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Out with the New, in with the Old: Reconsidering the Analytical Framework for Excessive Force Claims Created in Cortez v. McCauley

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OUT WITH THE NEW, IN WITH THE OLD: RECONSIDERING THE ANALYTICAL FRAMEWORK FOR EXCESSIVE FORCE CLAIMS CREATED IN *CORTEZ V. MCCAULEY*

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I. INTRODUCTION

In *Cortez v. McCauley*,[1] an en banc Tenth Circuit Court of Appeals considered whether a Fourth Amendment excessive force claim is subsumed within a Fourth Amendment unlawful seizure claim.[2] The court held that the two claims constituted two separate causes of action, and in so holding overruled a previous decision by a three judge panel of the Tenth Circuit Court of Appeals.[3] However, the en banc court did not unanimously agree as to the proper analytical framework. Instead, the en banc majority announced one approach,[4] while Judge Hartz proposed a different approach in a separate opinion.[5] While undoubtedly motivated by achieving the most equitable and legally sound analytical framework for excessive force claims arising in connection with a Fourth Amendment seizure, the en banc majority created a rigid and artificial framework that poses significant analytical and equitable problems. Similarly, Judge Hartz's alternative approach, while appealing at first glance, ultimately proves overly complex and invasive. Thus, the en banc court erred in overruling the previous panel decision.

Part II of this Note begins with an analysis of the background law that guided the court's analysis and decision, encompassing the statutory and constitutional causes of action and defenses.[6] Part III summarizes the facts of the case and details both the panel and en banc decisions by the Tenth Circuit Court of Appeals.[7] Finally, Part IV of this Note analyzes the en banc court's adoption of a new analytical framework for excessive force claims and offers a proposed alternative approach.[8] This Note argues that the approach announced by the panel decision should be reinstated and expanded.[9] Specifically, this Note suggests that all claims of excessive force stemming from an unlawful seizure should be subsumed within one claim that considers the alleged excessive force as an element of damages instead of as a separate cause of action.[10] While ultimately acknowledging that the adoption of such an approach may not occur for some time, this Note urges the reconsideration of the approach adopted by the en banc court.[11]

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1. 478 F.3d 1108 (10th Cir. 2007) (en banc).
2. *Id.* at 1112, 1126–27.
3. *Id.*
4. *Id.* at 1127.
5. *Id.* at 1133–35.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part IV.
9. *See infra* Part IV.
10. *See infra* Part IV.
11. *See infra* Parts IV, V.

II. BACKGROUND LAW

A. 42 U.S.C. § 1983

In 1871, the forty-second United States Congress enacted what was eventually codified as 42 U.S.C. § 1983[12] essentially as an enforcement mechanism for the Fourteenth Amendment.[13] The United States Supreme Court elaborated on the purpose of Section 1983, stating:

> As a result of the new structure of law that emerged in the post-Civil War era —and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation...
>
> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."[14]

It is important to note that while Section 1983 creates a federal cause of action,[15] it does not in itself confer any substantive rights.[16] Instead, the source of substantive rights derives from the Fourteenth Amendment and those portions of the Bill of Rights applicable to the states via incorporation by the due process clause of the Fourteenth Amendment.[17]

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12. 42 U.S.C. § 1983 (2000) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

13. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:3 (4th ed. 1997).

14. *Id.* § 1:4 (quoting Mitchum v. Foster, 407 U.S. 225, 238–239 (1972)).

15. Under 28 U.S.C. § 1343 (2000), federal courts have original jurisdiction over Section 1983 actions. The statute reads in part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

16. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617–18 (1979).

17. *See* NAHMOD, *supra* note 13, § 2:1. The Supreme Court has found the following provisions of the Bill of Rights applicable to the States:

> 1) First Amendment freedom of speech, press, assembly and petition.
> 2) First Amendment free exercise and establishment of religion.

A plain reading of Section 1983 reveals its broad language, the interpretation of which has been the subject of much litigation and scholarly debate. Consequently, the law surrounding this statute and its interpretation has become highly nuanced. While a discussion of each of the many nuances of Section 1983 is beyond the scope of this Note, discussion of the landmark litigation that either brought about or clarified some of the nuances relevant to this Note is essential to the later discussion herein.

1. What Does "Person" Mean?

The use of the word "person" at the beginning of the statute[18] has given rise to some debate and litigation over the statutory intent behind the usage of that word. It has been generally understood that natural persons, corporations, and associations are considered persons within the meaning of the statute.[19] However, debate and litigation arose with respect to whether a city or county could be considered a "person" within the meaning of the statute. The Supreme Court initially concluded in its 1961 decision in *Monroe v. Pape* that those municipal bodies were not persons for purposes of Section 1983.[20] There, the Court pointed to the Reconstruction Congress's rejection of a proposed bill, the Sherman Amendment, which would have held cities liable for failing to prevent mob violence as evidence of that Congress's intent not to allow suit against cities.[21]

The Court revisited that decision in 1978 in *Monell v. Department of Social Services* and concluded that municipal bodies were persons subject to suit and liability under Section 1983.[22] There, the Court reviewed the same legislative history as the *Monroe* Court and reached a different conclusion, finding that the language of the statute suggested a clear intent to impose liability on a government that directly violated the terms of the statute.[23] However, the Court was quick to note that the statutory language did not evince legislative intent to impose vicarious, or respondeat superior, liability on municipalities.[24] Thus, under *Monell* a municipality may not be held liable under Section 1983 where the only source of potential liability is the actions of the municipality's employee(s). Rather, the

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3) Fourth Amendment prohibition against unreasonable searches and seizures.
4) Fifth Amendment protection from double jeopardy and self-incrimination.
5) Fifth Amendment "takings clause" protection, i.e. the right to just compensation for a public taking.
6) Sixth Amendment right to a speedy and public trial by an impartial jury. The Sixth Amendment rights to notice, confrontation, compulsory process and counsel are also applicable to the States.
7) Eighth Amendment protection from cruel and unusual punishment and from excessive bail.

See id. § 2:3.

18. *See supra* note 12.

19. NAHMOD, *supra* note 13, § 1:15.

20. *See* Monroe v. Pape, 365 U.S. 167, 187–92 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

21. *See* MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 22–23 (3d ed. 2006); *Monroe*, 365 U.S. at 187–92.

22. 436 U.S. 658, 690 (1978).

23. *Id.* at 691–92.

24. *Id.* at 691–92 & 692 n.57.

plaintiff must demonstrate that an official policy or custom was the cause in fact of the alleged constitutional deprivation.[25]

However, under certain circumstances Section 1983 allows plaintiffs to hold supervisors individually liable for the conduct of their subordinates, despite the general prohibition on respondeat superior liability.[26] To establish such liability, a plaintiff must demonstrate an "affirmative link between the supervisor's conduct and the [alleged] constitutional deprivation."[27] Such a demonstration requires the plaintiff to establish the supervisor's direct participation in or acquiescence to the alleged deprivation.[28] Hence, establishing liability under this theory requires a showing of some personal involvement by the supervisor in the alleged constitutional deprivation and does not allow imposition of liability through the mere existence of a supervisor-subordinate relationship. In this way, the supervisory liability jurisprudence comports with the general prohibition on respondeat superior liability under Section 1983, even though it does not appear so at first glance.

Monroe was also important to the development of Section 1983 jurisprudence because of its interpretation of the ambiguous phrase "under color of."[29] In that decision, the Supreme Court found that action could be "under color of state law" even if the action forming the basis of the suit violated state law.[30] The Court's decision in this regard relied in part on legislative history following its decision in *United States v. Classic*, from which the Court determined a general acceptance of the definition of "under color of" announced by the Court in that decision.[31] Although some scholars have certainly criticized this interpretation,[32] the decision is generally credited with resurrecting the largely unused Section 1983.[33]

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25. *Id.* at 694–95. It is not necessary that a custom be officially approved or written by the municipality's governing body for action in accordance therewith to give rise to Section 1983 liability. Rather, action pursuant to "well-settled practices of government officials" is sufficient to establish custom. *See* 2 NAHMOD, *supra* note 13, §§ 6:1, 6:6.

26. It is important to note that liability under this theory is individual liability and does not require a showing that the supervisor acted pursuant to policy or custom. *See* NAHMOD, *supra* note 13, § 3:96.

27. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990)).

28. Holland *ex rel.* Overdorff v. Harrington, 268 F.3d 1179, 1187 (10th Cir. 2001).

29. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 55 (1989).

30. *See* Monroe v. Pape, 365 U.S. 167, 183–87 (1961) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (citing United States v. Classic, 313 U.S. 299, 326 (1941)), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

31. *See id.* at 183–87. However, one scholar, relying on the same legislative history, reaches the opposite conclusion as the Court, arguing that "[a]s a matter of statutory construction *Monroe* is flatly wrong. Close textual exegesis of the majority opinion shows that the Court misused legislative history and cited inapplicable precedent to reach its construction of section 1983." *See* Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 502 (1985). The author continues by arguing that a proper reading of the legislative history suggests that the legislature intended "under color of" state law to connote "under the authority of" state law, which a violation of the law could not be. *Id.* at 555–56. While this argument may be the fodder of further scholarly debate, it is of little consequence to the Court's continued interpretation of Section 1983, in accordance with *Monroe*.

32. *See, e.g.*, Zagrans, *supra* note 31.

33. *See, e.g.*, Sheldon H. Nahmod, *The Prima Facie § 1983 Case*, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983 1 (Mary Massaron Ross ed., 1998).

2. Qualified Immunity

Section 1983 affords some defendants who are not otherwise absolutely immune from suit[34] the affirmative defense of qualified immunity.[35] While the statutory language of Section 1983 does not include any defenses or immunities, the Supreme Court extended qualified immunity to certain public officials beginning in 1967.[36] Specifically, the Court extended qualified immunity to police officers, executives, school board members, mental health administrators, and prison officials.[37] In so doing, the Court sought to strike a balance between "preventing, and compensating for, constitutional violations and...avoiding the overdeterrence [sic] of independent decision making by government officials."[38]

Essentially, the defense of qualified immunity serves two purposes. First, it acts as a shield to liability for government officials whose alleged actions "did not violate 'clearly established' law."[39] As the Supreme Court announced in its highly influential decision in *Harlow v. Fitzgerald*, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[40] Generally, the law is clearly established where there is circuit court of appeals or United States Supreme Court precedent on point, or where the "clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[41]

However, what is "on point" has been the source of some contention. From a plaintiff's perspective, the "clearly established" inquiry should "take place at a fairly general level," while defendants would prefer a more specific inquiry that would only find liability where plaintiffs have presented a "case on all fours."[42] While the Supreme Court did not fully resolve this ongoing debate in *Anderson v.*

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34. Generally, states, state or regional legislators acting within a "traditional legislative capacity," judges not acting "in clear absence of all jurisdiction," and prosecutors acting as "advocates in the criminal process" are absolutely immune from Section 1983 liability. *See* NAHMOD, *supra* note 13, § 1:16 (States); 2 NAHMOD, *supra* note 13, § 7.1 (state and regional legislators, judges, and prosecutors).

