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Arriving at Clearly Established: The Taser Problem and Reforming Qualified Immunity Analysis in the Ninth Circuit

Kate Seabright

ARRIVING AT CLEARLY ESTABLISHED: THE TASER PROBLEM AND REFORMING QUALIFIED IMMUNITY ANALYSIS IN THE NINTH CIRCUIT

Kate Seabright

Abstract: Federal law allows private citizens to bring civil suits against government officials who violate their constitutional rights while acting under the color of state law. The doctrine of qualified immunity shields officials from liability when their conduct does not violate clearly established constitutional rights. When determining whether a right was clearly established at the time of a particular injury, the Ninth Circuit purportedly looks to whatever decisional law is available to inform its analysis. This Comment examines recent Taser-related cases to show that, in practice, courts in the Ninth Circuit actually take two divergent approaches. Some look only to binding, factually similar precedent, while others are willing to look outside of a case's factual context and rely on both published and unpublished cases from across the country. This inconsistency creates three major problems: inconsistent outcomes for litigants, confusion for district courts and government officials, and a propensity for defining clearly established law at an impermissibly high level of generality. This Comment argues that adopting the three-part framework articulated by the Eleventh Circuit would mitigate each of these issues and bring much needed clarity to the law of qualified immunity in the Ninth Circuit.

INTRODUCTION

In 2006, Jayzel Mattos was tased by a Maui police officer who was responding to a domestic violence call at the Mattos home.[1] Ms. Mattos happened to be standing between her husband and the officer when the officer announced that her husband was under arrest.[2] She did not immediately move out of the way, and as the officer moved toward her, she held out her arm to prevent his body from pressing against her chest.[3] Ms. Mattos was attempting to defuse the situation by asking everyone to calm down and go outside so that her sleeping children would not be disturbed when, without warning, the officer shot his Taser at her.[4]

Two years later, a Snohomish County police officer tased Donald Gravelet-Blondin outside of his home.[5] The officer was responding to a

1. Mattos v. Agarano, 661 F.3d 433, 439 (9th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1090 (9th Cir. 2013).

911 call placed by the family of Mr. Blondin's neighbor, who was attempting to commit suicide.[6] As officers wrestled with the suicidal man, Mr. Blondin emerged from his house to ask them what they were doing to his neighbor.[7] The officers ordered him to stop and move back, and when Mr. Blondin did not immediately comply, one of the officers tased him.[8]

Both Ms. Mattos and Mr. Blondin sued the officers who tased them for using excessive force.[9] However, only Mr. Blondin was allowed to proceed with his case: the Ninth Circuit granted qualified immunity to the officer in *Mattos v. Agarano*[10] but denied immunity to the officer in *Gravelet-Blondin v. Shelton.*[11] Qualified immunity protects government agents from liability for civil damages when their conduct does not violate clearly established constitutional rights.[12] Whether a right was clearly established at the time of a particular injury depends on the precedent available at the time of the injury: the Supreme Court has held that existing precedent "must have placed the . . . constitutional question beyond debate."[13]

Problematically, the Supreme Court has declined to provide lower courts with guidance as to which sources of law may inform a court's clearly established analysis.[14] The *Mattos* court relied only on binding, Taser-related precedent to inform its analysis.[15] Finding no pre-2006 Supreme Court or Ninth Circuit case addressing the use of a Taser in a factually similar situation, the court concluded that Ms. Mattos' rights were not clearly established at the time of her injury and that the officer was therefore entitled to qualified immunity from Ms. Mattos' suit.[16] In contrast, the *Gravelet-Blondin* court found that Mr. Blondin's right to be free from excessive force under the Fourth Amendment was clearly established as of 2008, even though no Supreme Court or Ninth Circuit

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6. *Id.* at 1089.

7. *Id.* at 1089–90.

8. *Id.* at 1090.

9. *Mattos*, 661 F.3d at 439; *Gravelet-Blondin*, 728 F.3d at 1090.

10. 661 F.3d at 452.

11. 728 F.3d at 1096.

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

13. Ashcroft v. al-Kidd, __U.S.__, 131 S. Ct. 2074, 2083 (2011).

14. *Harlow*, 457 U.S. at 818 n.32; John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1309 (2012) ("[I]t is important to enumerate the sources of law that may establish [a] right. However, the Supreme Court did not perform this task in *Harlow*, and it has not done so in the intervening thirty years.").

15. *Mattos*, 661 F.3d at 452.

16. *Id.*

case dealing with Tasers and excessive force had been decided between Ms. Mattos' injury in 2006 and Mr. Blondin's injury two years later.[17]

If no additional precedent were available by the time of Mr. Blondin's injury, what explains the difference in outcomes in these two cases? This Comment suggests that the divergent approaches to the clearly established analysis taken by different Ninth Circuit courts are to blame. When deciding whether to grant immunity to the officer in *Mattos*, the Ninth Circuit panel looked only to binding, Taser-related precedent.[18] When faced with the same inquiry, the *Gravelet-Blondin* panel looked to non-Taser cases, cases from other circuits, and unpublished district court orders.[19] By looking to a larger body of case law, the *Gravelet-Blondin* court was able to find the precedent it needed to hold that Mr. Blondin's right was clearly established at the time of the injury. Crucially, the *Mattos* court could have come to the same conclusion had it also looked to the broader scope used by the *Gravelet-Blondin* court.[20] This example illustrates the need to harmonize the Ninth Circuit's standard regarding what constitutes clearly established law in the qualified immunity context.

This Comment uses the Taser cases discussed above to illuminate the inconsistency in what constitutes clearly established law in the Ninth Circuit. Part I explores the purpose of the qualified immunity doctrine and lays out the test for determining when the doctrine protects officials accused of constitutional violations. Part II summarizes Ninth Circuit precedent to date on qualified immunity in the Taser context and uses these cases to note an inconsistency in how Ninth Circuit panels have approached the issue of clearly established rights. Part III explains the three main problems this variance causes: inconsistent outcomes for litigants, confusion for district courts and law enforcement, and a tendency to define clearly established law at an impermissibly high level of generality. Finally, Part IV argues that the Ninth Circuit should adopt the three-part framework created by the Eleventh Circuit for the clearly established analysis. It again looks to the Taser cases to show how the Eleventh Circuit's approach differs from those applied by the Ninth Circuit, and argues that the Eleventh Circuit's approach would help address the issues identified in Part III. Lastly, this Comment recommends that the Ninth Circuit take an appropriate case en banc to

17. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1105 (9th Cir. 2013) (Nguyen, J., dissenting).

