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—if they have not violated clearly established law. The Court has explained that watershed cases describing legal requirements—like Graham v. Connor *and* Garner v. Tennessee*—are insufficient to clearly establish the law. Instead, the plaintiff must find prior cases applying* Graham *and* Garner *to cases with virtually identical facts, 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 and trainings. Having viewed hundreds of police policies, training outlines, and other educational 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 told to apply those principles in the widely varying circumstances that come their way.*

Moreover, even if law enforcement 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

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Article reveals another reason to 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.[1] Hercules, cursed by Hera, and enslaved by Eurystheus, was ordered to perform 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

[1] EDITH HAMILTON, *The Quest of the Golden Fleece*, in MYTHOLOGY 117-30 (1953).

man-eating mares of King Diomedes, the cattle of the three-bodied giant Geryon, and the triple-headed dog, Cerberus, from the underworld.[2]

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."[3] The Court has said that, except in extraordinary circumstances, the law is "clearly established" only if a prior case has declared the conduct unconstitutional.[4] And that prior case must have facts that map neatly onto the facts of the plaintiff's case.[5] The Supreme Court has repeatedly emphasized that it is not enough simply to point to watershed decisions like *Graham v. Connor*[6] and *Tennessee v. Garner*[7]—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.[8]

To find a factually similar case is a challenge on its own—particularly given the unending number of ways government officials can violate people's constitutional rights. But the Supreme Court has made the search for "clearly established" law even more formidable by limiting which courts can clearly establish the law. Although the Court has held that the law can be clearly established by prior decisions in the circuit, or a consensus of cases from other circuits,[9] it has more recently suggested that its own decisions

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[2] EDITH HAMILTON, *Hercules*, in MYTHOLOGY 159-72 (1953).

[3] Harlow v. Fitzgerald, 457 U.S 800, 818 (1982).

[4] *See infra* notes 34-35 and accompanying text.

[5] *See infra* notes 36-41 and accompanying text.

[6] 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," 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.").

[7] 471 U.S. 1, 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.")

[8] *See infra* notes 42-48 and accompanying text (describing Supreme Court cases setting out this requirement).

[9] *See* Wilson v. Layne, 526 U.S. 603, 617 (1999).

are the only surefire means of clearly establishing the law.[10] And, even assuming circuit and district courts can still clearly establish the law, the Court has made such decisions difficult to find by allowing lower courts to grant qualified immunity without ruling on the merits of plaintiffs' claims.[11] As Fifth Circuit Judge Willett put it: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose."[12] 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 Section 1983 became law, undermining government accountability, and failing to achieve its intended policy goals.[13] 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.[14] 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.[15] As John Jeffries has observed, the existence of precedent

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[10] *See, 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."); City and 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.") (quoting *Carroll*, supra)), 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….").

[11] *See* Pearson v. Callahan, 555 U.S. 223 (2009).

[12] Zadeh v. Robinson, 902 F.3d 483, 499 (2018) (Willet, J., concurring dubitante).

[13] *See, e.g.*, Joanna C. Schwartz, The Case Against Qualified Immunity, 93 NOTRE DAME L. REV. 1797 (2018) (describing these critiques). *See also infra* notes 191-199 and accompanying text (same).

[14] *See, e.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 653-57 (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, 854-66 (2010) (describing confusion about which sources can clearly establish the law and how factually analogous prior cases must be to clearly establish the law).

[15] *See* Jeffries, *supra* note 14; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013). *See also* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 436-48 (2019).

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.[16] It is, Jeffries writes, "as if the one-bite rule for bad dogs started over with every change in weather conditions."[17]

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"[18] or "fair notice"[19] 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.[20] 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.[21] 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.[22]

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 have held various forms of law enforcement conduct unconstitutional. 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.[23] Nor has much consideration been given to the likelihood that police officers recall the facts and holdings of these hundreds or thousands

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[16] Jeffries, *supra* note 15, at 256.

[17] *Id*.

[18] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[19] Brousseau v. Haugen, 543 U.S. 194, 198 (2004).

[20] *See infra* notes 42-43 and accompanying text (describing this assumption).

[21] *See infra* notes 44-48 and accompanying text (describing this assumption).

[22] *See infra* Part I.B (describing this assumption).

[23] *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.").

of cases as they are making split-second decisions about whether to conduct a stop-and-frisk, search a car, or shoot their gun.[24]

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.[25] 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 may reference or incorporate the constitutional standards from watershed decisions like *Graham* and *Garner*, but rarely reference any cases in which *Graham* and *Garner* were applied.[26] California police officer trainings similarly focus primarily on the broad principles articulated in *Graham* and *Garner*.[27] More than three-fourths of the 328 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 the underlying facts and holdings of the cases. 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.[28] Trainings do, regularly, incorporate hypotheticals as a way for officers to develop their understanding about whether and what degree of force is appropriate in various scenarios. But these scenarios do not appear to be based on court cases.

Police officers are not reliably learning about use-of-force cases applying *Garner* and *Graham* from other sources, either.[29] District attorneys and city attorneys do not appear to train officers about the facts and holdings

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[24] For one notable exception, see Manzanares v. Roosevelt County Adult Det., 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 there anything like the facts in York v. City of Las Cruces?'").

[25] For discussion of my reasons for focusing on use-of-force decisions, see infra note 70 and accompanying text. For discussion of my reasons for focusing on California officers, see infra notes 92-93 and accompanying text.

[26] For further discussion of these findings, see *infra* Part III.A.

[27] For further discussion of these findings, see *infra* Part III.B.

[28] *See infra* notes 135-139 and accompanying text (discussing training outlines that use Ninth Circuit cases to illustrate this point).

[29] *See infra* Parts III.C, D.

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 reason to believe that officers reliably subscribe to and read them. In sum, California police officers are not regularly or reliably given "warning" or "fair notice" of court decisions that apply the frameworks in *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 might clearly establish the law. 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.[30] At best, prior cases 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 type of complex information contained in court decisions when making decisions under high pressure circumstances—as 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. And, until Congress or the Supreme Court takes 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,

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[30] For further discussion, see *infra* Part IV.

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, 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 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.

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 court of appeals' decisions applying broad constitutional principles like *Graham* and *Garner* to various factual circumstances, and that officers recall and rely on 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."[31] But today's qualified immunity doctrine has nothing to do with officers' good faith. In 1982, in a case called *Harlow v. Fitzgerald*, 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."[32] 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.[33] In this Subpart, I explain how the Court's

[31] Pierson v. Ray, 386 U.S. 547 (1967).

[32] 457 U.S. 800, 818 (1982).

[33] *See infra* notes 38-48 and accompanying text.

definition of "clearly established law" has evolved from 1982 to the present day, both in terms of what sources of law can clearly establish the law and how factually similar those prior sources of law must be to the case at hand.

The Court has offered shifting guidance about whether a prior court decision is necessary to clearly establish the law. In 2002, the Court held, in *Hope v. Pelzer*, that a prior court opinion with similar facts was unnecessary to clearly establish that prison guards could not punish a prisoner by shackling him to a hitching post for seven hours under the Alabama sun.[34] But—without ever overruling *Hope*—the Court's subsequent 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 point to prior court decisions to overcome a qualified immunity motion.[35]

In addition, the Supreme Court has gotten more particular about which courts' decisions will clearly establish the law. The Court wrote in 1999, in *Wilson v. Layne*, that the plaintiff must identify a case of "controlling authority in their jurisdiction at the time of the incident" or a "consensus of persuasive authority" to defeat a qualified immunity motion.[36] In recent years, however, the Court has suggested that not even court of appeals cases will reliably do the trick in opinions that only "assum[e] arguendo" that a decision by a court other than the Supreme Court can clearly establish the law.[37]

The Court has also gotten more particular 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,"[38] but, in 2011, in *Ashcroft v. al-Kidd*, the Court substi-

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

[35] To the extent that Supreme Court opinions have invoked *Hope*'s language, it has largely 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) ("The 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 Saucier v. Katz, 533 U.S. 194, 202 (2001); then quoting Hope, 536 U.S. at 739)). *But see* Tolan v. Cotton, 572 U.S. 650, 656 (2014) (citing *Hope* when describing the qualified immunity standard).

[36] 526 U.S. 603, 617 (1999).

[37] Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012). See also Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015); *supra* note 10 and accompanying text.

[38] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

tuted "every" for "a," such that "*every* reasonable official" now needs to understand that their conduct violates the law.[39] 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.[40] "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.'"[41]

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.'"[42] For example, the Supreme Court made clear in *Brousseau* that it was not enough to ask whether it was clearly established that a police officer may use deadly force only "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[43] Instead, the correct inquiry, according to the Court, is 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."[44] The Court concluded in *Brousseau* 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.[45]

In recent years, the Court has granted a spate of qualified immunity denials, reversing every one, and repeatedly criticized lower courts for not fully appreciating how factually similar prior cases must be to clearly establish the law. For example, in *White v. Pauly*, 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 was again necessary, in *White*, "to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'"[46] The Court criticized

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[39] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011).

[40] Id. at 2084.

[41] Mullenix v. Luna, 136 S.Ct. 305, 308 (2015) (first quoting al-Kidd, 131 S. Ct. at 2074; then quoting Brousseau v. Haugen, 543 U.S. 194, 198 (2004)).

[42] White v. Pauly, 137 S. Ct. 548, 552 (2017) (citing Brousseau v. Haugen, 543 U.S. 194, 199 (2004).