35. *See generally* NAHMOD, *supra* note 13, § 8.

36. *Id.* § 8:1.

37. *Id.* (citing Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (mental hospital administrators); Wood v. Stickland, 420 U.S. 308 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (executives); Pierson v. Ray, 386 U.S. 547 (1967) (police officers)).

38. *Id.*

39. KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION, (1998) 81 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The authors note that while qualified immunity bans an award of damages for the actions of government officials when the law is not clearly established, it does not prohibit a grant of injunctive relief. *Id.* (citing Behrens v. Pelletier, 516 U.S. 299 (1996).

40. *Harlow*, 457 U.S. at 818. This standard significantly altered the qualified immunity defense and courts' analysis thereof by eliminating the "subjective bad faith" component of the analysis that previously existed. *See* BLUM & URBONYA, *supra* note 39, at 82. This standard permitted the imposition of liability on Section 1983 defendants when a plaintiff could demonstrate that the defendant acted with ill will, or "subjective bad faith," even where his conduct was otherwise objectively reasonable. This standard effectively eliminated defendants' ability to succeed on summary judgment under Rule 56 of the Federal Rules of Civil Procedure because the state of mind component of the "bad faith" allegation frequently presented a factual issue for a jury to decide. *See* COLLINS, *supra* note 21, at 152.

41. Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992).

42. *See* NAHMOD, *supra* note 13, § 8:1.

Creighton,[43] it did provide some much needed guidance. Specifically, the Court, while making it clear that a "case on all fours [was] not required,"[44] did establish a more fact-specific,[45] and thus pro-defendant, standard of analysis.[46] Consequently, courts analyze whether at the time of the events giving rise to the litigation it was clearly established "within a sufficiently analogous factual setting" that the government official's conduct amounted to a constitutional violation.[47] No longer is an analysis of "generalized legal principles" sufficient.[48]

The second, equally important purpose that qualified immunity serves is as an "entitlement not to stand trial or face the other burdens of litigation."[49] The Supreme Court demonstrated its concern about subjecting government officials to the burdensome litigation process unnecessarily when it effectively eliminated the "subjective bad faith"[50] component of the qualified immunity analysis. In so doing, "[t]he Court's purpose was to permit the defeat of insubstantial claims without resort to trial."[51] This purpose reflects the Court's continuing concern with effectuating the appropriate balance between plaintiffs' right to vindication of rights and defendants' ability to perform their duties without constant fear of litigation.[52] In this vein, the Court's purpose evinces its concern both with the financial cost of defending a Section 1983 claim and with the "diversion of official energy from pressing public issues...the deterrence of able citizens from accepting public office...and...the chilling effect on the discharge of official duties."[53] For this reason, the Court has been adamant about resolving the issue of qualified immunity early in the litigation.[54]

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43. 483 U.S. 635 (1987).

44. NAHMOD, *supra* note 13, § 8:1.

45. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

46. NAHMOD, *supra* note 13, § 8:1. This somewhat pro-defendant standard is evident in the burden allocation under the qualified immunity analysis as well. Once a defendant raises the defense of qualified immunity, "'the plaintiff initially bears a heavy two-part burden [and] must show (1) that the defendant's actions violated a constitutional...right, and (2) that the right allegedly violated [was] clearly established at the time of the conduct at issue. Unless the plaintiff carries its twofold burden, the defendant prevails.'" Reynolds v. Powell, 370 F.3d 1028, 1030 (10th Cir. 2004) (alterations in original) (quoting Mick v. Brewer, 76 F.3d 1127, 1134 (10th Cir. 1996)).

47. Medina v. City & County of Denver, 960 F.2d 1493, 1497 (10th Cir. 1992) (citing *Anderson*, 483 U.S. at 639–40). It should be noted, however, that specific conduct need not have been previously held unlawful for the law to be clearly established, meaning that government officials may be said to have "notice" that their conduct violates a constitutional right even in novel factual situations. The essential component of the "clearly established" analysis is whether given the state of the law at the time of the alleged conduct, the government official would have had fair warning that his conduct was unconstitutional. *See* Hope v. Pelzer, 536 U.S. 730, 739–41 (2002).

48. *Medina*, 960 F.2d at 1497.

49. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

50. *See supra* note 40.

51. NAHMOD, *supra* note 13, § 8:4.

52. *See* COLLINS, *supra* note 21, at 150–56.

53. NAHMOD, *supra* note 13, § 8:5.

54. *See* Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.") Resolving the issue of qualified immunity early in the litigation also reflects a necessary caution in analyzing this defense because it is effectively lost if the case is erroneously allowed to proceed to trial. Saucier v. Katz, 533 U.S. 194, 200–201 (2001) (quoting *Mitchell*, 472 U.S. at 526).

Overall, the affirmative defense of qualified immunity provides a "potent weapon"[55] in a defendant's litigation arsenal and reflects the ongoing concern of courts around the country with balancing the rights and interests of plaintiffs and defendants.

B. The Fourth Amendment

The Fourth Amendment provides in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[56] As one of the provisions of the Bill of Rights that has been incorporated against the states through the Fourteenth Amendment,[57] the Fourth Amendment is appropriate subject matter for a Section 1983 claim.

In general, a plaintiff must establish two separate and distinct elements of a Fourth Amendment claim before successfully asserting a violation of his Fourth Amendment rights.[58] First, the plaintiff must satisfy the "threshold [s]tanding [r]equirement"[59] by showing that a "search or seizure of his or her person, house, papers or effects has been conducted by an agent of the government."[60] This "standing requirement" entails three basic elements: (1) a showing by the plaintiff that *his* Fourth Amendment rights have been violated, not those of a third party; (2) a showing that an agent of the government, not "a private person with no governmental involvement," committed the violation; and (3) a showing that a "search or seizure of [his]...person, house, papers or effects" has occurred.[61] Upon successfully establishing each of the aforementioned elements, the plaintiff may then proceed to the second element of his Fourth Amendment claim, reasonableness.[62]

The Supreme Court has held that the "Fourth Amendment's central requirement is one of reasonableness."[63] Simply stated, to prevail on a Fourth Amendment claim, the plaintiff must show that the search or seizure at issue was "unreasonable."[64] Determining the reasonableness of a search requires courts to balance the "privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable."[65] Specifically, courts are instructed to balance "(1) the nature or degree of the intrusiveness of the governmental invasion into personal privacy or personal security represented by the search or seizure in question, as against (2) the gravity

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55. *See* NAHMOD, *supra* note 13, § 8:11.

56. U.S. CONST. amend. IV.

57. *See* Colorado v. Bannister, 449 U.S. 1, 2 (1980) (per curiam); NAHMOD, *supra* note 13, § 2:3.

58. PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 10 (2005).

59. *Id.* (internal quotation marks omitted). The Supreme Court has not accepted this terminology with respect to the Fourth Amendment except as it otherwise applies through its normal "constitutionally-based meaning." However, for purposes of efficiency the terminology is "helpful as a shorthand reference to describe a separate and distinct branch of substantive Fourth Amendment law." *See id.*

60. *Id.* (internal quotation marks and brackets omitted).

61. *Id.* at 11 (internal quotation marks and brackets omitted).

62. *Id.* at 11.

63. Illinois v. McArthur, 531 U.S. 326, 330 (2001) (citing Texas v. Brown, 460 U.S. 730, 739 (1983)).

64. *See id.*; HUBBART, *supra* note 58, at 11.

65. *McArthur*, 531 U.S. at 331.

of the governmental interest served by the search or seizure."[66] This balancing test reflects the Supreme Court's effort to "avoid giving government officials the right to conduct searches or seizures at their absolute discretion."[67]

The balancing test, though, is only part of the ultimate determination of reasonableness. The final determination typically rests on an assessment of the facts giving rise to the search or seizure under some objective evidentiary standard, which for the Fourth Amendment is either probable cause or reasonable suspicion.[68] Both standards will be discussed in greater detail herein.[69] However, for purposes of the current discussion of general Fourth Amendment principles, it is simply important to note that an analysis of an alleged Fourth Amendment violation is essentially an assessment of the "objective reasonableness" of the government official's conduct.[70]

In the context of a Section 1983 action, a court's finding that the search or seizure at issue was unreasonable does not preclude a defendant from successfully pleading qualified immunity. Instead, "conduct unreasonable under the Fourth Amendment [can] still be objectively reasonable for the purpose of qualified immunity."[71] While this principle is seemingly contradictory by first appearances, it evinces consistency in the Court's application of the "clearly established" element of the qualified immunity defense.[72] For instance, if a police officer effects an arrest of an individual absent probable cause,[73] unless certain exceptions apply[74] such an arrest generally violates that individual's Fourth Amendment rights.[75] Hence, where no exceptions apply, the court would deem the arrest unreasonable and find a Fourth Amendment violation. However, in a Section 1983 action the court would then examine whether, in light of the "clearly established" law existing at the time of the arrest, a reasonable officer would have had sufficient notice that his conduct violated that individual's Fourth Amendment rights. Where an officer reasonably but mistakenly believed that probable cause existed to effect the arrest or that certain exceptions applied to justify an arrest absent probable cause, the officer generally will be relieved from liability based on qualified immunity.[76]

At this point a more in-depth discussion of the Fourth Amendment law relevant to the later discussion herein is necessary to a full understanding of the legal basis for the Court's decision. Specifically, the following discussion will focus on the law

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66. HUBBART, *supra* note 58, at 167.

67. *Id.*

68. *See id.* at 167 n.20, 169.

69. *See infra* Part II.B.i.

70. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388 (1989). The government official's *subjective* state of mind is irrelevant for purposes of this inquiry. "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action." Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (internal citations and quotation marks omitted).

71. BLUM & URBONYA, *supra* note 39, at 83 (citing Malley v. Briggs, 475 U.S. 335, 344–45 (1986)).

72. *See supra* Part II.A.ii.

73. *See infra* Part II.B.i.

74. *See infra* Part II.B.i.

75. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985).

76. BLUM & URBONYA, at 84 (citing Anderson v. Creighton, 483 U.S. 635, 636–41 (1986)); *see also* Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995).

concerning Fourth Amendment seizures,[77] with specific emphasis on the evidentiary requirements and standards surrounding such seizures and the necessary use of force connected therewith.

1. Fourth Amendment Seizures

Fourth Amendment jurisprudence recognizes two types of seizures: "physical seizures and submission-to-authority" seizures.[78] Physical seizures present the more obvious case where a government official, often a law enforcement officer, physically restrains a person and restricts that person's freedom to leave.[79] To constitute a seizure under the Fourth Amendment, though, the officer "must *intentionally,* not accidentally impose this physical restraint."[80] The Supreme Court has made this principle abundantly clear, stating "[a] Fourth Amendment seizure [of the person] does not occur [unless]...there is a governmental termination of [an individual's] freedom of movement through means intentionally applied."[81] Common examples of such intentional seizures include the physical detention of a person to determine the person's identity,[82] intentionally shooting a "fleeing suspect,"[83] or intentionally erecting a police roadblock that physically stops a fleeing suspect whose vehicle crashes into it.[84]

The less obvious case of a Fourth Amendment seizure presents in the "submission to authority" variety. One circumstance commonly giving rise to such

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77. Searches and seizures under the Fourth Amendment are subject to different albeit similar legal standards. *See* HUBBART, *supra* note 58, at 11. Because the entry into the plaintiffs' residence occupied little of the court's discussion in *Cortez,* a complete discussion of Fourth Amendment search law is neither necessary nor useful in understanding the court's decision. *See generally* Cortez v. McCauley, 478 F.3d 1108 (10th Cir. 2007) (en banc). However, to the extent an understanding of Fourth Amendment search law is necessary, a brief discussion of the basic, governing legal principles provides sufficient grounding.