18. *Mattos*, 661 F.3d at 452.

19. *Gravelet-Blondin*, 728 F.3d at 1092–96.

20. *See infra* Part III.A.

change its clearly established standard.

I. QUALIFIED IMMUNITY PROTECTS GOVERNMENT OFFICIALS FROM CIVIL LIABILITY FOR CONDUCT THAT DOES NOT VIOLATE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS

A. Qualified Immunity Aims to Balance Citizens' Rights with Officers' Need to Perform Their Duties Reasonably

Federal law gives citizens the right to bring a private cause of action against public officials who violate constitutional rights while acting under the color of state law.[21] When faced with these suits officials often claim the protection of qualified immunity,[22] which protects government agents from civil liability when their conduct does not violate clearly established constitutional rights.[23] Federal courts have embraced qualified immunity in recognition that a government actor should not be held liable if he or she acted in good faith.[24] The doctrine is considered necessary to permit government actors to "exercise their discretion boldly":[25] if government officials were liable every time their actions violated the law, they would hesitate to take action that might be "close to the line" of legality.[26] Critically, the doctrine shields government officials even if they acted based on a mistaken understanding of law or fact.[27] Consequently, an official can use the doctrine to avoid liability even if his or her conduct violated the claimant's constitutional rights.[28] In sum, courts are charged with balancing the competing interests of holding public officials accountable when they exercise their power irresponsibly and shielding officials from "harassment, distraction, and

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21. 42 U.S.C. § 1983 (2006). These are commonly known as "Section 1983 suits," after the statute creating the right. *See, e.g.*, Marjorie J. Dickman, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 84 GEO. L.J. 1500, 1504 (1996) (referring generally to "section 1983 suit[s]").

22. Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57, 57 (2007).

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

24. 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573.3 (3d ed. 1998).

25. *Id.*

26. *Id.*

27. *Id.*; *see also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (granting qualified immunity to officers who conducted a warrantless search pursuant to a controversial consent doctrine that had not yet been ruled upon by their own federal court of appeals).

28. WRIGHT, *supra* note 24, § 3573.3.

liability when they perform their duties reasonably."[29]

The Supreme Court first articulated the underpinnings of the modern doctrine in *Harlow v. Fitzgerald*:[30] "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[31] Since *Harlow*, the Court has refined this pronouncement into a two-step test.[32] First, taking the facts in the light most favorable to the allegedly injured party, courts must determine whether the officer's conduct violated a constitutional right.[33] Second, if a violation occurred, courts ask whether the right was clearly established.[34] *Harlow* and the ensuing two-step test raise two questions. First, how clear must the contours of a right be before it can be considered clearly established?[35] And second, to which sources of law should a court look when conducting the clearly established analysis?[36]

The Court has addressed the first question—the meaning of "clearly established"—in several cases since *Harlow*, but a great deal of ambiguity remains.[37] The first such case was *Anderson v. Creighton*,[38] in which Justice Scalia, writing for the majority, stated,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be

29. *Pearson*, 555 U.S. at 231.

30. 457 U.S. 800 (1982).

31. *Id.* at 818.

32. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). Courts are allowed to exercise discretion in deciding which of the two steps should be analyzed first. Pearson v. Callahan, 555 U.S. 223, 236 (2009). Nevertheless, the Supreme Court has advised that addressing the two steps in order is often beneficial. *Id.* This is especially true in emergent areas of law, as following the order "promotes the development of constitutional precedent." *Id.*

33. *Saucier*, 533 U.S. at 201.

34. *Id.*

35. Williams, *supra* note 14, at 1305.

36. *Id.* at 1305.

37. *See, e.g.*, Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1034 (2005) (noting that "courts routinely struggle with the determination of the proper level of generality at which the law must be established"); Williams, *supra* note 14, at 1304–09 (discussing the post-*Harlow* line of cases and the questions that remain).

38. 483 U.S. 635 (1987).

apparent.[39]

Anderson thus clarified that clearly established law can be defined with some generality—in other words, the official's exact conduct need not have been found unlawful before—but reiterated that the state of the law at the time of the alleged injury must have been sufficiently clear to put a reasonable official on notice that his or her conduct violated a constitutional right.[40] The Court confirmed the notice requirement in *United States v. Lanier*,[41] which held that officials are entitled to "fair warning" that their conduct was unlawful.[42]

The Court further refined its stance on notice to officials in *Hope v. Pelzer*.[43] In that case, the Eleventh Circuit granted qualified immunity to prison officials who handcuffed the plaintiff to a hitching post for seven hours and denied him water and shelter from the sun because no prior case addressed the specific conduct at issue.[44] The Supreme Court reversed, and made clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances": no case with "fundamentally similar" or "materially similar" facts need exist to provide the "fair warning" the Court discussed in *Lanier*.[45] *Hope* thus indicated that qualified immunity could be denied when a government official's conduct obviously violated a constitutional right, even in the absence of precedent on point.[46]

Next, in *Brosseau v. Haugen*,[47] the Court set a limit on the ostensibly broad "fair warning" standard it articulated in *Lanier* and *Hope*.[48] In *Brosseau*, the Ninth Circuit denied qualified immunity to an officer who shot the plaintiff in the back as he attempted to flee.[49] The Ninth Circuit reasoned that using deadly force when the suspect posed no threat of serious physical harm was a violation of clearly established law.[50] The Supreme Court found this formulation excessively broad and reversed, emphasizing that the clearly established inquiry "must be undertaken in

39. *Id.* at 640.

40. *See id.* at 637–38.

41. 520 U.S. 259 (1997).

42. *Id.* at 270–71.

43. 536 U.S. 730 (2002).

44. Hope v. Pelzer, 240 F.3d 975, 977, 982 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

45. *Hope*, 536 U.S. at 741 (internal quotation marks omitted).

46. *See id.*

47. 543 U.S. 194 (2004).