[43] Haugen v. Brousseau, 339 F.3d 857, 873 (9th Cir. 2003).

[44] Brousseau, 543 U.S. at 199-200.

[45] Id at 201.

[46] White, 137 S. Ct. at 552.

the lower court 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 generalized level,"[47] and granted 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."[48]

Lower courts appear to have gotten the message.[49] Recent circuit courts' qualified immunity decisions have repeatedly invoked the Supreme Court's instruction that clearly established law should not be denied "at a high level of generality" when assessing officers' entitlement to qualified immunity.[50] And circuit courts have granted officers qualified immunity even

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[47] *See* White, 137 S. Ct. at 552; see also id. ("[W]e have held that *Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'") (citing Brousseau v. Haugen, 543 U.S. 194, 199 (2004)); City and County of San Francisco v. Shehan, 135 S.Ct. 1765, 1775-76 (2015) (explaining that "Graham holds only that the 'objective reasonableness' test applies to excessive-force claims under the Fourth Amendment. That is far to general a proposition to control this case."); City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) ("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.").

[48] White, 137 S. Ct. at 552.

[49] Accord Manzanares v. Roosevelt County Adult Det., 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) ("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.").

[50] See, e.g., Isayeva v. Sacramento Sheriff's Department, 872 F.3d 938 (9th Cir. 2017) (observing that, when assessing whether the law is clearly established, "general standards" like those in Graham v. Connor "are only the starting point." 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.") (citation omitted) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)); S.B. v. County of San Diego, 864 F.3d 1010, 1015 (9th Cir. 2017) (citing Sheehan, 135 S. Ct. at 1775-76, White v. Pauly, 137 S. Ct. 548, 551 (2017)). See also 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 clearly 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.") (first quoting Sheehan, 135 S. Ct. at 1775-16; then quoting White v. Pauly, 137 S. Ct. 548, 552 (2017)); Garcia v. Escalante, 678 Fed. Appx. 649, 654-55 (10th Cir. 2017) (noting the Supreme Court's repeated admonitions to

when prior precedent held that almost identical conduct was unconstitutional. For example, in *Baxter v. Bracey*, 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.[51] 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 unconstitutionality of the officers' decision to release a police dog on a person who was seated with their hands in the air.[52]

In another case, *Kelsay v. Ernst,* 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.[53] Prior Eighth Circuit cases had held that, "where a nonviolent misdemeanant 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."[54] 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."[55]

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 difficult to sue government officers.[56] Instead, this requirement

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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 circumstances…was held to have violated the Fourth Amendment," and granting qualified immunity) (citing White v. Pauly, 137 S. Ct. 548, 552 (2017).

[51] 751 F. App'x 869 (6th Cir. 2018)

[52] See id.

[53] 933 F.3d 975 (8th Cir. 2019).

[54] Id. at 980.

[55] Id.

[56] That may, however, be part of the Court's inspiration. 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 v. Creighton, 483 U.S. 635, 639 (1987).

is explicitly tied to an assumption that officers know about these court decisions and rely on them when doing their jobs.[57] 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*."[58] In *Anderson*, the Court explained that the protections of qualified immunity are "intended to provide government officials with the ability '*reasonably [to] anticipate* when their conduct may give rise to liability for damages."[59] And the Court explained, in *Broussau*: "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."[60]

The Court appears actually to expect that qualified immunity causes government officials to assess, before acting, whether prior court decisions clearly establish that their conduct would violate the Constitution. In *Mitchell v. Forsyth*, the Court wrote that the limited protections of qualified immunity meant the United States 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."[61] 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….'"[62] 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 proposed 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*

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[57] *See, e.g.*, Fred O. Smith, Jr., *Formalism, Fergusson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2103 (2018) (explaining that qualified immunity doctrine "relies on principles of notice.").

[58] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

[59] Anderson v. Creighton, 483 U.S. 635, 646 (emphasis added) (quoting Davis v. Scherer, 468 U.S. 183, 195) (1984).

[60] Brousseau v. Haugen, 543 U.S. 194, 198 (2004) (emphasis added).

[61] Mitchell v. Forsyth, 472 U.S. 511, 524 (1985).

[62] Id. (emphasis in original) (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982).

v. Hughes, the Court explained, when instructing lower courts "not to define clearly established law at a high level of generality"[63]:

> 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, 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.[64]

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," and that "*[p]recedent involving similar facts can…provide an officer notice* that a specific use of force is unlawful."[65] In other recent qualified immunity decisions concerning police officers' Fourth Amendment powers the Court has used almost identical language to press home the point.[66]

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[63] Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018).

[64] *Id.* at 1152-53.

[65] *Id.* (emphasis added).

[66] *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (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 doctrine, here excessive force, will apply to the factual situation the officer confronts.'") (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001); District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) ("Given its precise 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.") (citations omitted); City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (quoting Kisela, 138 S. Ct. at 1153). The Court has also expressed 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 (2011) (asserting that "[r]esponsible 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," and that "[a]n officer who conducts a search in reliance on binding appellate precedent does no

Lower courts appear to have embraced the assumption that officers are notified of the substance and holdings of court opinions and rely on those decisions before taking action.[67] Take, for example, *Bryan v. United States*, in which the Third Circuit granted qualified immunity to Customs and Border Inspection officers who had searched a cruise ship cabin.[68] 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."[69] 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.

It follows from the *Bryan* court's rationale—and the rationale in recent Supreme Court decisions like *Kisela*—that officers will learn 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 assump-

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more than 'act as a reasonable officer would and should act' under the circumstances.") (citations omitted).

[67] 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 that right.'") (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) (quoting Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018)); Mason-Funk v. City of Neenah, 895 F.3d 504, 508-09 (7th Cir. 2018) (citing *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.").

[68] 913 F.3d 356 (2019).

[69] Id. at 363.

tion that officers are educated not only about watershed decisions like *Graham* and *Garner* but also about decisions applying *Graham* and *Garner* to various factual situations. 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 and 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 true.

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.[70] 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.[71] 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 reflects the vast body of law about which qualified immunity doctrine assumes officers are aware.

As of July 10, 2020, I found 285 Supreme Court and Ninth Circuit decisions on Westlaw applying *Graham* and/or *Garner* to a use-of-force incident

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[70] I focused on materials about the cases clearly establishing the constitutionality of uses of force for three reasons. First, virtually all law enforcement agencies have use-of-force policies, and topics related to the use of force play a predominant role in police trainings. See Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 251-52 (2017) (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); Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. Ill. L. Rev. 363, 396 (1999) ("The single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force, which happens to be one of the few domains where police are successfully sued for large sums of money."). Second, as the Supreme Court has observed, there are a wide variety of factual circumstances in which force can be used, and a great number of court cases that apply *Graham* and *Garner* to explicate the boundaries of the Fourth Amendment. Third, use-of-force cases represent a significant part of the Supreme Court's qualified immunity docket, particularly in recent years when it has emphasized the need for prior factually similar cases to clearly establish the law.

[71] *See* Prison Legal News v. Lehman, 397 F.3d 692, 701-02 (9th Cir. 2005); Bahrampour v. Lampert, 356 F. 3d 969, 977 (9th Cir. 2004) (agreeing that unpublished district court decisions could clearly establish the law); Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002) ("[U]npublished decisions of district courts may inform our qualified immunity analysis").

and articulating one or more holdings regarding the constitutionality of defendants' alleged conduct.[72] Of those 285 cases, six are Supreme Court decisions and 279 are Ninth Circuit decisions. Among the 279 Ninth Circuit decisions, 172 are "unpublished" and 107 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 their circuit and district courts can clearly establish the law.[73]

The manner in which the Ninth Circuit clearly establishes the law depends in some part on the procedural posture of the case. The vast majority of decisions are appeals of lower court summary judgment decisions, although some are appeals of decisions on motions to dismiss or trial judgments. Some decisions—particularly appeals of trial judgments or judgments as a matter of law during or after trial—typically rule on whether the evidence presented by the parties support a jury's view 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 estab-

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[72] I have not included in this count decisions that cite *Graham* and/or *Garner* but concern substantive due process claims or claims against prison officials. Instead I have focused on Ninth Circuit decisions that would clearly establish the law for excessive force cases brought under the Fourth Amendment against law enforcement officers. I have also omitted from this count 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.

[73] 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 v. Lehman, 397 F.3d 692, 702 (9th Cir. 2005). 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"). Even as the Supreme Court has described the requirements of qualified immunity in increasingly exacting terms, the Ninth Circuit has continued to rely on unpublished decisions for clearly established law. See, e.g., Sweet v. Langley, 798 Fed. Appx. 135, 136 (9th Cir. 2020); Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019); Foster v. City of Indio, 908 F.3d 1204, 1216 n.6 (9th Cir. 2018). 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). Note also that some circuits do not hold this view regarding unpublished opinions. See, e.g., Grissom v. Roberts, F.3d 1162, 1168 (10th Cir. 2018) (holding that "an unpublished opinion can be quite relevant in showing that the law was not clearly established" but are less likely to show that the law was clearly established); Delaughter v. Woodall, 909 F.3d 130, 140 (5th Cir. 2018) (stating that "a combination of precedential authority and a robust consensus of unpublished authority" can clearly establish the law, but an unpublished case on its own cannot).

lish the law for qualified immunity purposes—and many of these 285 decisions have been cited in other qualified immunity decisions for just this purpose.