Generally, the Supreme Court "has expressed a strong preference for [conducting] searches...pursuant to [a] search warrant." 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1 (4th ed. 2004). While a warrantless search is considered presumptively unreasonable, the Court has recognized certain exceptions to its general search warrant requirement in the face of exigent circumstances. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

> Although the Court has not articulated an exhaustive list of the emergencies [or exigencies] involved in this exception, the exception has to date revolved around three general scenarios with possible variations on each: (1) police in 'hot pursuit' of a fleeing felon enter private premises to arrest the suspect; (2) police or firemen enter private premises to deal with a situation that is life-threatening or perilous to persons inside or outside the premises or to the police themselves; and (3) police enter private premises to prevent the imminent destruction of evidence of a serious crime.

HUBBART, *supra* note 58, at 275. Where these exceptions do not otherwise cover a particular situation, a court will determine the existence of exigent circumstances based on whether there exists a "plausible claim of specially pressing or urgent law enforcement need," Illinois v. McArthur, 531 U.S. 326, 331 (2001), and where the "manner and scope of the search is reasonable." United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).

78. HUBBART, *supra* note 58, at 120.

79. *Id.* at 120–21.

80. *Id.* at 121.

81. *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 844 (1998) (alterations in original)). Hence, where the police "stop a fleeing suspect by *accidentally* crashing into a vehicle driven by a suspect during a high speed automobile chase," a Fourth Amendment seizure has not occurred. *Id.*

82. *Id.* (citing Brown v. Texas, 443 U.S. 47 (1979)).

83. *Id.* (citing Tennessee v. Garner, 471 U.S. 1 (1985)).

84. *Id.* (citing Brower v. County of Inyo, 489 U.S. 593 (1989)). As Hubbart notes, this type of roadblock should be distinguished from a police checkpoint "in which the motorist submits to the police show of authority and stops his car," which constitutes a "submission to authority" seizure. *Id.* at 121 n.8.

a seizure occurs when a law enforcement officer approaches and questions an individual.[85] The Supreme Court has held that a Fourth Amendment "seizure does not occur simply because a police officer approaches an individual and asks a few questions."[86] "Asking questions is an essential part of police investigations"[87] and is "generally either benign or otherwise absolutely essential to the job—whether in responding to calls for assistance or investigating possible criminal activity."[88] Permitting officers to perform such "benign" questioning allows them to speak with crime victims, witnesses, or those in need of assistance without the need to assert some individualized suspicion of criminal activity.[89]

However, law enforcement officers do not always approach an individual for "benign" questioning. Instead, an officer may suspect an individual of some type of criminal wrongdoing and approach the individual to question him about that suspected wrongdoing. That questioning in and of itself does not necessarily constitute a Fourth Amendment seizure;[90] rather, analysis of all the circumstances surrounding the encounter determine whether such a seizure has occurred.[91] Specifically, "when police approach and question someone whom they...suspect of a crime, either initially or at sometime during the encounter," courts determine whether the encounter amounts to a seizure under the Fourth Amendment by determining whether, in light of an officer's show of authority, "a reasonable person innocent of any crime would have believed that he or she (1) was...free to leave the officer's presence, or (2) was...free to refuse the government official's requests and terminate the encounter."[92] A Fourth Amendment seizure occurs where the court answers either question in the negative.[93]

The aforementioned provides the foundation for identifying the spectrum of police-citizen encounters that the Tenth Circuit Court of Appeals and the Supreme Court have identified.[94] On one end of the spectrum are consensual encounters, which are characterized by the kind of "benign" questioning previously mentioned and a freedom on the part of the citizen to refuse to answer the questions and terminate the encounter.[95] Such encounters "are not seizures within the meaning of the Fourth Amendment, and need not be supported by suspicion of criminal wrongdoing."[96]

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85. *Id.* at 121.

86. Florida v. Bostick, 501 U.S. 429, 434 (1991).

87. Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185 (2004).

88. HUBBART, *supra* note 58, at 122.

89. *Id.*

90. *See* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Obviously, not all personal intercourse between policemen and citizens involve 'seizures' of the person.").

91. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

92. HUBBART, *supra* note 58, at 122. "A reasonable person under this objective test 'presupposes an innocent person,' not someone who is guilty of a crime and who might very well overreact to otherwise non-threatening police behavior." *Id.* (citing Florida v. Bostick, 501 U.S. 429, 430 (1991)).

93. *See id.*

94. *See, e.g.*, Oliver v. Woods, 209 F.3d 1179 (10th Cir. 2000); Florida v. Royer, 460 U.S. 491 (1983). The categories identified in the spectrum "are not static and may escalate from one to another." Cortez v. McCauley, 478 F.3d 1108, 1115 n.5 (10th Cir. 2007) (en banc) (citing United States v. Shareef, 100 F.3d 1491, 1500 (10th Cir. 1996)).

95. *See Oliver*, 209 F.3d at 1186.

96. *Id.*

In the middle of the spectrum are investigative detentions, also known as *Terry* stops,[97] which fall short of a full arrest but nevertheless must be supported by a reasonable suspicion that "criminal activity 'may be afoot.'"[98] Establishing reasonable suspicion requires the officer to demonstrate that based on a totality of the circumstances, he had a "particularized and objective basis for suspecting the particular person stopped of criminal activity."[99] While an "inchoate and unparticularized suspicion or 'hunch'" is insufficient to establish reasonable suspicion,[100] an officer need only articulate a probability, not a certainty, that any criminal activity has occurred or is about to occur.[101] Thus, when assessing the existence of reasonable suspicion, an analysis of the totality of the circumstances presented to the officer at the time of the detention is essential. The Supreme Court has observed that:

> The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> 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 [sic] are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.[102]

Where such considerations yield a particularized suspicion of criminal wrongdoing, the officer is permitted to "briefly detain the individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information."[103] The amount of time an officer may detain an individual under a *Terry* stop is not precisely defined, but rather is generally regarded as "whatever reasonable length of time is necessary to investigate the suspicion that prompted the stop."[104] Following this brief detention, the officer must either arrest the individual,

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97. *See* Terry v. Ohio, 392 U.S. 1 (1968).
98. *Oliver*, 209 F.3d at 1186 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).
99. United States v. Cortez, 449 U.S. 411, 417–18 (1981).
100. *See Terry*, 329 U.S. at 27.
101. *See* United States v. Cortez, 449 U.S. at 418.
102. *Id.*
103. *Oliver*, 209 F.3d at 1186 (internal citation and quotation marks omitted).
104. HUBBART, *supra* note 58, at 181. "'To ensure that the resulting seizure is constitutionally reasonable, a Terry stop must be limited. The officer's actions must be justified at its inception, and...reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 181 n.11 (quoting Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185 (2004)).

The Supreme Court has stated:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc*

assuming the investigation has provided a sufficient evidentiary basis for doing so, or release him.[105]

At the end of the spectrum is a full arrest, which is generally regarded as the most "highly intrusive" type of police-citizen encounters.[106] Telltale signs of an arrest may include the "'use of firearms, handcuffs, and other forceful techniques'" as such conduct is typically outside the scope of a *Terry* stop.[107] Unlike a *Terry* stop, arrests are subject to the more stringent evidentiary standard of probable cause.[108] "Probable cause to arrest exists only when the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[109] Like the reasonable suspicion standard, probable cause does not require the arresting officer to deal in certainties but does require more than a "mere suspicion" of criminal wrongdoing.[110] Accordingly, probable cause "has been traditionally defined as a practical, non-technical evidentiary showing of individualized wrongdoing that amounts to more than a mere suspicion, but less than proof beyond a reasonable doubt based on a totality of the circumstances."[111]

In considering the totality of the circumstances, the court may consider the collective knowledge of all officers present at an investigation and need not base its ultimate determination of probable cause on the knowledge of the arresting officer alone.[112] Generally, that collective knowledge may include hearsay statements,

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> evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render the search unreasonable.

United States v. Sharpe, 470 U.S. 675, 686 (1985) (internal citations, alterations, and quotation marks omitted).

105. HUBBART, *supra* note 58, at 182 (citing Illinois v. Wardlow, 528 U.S. 119, 126 (2000)). A *Terry* stop may become the "functional equivalent of an arrest where police exceed the limits of a temporary detention." *Id.* at 180.

106. *Oliver*, 209 F.3d at 1186 (arrests are characterized by "highly intrusive or lengthy search or detention") (internal quotation marks and citation omitted).

107. *See* United States v. Shareef, 100 F.3d 1491, 1502 (10th Cir. 1996) (quoting United States v. Melendez-Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994) (noting that the use of such tactics does not automatically turn the encounter into an arrest, but such tactics are warranted in non-arrest, i.e., *Terry* stop, situations only when the "'facts available to the officer would warrant a man of reasonable caution in the belief that the action taken was appropriate'").

108. *See* Michigan v. Summers, 452 U.S. 692, 700 (1981); *cf.* United States v. Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004) ("'Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.'" (quoting Alabama v. White, 496 U.S. 325, 330 (1990)); HUBBART, *supra* note 58, at 180 ("[I]f a detention has a criminal investigative purpose, it need not be supported by probable cause, and is reasonable if supported by the lesser standard of reasonable suspicion.").

109. *Valenzuela*, 365 F.3d at 896 (citation and internal quotation marks omitted).

110. *See* United States v. Morris, 247 F.3d 1080, 1088 (10th Cir. 2001) ("Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than a mere suspicion." (citation and internal quotation marks omitted)).

111. HUBBART, *supra* note 58, at 187 (citations omitted); *see also* United States v. Edwards, 242 F.3d 928, 934 (10th Cir. 2001) (Courts analyzing the existence of probable cause after the fact must make their decision "in light of [the] circumstances as they would have appeared to a prudent, cautious, trained police officer." (citation and quotation marks omitted)).