48. United States v. Lanier, 520 U.S. 259, 265 (1997); *Hope*, 536 U.S. at 741.

49. Haugen v. Brosseau, 351 F.3d 372, 379 (9th Cir. 2003), *rev'd*, 543 U.S. 194 (2004).

50. *Id.* at 392–93.

the light of the specific context of the case, not as a broad general proposition."[51] In other words, the Court stated, the contours of the right cannot be "cast at a high level of generality."[52]

Finally, in *Ashcroft v. al-Kidd*,[53] the Court continued to backtrack from the broad "fair warning" standard.[54] In that case, the Court reversed the Ninth Circuit and unanimously granted qualified immunity to then-Attorney General John Ashcroft,[55] whose policy authorizing federal agents to use the material-witness statute to detain individuals with suspected ties to terrorist organizations led to the detention of Abdullah al-Kidd, a native-born United States citizen who was never called to testify at trial.[56] The Court concluded that the law cited by the Ninth Circuit, which relied heavily on a footnote in a Southern District of New York order,[57] did not clearly establish al-Kidd's rights at the time of his detention.[58] The Court called the idea that this footnote would provide the Attorney General with fair warning that his actions were unconstitutional "[a]n extraordinary proposition" and declared that the "footnoted dictum falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'"[59] The Court explained that it did "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[60]

B. The Ninth Circuit Purportedly Looks to Any Available Law to Inform Its Clearly Established Analysis

The second question left open by *Harlow* is which sources of law may inform a court's clearly established analysis.[61] The Supreme Court has declined to provide lower courts with guidance as to how to determine whether a particular right was clearly established at the time of an alleged violation.[62] Circuit courts are therefore left to decide for

51. *Brosseau*, 543 U.S. at 198 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

52. *Id.* at 199.

53. __U.S.__, 131 S. Ct. 2074 (2011).

54. *Id.*

55. *Id.* at 2085.

56. *Id.* at 2079.

57. United States v. Awadallah, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002).

58. *Ashcroft*, 131 S. Ct. at 2084 (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

59. *Id.*

60. *Id.* at 2083.

61. Williams, *supra* note 14, at 1305.

62. Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32 (1982); Williams, *supra* note 14, at 1309.

themselves how to make such a determination and which sources of law they will use to do so.[63] The Ninth Circuit ostensibly looks to a broad variety of precedent, beginning with binding precedent from the Supreme Court and its own body of law.[64] If binding precedent clearly establishes the right, the inquiry ends.[65] But in the absence of binding precedent, the Ninth Circuit will purportedly look to "whatever decisional law is available" to determine whether a right is clearly established for the purpose of a qualified immunity analysis.[66] Such law may include "decisions of state courts, other circuits, and district courts."[67] Even "unpublished decisions of district courts" may be considered.[68] The Ninth Circuit compares nonbinding precedent with Supreme Court and Ninth Circuit law to inquire whether, at the time the nonbinding opinions were rendered, the Ninth Circuit would have reached the same results.[69]

As commentators have noted, this standard is broad—perhaps unworkably so—and requires law enforcement officials to have an expansive working knowledge of case law from nearly all courts across the country.[70] As explained in the Parts that follow, the Ninth Circuit's line of Taser cases illustrates that different panels do not always apply this standard uniformly.

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63. *See generally* Catlett, *supra* note 37.

64. Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004).

65. *Id.*

66. Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (citations omitted).

67. *Id.*

68. *Id.* (citations omitted).

69. *Boyd*, 374 F.3d at 781.

70. *See, e.g.*, Catlett, *supra* note 37, at 1048 ("[C]ourts in the Ninth Circuit must examine the legal analysis of outside courts and compare it to the Ninth Circuit's analysis in related but factually different situations. Somehow, the Ninth Circuit expects government officials, who normally have had little or no legal training, to do so as well."); Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May be Used to Determine Whether the Law is "Clearly Established" In the Third Circuit?*, 47 VILL. L. REV. 1221, 1228 (2002) (noting the Ninth Circuit's "broad approach"); R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 19–22 (1998) (discussing the negative implications of the Ninth Circuit's broad approach).

II. THE NINTH CIRCUIT HAS TAKEN TWO DIFFERENT APPROACHES TO DETERMINE WHETHER CONSTITUTIONAL RIGHTS ARE CLEARLY ESTABLISHED IN TASER CASES

The Ninth Circuit's jurisprudence on Taser use and qualified immunity demonstrates that, in practice, different Ninth Circuit panels apply different standards when analyzing the clearly established question. Some look only to binding, factually similar precedent, while others apply the broader standard discussed in the previous Part. In its first three seminal cases on Taser use, discussed in turn below, the Ninth Circuit used the narrower standard to find that the victims' Fourth Amendment rights to be free from the use of excessive force were not clearly established because no Supreme Court or Ninth Circuit decision specifically addressing Taser use and excessive force had been decided.[71] In the most recent Taser-related case, however, the court changed its approach and used the broader standard to deny qualified immunity.[72]

A. Early Cases Relied Solely on Binding Taser-Related Precedent

The first Ninth Circuit cases to address Taser use and qualified immunity were *Bryan v. MacPherson*,[73] *Brooks v. City of Seattle*,[74] and *Mattos v. Agarano*.[75] In each of these cases, the Ninth Circuit found that the officers' Taser use constituted excessive force, but that the officers were nonetheless entitled to qualified immunity because no binding, Taser-related precedent clearly established the right in question.[76]

On July 24, 2005, Officer Brian MacPherson stopped a car driven by the plaintiff, Carl Bryan, because Mr. Bryan was not wearing his seatbelt.[77] Once outside the car, Mr. Bryan became upset and frustrated, and he began to yell and hit his own thighs.[78] Mr. Bryan did not direct

71. Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011); Bryan v. MacPherson, 630 F.3d 805 (9th Cir. 2010). *Mattos* was the consolidation of two cases for rehearing en banc: *Brooks v. City of Seattle*, No. C06-1681RAJ, 2008 WL 2433717 (W.D. Wash. June 12, 2008) and *Mattos v. Agarano*, CV. No. 07-00220 DAE BMK, 2008 WL 465595 (D. Haw. Feb. 21, 2008).

72. Gravelet-Blondin v. Shelton, 728 F.3d 1086 (9th Cir. 2013).

73. 630 F.3d 805 (2010).

74. 661 F.3d 433 (2011).

75. *Id.*

76. *Bryan*, 630 F.3d at 833; *Mattos*, 661 F.3d at 448, 452.

77. *Bryan*, 630 F.3d at 822.