These 285 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.[74] Shooting cases are the most common, representing 109 (38%) of all 285 Ninth Circuit and Supreme Court use of force decisions. Other common types of force adjudicated in these decisions are uses of force without weapons (93 decisions), pointing guns (21 decisions), tasers (17 decisions), handcuffs (15 decisions), pepper spray (14 decisions), and police dogs (12 decisions). Within these broad categories, there are clusters of cases involving similar applications of the same type of force. For example, in eleven of the 109 decisions involving shootings, officers shot at people in cars. In six of the 93 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 forced was used acted in similar ways—cases in 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 285 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*, a Ninth Circuit decision reversing the district court's denial of qualified immunity.[75] 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. 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 Barry

[74] These court decisions will be made publicly available in the near future.

[75] 872 F.3d 938 (2017).

> grabbed one of his arms. Deputy 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.[76]

In determining whether Detective 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*, a case in which the Ninth Circuit found that a taser deployment violated the Fourth Amendment.[77] 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.[78]

Yet, according to the *Isayeva* court, the decision in *Bryan* did not clearly establish that Officer Barry's conduct violated clearly established law because there were factual distinctions between the cases: while Officer 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.[79]

Next, the *Isayeva* court compared the constitutionality of Officer Barry's conduct with two other cases that were consolidated and heard together—*Brooks v. City of Seattle* and *Mattos v. Agarano*—in which the Ninth Circuit found officers' taser use violated the Constitution.[80] In *Brooks*, a seven-month pregnant woman was pulled over for speeding and would not sign a traffic citation or exit her car.[81] When an officer forcibly tried to remove her from her vehicle, she "stiffened her body and clutched

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[76] *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.

[77] 630 F.3d 805 (2009).

[78] Isayeva, 872 F.3d at 948.

[79] *Id.* at 949.

[80] 661 F.3d 433 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2681 (2012).

[81] *See id.*

the steering wheel," and an officer tased her in drive-stun mode three times in less than a minute.[82] 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. The officer tased the plaintiff once in dart mode. 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.[83]

Despite these similarities, the *Isayeva* court concluded that *Brooks* and *Mattos* did not clearly establish the unconstitutionality of Officer Barry's conduct. Tereschenko was a "very big man," and larger than the officers, while the plaintiffs in *Brooks* and *Mattos* were female and one was pregnant.[84] 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."[85] Tereschenko was "likely under the influence of drugs" while available evidence suggests the plaintiffs in *Brooks* and *Mattos* were sober.[86] 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.[87] 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.'"[88] 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,

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[82] *Id.*

[83] Isayeva, at 949.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 950.

[88] *Id.*

and the distinct uses of *Bryan, Brooks,* and *Mattos* 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."[89] 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 officers 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 person tased, the distance of the officer to the person tased, the relative size of the people tased to the officers who tased him, 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 that discussion in this Part has focused on fewer than four of seventeen (23.7%) Ninth Circuit cases addressing the constitutionality of taser use, just a miniscule portion (1.4%) of the 285 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.

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[89] Graham v. Connor, 490 U.S. 386, 396-97 (1989).

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.[90] But neither the Supreme Court's assumption of notice—nor lower 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*. California is the nation's most populous state, and has more than 500 law enforcement agencies; for those reasons alone it is a worthwhile subject of study.[91] 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.[92] 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 its transparency regarding policies and trainings, there is no reason to believe that California departments' policies and trainings are not otherwise representative of practices nationwide.[93]

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[90] *See supra* notes 23-24 and accompanying text.

[91] *See* Charles D. Weisselberg, In the Stationhouse After Dickerson, 99 Mich. L. Rev. 1121,1123 (2001) (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, 2008 CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (July 2011) (reporting that California has 509 law enforcement agencies).

[92] SB 978, 2017-2018 Reg. Sess. (Cal. 2018). For further description of these obligations, see Commission on Police Officer Standards and Training Bulletin No. 2019-19, 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), at https://post.ca.gov/Portals/0/post_docs/bulletin/2019-29.pdf.

[93] For a description of California departments' use-of-force policies as compared to use-of-force policies across the country, see infra notes 103-104 and accompanying text. For the number of training hours and requirements in California, as compared to the national average, see *infra* note 117 and accompanying text.

I focused on policies, trainings, and other educational materials received by California law enforcement officers because I assume that these are the mechanisms by which officers would learn about court decisions. As Charles Weisselberg has observed, "[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."[94] I also supplemented this publicly available information about California law enforcement agencies' policies and trainings with public records requests to district attorneys and city attorneys, and online research about other subscription services that 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. The first is Lexipol LLC, a private, for-profit provider of police department policies and trainings that count approximately 95% of California law enforcement agencies among their clients.[95] The second is the State of California Commission on Peace Officer Standards and Training (California POST), which determines the requirements for police basic and in-service training—including the subjects covered and the amount of time spent on various areas—and additionally certifies training outlines as compliant with those requirements.[96]

In this Part, I describe my findings. In sum, I find California officers appear regularly to be 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.[97] But my review of California police department policies and trainings, advice from government

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[94] Weisselberg, *supra* note 91, at 1135. *See also* Connick v. Thompson, 563 U.S. 51 (2011) (explaining that "[t]here 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.").

[95] For an overview of Lexipol LLC's services and business model, see generally Ingrid V. Eagly & Joanna C. Schwartz, Lexipol: The Privatization of Police Policymaking, 96 Tex. L. Rev. 891 (2018). Lexipol provides policies to more than 3000 law enforcement agencies across the country—so their practices and perspectives have a disproportionate impact not only on California agencies, but on agencies nationwide.

[96] For an overview of the role of California POST in police policies and trainings, see Weisselberg, *supra* note 91, at 1136-40. See also California POST website, accessible at https://post.ca.gov/.

[97] *See, e.g.*, See, e.g., Police Exec. Research Forum, Guiding Principles on Use of Force 18 (2016) (explaining that after the Fourth Circuit held that using a Taser repeatedly in drivestun 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) ("After the Court

attorneys, and other educational 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.

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.[98] This Article should also

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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."); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008) (observing that California law enforcement agencies stopped training their officers not to conduct warrantless searches of trash—a requirement of California constitutional law—after the United States Supreme Court rejected this prohibition); Weisselberg, *supra* note 91, at 1121 (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming Miranda); Patrick Healy, LAPD Commission Adds to Guidelines for Review of Police Use of Force, NBC L.A. (Feb. 19, 2014), https://www.nbclosangeles.com/news/local/ LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html (reporting that 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). This Article does not attempt to define what constitutes a watershed decision, but does clearly show that applications of *Graham* and *Garner* to various factual scenarios do not fall within this definition.

[98] *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"); Rachel Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) (arguing that Supreme Court decisions "regulating the use of force by police officers is deeply impoverished"); Garrett & Stoughton, *supra* note 70, at 291 ("[t]o 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, *Fourth Amendment Flaws, Constitutional Spillage, and the Regulation of Police Violence*, EMORY L.J. (forthcoming) (explaining that the *Graham* factors "have limited analytical value" and "[a]t best…serve as potentially misleading proxies for the governmental interests that can justify the use of force by police, offering no guidance on what type of force

not be read to 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.[99]

My focus in this Article is not on what form police use-of-force policies and trainings should take. It is, instead, is on the extent to which the Supreme Court's expectations that officers have notice about 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. 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.[100] And virtually all of these policy manuals contain policies regarding the use of force by officers, which can themselves be many pages long.[101] Use-of-force policies must comport with federal and state law, and may also include various other limitations or provisions to guide officers' discretion.[102]

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or how much force officers can legimately use in any given situation."). See also Police Executive Research Forum, Guiding Principles on Use of Force 35-36 (2016), https://www.policeforum.org/assets/guidingprinciples1.pdf (recommending that police agencies "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.").

[99] For further discussion of the ways in which police might benefit from closer attention to court decisions, see *infra* notes 173-174 and accompanying text.

[100] *See* SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 97 (2020) (explaining that, as of 2000, "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.").

[101] *See, e.g.*, Contra Costa County Sheriff's Office Use of Force Policy (16 pages); San Francisco Police Department Use of Force Policy (19 pages); Upland Police Department Use of Force Policy, (22 pages); Davis Police Department Use of Force Policy (27 pages); San Jose Police Department Use of Force Policy (30 pages).

[102] William Terrill, Eugene A. Paoline III & Jason Ingram, Final Technical Report Draft, Assessing Police Use of Force Policy and Outcomes iii (May 2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf (surveying use-of-force policies in 1,000 agencies across the country and finding wide variation).

The Supreme Court's decisions in *Graham v. Connor* and *Garner v. Tennessee* play an outsized role in law enforcement use of force policies nationwide.[103] *Graham* also plays a starring role in most of California's agencies' use of force policies. More than 95% of California's law enforcement agencies have use-of-force policies designed by Lexipol LLC.[104] 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*.[105]

Although Lexipol's use-of-force policy relies heavily on the language in *Graham*, the 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."[106]

More generally, Lexipol's representatives reported to me that they "rarely, if ever, utilize appellate decisions as a basis for policy change."[107] Indeed, in the view of Bruce 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

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[103] *See* Garrett & Stoughton, *supra* note 70, at 285 (finding that "[a]bout half" of the policies for the fifty largest police departments "relied on language from *Graham* and the Supreme Court's Fourth Amendment cases."); Stoughton, *supra* note 98, at 56-61 (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 (2018) (arguing that agency policies "over-rely on reciting the basic constitutional standard for police engagements…").