112. *See* United States v. Zamudio-Carrillo, 499 F.3d 1206, 1209 (10th Cir. 2007).

informant or anonymous tip information, or evidence otherwise potentially inadmissible at trial.[113] Courts permit officers to use such information or evidence in their on-scene determination of probable cause so long as the officers have a reasonable basis to trust the validity of the information or evidence.[114] However, courts may not consider the subjective belief of the officers concerning probable cause and must restrict their analyses to the objective evidence proffered in support of a finding of probable cause.[115]

When arresting an individual outside of a "private dwelling," officers are not required to have an arrest warrant.[116] Conversely, when law enforcement officers arrest an individual inside a private dwelling they are typically required to have an arrest warrant before entering the home to effect the arrest, absent exigent circumstances or consent.[117] Similarly, when the intended arrestee is inside the private dwelling of a third party, the officers must obtain a search warrant before entering the dwelling to effect the arrest, again, absent exigent circumstances or consent.[118] The exigent circumstances exception should not be overstated, though, as the Tenth Circuit Court of Appeals has cautioned that the exception is narrow, and "must be jealously and carefully drawn."[119] However, the exception may be appropriate when:

(1) police are in "hot pursuit" of a fleeing felon and enter a dwelling to arrest the suspect; or
(2) when police enter the dwelling to deal with a life-threatening or perilous situation to persons inside or outside the premises or to the police themselves; and
(3) when police enter the dwelling to prevent the imminent destruction of evidence of a serious crime.[120]

The above list serves only as a guide in the determination of exigent circumstances since "[t]here is no absolute test for the presence of exigent circumstances because such a determination depends on the unique facts of each controversy."[121]

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113. HUBBART, *supra* note 58, at 194. However, officers "may not ignore easily accessible evidence and thereby delegate their duty to investigate and make an independent probable cause determination based on that investigation." Baptiste v. J.C. Penney, Co., 147 F.3d 1252, 1259 (10th Cir. 1998).

114. HUBBART, *supra* note 58, at 194.

115. *See generally* Whren v. United States, 517 U.S. 806 (1996).

116. *See* HUBBART, *supra* note 58, at 183 (citing United States v. Watson, 423 U.S. 411 (1976)).

117. Kirk v. Louisiana, 536 U.S. 635, 638 (2002) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house, [and] absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.") (citation, internal quotation marks, and alterations omitted); *see also* Steagald v. United States, 451 U.S. 204, 212 (1981) ("The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.").

118. *See* Steagald, 451 U.S. at 213–14.

119. United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir. 1998) (citation and quotation marks omitted).

120. HUBBART, *supra* note 58, at 183–84. In a similar formulation, the Tenth Circuit Court of Appeals has held that a warrantless entry into a home is allowed if: "(1) clear evidence of probable cause exists of, (2) a serious crime where destruction of evidence is *likely*, (3) any such search is limited in scope, and (4) it is supported by clearly defined indicators of exigency that are not subject to police manipulation." Cortez v. McCauley, 478 F.3d 1108, 1124 (10th Cir. 2007) (en banc) (citing United States v. Scroger, 98 F.3d 1256, 1259 (10th Cir. 1996)).

121. *Scroger*, 98 F.3d at 1259 (citation and internal quotation marks omitted).

Overall, the issues arising within the spectrum of police-citizen encounters are numerous and complex, and the issues only increase in complexity when the use of force factor enters the calculus.

2. Excessive Force Claims

In the seminal case of *Graham v. Connor*, the Supreme Court explained that "the right to make an arrest or investigatory stop carries with it the right to use some degree of physical coercion or threat thereof to effect it."[122] However, as other courts have clarified, "the degree of physical coercion that law enforcement officers may use is not unlimited."[123] Thus, the situation frequently arises where an individual alleges that a law enforcement officer employed an excessive level of physical coercion, i.e., force, in effecting a *Terry* stop or arrest. A claim of excessive force stemming from a *Terry* stop or an arrest "is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right to be free from unreasonable seizures of the person."[124] Accordingly, such claims are subject to the Fourth Amendment's reasonableness standard.[125]

Simply stated, the test of reasonableness requires courts to consider the "totality of the circumstances" and determine whether those circumstances warranted the type of force used.[126] The Supreme Court has stated in greater detail that:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application...its proper application requires careful attention to the facts and circumstances of each particular case, 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.[127]

The *Graham* Court cautioned, though, that in determining the appropriateness of a particular use of force, courts must judge the use of force from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[128] Accordingly, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[129] Thus, like the analysis of other alleged Fourth Amendment violations, the essential question is whether the officer's actions were reasonable given the facts and circumstances presented "without regard to [the] underlying intent or motivation" for such actions.[130]

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122. 490 U.S. 386, 396 (1989).

123. Cortez v. McCauley, 478 F.3d 1108, 1125 (10th Cir. 2007) (en banc).

124. *Graham*, 490 U.S. at 394 (internal quotation marks and alterations omitted) (rejecting substantive due process as the method of analysis for excessive force claims). It is important to note that the Tenth Circuit Court of Appeals has held that the Fourth Amendment protections "are not confined to the right to be secure against physical harm; they include liberty, property and privacy interests–a person's 'sense of security' and individual dignity." Holland *ex rel.* Overdorff v. Harrington, 268 F.3d 1179, 1195 (10th Cir. 2001).

125. *See* Graham, 409 U.S. at 396.

126. Tennessee v. Garner, 471 U.S. 1, 8–9 (1985).

127. *Graham*, 490 U.S. at 396 (citations, internal quotation marks, and alterations omitted).

128. *Id.*

129. *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

130. *Id.* at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

In the specific context of the case discussed herein, whether overly tight handcuffing constitutes an excessive use of force requires courts to look further than the actual act of handcuffing giving rise to the claim. Generally, courts appear to agree that overly tight handcuffing alone does not constitute an excessive use of force. Instead, to state a cognizable claim, a plaintiff must show actual injury from the purportedly over-tight handcuffing.[131] The asserted "actual injury" must be more than *de minimus*, though it may be either physical or psychological.[132] Importantly, the entirety of this analysis must occur within the aforementioned objective reasonableness framework, and thus is merely an extension thereof.

III. FACTS AND PROCEDURAL HISTORY

A. *Facts*

Cortez v. McCauley[133] arose from Rick and Tina Cortez's early morning encounter with Bernalillo County Sheriff's Deputies on May 26, 2001. At 12:24 a.m. that day, a nurse at Saint Joseph's Hospital called the Bernalillo County Sheriff's Department regarding a two-year-old patient who had complained that her babysitter's "boyfriend"[134] had "hurt her pee pee."[135] Upon receiving this call, the Sheriff's Department dispatched defendant deputies McCauley, Gonzales, Sanchez, and Covington to Rick and Tina Cortez's residence.[136] At the time the deputies were dispatched, they did not have the results of the medical examination of the child, had not interviewed the child or her mother, and had not sought to obtain a search warrant for the plaintiffs' residence.[137] Nevertheless, fearing the possible destruction of evidence related to the child's allegations and concerned that other children may have been at the plaintiffs' residence, the defendant deputies decided to respond immediately.[138]

The deputies arrived at the plaintiffs' residence at approximately 1:00 a.m. and knocked on the plaintiffs' front door. Plaintiff Rick Cortez answered the door wearing only a pair of shorts and saw two deputies through the closed screen door. He repeatedly asked the deputies what was going on but they ordered him to step outside of the house before answering his questions. Mr. Cortez complied with the

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131. *See, e.g.*, Lyons v. City of Xenia, 417 F.3d 565, 575–76 (6th Cir. 2005); Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001); Ashbrook v. Boudinot, No. C2-06-140, 2007 WL 4270658, at *7 (S.D. Ohio Dec. 3, 2007) (absence of even *de minimus* injury renders excessive force claim untenable); Judson v. Mount Desert Police, No. 06-124-B-W, 2007 WL 2344969, at *7 n.9 (D. Me. Aug. 10, 2007) (same); Vance v. Wade, No. 2:00-CV-213, 2007 WL 2021934, at *5 (E.D. Tenn. July 10, 2007) (officer removing handcuffs in response to complaint about tightness negated excessive force claim).

132. Cortez v. McCauley, 478 F.3d 1108, 1129 n.25 (10th Cir. 2007) (en banc) (citing Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005)). Some courts require a showing of substantial psychological injury to state a cognizable excessive force claim under that theory. *See* Flores v. City of Palacios, 381 F.3d 391, 400 (5th Cir. 2004).

133. 478 F.3d 1108.

134. As the court notes, plaintiff Rick Cortez is actually the husband of babysitter Tina Cortez. *Id.* at 1113 n.1.

135. *Id.* at 1112–13.

136. *Id.* at 1113.

137. *Id.*

138. *See* Appellants'/Defendants' Opening Brief, Cortez v. McCauley, 438 F.3d 980 (10th Cir. 2006) (No. 04-2062), 2004 WL 5332119 at *3–4.

deputies' order and opened the screen door to exit the house.[139] As he did so, the deputies took hold of him, placed him in handcuffs, read him his *Miranda*[140] rights and seated him in the back of a patrol car where he was subsequently questioned.[141]

Plaintiff Tina Cortez arrived at the front door of the residence at approximately the same time the deputies handcuffed her husband. Ms. Cortez then walked back toward the bedroom to make a telephone call but was stopped by defendant deputy McCauley who had entered the home. Deputy McCauley seized Ms. Cortez by the arm, escorted her outside of the home, and seated her in the back of a separate patrol car from her husband for later questioning. Deputy McCauley then allowed Ms. Cortez to use his cell phone to make the call she had started to make when she was escorted from the home. Both plaintiffs claimed that the deputies had seized keys to the residence, locked the front door, and would not let the plaintiffs return inside for approximately one hour.[142] The defendant deputies later asserted that the plaintiffs were kept outside of the residence to prevent the destruction of any potential evidence located therein.[143]

As the plaintiffs sat in the patrol cars, the defendant deputies performed a warrantless search of the home in a purported attempt to find any children in the residence and to ensure officer safety. After ensuring that the home was secure and that no children were inside, the deputies questioned both plaintiffs. While questioning Ms. Cortez, the deputies learned that Ms. Cortez managed a daycare facility that cared for several children. Ms. Cortez also revealed that she and Raquel Villegas, the mother of the child complainant, had recently had a verbal altercation when Ms. Cortez informed the mother that the daycare would no longer take care of her child.[144]

In his statement, Mr. Cortez essentially confirmed his wife's statement. Also, while providing his statement, Mr. Cortez complained to the deputies about the tightness of his handcuffs and claimed that they were causing him pain. The deputies did not adjust or loosen the handcuffs.[145]

While the defendant deputies conducted their investigation at the plaintiffs' residence, Deputy Zuniga and Detective Foster contacted Ms. Villegas at the hospital. Ms. Villegas provided an unsworn, written statement detailing her and her child's accusation, which included information about a verbal dispute with the plaintiffs.[146] Detective Foster also interviewed the nurse who had examined the child complainant, who informed him that "no evidence of penile penetration was

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139. *Cortez*, 478 F.3d at 1113.

140. Miranda v. Arizona, 384 U.S. 436 (1966); *Cortez*, 478 F.3d at 1113 n.2 (noting that *Miranda* warnings are required for custodial interrogations occasioned by an arrest, but not for questioning during an ordinary investigative detention) (citing Berkemer v. McCarty, 468 U.S. 420, 440 (1984); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

141. *Cortez*, 478 F.3d at 1113.

142. *Id.*

143. The court omits this seemingly important fact from its en banc decision, though the defendant deputies presented this fact to the court in their opening brief. *See* Appellants'/Defendants' Opening Brief, *supra* note 138, at *3–4.

144. *Cortez*, 478 F.3d at 1113.