78. *Id.*

his yelling at Officer MacPherson, and he maintained a distance of twenty to twenty-five feet from the officer.[79] The physical evidence suggested that he was facing away from Officer MacPherson when, without warning, the officer shot Mr. Bryan with his Taser.[80]

The court held that, under the totality of the circumstances, use of the Taser on Mr. Bryan constituted excessive force in violation of the Fourth Amendment.[81] Yet the court ultimately found that Officer MacPherson was entitled to qualified immunity on the grounds that Mr. Bryan's rights were not clearly established at the time of his injury.[82] While acknowledging that the Supreme Court's Fourth Amendment jurisprudence placed Officer MacPherson on fair notice that the use of a Taser was not justified, the court nevertheless concluded "a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the [T]aser use in the circumstances."[83] The court based its determination on the fact that as of July 2005, there were no Supreme Court or Ninth Circuit decisions addressing the use of a Taser in the mode selected by the officer in this case.[84] The court further noted that "the Taser is a relatively new implement of force, and case law related to the Taser is developing."[85] Given the "dearth of prior authority," the court granted Officer MacPherson qualified immunity.[86]

In *Brooks v. City of Seattle*, Seattle Police Officer Juan Ornelas stopped plaintiff Malaika Brooks on November 23, 2004 for speeding in a school zone.[87] Ms. Brooks was driving twelve miles per hour above

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79. *Id.*

80. *Id.* The Taser used on Mr. Bryan was set to "dart mode," in which the device uses compressed nitrogen to discharge two barbed darts toward the target. The darts, which have a range of fifteen to thirty-five feet, remain connected to the device by thin, insulated wires. Once the darts contact the skin (or the target's clothing within two inches of the skin), an electrical circuit is completed and a charge is delivered. The charge interrupts the signals from the target's central nervous system to the rest of the body, which overloads the motor nervous system and causes rigidity and uncontrollable muscle spasms. As a result, the target will experience momentary paralysis and fall to the ground. *See generally* Greg Meyer, *Conducted Electrical Weapons: A User's Perspective*, *in* TASER CONDUCTED ELECTRICAL WEAPONS: PHYSIOLOGY, PATHOLOGY AND LAW 1 (Mark W. Kroll & Jeffery D. Ho eds., 2009); AMNESTY INT'L, 'LESS THAN LETHAL'?: THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 6 (2008).

81. *Bryan*, 630 F.3d at 832.

82. *Id.* at 833.

83. *Id.* at 832–33.

84. *Id.* at 833.

85. *Id.* (citation omitted).

86. *Id.*

87. Mattos v. Agarano, 661 F.3d 433, 436 (9th Cir. 2011).

the posted limit.[88] Following standard procedure, the officer asked Ms. Brooks to acknowledge receipt of the traffic infraction notice by signing it.[89] When she refused, Officer Ornelas ordered Ms. Brooks to get out of her car.[90] Ms. Brooks did not comply, and stiffened her body and clutched her steering wheel to prevent the officers from prying her from the car.[91] A second officer, Officer Jones, pulled out his Taser and showed it to Ms. Brooks.[92] Ms. Brooks informed the officers that she was pregnant, but still refused to leave the car.[93] Officer Ornelas then reached into Ms. Brooks' car and took her key from the ignition.[94] After the keys were removed, Officer Jones tased Ms. Brooks three times within the span of about one minute.[95]

Despite finding that Ms. Brooks' Fourth Amendment rights were violated, the Ninth Circuit held that qualified immunity protected the officers because those rights were not clearly established at the time of the incident.[96] In so holding, the court relied partially on the fact that as of November 2004, no federal appellate court had found that Taser use constituted a Fourth Amendment violation.[97] At that time, only three circuit cases involving Tasers had been decided[98] and the court found all three factually distinguishable.[99] The court then noted that in *Bryan*, it had granted qualified immunity on the grounds that no Supreme Court or Ninth Circuit case addressing the use of a Taser in dart mode had been

88. *Id.*

89. *Id.* at 437.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* Unlike in Mr. Bryan's case, the Taser used on Ms. Brooks was set to "drive stun mode." *Id.* In that mode, the officer touches the target directly with the device to deliver the shock. In contrast to dart mode, a Taser applied in drive-stun mode incapacitates only the area of the body to which the Taser is applied. It causes significant pain but does not affect the target's neuromuscular system. Tasers in drive-stun mode are therefore used primarily as a "pain compliance" tool. Meyer, *supra* note 80, at 2. *See generally* AMNESTY INT'L, *supra* note 80, at 6.

96. *Mattos*, 661 F.3d at 446.

97. *Id.* at 448.

98. Those cases were *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) (holding that Taser use was appropriate where the plaintiff behaved in a confrontational and agitated manner); *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993) (finding no Fourth Amendment violation where officers used a Taser on an escapee from a psychiatric institute who threatened to kill the officers and brandished knives at them); and *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992) (approving Taser use where the plaintiff shoved, kicked, and bit law enforcement officers).

99. *Mattos*, 661 F.3d at 448.

decided prior to the injury in question.[100] The *Mattos* court granted qualified immunity because the relevant law was not sufficiently clearly established at the time of the injury, leaving unclear whether it had based its decision on the inapplicability of the other circuits' precedent or on the lack of available precedent from the Supreme Court and the Ninth Circuit.[101]

In *Mattos v. Agarano*, plaintiff Jayzel Mattos called the police after a domestic dispute with her husband Troy on August 23, 2006.[102] When the officers arrived and saw Mr. Mattos sitting outside, they asked if they could speak with Ms. Mattos.[103] Mr. Mattos went inside the house to get his wife, and the officers followed him in.[104] Because Mr. Mattos did not want the officers in his home, Ms. Mattos agreed to talk to with them outside.[105] Before she could leave, another officer entered the home and announced that Mr. Mattos was under arrest.[106] Ms. Mattos, who was standing in front of her husband, did not immediately move out of the way.[107] As the officer moved closer to complete the arrest, Ms. Mattos extended her arm to prevent the officer's body from pushing against her chest.[108] She asked why her husband was being arrested and asked everyone to calm down and go outside to prevent disturbing her sleeping children.[109] The officer became upset that Ms. Mattos had touched him and tased her without warning.[110]

As in *Bryan* and *Brooks*, the court found that the officer's conduct violated Ms. Mattos' Fourth Amendment rights.[111] But, for the same reasons cited in *Brooks*, the court once again found that the officer was shielded by qualified immunity: the alleged constitutional violation was not clearly established at the time the conduct occurred because there was no Supreme Court or Ninth Circuit opinion addressing the use of a Taser in the mode selected by the officer in this case.[112]

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100. *Id.*
101. *Id.*
102. *Id.* at 438.
103. *Id.*
104. *Id.* at 438–39.
105. *Id.* at 439.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* The Taser applied to Ms. Mattos was set to dart mode. *Id.*
111. *Id.* at 451.
112. *Id.* at 452.

