would also require concluding that law enforcement agencies and educators across California—and, it appears, across the country—are inadequately training their officers about the constitutional limits of their power. As this Article has shown, trainers educate officers about the framework set out in *Graham* and/or *Garner*—and, sometimes, general principles drawn from a few additional cases—and then help officers get comfortable applying that framework in varying factual scenarios.<sup>269</sup> But they do not train officers about the cases that the Supreme Court has said officers need to know in order to understand their constitutional authority.

The Supreme Court is usually very willing to defer to law enforcement agencies' assertions of expertise.<sup>270</sup> This deference to law enforcement expertise extends to the ways in which law enforcement agencies train their officers.<sup>271</sup> Applying that same level of deference in the qualified immunity context would mean that the Supreme Court should defer to agencies' and trainers' views that officers do not need to be educated about the facts and holdings of cases applying *Graham* and *Garner* to understand the scope of their authority. And that deference should lead to the conclusion that the definition of "clearly established law" should be more forgiving.

But if, instead, the Supreme Court or Congress maintains that officers need to be educated about the facts and holdings of cases applying *Graham* and *Garner* in order to understand the extent of their power, then the fact that agencies are not training their officers about these cases should be reason enough to hold them liable for their officers' misconduct. The Supreme Court has long held that local governments can be held liable under § 1983 if they fail to adequately train their officers about the scope of their authority and that failure "evidences a 'deliberate indifference' to the rights of its inhabitants."<sup>272</sup> The Supreme Court has also explained that an agency's failure to teach officers about the

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<sup>269</sup> See, e.g., *supra* notes 157, 182–83 and accompanying text.

<sup>270</sup> See generally, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

<sup>271</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (describing the "increasing professionalism of police forces" including "wide-ranging reforms in the education, training, and supervision of police officers" (quotation marks omitted) (quoting S. WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 51 (1993))).

<sup>272</sup> *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

scope of their constitutional authority—including “what is required of them under this Court’s cases”—can be a basis for municipal liability.<sup>273</sup> So, if—in the Supreme Court’s view—adequately training officers about “what is required of them” under the Constitution requires educating them about the facts and holdings of cases that “clearly establish the law,” the failure of agencies across California to educate their officers about these cases should be a basis for municipal liability when their officers use excessive force.

To be clear, I do not believe that local governments should be expected to train their officers about all of the cases that clearly establish the law. But if the qualified immunity standard is not adjusted—or officers are granted *more* qualified immunity protections because they are not educated about the cases applying *Graham* and *Garner*—then liability should shift to local governments.

### C. A Path Forward for Lower Courts

If the Supreme Court or Congress does not abolish qualified immunity or formally change the definition of “clearly established law,” lower courts considering qualified immunity motions should keep this Article’s findings in mind. True, the Supreme Court has repeatedly instructed lower courts not to define “clearly established law . . . at a high level of generality.”<sup>274</sup> And the Court has repeatedly reversed lower courts in recent years for finding that insufficiently similar court decisions clearly established the law.<sup>275</sup> But there remains some flexibility in Supreme Court precedent—the Court has repeatedly observed that plaintiffs need not point to prior precedent to defeat a qualified immunity motion when the constitutional violation is obvious, and the Court has offered shifting guidance about how factually similar a prior decision must be to clearly establish the law.<sup>276</sup> Professor Richard Re has argued that lower courts have the power to legitimately narrow Supreme Court precedent under these types of circumstances—meaning they can “interpret[] a precedent more

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<sup>273</sup> *Hudson*, 547 U.S. at 599.

<sup>274</sup> *White*, 137 S. Ct. at 552 (quoting *al-Kidd*, 563 U.S. at 742).

<sup>275</sup> See, e.g., *id.*; *Emmons*, 139 S. Ct. at 503; *Kisela*, 138 S. Ct. at 1152–53; *Mullenix*, 136 S. Ct. at 308–09; *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–78 (2015).

<sup>276</sup> See *supra* Part II.

narrowly than it is best read”—so long as their reading of the law is “reasonable.”<sup>277</sup>

Courts already vary in their willingness to grant qualified immunity motions. Professors Aaron Nielson and Christopher Walker have found significant differences in qualified immunity grant rates depending on the circuit in which the motion is brought and the political party of the president who appointed the judges on the panel.<sup>278</sup> A cursory review of the analyses and holdings in the 284 Supreme Court and Ninth Circuit decisions reviewed for the purposes of this study make clear that judges on the Ninth Circuit vary in their views about how factually similar prior court decisions must be to clearly establish the law. Evidence that officers do not in fact learn about the facts and holdings of these decisions or rely upon them when doing their job is further reason for lower courts to lean on the Court’s more capacious descriptions of “clearly established law” when considering defendants’ qualified immunity motions.

#### CONCLUSION

The Supreme Court’s qualified immunity doctrine sends plaintiffs’ attorneys on nearly impossible quests for “clearly established law.” Success is elusive given the factual variation across cases, courts’ ability to grant qualified immunity without ruling on the constitutionality of officers’ conduct, and the Court’s requirement that the prior cases concern virtually identical facts. Although this requirement is described as a way of ensuring that officers are on notice of the unconstitutionality of their conduct, this study shows that officers are not actually educated about the facts and holdings of court decisions that clearly establish the law. Instead, they are taught broad principles from watershed cases like *Graham* and *Garner*, and then are given experience applying those frameworks to varying factual situations not based on court decisions. And even if officers did spend more time learning about court decisions applying *Graham* and *Garner*, human-error research and common sense suggest that officers would not analogize and distinguish their facts with those in court decisions

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<sup>277</sup> See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 925–26, 932 (2016).

<sup>278</sup> See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 39–49 (2015); Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 101–10 (2016).

when deciding how to act. Even the Supreme Court has recognized, in other areas of the law, that police officers are not well suited to make these types of fine-grained decisions while doing their jobs.

For all of these reasons, the Court's demand for "clearly established law" makes as much logical sense as does King Pelias's requirement that Jason find a ram with golden fleece to secure the throne in Thessaly.<sup>279</sup> Calls are mounting for the Supreme Court or Congress to abolish or reform qualified immunity. This Article offers yet one additional reason to reconsider the doctrine.

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<sup>279</sup> See Hamilton, *supra* note 1, at 117–30.