145. *Id.*

146. *Id.* at 1113–14.

present."[147] Additionally, the nurse identified two possible sources of the child's vaginal irritation: the urine stained underwear the child was wearing and bubble bath.[148]

Once the defendant deputies received information that the hospital did not find any evidence of molestation, they released the plaintiffs and allowed them to re-enter their residence. According to the Bernalillo County Sheriff's Department's dispatch report, the defendant deputies released the plaintiffs sometime between 1:49 a.m. and 2:16 a.m. on May 26, 2001.[149] Thus, the duration of the plaintiffs' encounter with the defendant deputies was anywhere between forty-nine to seventy-six minutes. Mr. Cortez was never charged with a crime stemming from Ms. Villegas's allegations.[150]

Following their encounter with the defendant deputies, the plaintiffs filed suit under 42 U.S.C. § 1983 and New Mexico law alleging violations of their Fourth Amendment rights. Specifically, the plaintiffs alleged that the defendant deputies unlawfully arrested and interrogated the plaintiffs, used excessive force in detaining the plaintiffs, and unlawfully entered the plaintiffs' residence.[151] The plaintiffs further alleged that Defendant Sheriff Bowdich was liable in his supervisory capacity for the alleged Fourth Amendment violations purportedly committed by his deputies.[152] The defendant deputies moved for partial summary judgment[153] based on qualified immunity, arguing that they did not unreasonably search or seize either plaintiff. Defendant Bowdich also moved for summary judgment arguing that he could not be held liable in his supervisory capacity. Shortly after filing that motion, each of the defendants, along with the Defendant Board of County Commissioners, moved to stay discovery pending the outcome of the summary judgment motion on qualified immunity.[154]

B. Procedural History

1. District Court

The district court denied the defendants' motion for partial summary judgment, finding that the defendant deputies effected a full custodial arrest of the plaintiffs, that there was a genuine issue of material fact as to whether sufficient probable cause existed, and that, in viewing the evidence in the light most favorable to the plaintiffs,[155] the defendant deputies were not entitled to qualified immunity because no reasonable officer would have believed that probable cause existed to effect an arrest.[156] The district court further found that no exigent circumstances existed on

147. *Id.* at 1114 (internal quotation marks omitted).
148. *Id.* at 1114 n.3.
149. *Id.*
150. *Id.*
151. *Id.* at 1112, 1114.
152. *Id.* at 1114.
153. *See generally* FED. R. CIV. P. 56.
154. *Cortez*, 478 F.3d at 1114.
155. *See* FED. R. CIV. P. 56(C).
156. *See generally* Cortez v. McCauley, No. Civ. 02-1458 MCA/WDS (D.N.M. Mar. 17, 2004) (Memorandum Opinion and Order).

the night of the encounter that would have justified the defendant deputies entering the plaintiffs' residence to arrest them without a warrant, and that the law surrounding that part of the encounter was clearly established.[157]

With respect to the plaintiffs' excessive force claims, the district court held that because the defendant deputies were not justified in arresting the plaintiffs, they also were not justified in using the amount of force that they did to effect the arrest. The court found that the law concerning use of force was clearly established and provided the defendant deputies with sufficient notice that their use of force in this situation was excessive.[158] However, the court denied the plaintiffs' motion for partial summary judgment with respect to the excessive force claims because of an unspecified genuine issue of material fact related to witness reliability in the case.[159]

Finally, given its denial of the defendant deputies' qualified immunity defense, the district court lifted its previously imposed order staying discovery.[160] Additionally, the court found that an affidavit the plaintiffs filed in response to the defendant deputies' motion for partial summary judgment provided good cause to deny certain parts of the motion and permit discovery on some remaining claims.[161]

Following the district court's denial of their motion for partial summary judgment, the defendant deputies and Defendant Bowdich appealed the ruling to the Tenth Circuit Court of Appeals.

2. Tenth Circuit Panel Decision

On appeal, a three-judge panel reviewed the district court's denial of qualified immunity[162] to the defendant deputies and Defendant Bowdich and the district court's decision to lift the stay on discovery. The decision, written by Judge White[163] and joined by Judge Ebel, affirmed in part and reversed in part the district court's decision and remanded the case for further proceedings.[164] Judge Henry filed a separate opinion in which he concurred in part and dissented in part with the majority's decision.[165]

157. *Id.* at 27–30.

158. *Id.* at 32–33.

159. *Id.* at 33.

160. Generally, when defendants assert the defense of qualified immunity a stay of discovery is warranted unless the plaintiff makes a sufficient showing to the contrary. *See id.* at 40 (citing Behrens v. Pelletier, 516 U.S. 299, 308 (1996); Workman v. Jordan, 958 F.3d 332, 336 (10th Cir. 1992); Jones v. City & County of Denver, 854 F.2d 1206, 1210–11 (10th Cir. 1988)).

161. *See id.* at 40–41.

162. The appellate court's jurisdiction to review the district court's denial of qualified immunity only extends to issues concerning "neat abstract issues of law" and not to the district court's assessment of the existence of genuine issues of material fact. *See* Cortez v. McCauley, 438 F.3d 980, 991 n.11 (10th Cir. 2006) (citations and internal quotation marks omitted), *vacated on rehearing en banc by* 478 F.3d 1108 (10th Cir. 2007).

163. The Honorable Ronald A. White, United States District Court Judge for the Eastern District of Oklahoma, sitting by designation.

164. *Cortez*, 438 F.3d at 1002.

165. *See id.*

a. Seizure of Mr. Cortez

After reviewing the facts and establishing the basic standard of review for qualified immunity cases,[166] the court initially addressed the seizure of Mr. Cortez. In light of the facts presented,[167] the court concluded that Mr. Cortez had sufficiently demonstrated a violation of his Fourth Amendment rights and that a jury could find that Mr. Cortez had been arrested without probable cause.[168] The court then considered the next sequential question in the qualified immunity analysis, namely whether the law was clearly established at the time the defendant deputies arrested Mr. Cortez. Answering that question in the affirmative, the court concluded that the Fourth Amendment's probable cause standard was clearly established at the time the defendant deputies effected the arrest as was the requirement to reasonably investigate.[169] As such, and because the court concluded that a reasonable officer could not have believed that probable cause existed to arrest Mr. Cortez, the court found that the defendant deputies were not entitled to qualified immunity.[170]

b. Seizure of Ms. Cortez

Next, the court considered the seizure of Ms. Cortez. Again, in considering the evidence presented in the light most favorable to Ms. Cortez as the non-moving party,[171] the court found that Ms. Cortez had sufficiently demonstrated the violation of her clearly established right to be free from unreasonable seizure.[172] In so holding, the court assumed for the sake of argument that Ms. Cortez had been subjected to an investigative detention, and found that even under the less stringent reasonable suspicion standard, the defendant deputies did not have sufficiently reliable information based on the hearsay statement of a two-year-old child to warrant a detention. Moreover, the court noted that the child's statement did not implicate Ms. Cortez in any criminal wrongdoing or suggest that she would destroy evidence related to the alleged wrongdoing. Accordingly, the court upheld the denial of qualified immunity with respect to the seizure of Ms. Cortez.[173]

c. Exigent Circumstances

The court then considered the defendant deputies' assertion that exigent circumstances existed that warranted them entering and searching the Cortez's home and arresting them. In rejecting the defendant deputies' argument in this regard, the

166. *See supra* Part II.A.ii.

167. Specifically, that the defendant deputies grabbed Mr. Cortez and pulled him from the doorway of his house, handcuffed him, advised him of his *Miranda* rights, placed him in the back of a patrol car, and questioned him while he was in the back of the patrol car. *Cortez*, 438 F.3d at 989.

168. *Id.*

169. *Id.* at 990.

170. *See id.* at 991.

171. Specifically, that (1) the defendant deputies ordered Ms. Cortez out of the house, (2) Ms. Cortez at some point returned to her bedroom, (3) one of the defendant deputies took away the telephone Ms. Cortez was using, (4) the deputy escorted Ms. Cortez from the home by the arm and placed her in the back seat of a patrol car, (5) Ms. Cortez was allowed to use one of the defendant deputies' cell phones while in the patrol car, and (6) that one of the defendant deputies questioned Ms. Cortez while she was in the back of the patrol car. *See id.*

172. *Id.* at 992.

173. *Id.*

court found that they had "offered nothing, beyond innuendo and speculation, to establish a 'reasonable basis, approaching probable cause' that an emergency existed within the plaintiffs' home."[174] Furthermore, the court held that the defendant deputies had not "articulat[ed] any specific facts that led them to believe the plaintiffs posed a threat to the officers or others."[175] Because the court agreed with the district court's ruling that the evidence did not suggest exigency, it affirmed the ruling of the district court in this regard and denied qualified immunity.[176]

d. Excessive Force

After addressing the defendant deputies' exigent circumstances argument, the court shifted its focus to the plaintiffs' excessive force claims. In addition to setting forth the general legal standard concerning excessive force claims, primarily articulated in *Graham*,[177] the court also articulated the controversial legal principle that an excessive force claim is subsumed within a wrongful arrest claim, and in so doing provided the basis for Judge Henry's dissent.[178] Specifically, the court, noting its approval of the Eleventh Circuit Court of Appeals' approach, held that "when an excessive force claim rests solely on an allegation that the force was excessive because the underlying seizure itself was unlawful the excessive force claim is derivative: it necessarily exists as a result of the unlawful seizure, and does not constitute a separate claim for relief."[179] However, the court was careful to note that when a plaintiff alleges excessive force during the course of an otherwise lawful seizure, such a claim does give rise to a separate and independent cause of action.[180]

The court justified the application of this rule on two grounds. First, it found that "[t]o permit a jury to award damages on both claims individually would allow a plaintiff to receive double the award for essentially the same claims."[181] Second, it found that "it would be nearly impossible for a jury to apportion damages between an unlawful seizure claim and an excessive force claim, when the excessive force claim is based solely on the unlawfulness of the seizure."[182] As such, the court explained that "it is most proper to allow no more than one recovery...with the level of force used in effecting the unlawful seizure playing a role in the calculation of damages for that seizure."[183] Thus, it held that if a jury determined that the

174. *Id.*
175. *Id.*
176. *Id.* at 993.
177. *See supra* Part II.B.ii.
178. *See Cortez*, 438 F.3d at 996, 1002–1004.
179. *Id.* at 996. The court relied upon several Eleventh Circuit opinions: *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000) (holding that "a claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim"), and *Motes v. Myers*, 810 F.2d 1055, 1059 (11th Cir. 1987) (finding that "[i]t is obvious that if the jury finds the arrest unconstitutional, the use of force and the search were unconstitutional and they become elements of damages for the § 1983 violation").
180. *Cortez*, 438 F.3d at 996 (citing Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002)).
181. *Id.*
182. *Id.*
183. *Id.*

defendant deputies seized either plaintiff unreasonably, then neither plaintiff could recover damages separately for their excessive force claims.[184]