B. Gravelet-Blondin v. Shelton *Took a Divergent Approach to the "Clearly Established" Question*

In the next Taser case, just two years after *Mattos*, the Ninth Circuit reversed course and held that the defendant officers were not entitled to qualified immunity.[113] In contrast with the earlier cases, the court cited broad, general legal principles from non-Taser cases, other circuits, and district courts in conducting its clearly established inquiry.[114] In *Gravelet-Blondin v. Shelton*,[115] Washington police officers responded to a 911 call placed on May 4, 2008 by the family of a man, Jack Hawes, who was attempting to commit suicide in his car.[116] The officers successfully convinced Mr. Hawes to get out of the car, but when Mr. Hawes refused multiple instructions to show his hands, one of the officers tased him.[117] Mr. Hawes fell to the ground but continued to resist as the officers attempted to restrain him.[118] At some point during the struggle, the Hawes' neighbor, Jack Gravelet-Blondin, came out of his house to see what was happening.[119] Mr. Blondin called out, "What are you doing to Jack?"[120] The officers ordered Mr. Blondin to get back, but he "froze" and did not respond to their commands.[121] The officers then tased Mr. Blondin as well.[122]

The district court found that the officer's use of force was excessive under the Fourth Amendment.[123] Still, the court held that the officers were entitled to qualified immunity because as of the date of the injury, no Supreme Court or Ninth Circuit decision had been issued addressing the use of Tasers in the mode selected by the officer in this case.[124] The court specifically noted that the *Mattos* court found no binding decision would have placed officers in that case on notice that their conduct was unconstitutional, and no such decision had been issued between the

113. Gravelet-Blondin v. Shelton, 728 F.3d 1086 (9th Cir. 2013).

114. *Id.* at 1092–96.

115. 728 F.3d 1086.

116. *Id.* at 1089.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1090.

121. *Id.*

122. *Id.* The taser used on Mr. Blondin was also set to dart mode. *Id.*

123. Gravelet-Blondin v. Shelton, No. C09-1487RSL, 2012 WL 395428, at *5–6 (W.D. Wash. Feb. 6, 2012).

124. *Id.* at *7.

events in *Mattos* and those in *Gravelet-Blondin*.[125]

A divided Ninth Circuit panel reversed the district court. The panel agreed that Mr. Blondin's constitutional rights were violated, but disagreed with the district court's determination that neither the officers nor the city could be held liable for it.[126] Ultimately, the court found that "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance" was clearly established before May 2008.[127] In support of this assertion, the court cited two cases. The first was *Deorle v. Rutherford*,[128] in which the Ninth Circuit denied qualified immunity to an officer who, without warning, shot a beanbag projectile at the emotionally disturbed plaintiff, who was walking directly toward the officer.[129] The second was *Headwaters Forest Defense v. County of Humboldt*,[130] in which the Ninth Circuit held that the law regarding a police officer's use of pepper spray to subdue, remove, or arrest nonviolent protestors was sufficiently clear to put the officer on notice that his use of force was excessive.[131]

The court acknowledged that those cases did not concern Tasers, but stated that such a connection was unnecessary.[132] It noted the "well-established" rule that

> it does not matter that no case . . . directly addresses the use of [a particular weapon]; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury."[133]

The court also noted that as of 2008, three other circuits had held that using a Taser might in some instances constitute excessive force.[134]

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125. *Id.*

126. *Gravelet-Blondin*, 728 F.3d at 1090.

127. *Id.* at 1093.

128. 272 F.3d 1272 (9th Cir. 2001).

129. *Id.* at 1276–78, 1282.

130. 276 F.3d 1125 (9th Cir. 2002).

131. *Id.* at 1131.

132. *Gravelet-Blondin*, 728 F.3d at 1093.

133. *Id.* (quoting *Deorle*, 272 F.3d at 1286).

134. *Id.* Those cases were *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012) (holding it was clearly established as of 2008 that tasing an unarmed individual suspected of a misdemeanor who did not resist arrest, threaten an officer, or attempt to run, and who did not behave aggressively constituted excessive force); *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010) (holding it was clearly established as of 2006 that police officers could not, without warning, tase "a nonviolent misdemeanant who did not pose a threat" or resist or evade arrest); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009) (holding it was clearly established as of 2005 that tasing an individual who posed a minimal safety threat and who was not resisting arrest or

The majority's formulation of the issue in this case may be broken down into two components: whether Mr. Blondin engaged in "mere passive resistance," and whether a Taser in dart mode constitutes "non trivial force."[135] The court answered both of these questions in the affirmative. As to the first issue, the court determined that Mr. Blondin had no connection to the underlying crime, took no affirmative steps to violate an officer's order, did not physically resist or make physical contact with officers, and did not attempt to interfere with efforts to arrest a suspect.[136] The court concluded that his failure to move farther than thirty-seven feet away from the officers after inquiring as to what they were doing could not be considered resistance.[137] As to the second issue, the court cited a variety of opinions from other circuits and district courts to determine that the use of a Taser in dart mode did constitute "non-trivial force."[138] The court tracked the progression of other courts' statements regarding Tasers' level of force and circumstances under which their use is constitutional, beginning with its own 2005 pronouncement that Tasers are a "variety of non-lethal 'pain compliance' weapons."[139] It then considered Tenth Circuit and district court cases finding that Taser use was unconstitutional in some instances,[140] cases finding that Taser use may be justified when the suspect is actively resisting arrest,[141] and finally district court orders finding that Tasers constitute "excessive force" and disapproving of their use on arrestees who "passively comply" with an officer's orders.[142] The court used these cases to support its determination that, as of 2008, it was well known "that a [T]aser in dart mode constitutes more than trivial

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attempting to flee violated the Fourth Amendment); and *Oliver v. Fiorino*, 586 F.3d 898 (11th Cir. 2009) (holding it was clearly established as of 2004 that it was excessive to repeatedly tase an individual who engaged in a physical struggle with an officer, because the individual became immobilized after the first tasing).

135. *Gravelet-Blondin*, 728 F.3d at 1093, 1094–95.

136. *Id.* at 1094. Note, however, the difference between the Ninth Circuit's version of events and that offered by the District Court. Gravelet-Blondin v. Shelton, No. C09-1487RSL, 2012 WL 395428, at *1–3 (W.D. Wash. Feb. 6, 2012) (noting that Blondin's presence distracted the officers in a "very dangerous, fluid situation" and that he contributed to the "volatile" nature of the scene).

137. *Gravelet-Blondin*, 728 F.3d at 1094.

138. *Id.* at 1094–96.

139. *Id.* at 1095 (citing San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 204 F.3d 962 (9th Cir. 2005)).

140. *Id.*

141. *Id.* (citing Casey v. City of Fed. Heights, 509 F.3d 1278 (10th Cir. 2007); Hinton v. City of Elwood, 997 F.2d 774 (10th Cir. 1993); Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)).