[104] *See* Eagly & Schwartz, *supra* note 95, at 893-94.

[105] *See, e.g.*, Torrance Police Department Use of Force Policy (on file with author).

[106] *Id.*

[107] Email from Tim Kensok, Lexipol Vice President of Product Management, to author (May 6, 2020, 8:15 AM) (on file with author).

> on how to assess and articulate the totality of each set of circumstances when making the often split-second decision to use force.[108]

In sum, police 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 court decisions applying *Graham* and *Garner*.[109]

Among the twenty-four California jurisdictions I identified that do not currently rely on Lexipol, there is more variation in use-of-force policies, but minimal attention to court decisions beyond *Graham* and *Garner*.[110] These jurisdictions' use-of-force policies appear to rely generally on the principles set out in *Graham* and *Garner*, as well. Some explicitly mention *Graham* and, less frequently, *Garner*.[111] Among them, only three—the Alameda County Sheriff's Office, the Kern County Sheriff's Office, and the

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[108] Email from Bruce Praet, Co-Founder of Lexipol, to author (May 5, 2020, 3:49 PM) (on file with author).

[109] Lexipol subscribers can modify their policies, but those changes will revert as soon as there is a policy update. See Eagly & Schwartz, *supra* note 95, 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.

[110] As of 2018, among the largest 200 law enforcement agencies in California, twenty-six did not contract with Lexipol and another eight did subscribe with Lexipol but published their own policy manual that drew in some manner on Lexipol's materials. *See* Eagly & Schwartz, *supra* note 95, 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 County Sheriff's Department Use of Force Policy; Torrance Police Department Use of Force Policy; Irvine Police Department Use of Force Policy; Santa Clara Police Department Use of Force Policy; Beverly Hills Police Department Use of Force Policy; El Cajon Police Department Use of Force Policy; Solano County Sheriff's Office Use of Force Policy; Butte County Sheriff's Office Use of Force Policy; Indio Police Department Use of Force Policy (on file with author).

[111] *See, e.g.*, Los Angeles Police Department Use of Force Policy ("The Department examines reasonableness using *Graham v. Connor* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances."); Los Angeles Sheriff's Department Use of Force Policy ("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 ("'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 v. Connor); Placer County Sheriff's Office Use of Force Policy (explaining that "[a]ny 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 forced that is necessary in a particular situation under Graham v. Conner, 109 S. Ct. 1865 (1989); Escondido Police Department Use of Force Policy ("[a]ny analysis of the use of force in the course of an arrest…shall be analyzed under the Fourth Amendment and its 'objective reasonableness' standard.") (quoting *Graham*, 490 U.S. at 395-98).

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

For example, 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,[112] and then includes hyperlinked references to two California penal statutes and three court decisions: *Graham, Garner*, and *Forrester v. San Diego.*[113] 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.[114]

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 engagement, with the application of those principles illuminated through procedures and trainings.[115] 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.[116] Yet, as I describe in the next Subpart, 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.

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[112] Alameda County Sheriff's Office Use of Force Policy (on file with author).

[113] 25 F.3d 804 (9th Cir. 1994). For further discussion of the role played by *Forrester v. City of San Diego* in police trainings, see *infra* notes 132-136 and accompanying text.

[114] 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. The cases include *Graham*, *Garner*, *Forrester*, *Lyons v. City of Los Angeles* (which sets out the standard for standing in cases seeking injunctive relief), *Burns v. Honolulu* (an unpublished 1979 district court decision unavailable on Westlaw), and *Bryan v. McPherson*, 590 F.3d 767 (9th Cir. 2009). For further discussion of the role played by *Bryan* in police trainings, see infra note 132, 141 and accompanying text. 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." There is no description of the facts of the cases.

[115] For one description of the distinction between policies and procedures, see Eagly & Schwartz, *supra* note 95, 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." *See also generally* Garrett & Stoughton, *supra* note 70 (describing the differences between police use-of-force policies and tactics).

[116] Weissleberg, supra note 91, at 1135 ("[I]n-service training makes the most significant contribution to officers' understanding of search and seizure law.")

B. 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.[117] California POST also certifies law enforcement agencies' and private companies' detailed training outlines as sufficient to satisfy these training hours, and are required by California law to post those training outlines on their website.[118]

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 law as one of the objectives of the courses.[119] 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.[120] In the subparts the 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.

1. Basic Training

All California law enforcement officers must go through basic training, including training about use of force. California POST has designated forty-

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[117] *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 amount of minimum training is 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*, THE INSTITUTE FOR CRIMINAL JUSTICE TRAINING REFORM, available at https://www.trainingreform.org/state-police-training-requirements. Note that nationwide states require an average of 651 basic training hours and 21 yearly in-service training hours. California requires 664 basic training hours and 12 yearly in-service training hours. See id.

[118] 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. Basically, what are you teaching and tell us everything down to that third level of detail.").

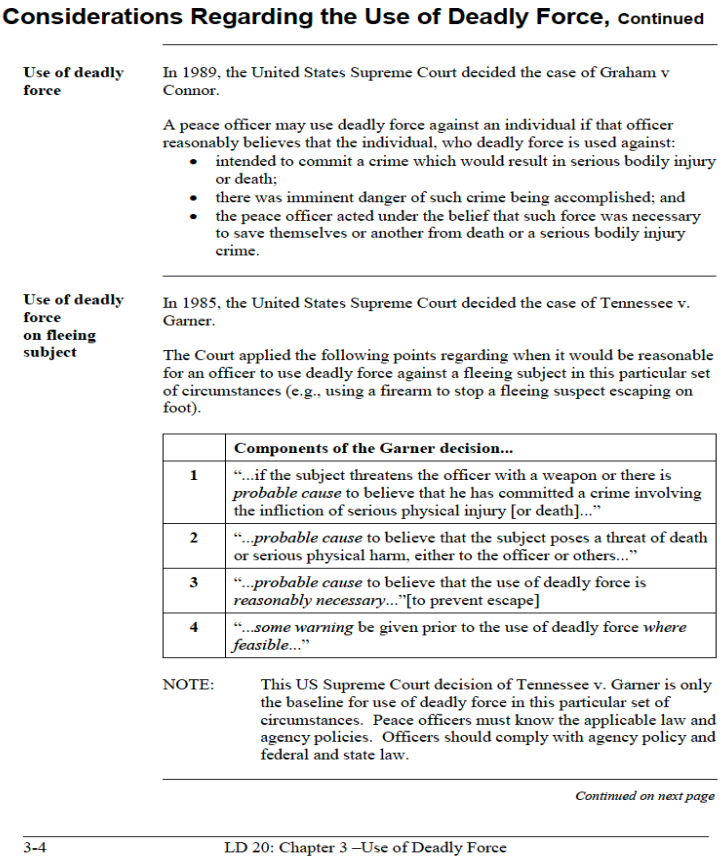
[119] There are numerous types of courses – in firearm tactics or take down techniques, for example, or science based courses, or courses about bias, that do not include legal updates among their aims. Accordingly, I have not included those courses in this discussion.

[120] Some departments have submitted multiple versions of the same training; I am treating these multiple versions as a single training for the purposes of this study.

three "Learning Domains" that regular basic training must contain ranging from "leadership, professionalism, and ethics" to "controlled substances" to "investigative report writing," and "cultural diversity/discrimination." "Use of force/deescalation"—Domain 20—includes as its learning objectives the "Fourth Amendment standard for determining objective reasonableness as determined by the Supreme Court" and the "legal framework establishing a police officer's authority during a legal arrest."[121]

California POST appears to intend that *Graham* and *Garner* play the predominant role in officers' regular basic training about the constitutional bounds of uses of force.

FIGURE 1: EXCERPT OF CALIFORNIA POST'S REGULAR BASIC TRAINING WORKBOOK



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 ***probable cause*** to believe that he has committed a crime involving the infliction of serious physical injury [or death]..."
2	"...***probable cause*** to believe that the subject poses a threat of death or serious physical harm, either to the officer or others..."
3	"...***probable cause*** to believe that the use of deadly force is ***reasonably necessary***..."[to prevent escape]
4	"...***some warning*** be given prior to the use of deadly force ***where feasible***..."

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

[121] *Regular Basic Course Training Specifications*, CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, https://post.ca.gov/regular-basic-course-training-specifications.

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 decisions in *Graham* and *Garner* in some detail.[122]

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 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)[123]

Resistance, Continued

Examples (continued)

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 complied with the officer's verbal command to get out of the car and showed no signs of threatening behavior, but refused to cooperate in any other way.	*Appropriate:* The officer used a firm grip to overcome the driver's passive resistance to the officer's efforts to direct the movement of the driver and maintain control of the situation.
		Inappropriate: The officer used an impact weapon to disable the subject before applying a control hold and placing the subject under arrest.

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 that is objectively reasonable under the totality of the facts and circumstances confronting the officer at the time.[124]

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[122] *Regular Basic Training Workbook*, CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING (2018), available at https://post.ca.gov/Data/Sites/1/post_docs/training/PC832Materials/PC%20832%20Workbooks/PC_832_VOL_4_V-3.0.pdf.

[123] *Id.* at 1-16.

[124] *Id.* at iii.