The court's holding in this regard was not unanimous. Judge Henry, while concurring in much of the court's opinion, took exception with the court's following of the Eleventh Circuit's approach. Initially, Judge Henry argued that the approach did not comport with Fourth Amendment jurisprudence. In his view, the Eleventh Circuit's approach abandoned the fact-specific reasonableness inquiry that is essential to any alleged violation of the Fourth Amendment and replaced that inquiry with a "bright-line" rule.[185] Similarly, Judge Henry found that a proper reading of the Eleventh Circuit's approach indicated that it applied only to cases in which an excessive force claim arose solely because there was no justification for the underlying seizure.[186] In his view, *Cortez* was not such a case because "neither of the plaintiffs hint[ed] that his or her excessive force claim rest[ed] solely on the fact that he or she was unlawfully seized."[187] Therefore, as he explained, "even if I believed the Eleventh Circuit rule was appropriate, I would not apply it in the circumstances of this case."[188]

Despite the majority's holding that an excessive force claim is subsumed within a wrongful arrest claim, the court still considered the merits of each plaintiff's excessive force claims. Although it previously decided that the defendant deputies were not entitled to qualified immunity with respect to the seizure of either plaintiff, the court noted that its qualified immunity holding did not "resolve conclusively" whether either plaintiff was seized unreasonably. Instead, the court explained that a definitive conclusion would only come "after adversarial testing of plaintiff's allegations."[189] Accordingly, the court performed its analysis of the plaintiffs' excessive force claims accounting for all possible outcomes of such "adversarial testing."

i. Mr. Cortez's Excessive Force Claim

First, the court considered Mr. Cortez's excessive force claim, noting that "adversarial testing might result in a determination that Rick Cortez was (1) unreasonably arrested; (2) unreasonably subjected to an investigative detention; (3) reasonably arrested; or (4) reasonably subjected to an investigative detention."[190] Because the amount of force that officers are permitted to use differs between an arrest and an investigative detention,[191] the court analyzed each potential outcome separately, keeping in mind that a distinct cause of action for excessive force would only arise where the underlying seizure was determined to be lawful. The court started its analysis by assuming, arguendo, that Mr. Cortez had been subjected to

184. *Id.* at 996, 1001.
185. *See id.* at 1002–1003 (citing Ohio v. Robinette, 519 U.S. 33, 39 (1996); Graham v. Connor, 490 U.S. 386, 396 (1989)).
186. *Id.* at 1003.
187. *Id.*
188. *Id.* at 1004.
189. *Id.* at 995, 1001.
190. *Id.* at 995.
191. *Id.* (citing United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993)).

an otherwise lawful arrest.[192] Then it pinpointed the specific conduct forming the basis of Mr. Cortez's claim, namely that one of the defendant deputies applied the handcuffs too tightly.[193] In finding that the defendant deputies' conduct did not constitute excessive force under this analysis, the court noted that Mr. Cortez failed to show any damage to his wrists beyond red marks, and thus did not sufficiently show more than a *de minimus* injury stemming from an otherwise justified use of the handcuffs.[194] Moreover, the court found that even if Mr. Cortez had sufficiently demonstrated actual injury, the defendant deputies would be entitled to qualified immunity because the law was not clearly established that tight handcuffing was excessive in effecting an otherwise lawful arrest.[195]

Next, the court considered Mr. Cortez's excessive force claim under the framework of a hypothetically lawful investigative detention. Under this analysis, the court found that Mr. Cortez's excessive force claim would be viable because the defendant deputies used more force than was reasonably necessary under the circumstances to effect an investigative detention.[196] In so holding, the court acknowledged the general permissibility of officers grabbing an individual by the arm in effecting an investigative detention, but simultaneously noted the limited permissibility of handcuffing the individual absent an attempt to resist or evade.[197] The court found that the defendant deputies' handcuffing of Mr. Cortez was excessive in effecting an investigative detention because Mr. Cortez was cooperative with the defendant deputies throughout the encounter and did not attempt to flee.[198] Furthermore, the court noted that the law concerning the permissible use of force in effecting an investigative detention was clearly established at the time of the encounter, and thus the defendant deputies would not be entitled to qualified immunity.

Based on its analysis of both potential outcomes, the court concluded that

> there [was] but one way that Rick Cortez could recover damages on the basis of a discrete excessive force claim. That is the situation where it is determined that (1) Rick Cortez's seizure was an investigative detention, and not an arrest; (2) the investigative detention was justified on the basis of articulable suspicion; and (3) the force used to accomplish the investigative detention was excessive.[199]

Because the court determined that the evidence presented could support all three findings, it affirmed the district court's denial of summary judgment for the defendant deputies.[200]

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192. *Id.* at 996–97.

193. *Id.* at 997–98.

194. *Id.* at 997. Again, the justification for the use of the handcuffs was only hypothetical and is meant to address one of the possible outcomes of "adversarial testing."

195. *Id.* at 998.

196. *Id.* at 999–1000.

197. *Id.* at 999 (citing Terry v. Ohio, 392 U.S. 1, 7 (1968); United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993); Graham v. Connor, 490 U.S. 386, 396 (1986)).

198. *Id.* at 999–1000.

199. *Id.* at 1000.

200. *Id.*

ii. Ms. Cortez's Excessive Force Claim

After completing its analysis of Mr. Cortez's excessive force claim, the court turned its attention to Ms. Cortez's claim in that regard. The analysis for her claim was somewhat less extensive because the court determined that Ms. Cortez was only potentially subjected to an investigative detention and not an arrest.[201] While the court recognized that a jury might find that the defendant deputies used excessive force against Ms. Cortez in light of their warrantless, nighttime entry into her home accompanied by her removal from the home, it nevertheless reversed the district court's denial of summary judgment to the defendant deputies on this claim. Similarly, the court concluded that the defendant deputies' would be entitled to qualified immunity on this claim because their "conduct regarding Tina Cortez was [not] so clearly unlawful under prior case law that a reasonable officer could not have believed the conduct was legal."[202]

However, this portion of the court's decision also marks the other portion with which Judge Henry did not agree. While noting his continued disagreement with the majority's adoption of the Eleventh Circuit approach,[203] Judge Henry found that even under that approach the defendant deputies "violated Ms. Cortez's clearly established constitutional right to be free from excessive force."[204] In so holding, Judge Henry argued that the defendant deputies should have known that "they were permitted to use only as much force as was necessary to secure their own safety and maintain the status quo."[205] To support his argument, Judge Henry noted that "[u]nder prior case law in the Tenth Circuit, officers are required to articulate specific justifications for uses of force during an investigative detention, such as locking a person in a police cruiser."[206] In his view, the defendant deputies' assertion that Ms. Cortez could have destroyed evidence if left in the house alone was unsupported by any particularized facts. Moreover, he found that the level of force used to effect the investigative detention of Ms. Cortez exceeded what "was reasonable in relation to the threat that she presented."[207] Accordingly, Judge Henry found that the defendant deputies' conduct constituted excessive force and argued that they had fair warning that their conduct was unlawful. As such, he would have affirmed the district court's denial of qualified immunity to the defendant deputies.[208]

e. Defendant Bowdich

Finally, the court examined the district court's denial of summary judgment based on qualified immunity to Defendant Bowdich. Reviewing the district court's decision for abuse of discretion,[209] the court affirmed the denial finding that the

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201. *Id.* at 1001.
202. *Id.*
203. *See supra* note 179.
204. *Cortez*, 438 F.3d at 1004.
205. *Id.*
206. *Id.*
207. *Id.* at 1005.
208. *Id.* at 1004–1005.
209. *Id.* at 1002 ("The standard of review, despite the Defendants' assertion to the contrary, is abuse of discretion." (citations omitted)).

plaintiffs had "made a meritorious showing under Fed. R. Civ. P. 56(f)" to present a factual issue sufficient to defeat summary judgment and warrant further discovery.[210] Accordingly, the court found no basis on which to conclude the district judge had abused her discretion.[211]

Following the court's ruling, the plaintiffs filed a petition for rehearing en banc, primarily to consider the court's adoption of the Eleventh Circuit's approach whereby an excessive force claim is subsumed within a wrongful arrest claim. The court granted rehearing en banc and revisited the panel decision.[212]

3. Tenth Circuit En banc Decision

The court primarily granted the plaintiffs' petition to consider "under what circumstances, if any, an excessive force claim is subsumed in an unlawful arrest claim."[213] As an initial matter, the court rejected "the notion that an excessive force claim is subsumed in an unlawful arrest claim in the facts presented."[214] Consequently, the court vacated the panel decision as it found that its rejection of the panel's holding in that regard necessitated a change in some of the legal analysis. As a result, the divided en banc court revisited the entire appeal and affirmed in part and reversed in part.[215] Judge Hartz, joined by Judge O'Brien, filed an opinion concurring in part and dissenting in part with the majority's decision.[216] Similarly, Judge McConnell filed an opinion concurring in part and dissenting in part with the majority's decision.[217] Finally, Judge Gorsuch, joined by Judges Hartz, O'Brien, Tymkovich, and Holmes, and joined in part by Judge McConnell, filed an opinion concurring in part and dissenting in part with the majority opinion.[218]

After setting forth the same standard of analysis articulated in the panel decision,[219] the court analyzed each plaintiff separately along with the alleged actions taken against each plaintiff. The following discussion of the en banc decision will proceed accordingly and will add, where appropriate, the concurring and dissenting opinions as they relate to each plaintiff and each cause of action.

a. Seizure of Mr. Cortez

In one of the few unanimous findings of the decision, the court found that the detention of Mr. Cortez constituted an arrest and agreed with the district court's characterization of the encounter that "the scope and duration of a lawful investigative detention was quickly exceeded in this case, and the situation became a full custodial arrest."[220] However, the court was divided in its reasoning, though was unanimous in its result, regarding the subsequent question of whether the

210. *Id.* (citation and internal quotation marks omitted).
211. *Id.*
212. *See* Cortez v. McCauley, 478 F.3d 1108, 1112 (10th Cir. 2007) (en banc).
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 1133.
217. *Id.* at 1136.
218. *Id.* at 1137.
219. *See supra* Part III.B.ii; *see also supra* Part II.B.ii.
220. *Id.* at 1116 (citation and internal quotation marks omitted).

defendant deputies had probable cause to support the arrest of Mr. Cortez.[221] The majority, in reaching its conclusion, found that the only basis on which the defendant deputies had reason to suspect Mr. Cortez of committing a crime was the statement of a "barely-verbal two-year old child," which the Deputies received second-hand from the treating nurse.[222] With this information as the only basis, the majority, joined by Judge McConnell, concluded that "whether we view it as a need for more pre-arrest investigation because of insufficient information or inadequate corroboration, what the officers had fell short of reasonably trustworthy information indicating that a crime had been committed by Rick Cortez."[223] As such, the majority found that the defendant deputies arrested Mr. Cortez without probable cause.[224]

Judge Gorsuch, while concurring in the result, was troubled by the majority's analysis. First, Judge Gorsuch viewed the majority as articulating a "laundry list of things the officers might have done, but did not do, to corroborate the child's statement in this case."[225] Although he agreed that further investigation would have been desirable, Judge Gorsuch argued that "asking whether the officers might've, could've, or should've done more investigation before effecting an arrest is not the test for evaluating whether probable cause existed at the time of the arrest."[226] In so doing, he saw the majority as engaging in precisely the kind of "second-guessing [of law enforcement officers] that the Supreme Court has repeatedly cautioned us against."[227]

Second, Judge Gorsuch found the majority's criticism of the defendant deputies' reliance on the child's hearsay statement troubling and contradictory.[228] As he pointed out, the majority in one instance found that the child's hearsay statement alone did not provide probable cause, but later noted that because a particular hearsay statement may not be useable at trial does not mean that the statement cannot be a source of probable cause for a warrantless arrest.[229] Judge Gorsuch argued that the law was well-settled that an officer "*may* rely on hearsay, even multiple layers of hearsay, in establishing probable cause when the hearsay has some indicia of reliability."[230]

It was with respect to the requirement of reliability that Judge Gorsuch reached his third, and final, point of contention with the majority's reasoning. Essentially, he argued against the majority's characterization that the defendant deputies did not have facts to indicate the reliability of the child's statement.[231] In so doing, he pointed to the child's mother's purported belief that a crime had occurred, the

221. *See id.* at 1117 n.9 ("The en banc court is unanimous that probable cause was lacking to effect a warrantless arrest of Rick Cortez.").