142. *Id.* at 1095–96 (citing Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137 (W.D. Wash. 2007); Harris v. Cnty. of King, C05-1121C, 2006 WL 2711769 (W.D. Wash. Sept. 21, 2006)).

force."[143] In sum, the court departed from the precedent it set in *Bryan*, *Brooks*, and *Mattos* of looking strictly to Taser cases from the Ninth Circuit and the Supreme Court, and began looking to both Taser and non-Taser related cases from other circuits and from district courts.[144]

III. THE LACK OF CONSISTENCY IN THE NINTH CIRCUIT'S CLEARLY ESTABLISHED ANALYSIS RESULTS IN THREE MAJOR PROBLEMS

As the cases discussed above demonstrate, the Ninth Circuit has taken two different approaches to the clearly established analysis, despite its insistence that it will look to "whatever decisional law is available."[145] Some panels, including the *Bryan* and *Mattos* panels, look to binding, factually similar precedent.[146] For ease of reference, this Comment refers to this as the "*Bryan* approach." Others, including the *Gravelet-Blondin* majority, apply the broad "all available decisional law" rule,[147] which this Comment refers to as the "*Gravelet-Blondin* approach." The Taser cases help illustrate three major problems this variance creates. First, it results in inconsistent outcomes for litigants. Second, it creates confusion for district courts and government officials. Finally, it does nothing to help the Ninth Circuit's propensity for defining clearly established law at an impermissibly high level of generality.

A. Under the Current Approach, Litigants Are Subject to Inconsistent Outcomes

Perhaps most troubling, the current approach can lead to inconsistent results for litigants. A plaintiff whose case is subjected to the stricter *Bryan* approach has a lesser chance of being able to pursue relief than a plaintiff whose case is subjected to the broader *Gravelet-Blondin* approach. The Taser cases again provide an illustrative example. Arguably, the plaintiff in *Mattos* could have proceeded with her Section 1983 suit had the *Mattos* court applied the *Gravelet-Blondin* approach. As explained in Part II.B, the *Gravelet-Blondin* court broke the qualified

143. *Id.*

144. *Id.* at 1105 (Nguyen, J., dissenting).

145. Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003).

146. Bryan v. MacPherson, 630 F.3d 805, 833 (9th Cir. 2010); Mattos v. Agarano, 661 F.3d 433, 452 (9th Cir. 2011). The *Mattos* court looked at three cases from other circuit courts of appeal, but also relied on the statement in *Bryan* that no Supreme Court or Ninth Circuit case had touched on this issue. Furthermore, *Mattos* did not mention or examine district court cases.

147. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1095 (9th Cir. 2013).

immunity issue into two questions: Was the right to be free from the application of non-trivial force for engaging in mere passive resistance clearly established prior to the date of the injury?[148] And was it clear by that date that using a Taser was non-trivial?[149]

The *Gravelet-Blondin* court answered both of those questions in the affirmative,[150] and—based on the law at the time of the offense—the *Mattos* court could have as well. All of the cases cited in the *Gravelet-Blondin* court's discussion of the first question were published before the events in *Mattos*.[151] If the *Mattos* court had approached the clearly established question in the same way that the *Gravelet-Blondin* court did, it could also have found that the right to be free from the application of non-trivial force for engaging in passive resistance was established prior to the injury in that case.

As to the second part of the inquiry, most of the cases the *Gravelet-Blondin* court cited to find that Tasers constituted non-trivial use[152] were published after the events in *Mattos*, which occurred in August of 2006.[153] However, a district court had noted by 2004 in *Marsall v. City of Portland*[154] that "less-lethal" weapons can constitute "substantial force,"[155] and the Ninth Circuit had recognized by 2005 that Tasers were "non-lethal" weapons.[156] Therefore, the *Mattos* court could also have answered the second question in the affirmative and denied qualified immunity under the *Gravelet-Blondin* approach.

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148. The court distinguished *Bryan* and *Mattos* on the grounds that in each of those cases, the plaintiff "either took an affirmative step to contravene officer orders or engaged in behavior that posed some threat to officer safety." *Id.* at 1094. But this is not a foregone conclusion. Arguably, Jayzel Mattos did not engage in anything more than "mere passive resistance" when she blocked the officer attempting to arrest her husband. She did not intentionally interfere with the officer's access to her husband; she was simply standing in front of him at the time the officer announced the arrest and put out her arm to prevent the officer from pushing against her chest. *Mattos*, 661 F.3d at 439. Therefore, it was possible for the *Mattos* court to formulate the qualified immunity question in exactly the same way the *Gravelet-Blondin* court did.

149. *Gravelet-Blondin*, 728 F.3d at 1092–96.

150. *Id.*

151. *Id.* at 1093–94.

152. San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005); Casey v. City of Fed. Heights, 509 F.3d 1278 (10th Cir. 2007); Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137 (W.D. Wash. 2007); Harris v. Cnty. of King, No. C05-1121C, 2006 WL 2711769 (W.D. Wash. Sept. 21, 2006).

153. *Mattos*, 661 F.3d at 438.

154. No. CV-01-1014-ST, 2004 WL 1048127 (D. Or. May 7, 2004).

155. *Id.* at *9.

156. *San Jose Charter of Hells Angels*, 402 F.3d at 969. The *Gravelet-Blondin* majority cited this case for the same proposition. 728 F.3d at 1095.

B. District Courts and Government Officials Are Left Without Meaningful Guidance

The current inconsistent approach creates confusion for both district courts and government officials, which interferes with their ability to perform their respective functions efficiently. District courts are left to guess whether they should take the *Bryan* or the *Gravelet-Blondin* approach, and depending upon the panel hearing the case on appeal, they risk being reversed for guessing incorrectly. The Ninth Circuit spends time and resources writing published opinions for these reversals. *Gravelet-Blondin*'s own history provides an example. The district court in that case chose to apply the *Bryan* approach,[157] but the district judge had no way of knowing whether the appellate panel would agree or whether it would apply the *Gravelet-Blondin* approach, as it ended up choosing to do.[158] Litigants are also impacted: the current inconsistent approach creates an incentive to appeal, as there is always a chance that the Ninth Circuit will apply the standard rejected by the district court. The inconsistency thus may lead to a greater number of cases being appealed, increasing costs for both parties involved.