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 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

No cases referenced	3 (14.3%)
Reference to "case law"	6 (28.6%)
Reference to "case law" and/or *Graham* and/or *Garner*	7 (33.3%)
Reference to one other Supreme Court or Ninth Circuit use-of-force case (with or without other references to "case law," *Graham* and/or *Garner*)	5 (23.8%)
Reference to two Ninth Circuit/Supreme Court cases other than *Graham* and/or *Garner*	0
Reference to three or more Ninth Circuit/Supreme Court cases other than *Graham* and/or *Garner*	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 Circuit use-of-force case in addition to *Graham* and/or *Garner* and/or "case law."[125] 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

[125] Oakland Police Department (references "case law," *Graham*, and *Robinson v. Solano County*); San Jose Police Department (references "case law" and *Deorle v. Rutherford*), Santa Clara County Sheriff's Department (references "case law," *Graham*, *Garner*, and *Bryan v. McPherson*), Stanislaus County Regional Training Division (references "case law," *Graham*, *Garner*, and *Scott v. Harris*), Ventura County Criminal Justice Training Center (references "case law," *Garner*, and *Scott v. Harris*).

hours on each of three topics: "arrest and control," "driver training/awareness or driving simulator," and "tactical firearms or force options simulator."[126] Legal issues are among the required topics of perishable skills trainings regarding tactical firearms and arrest and control.[127] California POST also recommends that various legal topics be covered in the remaining twelve hours of biannual officer training.[128]

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.[129] Although legal issues are covered in most of these trainings, court decisions—beyond *Graham* and *Garner*—appear to play a limited role.

The overwhelming majority (76.2%) of in-service training outlines regarding force offer no description of any Supreme Court or Ninth Circuit cases interpreting *Graham* and *Garner*.[130] Another 18% of training outlines reference one or two Ninth Circuit or Supreme Court cases referencing *Graham* or *Garner*. Just 6.7% of the training materials reference three or more such cases.

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[126] *Perishable Skills Program*, CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, available at https://post.ca.gov/perishable-skills-program#:~:text=The%20intent%20of%20this%20program,every%20California%20law%20enforcement%20agency.&text=Perishable%20skills%20for%20peace%20officers,and%20control%2C%20and%20verbal%20communications.

[127] *Continuing Professional Training and Perishable Skills*, CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, available at https://post.ca.gov/commission-procedure-d-2-continuing-professional-training-and-perishable-skills.

[128] 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.*

[129] 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.

[130] 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 are only teaching officers about these additional cases if they, in turn, are educated about these cases. As I describe infra Part III.B.3, instructor training is also 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 Graham and/or *Garner*	6	5	126	3	**140 (52.4%)**
Reference to one Ninth Circuit/Supreme Court case other than *Graham* and/or *Garner*	7	21	0	1	**29 (10.9%)**
Reference to two Ninth Circuit/Supreme Court cases other than *Graham* and/or *Garner*	13	4	0	2	**19 (7.1%)**
Reference to three or more Ninth Circuit/Supreme Court cases other than *Graham* and/or *Garner*	4	14	0	0	**18 (6.7%)**
Total	44	47	164	12	**267 (100%)**

Among the sixty-six training outlines that do reference one or more cases applying *Graham* and/or *Garner*, just nineteen of the 285 Ninth circuit and Supreme Court cases that interpret *Graham* and/or *Garner*—described in Part II—make an appearance.[131] Just six cases account for the vast majority of case references: *Forrester v. San Diego, Forrett v. Richardson, Reed v. Hoy, Headwaters Forest Defense v. City of Humboldt, Bryan v. McPherson,* and *Scott v. Henrich*.[132] So, of the 267 in-service training outlines that cover 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 sixty-six

[131] For a list of all of the cases referenced, the frequency with which they are referenced, and the propositions for which they are referenced, see Appendix.

[132] Among the sixty-six in-service training outlines that reference cases interpreting *Graham* and *Garner*, *Forrester* is invoked the most frequently; it is included in fifty-five of the sixty-six trainings (83.3%). *Forrett* and *Reed* are each in fifteen of the sixty-six trainings (22.7%). *Headwaters*, *Bryan*, and *Scott* are each in thirteen of the sixty-six trainings (19.7%). The next most frequently invoked case, is *Brooks v. Seattle*, which is included in seven of the sixty-six trainings (10.6%). For further discussion of these cases see infra notes 134-142 and accompanying text.

trainings that do include cases other than *Graham* and Garner, just over 2% of the Ninth Circuit cases applying *Graham* and *Garner* are referenced.

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 factual circumstances 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 Options Simulator" course offered at the Alan Hancock Community College Public Safety Training Complex.[133]

FIGURE 3: FORCE OPTIONS SIMULATOR TRAINING OUTLINE, ALAN HANCOCK COLLEGE

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

d. Local standard for deadly force

[133] For further information about the training programs offered at Alan Hancock Community College, see https://www.hancockcollege.edu/pstc/.

The outline discusses several cases—including *Graham*, *Scott v. Henrich*, *Forrester v. City of San Diego*, and *Bryan v. McPherson*. But none of these descriptions concern the courts' application of *Graham* to the facts of the cases. In *Scott v. 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 Alan Hancock 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." 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 that *Bryan v. McPherson* did not clearly establish the unlawfulness of Deputy Barry's conduct in *Isayeva*. But Alan Hancock Community College's course outline contains none of those factual particularities about *Bryan* upon which Deputy Barry is assumed to have had notice and relied.

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."[134] But many of the cases most frequently invoked during trainings—including *Forrester, Forret, Scott* and *Reed*—are used to communicate the notion that officers can constitutionally use more force than necessary, so long as it was reasonable.[135] For example, *Forrester v. San Diego* is referenced in trainings for the proposition that the "level of force used does not have to be least intrusive, only reasonable."[136] *Forrett v. Richardson* 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 involved" and "[o]fficers are not required to exhaust every alternative before using justifiable deadly force."[137] *Scott v. Henrich* is referenced in

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[134] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (quoting Mullenix v. Luna, 136 S. Ct. 305, 308).

[135] The other two most often-cited cases are *Bryan* and *Headwaters*, described infra notes 141-142 and accompanying text.

[136] Self Defense Firearms Training (Force Options Simulator). See also San Bernardino Sheriff's Department (Driving/Force Options Sim Combo); Corona Police Department Force Options Simulator Course Outline).

[137] *See* Ventura County Criminal Justice Training Center; *see also* San Jose Police Department (Firearms Instructor) (explaining *Forrett* stands for the proposition that "it 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.") .

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."[138] And *Reed v. Hoy* is described in trainings as standing for the proposition that "[p]olice need not retreat."[139]

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.[140] But the in-service training outlines I reviewed never used multiple cases to illuminate the limits of constitutionally acceptable force. *Bryan v. McPherson* 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."[141] *Headwaters v. Humboldt County* is used in some trainings to explain that police "cannot use [pepper spray] against non-violent protestors."[142] 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.

Finally, to the extent that officers are taught through examples about the bounds 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 Hermosa Beach Police Department about officers' options when using force. The training outline describes the holdings of *Graham* and *Garner*. Then, time is spent with officers in small groups considering a series hypotheticals that read 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

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[138] *See* Self Defense Firearms Training (Force Options Simulator). See also Tulare County Sheriff's Office (Force Options Simulator); Riverside County Sheriff's Department (Force Options Simulator Instructor).

[139] *See* Self Defense Firearms Training (Force Options Simulator). *See also* Riverside County Sheriff's Department (citing Reed v. Roy for the proposition that officers "*cannot*, while using lawful (reasonable) force, lose their right to self defense.").

[140] Kisela v. Hughes, 138 S. Ct. 1148, 1152-53 (2018) (explaining that cases can help clarify for officers the "hazy border between excessive and acceptable force.")

[141] Santa Ana Police Department (Force Options Simulator).

[142] San Francisco Sheriff's Department (Force Options Simulator).

> 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?**[143]

I found several similar training outlines in which officers are asked how they would respond to various situations that might lead to the use of force. In none of these in-service training outlines were the scenarios identified as based on court decisions.[144]

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 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 in the in-

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[143] *See* Hermosa Beach Police Department Training (Force Options Simulator) (emphasis in original).

[144] In his recent study of use-of-force trainings, Ion Meyn reports that police trainers actually resist providing officers with concrete guidance about the boundaries of their power to use force. *See* Ion Meyn, *Can Use of Force Be Governed by Rules* (draft on file with author).

service training outlines. But the outlines used for instructor training are similarly sparse on court decisions applying *Graham* and *Garner*.

TABLE 3: COURT DECISIONS REFERENCED IN INSTRUCTOR TRAINING OUTLINES

No cases or "case law" referenced	12 (29.3%)
Reference to "case law"	5 (12.2%)
Reference to "case law" and/or *Graham* and/or *Garner*	11 (26.8%)
Reference to one Ninth Circuit/Supreme Court case applying *Graham* and/or *Garner*	1 (2.4%)
Reference to two Ninth Circuit/Supreme Court cases applying *Graham* and/or *Garner*	5 (12.2%)
Reference to three or more Ninth Circuit/Supreme Court cases applying *Graham* and/or *Garner*	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 instructors' training outlines were the same as those in the in-service training. Just five 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 instructor trainings.[145]

Moreover, as with the basic trainings and in-service trainings, the instructor trainings generally 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.[146]

4. Supplemental Trainings and Videos

Apart from the trainings reflected in the outlines on California POST's website, there are various supplemental training materials 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

[145] Those cases and the propositions for which they are referenced in the instructor training outlines are described in the Appendix.