222. *Id.* at 1116.

223. *Id.* at 1116–17, 1136–37 (citations omitted).

224. *Id.* at 1117.

225. *Id.* at 1139.

226. *Id.*

227. *Id.*

228. *See id.* at 1140.

229. *See id.*

230. *Id.* (citing United States v. Mathis, 357 F.3d 1200, 1205 (10th Cir. 2004); United States v. Monaco, 700 F.2d 577, 580 (10th Cir. 1983); United States v. Corral, 970 F.2d 719, 727 (10th Cir. 1992)).

231. *Id.*

reported allegations by hospital authorities, the duty under New Mexico law to immediately investigate allegations of child abuse or neglect,[232] and the child's description of the crime.[233] Thus, while Judge Gorsuch did not believe that the facts available supported probable cause, he rejected the notion that the defendant deputies had no facts to support their actions.[234] Accordingly, he found that in considering the totality of the circumstances, the majority correctly concluded that the defendant deputies lacked probable cause, but he refused to join in the majority's reasoning.[235]

Finally, with regard to the seizure of Mr. Cortez, the court had to consider the issue of qualified immunity. The court was divided as to result and reasoning regarding the appropriateness of qualified immunity for the arrest of Mr. Cortez. The majority concluded that it "should have been patently obvious" that probable cause was lacking to arrest Mr. Cortez based on the unsubstantiated hearsay statement of a two-year-old child.[236] While it recognized that there was no Tenth Circuit or Supreme Court case directly on-point, the majority noted the Supreme Court's holding that "'a general constitutional rule,'" such as the probable cause requirement to arrest,[237] "'already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.'"[238] However, even absent that guidance from the Supreme Court, the majority noted the Tenth Circuit's previous holdings that "a bare allegation of wrongdoing, without any investigation, in some circumstances, may not give rise to probable cause."[239] Thus, the majority concluded that the defendant deputies were on notice that their arrest of Mr. Cortez was unlawful and affirmed the district court's denial of qualified immunity to the defendant deputies on this claim.[240]

In his dissent, Judge Gorsuch, joined by Judges Hartz, O'Brien, Tymkovich, Holmes, and McConnell, found that neither Mr. Cortez nor the majority had cited to any case law that would have put the defendant deputies on notice that their conduct was unlawful.[241] With respect to the majority, Judge Gorsuch argued that the only case law it offered in support of its conclusion that the law was clearly established provided only general guidance to the officers. Furthermore, to the extent the majority cited to any case law that offered remotely specific guidance, Judge Gorsuch found that it would have been quite easy for even a diligent officer to believe mistakenly that his conduct was justified.[242] Similarly, Judge Gorsuch found that the only case law cited by Mr. Cortez actually did more harm than good to his claim and could not be found to have put the defendant deputies on notice that

232. *See* NMSA 1978, § 32A-4-3(c) (2005).
233. *See Cortez*, 478 F.3d at 1140–41.
234. *See id.*
235. *Id.* at 1141.
236. *Id.* at 1118–19.
237. *See generally* Tennessee v. Garner, 471 U.S. 1 (1985).
238. *Cortez*, 478 F.3d at 1119 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).
239. *Id.* at 1119.
240. *Id.* at 1120–21.
241. *Id.* at 1141–44.
242. *Id.* at 1141–43.

their reliance on the child's statement was insufficient to establish probable cause.[243] As such, Judge Gorsuch found that the law was not clearly established at the time of Mr. Cortez's arrest, and he therefore would have afforded the defendant deputies qualified immunity.[244]

b. Seizure of Ms. Cortez

The court next considered the seizure of Ms. Cortez, which it found to be less intrusive than the seizure of her husband. Because Ms. Cortez was not handcuffed, was not read her *Miranda* rights, was not the "object of the officers' primary suspicions," and was allowed to use one of the defendant deputies' cell phones to make a call, the court concluded unanimously that the seizure of Ms. Cortez amounted to an investigative detention.[245] Next, the court assessed whether that detention was based upon reasonable suspicion and unanimously determined it was not.[246] In reaching that determination the court noted that, like the arrest of her husband, the defendant deputies' detention of Ms. Cortez was based solely on the unsubstantiated hearsay statement of the child that in no way implicated Ms. Cortez in any criminal wrongdoing.[247] Furthermore, the court concluded that the defendant deputies did not know of any facts to suggest that Ms. Cortez was going to destroy evidence if left in the house, or that she was endangering any third parties.[248] Therefore, the court found that the defendant deputies did not have reasonable suspicion to detain Ms. Cortez and that a reasonable officer would not have believed otherwise.[249] As such, the court affirmed the district court's denial of qualified immunity to the defendant deputies on this claim.[250]

c. Exigent Circumstances

After analyzing the defendant deputies' seizure of both Mr. and Ms. Cortez, the court turned its attention to the defendant deputies' argument that exigent circumstances existed to justify the warrantless entry into the plaintiffs' home to seize them. In promptly rejecting the defendant deputies' exigent circumstances argument, the court noted that "[t]he Defendants have offered nothing, beyond innuendo and speculation, to establish objectively reasonable grounds of an emergency, i.e., an immediate need to protect their lives or others from serious injury or threatened injury."[251] Moreover, the court rejected the notion that the "New Mexico law requiring prompt investigation of child abuse allegations necessarily creates an 'inherent exigency.'"[252] Finding that the law concerning exigent circumstances was clearly established at the time of the defendant deputies'

243. *Id.* at 1143.
244. *Cf. id.* at 1141, 1144.
245. *Id.* at 1123.
246. *Id.*
247. *Id.*
248. *Id.*
249. *See id.*
250. *Id.*
251. *Id.* at 1124.
252. *Id.* at 1123 n.20.

conduct, the court affirmed the district court's denial of qualified immunity to the defendant deputies in this regard.[253]

d. Excessive Force—Abandoning the Panel Approach

Next, the court addressed the most complex and contentious issues of the en banc appeal: the plaintiffs' excessive force claims and the proper analytical framework for those claims. Although the court appeared unanimous in its rejection of the panel majority's adoption of the Eleventh Circuit's approach, it divided over what the proper analysis should be. In the interest of clarity, the discussion of this aspect of the decision will first address the en banc court's competing approaches then discuss the plaintiffs' respective excessive force claims under each approach.

i. The Majority's Approach

The en banc majority, like Judge Henry's dissent in the panel decision, viewed the panel majority's application of the Eleventh Circuit's approach as misplaced because it saw the plaintiffs' excessive force claims as stemming from more than the force used to effect their respective detentions.[254] Hence, the majority concluded that the plaintiffs' claims in this regard were not based solely on the defendant deputies' purported lack of justification for the plaintiffs' respective detentions. As such, it refused to decide the appropriateness of the Eleventh Circuit's approach in situations where excessive force claims arise solely from the absence of power to arrest or detain because, in its view, the plaintiffs' claims did not present such a situation.[255]

Instead, the court supported its rejection of the panel majority's decision by citing other Eleventh Circuit precedent that provides "'[w]hen properly stated, an excessive force claim presents a discrete constitutional violation relating to the manner in which an arrest was carried out, and is independent of whether law enforcement had the power to arrest.'"[256] In agreeing with this interpretation of excessive force claims, the majority found that any "contrary interpretation would conflict with the Supreme Court's direction that courts engage in careful balancing and examine excessive force claims under a Fourth Amendment reasonableness standard."[257] The majority continued by cautioning that "a contrary interpretation risks imposing artificial limits on constitutional claims without any basis other than a fear that such a distinction might be too fine for a jury (a fear we do not agree with)."[258]

Accordingly, the majority[259] held that where a plaintiff asserts both an unlawful arrest and excessive force claim stemming from a single encounter, courts should

253. *Id.* at 1123–24.
254. *Id.* at 1126–27.
255. *Id.* at 1127.
256. *Id.* (quoting Bashir v. Rockdale County, 445 F.3d 1323, 1332 (11th Cir. 2006)).
257. *Id.* at 1127 (citation omitted).
258. *Id.*
259. Judges McConnell, Tymkovich, and Holmes also joined in this reasoning. *See id.* at 1137.

"consider both the justification the officers had for the arrest and the degree of force they used to effect it."[260] The majority elaborated on its ruling, explaining that:

> If the plaintiff can prove that the officers lacked probable cause, he is entitled to damages for the unlawful arrest, which includes damages resulting from any force reasonably employed in effecting the arrest. If the plaintiff can prove that the officers used greater force than would have been reasonably necessary to effect a lawful arrest, he is entitled to damages resulting from that excessive force. These two inquiries are separate and independent, though the evidence may overlap. The plaintiff might succeed in proving the unlawful arrest claim, the excessive force claim, both, or neither.[261]

Therefore, under the majority's approach, courts must determine: (1) the type of seizure effected, (2) the underlying justification for that seizure, (3) the amount of force reasonably necessary to effect it, and (4) the extent to which the force used exceeded that which was reasonably necessary. Hence, numbers one through three constitute one claim, while number four provides the basis for a separate excessive force claim.[262]

ii. Judge Hartz's Unified Cause of Action

Judge Hartz, joined by Judge O'Brien, wrote separately primarily to address the deficiencies he saw in the majority's approach.[263] The majority's approach, he argued, "overcomplicate[d] the analysis of Fourth Amendment unlawful-seizure claims and [was] likely to confuse juries, to the detriment of justice for both parties."[264] Under that "pigeonhole" approach, Judge Hartz saw the need to make "difficult determinations that do not (or at least should not) have any practical consequences, risks double counting damages, and may undercompensate victims of unlawful seizures."[265] As an alternative, Judge Hartz proposed a "unified cause of action" that simply recognizes a violation of Fourth Amendment rights and entails a three-step analysis.[266] "First, determine what information was acquired by the law-enforcement officers and when it was acquired. Second, determine what action by the officers (detention, handcuffing, etc.) was justified by their information. Third, assess damages for any action not justified by the information."[267]

Judge Hartz advocated the superiority of the "unified cause of action" over the "pigeonhole framework" primarily on the basis of simplicity.[268] According to his argument, the "unified cause of action" removed the "need to make the often-unnecessary determination of the line between an investigative detention and an arrest," which was an absolute necessity under the "pigeonhole framework."[269]

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260. *Id.* at 1127.
261. *Id.*
262. *Cf. id.*
263. *Id.* at 1133.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *See id.* at 1133–36.
269. *Id.* at 1133.