The varying approaches taken by both the Ninth Circuit and district courts in turn create confusion and uncertainty for government officials. As has been pointed out, it is unrealistic to expect government officials to keep track of all the opinions published (or not published) across the country and adjust their behavior accordingly.[159] Qualified immunity is meant to shield officials from liability where the law gives no "fair warning" that a particular action violates a constitutional right.[160] That purpose is not achieved when officers cannot be sure what the rules are or how a court will evaluate their conduct.

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157. Gravelet-Blondin v. Shelton, No. C09-1487RSL, 2012 WL 395428, at *7 (W.D. Wash. Feb. 6, 2012).

158. *See id.* Simply overruling *Gravelet-Blondin* will not solve the problem. As long as the Ninth Circuit's pronouncement that in "the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes" remains good law, the problem identified in this Comment remains an issue. *See* Drummond *ex. rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (internal quotations omitted).

159. Catlett, *supra* note 37, at 1048.

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

C. The Current Approach Leads to Overly-Broad Definitions of Clearly Established Law

The final issue created by the uncertainty of the Ninth Circuit's approach is that it can sometimes lead to impermissibly broad definitions of clearly established law. In its most recent cases on qualified immunity, the Supreme Court has made clear that the clearly established analysis cannot be undertaken at a high level of generality,[161] and the Ninth Circuit has been criticized for disregarding this rule in the past.[162] The loose rules currently employed in the Ninth Circuit do nothing to keep courts in this circuit in line with the Supreme Court's mandate. To take another example from the Taser cases, the dissent in *Gravelet-Blondin* argued that the majority's formulation of the issue in that case (whether the right to be free from non-trivial force for engaging in mere passive resistance was clearly established prior to the date of the injury) was inappropriate in light of the Supreme Court's instruction that the qualified immunity inquiry must be undertaken "in light of the specific context of the case, not as a broad general proposition."[163]

The dissent has a point. The majority lifted general principles from the cases it relied upon without regard for the factual context that produced them. For example, the majority relied on *Headwaters Forest Defense v. County of Humboldt*[164] to support its assertion that "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance" was clearly established at the time of the injury in *Gravelet-Blondin*.[165] *Humboldt* involved a series of protests in which officers sprayed nonviolent protestors' faces with pepper spray from inches away and used Q-tips to apply pepper spray directly to the protestors' eyes.[166] The *Humboldt* court found that the protestors' rights were clearly established, but plainly tied its decision to the specific facts of that case:

> Because the officers had control over the protestors it would have been clear to any reasonable officer that it was unnecessary

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161. Saucier v. Katz, 533 U.S. 194, 201 (2001).

162. *See, e.g.*, Ashcroft v. al–Kidd, __U.S.__, 131 S. Ct. 2074, 2084 (2011) (reversing the Ninth Circuit) (warning "the Ninth Circuit in particular" to avoid "defin[ing] clearly established law at a high level of generality"); Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (same); *Katz*, 533 U.S. at 200 (same); Hunter v. Bryant, 502 U.S. 224, 227–29 (1991) (same).

163. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1103 (9th Cir. 2013) (Nguyen, J., dissenting).

164. 276 F.3d 1125 (9th Cir. 2002).

165. 728 F.3d at 1093.

166. *Humboldt*, 276 F.3d at 1128–29.

> to use pepper spray to bring them under control, and even less necessary to repeatedly use pepper spray against the protestors when they refused to [comply with orders] . . . . It also would have been clear to any reasonable officer that the manner in which the officers used the pepper spray was unreasonable . . . . [T]he manufacturer's label on the canisters of pepper spray defendants used expressly discouraged spraying pepper spray from distances of less than three feet.[167]

In short, the *Humboldt* holding was predicated upon the very specific facts of that case. The *Gravelet-Blondin* majority made no attempt to compare those facts to the circumstances of the case before it; the panel simply took a broad paraphrase of the *Humboldt* holding, stripped it of factual references, and applied that statement to its own, factually distinct situation.[168] In doing so, the majority failed to ground its analysis in the specific context of the case.

Additionally, the rule articulated by the *Gravelet-Blondin* majority likely runs afoul of the Supreme Court's admonition not to cast the contours of constitutional rights "at a high level of generality."[169] In *Gravelet-Blondin*, the court announced a clearly established right to be free from the application of non-trivial force for engaging in passive resistance.[170] The Ninth Circuit has been criticized in the past for relying on statements of a similar breadth. In *Brosseau v. Haugen*,[171] for example, the Supreme Court admonished the Ninth Circuit for finding a clearly established right based on the general statement that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm."[172] This statement is no less general than the one relied upon by the *Gravelet-Blondin* majority: "deadly force" is just as broad as "non-trivial force," while "pos[ing] a threat of serious harm" is equally general as "passive resistance." The lack of consistency in the Ninth Circuit's approach to the clearly established question gives courts substantial leeway in their analysis, which makes it all too easy to give in to the temptation to define clearly established law at a high level of generality.

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167. *Id.* at 1130 (internal quotation omitted) (emphasis omitted).

168. *See Gravelet-Blondin*, 728 F.3d at 1093.

169. Saucier v. Katz, 533 U.S. 194, 201 (2001).

170. *Gravelet-Blondin*, 728 F.3d at 1094.

171. 543 U.S. 194 (2004).

172. *Id.* at 198; Haugen v. Brosseau, 351 F.3d 372, 392–93 (9th Cir. 2003) (internal quotations omitted).

IV. THE NINTH CIRCUIT SHOULD ADOPT A CLEARLY-DEFINED THREE-STEP PROCEDURE FOR THE CLEARY ESTABLISHED ANALYSIS

As this Comment illustrates, the Ninth Circuit's different approaches to deciding what constitutes clearly established law create several serious problems. This Part argues that adopting the Eleventh Circuit's approach to the clearly established analysis will go a long way in addressing the problems created by the Ninth Circuit's current approach. The Ninth Circuit's line of cases regarding Taser use demonstrates how the approaches differ and why the Eleventh Circuit's approach will help mitigate the problems discussed above.

The Eleventh Circuit has created a clear and concise framework for conducting the clearly established analysis by identifying three ways in which government officials may be put on notice that their conduct is unconstitutional.[173] First, the language of a federal statute or constitutional provision may be "specific enough to establish clearly the law applicable to particular conduct and circumstances to overcome qualified immunity, even in the total absence of case law."[174] In other words, the plain language of a statute or constitutional provision may be "so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[175] The Eleventh Circuit calls such situations ones of "obvious clarity."[176]

Second, if the official's conduct "is not so egregious as to violate [the law] on its face," the Eleventh Circuit turns to broad statements of principle in case law.[177] Such statements are not tied to particularized facts and can be applied to different sets of facts to answer the clearly

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173. Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002).