[146] *See, e.g.*, Los Angeles Police Department Force Option Simulator Instructor Training (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.").

videos that it markets through a website called PoliceOne. 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."[147] Instead, Lexipol appears to use various hypothetical factual scenarios—not drawn from cases—to have officers consider the limits of reasonable force.[148]

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 v. Connor* 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. Bruce Praet, the co-founder of Lexipol, responded unequivocally that they do not create trainings based on these types of cases. He wrote, based on his conversations with Bruce Praet, the co-founder of Lexipol:

> [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].[149]

In other words, in the view of Lexipol's vice president for product development and its co-founder, police officers need no further judicial guidance beyond *Graham v. Connor* regarding the 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.

California POST also has online trainings that they have certified to meet their in-service requirements. POST gave me a listing of their online trainings. I was not given access to these videos but was informed by the

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[147] Email from Tim Kensok, Lexipol Vice President of Prod. Mgmt., to author (May 4, 2020, 2:46 PM). *See also* Email from Tim Kensok, *supra* note 107 (clarifying that his descriptions of their trainings, and the lack of appellate caselaw in those trainings, applies both to their two-minute trainings and to their PoliceOne Academy library).

[148] *See, e.g.*, Torrance Police Department Daily Training Bulletin, Canines (on file with author).

[149] Email from Tim Kensok, *supra* note 147.

organization that "[t]he vast majority of online courses do not rely on case law decisions."[150]

C. Government Attorneys

California law enforcement officers might also learn about use-of-force cases applying *Graham* and *Garner* from government attorneys. But, based on my correspondence with two district attorneys' offices and six 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 Charles Weisselberg examined how officers are instructed about their requirements under *Miranda*, he found that district attorneys' offices sometimes offered legal briefings or trainings.[151] 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 online collection of "recent cases and notes," although my review of these cases and notes suggest that the District Attorney is only reporting on the cases describing the constitutionality of interrogations and searches.[152] 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."[153]

City attorneys—whose offices represent government defendants in civil suits—could also advise law enforcement agencies and officers about court decisions applying *Graham* and *Garner*. Of the city attorneys' offices I queried, some reported that any communications they have with their police department clients are privileged,[154] and some provided me with use-

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[150] Email from Phil Caporale, Bureau Chief, Strategic Commc'ns & Research Bureau, Comm'n on Peace Officer Standards and Training, to author (Feb. 20, 2020, 9:34 AM).

[151] *See* Weisselberg, *supra* note 91, at 1143-48.

[152] *See Recent Cases and Notes*, OFFICE OF ALAMEDA COUNTY DISTRICT ATTORNEY, available at https://le.alcoda.org/publications/point_of_view/2019_editions.

[153] *See* Email from William Frayeh, Captain, L.A. Cty. Dist. Attorney Admin. Div., to author (May 1, 2020, 1:02 PM) ("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.").

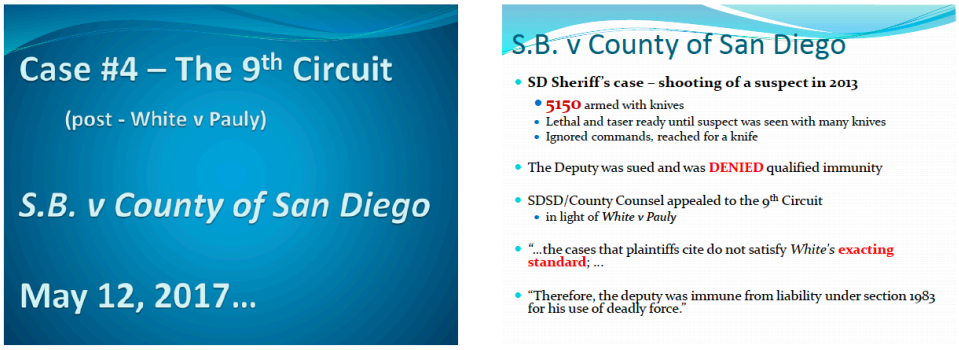
[154] See, e.g., Email from Bethelwel Wilson, L.A. City Attorney's Office, to author (May 15, 2020, 9:06 AM) (reporting that their office does not produce publicly available briefings, but does "have a few advice letters to LAPD that would be responsive to [my] request but they fall under the attorney work product and attorney-client privileges"); Email from Susana Alcala Wood, Sacramento City Attorney, to author (May 20, 2020, 3:07 PM) (claiming "a

of-force briefing materials that included no references to or descriptions of court opinions.[155]

I did, however, receive several slide presentations about civil liability from the San Diego City Attorney's Office that included references to a handful of cases, primarily from the Supreme Court. Notably, these discussions focused on the importance of qualified immunity for government attorneys and the language in recent Supreme Court and Ninth Circuit qualified immunity decisions, rather than on details about the uses of force in these decisions that could be used to clearly establish the law in qualified immunity analyses.

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*, in which qualified immunity was granted. 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



But the slide presentation does not reference the Ninth Circuit's holding, in *S.B.*, that a reasonable jury could find that the officer's "use of deadly

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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."); Email from Carmen Marino, Gen. Counsel—Police, City of Glenadale, to author (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.").

[155] *See, e.g.*, Email from Virdiana Gallardo-King, Deputy City Attorney, City Attorney of Bakersfield, to author (May 18, 2020, 9:06 AM) (explaining that her office does "provide summaries of cases," but that she "was unable to locate any regarding use of force."); Email from Diane Grant, Senior Office Assistant, City of San Bernardino City Clerk's Office, to author (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).

force was not objectively reasonable," or include the Ninth Circuit's detailed description of the underlying facts that support its conclusion.[156]

D. 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[157] and published a legal update each January.[158] These broadcasts and publications might have provided information about the facts and holdings of use-of-force cases.[159] But California POST stopped creating the monthly video series and discontinued the annual legal updates in 2018.[160]

In recent years, there has been a proliferation of online sources with information of interest to police department officials, including, sometimes, summaries of court decisions.[161] These sites do sometimes 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

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[156] S.B. v. County of San Diego, 864 F.3d 1010, 1014 (9th Cir. 2017) ("[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.").

[157] Weissleberg, *supra* note 91, at 1136.

[158] Email from Phil Caporale, Bureau Chief, Strategic Commc'ns & Research Bureau, Comm'n on Peace Officer Standards and Training, to author (Feb. 18, 2020, 2:31 PM).

[159] Weissleberg, *supra* note 91, at 1137-39 (describing information in the videos about court decision relevant to *Miranda* requirements).

[160] Caporale, *supra* note 158.

[161] *See, e.g.*, *The Monday Morning Memo*, ASS'N OF DEPUTY DIST. ATTORNEYS, available at http://campaign.r20.constantcontact.com/render?m=1120011172453&ca=7b62b14f-8049-4b0c-8032-aa9436781efe; *CPOA Case Summaries – March 2020*, CAL. PEACE OFFICERS' ASS'N (Apr. 15, 2020), available at https://cpoa.org/cpoa-case-summaries-march-2020/; *Legal Update – August 2019 Case Summaries*, DAIGLE LAW GROUP, available at https://daiglelaw-group.com/legal-update-august-2019/.

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 their trainings or other educational materials. And, when these cases are invoked, 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 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 CASELAW 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 285 Supreme Court and Ninth Circuit decisions applying *Graham* and *Garner* described in Part II. If trainers spent just five minutes describing the facts and holding of each case, it would take 1425 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.[162] 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

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[162] For arguments that police need additional training, and the types of topics to cover, see, for example, Kirk Burkhalter, Retired Officer: Give Police a Real Education Before Putting Them on the Street, USA Today (June 11, 2020, 7:48 AM), https://www.usatoday.com/story/opinion/policing/2020/06/11/ex-cop-academy-training-falls-short-police-need-extensive-education/5342917002/ (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 training); Final Report of the President's Task Force on 21st Century Policing 51-60 (2016); (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."). Notably, calls for further training do not focus on officers' need to learn more about court decisions that clearly establish the law.

factual distinctions between them—regarding the taser mode used, the number of times the people were tased, the injuries suffered by the person tased, the distance of the officer to the person tased, the relative size of the people tased to the officers who tased him, and the nature of the resistance.[163] 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 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 cases like *Isayeva*.[164]

B. The Limited Role of Caselaw 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 500 pages long and has ten chapters concerning general operations, patrol operations, traffic operations, and investigation operations.[165] 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 integrated more court opinions into their use-of-force policies, those decisions would 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 sixteen—2.4% of

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[163] *See supra* notes 75-88 and accompanying text.

[164] 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 (2011) (explaining that "attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.").

[165] *See, e.g.*, Elk Grove Police Department Policy Manual, at http://www.elkgrovepd.org/divisions/administrative_resources/egpd_policy_manual.

those hours—dedicated to the use of force and deescalation.[166] Moreover, just a small portion of the sixteen hours dedicated to the use of force and deescalation focus on legal restrictions—trainers also cover principles of de-escalation, decisionmaking, the range of force options, and reporting use of force incidents, among other topics.[167] Legal restrictions on the use of force play a similarly modest role in in-service trainings. Officers are required to receive twenty-four hours of training every two years, including eight hours of "perishable skills" training each year. Legal issues related to the use of force are required topics for some "perishable skills" trainings.[168] 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.[169] As others have observed, these on-the-job experiences and interactions may be more influential than is the guidance disseminated in training facilities.[170] 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.[171] Regardless of whether officers are given that message, officers are likely to log many more hours considering the "hazy border between excessive and acceptable force" on the job rather than in the classroom.[172]

Police department trainings and educational materials could definitely 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.[173] I have argued that police departments should similarly use information revealed in lawsuits brought against them and their officers as a

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[166] *See Regular Basic Course Training Specifications*, *supra* note 121.

[167] *Id.*

[168] *See supra* note 127 and accompanying text.

[169] *See* Jeff Asher & Ben Horwitz, How Do the Police Actually Spend Their Time? N.Y. TIMES (June 19, 2020).

[170] *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL OF RTS. J. 821, 833-34 (2013); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL (3d ed. 1994); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY (2005).

[171] *See* Armacost, *supra* note 170, at 514 (citing studies).

[172] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018).

[173] *See* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055 (2016).

means of learning about error and improving policies and trainings.[174] Court decisions could provide similar guidance to officers considering the scope of their power under current law.[175] But even if significantly more time was spent educating police officers about the facts and holdings in 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 power to use force.

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.[176] For that reason, those seeking to reduce error in aviation and medicine, and other fields, have relied on checklists and other interventions that reduce the number of variables people have to consider on the job.[177]

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.[178] As one illustration of the complexity of this analysis, Lexipol's use-of-force policy has a non-exhaustive[179] list of eighteen different factors that an officer should keep in mind when deciding whether to use force, and supervisors

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[174] *See id*.

[175] For these and other benefits of litigation as a source of information and transparency, see generally ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION (2017); Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657 (2016).

[176] For discussion of this research, see Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 538-45 (2018).

[177] *See, e.g.*, Atul Gawande, *The Checklist*, NEW YORKER (Dec. 10, 2007) (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 176, at 550-51.

[178] *See* Schwartz, *supra* note 176, at 545 (describing these pressures on law enforcement decisionmaking).

[179] San Mateo Sheriff's Department Use of Force Policy (dated Jan. 27, 2020) (explaining that the factors deputies should take into consideration "include but are not limited to" this list).

should consider when determining whether an officer's use of force was reasonable:

> A. The apparent immediacy and severity of the threat to the deputies or others (Penal Code § 835a).
> B. The conduct of the individual being confronted, as reasonably perceived by the deputy at the time.
> C. Deputy/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of deputies available vs. subjects).
> D. The conduct of the involved deputy (Penal Code § 835a).
> E. The effects of drugs or alcohol.
> F. The individual's apparent ability to understand and comply with deputy demands (Penal Code § 835a).
> G. Proximity of weapons or dangerous improvised devices.
> H. The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
> I. The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
> J. Seriousness of the suspected offense or reason for contact with the individual.
> K. Training and experience of the deputy.
> L. Potential for injury to deputies, suspects and others.
> M. Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the deputy.
> N. The risk and reasonably foreseeable consequences of escape.
> O. The apparent need for immediate control of the subject or a prompt resolution of the situation.
> P. Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the deputy or others.
> Q. Prior contact with the subject or awareness of any propensity for violence.
> R. Any other significant circumstances.[180]

Lexipol's policy has the proviso that deputies should take these eighteen factors into consideration "as time and circumstances permit."[181] But given all we know about human decisionmaking under high-pressure, high-stress circumstances, it would seem nearly impossible for officers to remember all

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[180] Id. For another list of possible considerations, see STOUGHTON et al., supra note 100, at 52-53 (describing twenty-four factors relevant in analyzing the appropriateness of the use of force).

[181] San Mateo Sheriff's Department Use of Force Policy, *supra* note 179.

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.[182]

But one need not delve deep into error science literature 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 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 in York v. City of Las Cruces?'"[183] Instead, Judge Browning imagined, "[i]t 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."[184]

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.[185] For example, in *Atwater v. City of Lago Vista*, 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."[186]

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

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[182] *See supra* notes 75-88 and accompanying text.

[183] Manzanares v. Roosevelt Cty. Adult Det., 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018).

[184] *Id.*

[185] For discussion of the Supreme Court's forgiveness of police errors, see generally Wayne Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69 (2011).

[186] 532 U.S. 318, 350 (2001).

> 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, but as understood by those versed in the field of law enforcement.[187]

Similarly, in *Illinois v. Gates*, 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."[188] 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."[189]

In these decisions, the Supreme Court has assumed that police officers are best guided by generalized tests that allow them to make "commonsense conclusions about human behavior," and rejected the notion that officers should be required to parse precise legal tests while on the job.[190] The Court's descriptions of officers' limited power to make fine-tuned distinctions in *Atwater*, *Cortez*, and *Illinois v. Gates* resonates with error science research and common sense. Yet, in the qualified immunity context, the Court has inexplicably 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-the-circumstances" approach and expecting that officers know about court decisions and 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 relies 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 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' understandings about the scope of their authority. And, even if officers were able to learn about

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[187] United States v. Cortez, 449 U.S. 411, 418 (1981).

[188] 462 U.S. 213, 232 (1983).

[189] Id.

[190] Cortez, 449 at 418.

and retain information about the factual distinctions between these cases, they would be exceedingly unlikely to analogize or distinguish the 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 any Ninth Circuit and Supreme Court cases applying *Graham* and *Garner*, and are highly unlikely to learn anything about the facts 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 error science, 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 debate about whether Congress or the Supreme Court should abolish or amend qualified immunity, 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 Section 1983 was enacted.[191] 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.[192] Yet

[191] *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 555)); 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.").

[192] *See* Pierson, 386 U.S. at 555 (describing qualified immunity as necessary to shield officers from financial liability); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (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

none of these justifications for the doctrine has empirical support. Will Baude and others have shown that there was no defense comparable to qualified immunity in existence when Section 1983 became law.[193] Qualified immunity is unnecessary to shield officers from financial liability because they are virtually always indemnified by their government employers—and are unlikely to be held personally liable even in the rare instances they are denied indemnification because plaintiffs and their attorneys are unlikely to press their claims against an officer with limited resources.[194] And qualified immunity is unnecessary to shield government officials from the burdens of defending themselves in "insubstantial cases."[195] Instead, there are many other barriers to relief for "insubstantial cases"—and "substantial" ones as well—including the challenges of getting a lawyer, pleading a "plausible" claim, proving a constitutional violation, and convincing sometimes skeptical juries of the merits of the plaintiff's claim.[196] 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 was simply an ineffective appendage of Section 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.[197] Because courts can grant

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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.'") (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

[193] *See* Albert W. Aschuler, Herring v. United States: *A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 465 (2010); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018); JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 16-17 (2017); Smith, *supra* note 57, at 2100; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1987).

[194] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (describing the prevalence of indemnification); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, GEO. L.J. (forthcoming 2020) (describing the disinclination of plaintiffs to seek money from officers who are not indemnified).

[195] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[196] See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) (describing these hurdles).

[197] The Court's definition of clearly established law is not, however, the only way in which qualified immunity doctrine undermines government accountability. Qualified immunity

officers qualified immunity simply because plaintiffs cannot identify a prior case with sufficiently similar facts, qualified immunity doctrine shields officers from liability even when they have behaved maliciously or recklessly and denies relief to plaintiffs whose constitutional rights have been violated.[198] Court decisions granting qualified immunity can harm government accountability in and of themselves—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.[199]

This Article shows that the Supreme Court's narrow definition of "clearly established law," which leads to these harmful results, is based on a false premise. The Supreme Court has written that officers are immune from liability unless they have violated "clearly established law," and has made clear that the law is not clearly established by watershed decisions like *Graham* and *Garner* but, instead, by decisions that apply those general principles to similar factual circumstances. The Court has repeatedly explained that the need for factually similar court decisions is based upon principles of fair notice, and has repeatedly maintained that officers in fact know about and rely on those court decisions before taking action. As the Court recently wrote, it is "sometimes difficult for an officer to determine how the relevant legal doctrine…will apply to the factual situation the officer confronts" and so officers are entitled to qualified immunity unless a prior factually similar court decision "squarely governs the specific facts at issue" and "provide[s] an officer notice that a specific use of force is unlawful."[200]

Yet all available evidence makes clear that officers are not on notice of these court decisions. There are hundreds or even 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. Yet 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

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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 id.* Qualified immunity leads to constitutional uncertainty and stagnation, because courts can grant qualified immunity without ruling on the merits of plaintiffs' constitutional claims. *See id*.

[198] *See id.*

[199] *See id.*

[200] Kisela v. Hughes, 138 S. Ct. 1148, 1152-53 (2018). The Court has used almost identical language in other cases.

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 decisionmaking under conditions of stress make clear that officers would not recall or rely on these decisions when deciding whether to use force.[201] Instead, it is far more likely, as Judge Browning observed, that officers in those circumstances would consider the general principles that they have been taught, and then apply those principles to the circumstances they are facing—precisely the type of exercise in which officers engaged during their basic and in-service trainings.[202] In contexts other than qualified immunity, the Supreme Court has embraced this understanding of how law enforcement officers make decisions on the job.[203] And this is, in fact, the very approach that California POST and Lexipol have reiterated in their policy and training materials; that officers should learn the general "totality of the circumstances" framework for the use of force, and get comfortable applying that framework to the unending variation in circumstances officers are destined to confront.[204]

B. Possible Reforms

There are growing calls to abolish qualified immunity, given the mounting evidence of its failures. This Article's findings further support the conclusion that qualified immunity fails to achieve its goals, and does far more harm than good. In prior work, I have predicted how constitutional litigation would function without qualified immunity, and will not restate those predictions here.[205] But it is worth pausing to emphasize that, 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

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[201] *See supra* Part IV.