174. *Id.* at 1350 (emphasis omitted).

175. *Id.*

176. *Id.* The Eleventh Circuit has found situations of "obvious clarity" in the Fourth Amendment context where, for example, an officer released a police dog to attack the plaintiff who was lying on the ground, did not pose a threat to anyone at the scene, and was not attempting to flee or resist arrest, *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000), or where an officer, while on the plaintiff's back attempting to handcuff him, broke the plaintiff's arm requiring surgery for multiple fractures even though the plaintiff offered no resistance at all, *Smith v. Mattox*, 127 F.3d 1416, 1419–20 (11th Cir. 1997). The Fifth Circuit has expressed the opinion that *Ashcroft v. al-Kidd* called into question the concept of "obvious cases" as established in *Hope v. Pelzer*. *See* Morgan v. Swanson, 659 F.3d 359, 373 (5th Cir. 2011). However, several circuits continue to apply the "obvious case" rule even after *Ashcroft*. For a detailed argument against the Fifth Circuit's position, see Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hold in Clearly Established Law*, 90 TEX. L. REV. 1283, 1300–04 (2012).

177. *Vinyard*, 311 F.3d at 1351.

established question.[178] These statements can only be created if the earlier court decided the case "by determining that 'X Conduct' is unconstitutional without tying that determination to a particularized set of facts."[179] The Eleventh Circuit notes that there is a presumption against wide principles of law, and if a broad principle is sufficient to establish clearly established law, it must do so with "obvious clarity" such that every reasonable government official in the same circumstances would know that his or her conduct violated the law.[180]

Third, if no broad pronouncement of law may be applied to the situation, the Eleventh Circuit looks at "precedent that is tied to the facts."[181] It looks to cases "in which the Supreme Court or [the Eleventh Circuit] or the pertinent state supreme court has said that 'Y Conduct' is unconstitutional in 'Z Circumstances.'"[182] When fact-specific precedent establishes the law, a case that is "fairly distinguishable" from the circumstances in the case before the court cannot clearly establish the law and qualified immunity must be granted.[183] Where, on the other hand, the circumstances of the instant case are "materially similar, the precedent can clearly establish the applicable law."[184] This Part suggests that the Eleventh Circuit's formulation would significantly mitigate the problems created by the Ninth Circuit's current approach.

The first issue that adopting the Eleventh Circuit's approach would help to address is inconsistent outcomes for litigants. The Eleventh Circuit's standard is both structured and detailed—two qualities the Ninth Circuit's divergent approach lacks. The Eleventh Circuit's approach requires that courts proceed through the three steps in order, for example, and it provides strict guidance on the types of cases that may provide support for the clearly established analysis. If all Ninth Circuit courts faithfully followed the Eleventh Circuit's three-step process, there would be less room for disagreement between courts, and litigants could feel more confident that their cases would be decided consistently regardless of the district court or appellate panel to which they were assigned.

Likewise, district courts and government officials could feel more confident about the law and how to apply it. Refining the clearly

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* (footnote omitted) (emphasis omitted).

183. *Id.* at 1352.

184. *Id.*

established analysis would help government officials understand where the line between acceptable and unacceptable conduct lies, and where they should look to find that line. The Eleventh Circuit's approach removes a good deal of the existing uncertainty by limiting the body of law used in its analysis, requiring only that officers be aware of the court's binding decisions.[185] It also limits the complexity of the legal analysis an officer must conduct before taking action. In *Gravelet-Blondin*, the Ninth Circuit performed legal acrobatics to arrive at its decision.[186] Under the Eleventh Circuit standard, only "materially similar" precedent that is "tied to the facts" of the situation faced by the officer would be relevant.[187]

Finally, faithful adherence to the three-step process would help Ninth Circuit courts avoid defining clearly established law at an impermissibly high level of generality. However, step two in particular must be applied with caution: courts must be careful to draw broad statements of principle only when the court that originally made the statement did not tie that principle to the specific facts of that case, as the standard requires.[188] For example, the assertion in *Gravelet-Blondin* regarding the right to be free from non-trivial force for engaging in mere passive resistance would not have passed muster under the Eleventh Circuit standard, as the cases cited for that proposition tied it directly to the facts of those cases.[189] Being mindful of the limitations in step two of the process, and bearing in mind the Eleventh Circuit's warning that there is a presumption against wide principles of judge-made law,[190] would help the Ninth Circuit keep its future decisions in line with the Supreme Court's instructions. Step three of the Eleventh Circuit's analysis, in which courts look to binding precedent that is specifically tied to the facts, will also remind courts to be cognizant of the specific factual

185. *Id.* at 1351 (noting that the Eleventh Circuit looks only to Supreme Court cases and cases from its own circuit).

186. *See supra* Part II.B.

187. *Vinyard*, 311 F.3d at 1351–52. The purpose of this Comment is not to make it more difficult for plaintiffs to proceed with their Section 1983 suits. Indeed, the Eleventh Circuit standard is no stricter than the *Bryan* approach. For example, it is entirely possible that under the Eleventh Circuit standard, Ms. Brooks would have been able to go forward with her case. Arguably, all relevant factors weighed strongly in favor of finding a Fourth Amendment violation. Under the Eleventh Circuit standard, Ms. Brooks' case could very well fall under the first category of "obvious cases" and qualified immunity would be denied. The "obvious cases" category is an important tool for all Section 1983 plaintiffs. For more on this category and its utility, see Friedman, *supra* note 176.

188. *Vinyard*, 311 F.3d at 1351.

189. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1103 (9th Cir. 2013).

190. *Id.*

context of the cases before them. For these reasons, the Ninth Circuit should take an appropriate case en banc to adopt the Eleventh Circuit's standard.

CONCLUSION

Significant uncertainty still exists regarding the clearly established inquiry and the sources of law to which a court should look when conducting the clearly established analysis. The Ninth Circuit purports to look to "any available decisional law," but in practice sometimes follows a much narrower standard, looking only to factually similar cases from the Supreme Court and its own jurisdiction.

This Comment highlights the inconsistency in the Ninth Circuit's approach and identifies the issues that may result: inconsistent results for litigants, confusion for district courts and government officials, and inappropriately broad pronouncements of clearly established law. The Ninth Circuit should take an appropriate case en banc to adopt the Eleventh Circuit's three-part inquiry, which would help to ensure fair and consistent outcomes, provide clarity to district courts and government officials, and help the Ninth Circuit avoid defining clearly established law at an impermissibly high level of generality.