[202] *See supra* note 183 and accompanying text.

[203] *See supra* notes 185-189 and accompanying text.

[204] *See supra* Part III.A-B.

[205] *See generally* Schwartz, *supra* note 196.

under the framework supplied by *Graham*—which requires the 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 circumstance that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation."[206] Courts' analyses would still be guided by prior decisions that clarify the *Graham* framework, including statements that officers do not have to use the least force available, so long as it is reasonable.[207] And courts would still be able to rely on the facts and holdings in prior court decisions when assessing whether an officer's decision to use force was objectively reasonable.[208] The key difference is that courts could not dismiss a case on qualified immunity grounds simply because there was not a prior decision in which a court held virtually identical conduct to be unconstitutional.

If Congress or the Supreme Court decides to amend qualified immunity instead of repealing the doctrine, the definition of "clearly established law" should be at the top of the list for adjustment. 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 perhaps clearly established law should be defined at that higher level of generality. The Court has expressed fear that watershed cases like *Graham* and *Garner* do not adequately clarify the "hazy border between excessive and acceptable force."[209] But California law enforcement educators do not appear to share this concern; instead, trainers appear to believe that the best way to educate officers about the legal limits of their power to use force is by teaching them the framework set out in *Graham* and/or *Garner*—and, sometimes, general principles drawn from a few additional cases—and then getting officers comfortable applying that framework in varying factual scenarios.[210] If law enforcement educators agree the general framework set out in *Graham* and *Garner* is sufficient to train officers about their constitutional power to use force, those decisions should also provide adequate notice in the context of qualified immunity.[211]

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[206] Graham v. Connor, 490 U.S. 386, 396-97 (1989).

[207] *See, e.g.*, *supra* notes 134-139 and accompanying text.

[208] *See supra* notes 75-88 and accompanying text.

[209] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018).

[210] *See, e.g.*, *supra* notes 124, 144, 149 and accompanying text.

[211] If, instead, the Court continues to maintain that officers need to be better educated about the cases applying *Graham* and *Garner*, then the failure of local governments to do so should be the basis for municipal liability. See *infra* note 217 and accompanying text for further discussion of this alternative.

An alternative is John Jeffries's proposal that the "clearly established law" standard be replaced with a rule that qualified immunity be granted absent "clearly unconstitutional" behavior.[212] As I understand this recommendation, it would maintain some form of qualified immunity for borderline constitutional violations, but disentangle that immunity from the absence or existence of court decisions holding similar conduct unconstitutional and do away with the fiction that officers are educated about these decisions.

Another alternative would be to restructure qualified immunity such that officers would be entitled to its protections if they could show that their conduct was previously authorized by federal or state law, or if a court had previously found similar conduct to be lawful.[213] This proposal would address concerns that, absent qualified immunity, officers could be held liable for following the law as it exists.[214] It would also place the burden on the defendant to identify legal rules that justified their conduct—instead of requiring the plaintiff to find court decisions holding their conduct violated the law. Given that qualified immunity is an affirmative defense, placing this burden on the defendant makes sense.

Yet another possibility would be to condition qualified immunity on proof that officers were acting in good faith and in accordance with governing policies and training they received about the constitutional limits of force. By following this approach, qualified immunity would hew closer to its original goal of protecting officers acting in "good faith."[215] In addition, courts would assess the reasonableness of officers' behavior based on what they were actually taught about the scope of their authority.[216] And, if courts decide that officers should have learned more about court opinions

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[212] *See* John C. Jeffries, Jr., *supra* note 15, at 263. Michael Wells has made a similar argument for situations in which general principles support liability but there is not a prior case holding similar facts to be unconstitutional. *See* Wells, *supra* note 15, at 436-38.

[213] This restructuring could take the form of a bill that Indiana Senator Mike Braun introduced to reform qualified immunity. *See Senator Mike Braun Introduces Reforming Qualified Immunity Act*, BRAUN.SENATE.GOV (June 23, 2020), https://www.braun.senate.gov/node/755. Alternatively, this type of restructuring could take the form of a non-retroactivity provision. *See* Schwartz, *supra* note 13, at 1830 (suggesting that the Supreme Court "could limit the circumstances in which constitutional innovations are retroactively enforced.").

[214] *See* Smith, *supra* note 57, at 2108-09 (expressing this concern).

[215] Pierson v. Ray, 386 U.S. 547 (1967).

[216] 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 Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773 (2016).

during the course of their training, this failure should be a basis for municipal liability.[217]

These possibilities capture some—but surely not all—of the ways in which qualified immunity doctrine might be adjusted to comport with evidence of the doctrine's policy failures and evidence that officers are not, in fact, on notice of the decisions that the Supreme Court describes as necessary to clearly establish the law. Regardless of the ultimate path taken by the Court or Congress, the status quo is indefensible in light of this evidence.

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."[218] And the Court has repeatedly reversed lower courts in recent years for finding that insufficiently similar court decisions clearly established the law.[219] But there remains some flexibility in Supreme Court precedent—the Supreme 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.[220] Richard Re has argued that lower courts have the power legitimately to narrow Supreme Court precedent under these types of circumstances—meaning they can "interpret[] a precedent more narrowly than it is best read"—so long as their reading of the law is "reasonable."[221]

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[217] Municipalities can be held liable for failing to train their officers only if the officer has violated the plaintiff's constitutional rights and the failure to train amounts to "deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989). But there is no obligation that police departments or state agencies use a particular type of training, and no obligation that trainers educate law enforcement officers about the substance of circuit court decisions that might clearly establish the law. This proposal would, therefore, require adjustment not only to the standard for qualified immunity but also to the standard for municipal liability.

[218] White v. Pauly, 137 S. Ct. 548, 552 (2017)

[219] *See, e.g.*, *id.*; City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019); Kisela v. Hughes, 138 S. Ct. 1148, 1158 (2018); Mullenix v. Luna, 136 S. Ct. 305, 314 (2015); City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

[220] *See supra* Part II.A.

[221] *See* Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921, 925, 932 (2016).

Courts already vary in their willingness to grant qualified immunity motions. Aaron Nielson and Chris 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.[222] A cursory review of the analyses and holdings in the 285 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 rely 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 great 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 holding 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*, error science research and common sense suggest that officers would not analogize and distinguish their facts with those in court decisions 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.[223] Calls are mounting for the Supreme Court or Congress to abolish or reform

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[222] *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).

[223] Hamilton, *supra* note 1, at 117-30.

qualified immunity. This Article offers yet one additional reason to reconsider the doctrine.

APPENDIX

The tables below reflect the total cases referenced in In-Service Trainings (Table A) and Instructor Trainings (Table B).

Table A: 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	3+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
Forrester v. San Diego	23	18	14	55 (83.3%)
Forrett v. Richardson	2	3	10	15 (22.7%)
Reed v. Hoy	1		14	15 (22.7%)
Headwaters Forest Defense v. County of Humboldt		11	2	13 (19.7%)
Bryan v. McPherson	1	3	9	13 (19.7%)
Scott v. Henrich			13	13 (19.7%)
Brooks v. Seattle			7	7 (10.6%)
Deorle v. Rutherford		1	5	6 (9%)
Smith v. Hemet	1	0	5	6 (9%)
Saman v. Robbins		1	4	5 (7.5%)
Reynolds v. County of San Diego			4	5 (7.5%)
Vera Cruz v. City of Escondido			3	3 (4.5%)
Chew v. Gates			3	3 (4.5%)
Scott v. Harris		1	1	2 (3%)
Glenn v. Washington			2	2 (3%)
Billington v. Smith			1	1 (1.5%)
Saucier v. Katz			1	1 (1.5%)
Alexander v. County of LA			1	1 (1.5%)
Young v. County of LA	1			1 (1.5%)
Total trainings	29	19	18	66

Table B: Case Coverage in 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	3+ additional Ninth Circuit or Supreme Court cases	Case coverage as percentage of trainings
Scott v. Henrich		3	8	11 (84.6%)
Forrett v. Richardson		3	4	7 (53.8%)
Reed v. Hoy			7	7 (53.8%)
Forrester v. San Diego			6	6 (46.2%)
Reynolds v. County of San Diego			4	4 (30.8%)
Smith v. City of Hemet			3	3 (23.1%)
Brooks v. Seattle			3	3 (23.1%)
Bryan v. McPherson			3	3 (23.1%)
Young v. County of LA		2		2 (15.3%)
City and County of San Francisco v. Sheehan		2		2 (15.3%)
LaLonde v. County of Riverside			2	2 (15.3%)
Saman v. Robbins			2	2 (15.3%)
Tatum v. City and County of San Francisco			2	2 (15.3%)
Deorle v. Rutherford			2	2 (15.3%)
Mattos v. Agarano			2	2 (15.3%)
Headwaters Forest Defense v. County of Humboldt			2	2 (15.3%)
Saucier v. Katz			2	2 (15.3%)
Scott v. Harris			2	2 (15.3%)
Chew v. Gates			1	1 (7.8%)
Ting v. United States	1			1 (7.8%)
Total trainings	1	5	7	13 (100%)