Under his approach, the only necessary determination is what action was justified by the information available to the officers.[270] To the extent that officers' actions exceeded those which were justified, the plaintiff would be entitled to compensation in an amount to be determined by the jury.[271]

Judge Hartz's explanation of his approach did not end there. Instead, he articulated the precise manner in which it would be implemented in an actual trial setting, particularly where the issue of qualified immunity arose.[272] Generally, Judge Hartz would implement his approach through a bifurcated trial.[273] The first portion of the trial would serve as a basic fact-finding session in which the jury answered "special interrogatories regarding what information was known to the officers."[274] Following this initial phase of the trial, the trial judge would decide, based on the jury's answers to the special interrogatories, "what alleged conduct would be unlawful—or, if a defendant claims qualified immunity, what alleged action would be clearly established as unlawful."[275] This proposed "intermediate stage" reflected Judge Hartz's concern over leaving the determination of reasonable suspicion or probable cause to the jury based on his view that it is the court's duty to determine the existence of probable cause where the material facts are undisputed.[276] Finally, assuming the case is not dismissed during the "intermediate stage," the jury would reconvene for a second session to determine "what the officers did and the amount of damages, if any, to which the plaintiff is entitled."[277]

Alternatively, Judge Hartz suggested jury instructions that "amount[ed] to a chart that told what result (regarding the existence of probable cause or reasonable suspicion) the jury should reach if it [found] particular facts."[278] He offered this suggestion as the "only acceptable alternative" to a bifurcated trial, which he indicated as the preferred method for implementing the "unified cause of action."[279]

iii. Mr. Cortez's Excessive Force Claim

The court first addressed Mr. Cortez's excessive force claim. The primary focus of the court's analysis with respect to this claim was on Mr. Cortez's allegation that the defendant deputies applied his handcuffs unnecessarily tight and ignored his complaints about the discomfort the handcuffs were purportedly causing.[280] Relying on the same legal precedent as the panel decision, the court concluded unanimously that Mr. Cortez had not established a claim of excessive force because he did not demonstrate anything beyond a *de minimus* injury, namely red marks on his wrists, from the handcuffing.[281] Therefore, because Mr. Cortez had not established a

270. *Id.* at 1134.
271. *See id.*
272. *See id.* at 1135–36.
273. *Id.* at 1135.
274. *Id.*
275. *Id.*
276. *Id.* at 1135–36.
277. *Id.* at 1135.
278. *Id.* at 1136.
279. *Id.* at 1135–36.
280. *Id.* at 1128–29.
281. *Id.* at 1129.

constitutional violation in this regard, the court found that the defendant deputies were entitled to qualified immunity and reversed the district court's denial of qualified immunity on this claim.[282]

Judge Hartz concurred in the court's finding on Mr. Cortez's excessive force claim, but performed a brief analysis of the claim under his "unified cause of action" framework.[283] The first step in his proposed analysis would be to determine whether the law was clearly established that the defendant deputies lacked probable cause to arrest Mr. Cortez.[284] If it was not, then the defendant deputies would be entitled to qualified immunity, but if it was, then the court would still need to determine if the defendant deputies had reasonable suspicion.[285] Judge Hartz explained that because the court appeared unanimous in its assessment that the defendant deputies had reasonable suspicion with respect to Mr. Cortez, the next step in the analysis would be to determine whether the law was clearly established that some of the defendant deputies' actions exceeded the permissible amount of force.[286] Depending on the outcome of this determination, the jury could assess damages for conduct it deemed excessive.[287]

iv. Ms. Cortez's Excessive Force Claim

The court divided as to reasoning and result with respect to Ms. Cortez's excessive force claim. The majority, joined by Judge McConnell, concluded that the amount of force the defendant deputies used against Ms. Cortez, namely escorting her from inside her house and placing her in the back of a locked patrol car, was excessive in relation to the threat Ms. Cortez posed to the defendant deputies or any potential evidence.[288] Furthermore, the majority concluded that the defendant deputies should have known that forcing Ms. Cortez out of her home, taking her keys, and placing her in the back of a locked patrol car violated the clearly established constitutional principles regarding investigative detentions.[289] While noting that Ms. Cortez did not allege any physical injury, the majority found that the Fourth Amendment protects "personal security and individual dignity interests, particularly of non-suspects."[290] Consequently, the court concluded that the defendant deputies' actions constituted an unjustified invasion of Ms. Cortez's

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282. *Id.* at 1129–30.
283. *See id.* at 1136.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* Interestingly, Judge Hartz noted that it was possible that damages would not have begun to accrue immediately for any excessive conduct if the defendant deputies had reasonable suspicion to detain Mr. Cortez and use some minimal amount of force. *See id.*
288. *Id.* at 1131. Judge McConnell, in his separate opinion, advanced the idea that the defendant deputies' warrantless entry into the plaintiffs' home should be considered as an element in Ms. Cortez's excessive force claim. *See id.* at 1137 n.1. Judge Gorsuch disputed this notion, claiming that the inclusion of that element in the excessive force claim would create a "double-counting of damages." *Id.* at 1146 n.15. Judge McConnell responded that inclusion of the warrantless entry in the excessive force claim would no more constitute double counting of damages than would inclusion of a single act in multiple causes of action in an ordinary tort suit. *Id.* at 1137 n.1. While this debate did not bear on the outcome of the court's decision on Ms. Cortez's excessive force claim, it exemplifies the split reasoning and legal analysis of the court in that regard.
289. *Id.* at 1131–32.
290. *See id.* at 1131.

personal security that "hardly [could] be considered de minimus."[291] Thus, the court denied the defendant deputies qualified immunity on this claim.[292]

Judge Gorsuch strongly disagreed with the majority's holding. First, he argued that the level of force the defendant deputies used to detain Ms. Cortez did not exceed what would have been reasonable in an otherwise lawful detention.[293] In support of this argument, he pointed out that "neither Ms. Cortez nor the majority point to a *single* case allowing an independent claim for excessive force to proceed under remotely analogous circumstances."[294] Instead, Judge Gorsuch contended that the cases in which courts have allowed plaintiffs to recover on excessive force claims alleging non-physical injuries typically involved a threat of "grave force" or "imminent and severe physical harm."[295] In his view, under the circumstances presented, the defendant deputies' actions did not amount to excessive force even though they could have accomplished a similar result with less intrusive means.[296]

Moreover, Judge Gorsuch argued that even if prior precedent had held that

> invasion of an individual's sense-of-security or dignity interests, standing alone, [could] form the basis of excessive force claims, without reference to the nature of the police encounter, it does not necessarily follow, as the majority seems to imply, that any subjective feeling of intimidation qualifies as a constitutionally sufficient invasion of these interests.[297]

As he analyzed Ms. Cortez's claim, he did not find that she had alleged that the defendant deputies "physically or verbally abused her, or displayed any animus towards her"; rather, he noted that one of the defendant deputies allowed Ms. Cortez to use his cell phone to "access...the outside world."[298] Judge Gorsuch cautioned that if the majority allowed Ms. Cortez to establish an excessive force claim under such circumstances, then it might "imply the possibility that the use of virtually any force in the course of an unlawful detention, no matter how mild and no matter whether any actual injury occurs, is unconstitutionally excessive."[299]

Judge Gorsuch noted his further disagreement with the majority's denial of qualified immunity to the defendant deputies on Ms. Cortez's excessive force claim. He again pointed to the majority's and Ms. Cortez's failure to cite to any cases with analogous circumstances that allowed recovery for an excessive force claim as evidence that the law was not clearly established at the time the defendant deputies detained Ms. Cortez.[300] Accordingly, he would have afforded the defendant deputies qualified immunity on Ms. Cortez's excessive force claim.[301]

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291. *Id.* at 1132.
292. *Id.* at 1130.
293. *Id.* at 1145.
294. *Id.*
295. *Id.* at 1145.
296. *Id.* at 1146 (noting that "it is not the law that officers must always act in the least intrusive manner possible or employ only that force that might be deemed necessary in hindsight").
297. *Id.* at 1147.
298. *Id.*
299. *Id.* at 1148.
300. *Id.* at 1149.
301. *See id.*

v. Defendant Bowdich

Lastly, the court considered the district court's denial of qualified immunity to Defendant Bowdich and its decision to lift the stay on discovery. Reviewing the decision under an abuse of discretion standard, the court concluded that the district court did not abuse its discretion by denying the motion without prejudice and lifting the stay on discovery based upon its finding that the plaintiffs had made a "'meritorious showing under Fed. R. Civ. P. 56(f)."[302]

IV. ANALYSIS

As evidenced by the above discussion, the en banc decision in *Cortez v. McCauley*[303] was complex and considered many pertinent legal issues. The divided decision underscores the complexity of the issues facing the court and leaves open many potential areas for further analysis. However, the court's reformulation of the analytical framework governing excessive force claims that arise in conjunction with unlawful arrest claims stands out as the area of the court's decision in greatest need of such analysis. This section will address the apparent shortcomings of both the en banc majority's framework,[304] i.e., the "pigeonhole framework,"[305] and Judge Hartz's "unified cause of action,"[306] and advocate the need for the Tenth Circuit to return to a more complete version of the panel majority's framework.[307]

A. *The Shortcomings of the En banc Frameworks*

1. The En banc Majority Approach

The en banc majority's approach, while purporting to be the most constitutionally sound, is in fact unsupported by precedent and creates a rigid framework that promotes an artificial analysis of excessive force claims. In formulating its approach, and simultaneously rejecting the approach of the panel majority, the en banc majority quoted the Eleventh Circuit case *Bashir v. Rockdale County*,[308] which announced that "[w]hen properly stated, an excessive force claim presents a discrete constitutional violation relating to the manner in which an arrest was carried out, and is independent of whether law enforcement had the power to arrest."[309] In so doing, the en banc majority apparently was attempting to demonstrate the necessity of two independent causes of action and undercut the principle announced by the panel majority, which relied on other Eleventh Circuit decisions,[310] that an excessive force claim is subsumed within an unlawful arrest or detention claim.

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302. *Id.* at 1132 (citation and internal quotation marks omitted).
303. 478 F.3d 1108 (10th Cir. 2007) (en banc).
304. *See id.* at 1127.
305. *Id.* at 1133.
306. *Id.*
307. *See infra* Part III.B.ii.d.
308. 445 F.3d 1323 (11th Cir. 2006).
309. *See Cortez*, 478 F.3d at 1127 (quoting *Bashir*, 445 F.3d at 1332).
310. *See Cortez*, 438 F.3d at 996 (citing Jackson v. Sauls, 206 F.3d 1156, 1171 (11th Cir. 2000) (holding that "a claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim"); Williamson v. Mills, 65 F.3d 155, 158–59 (11th Cir. 1995) (per

However, the *Bashir* quote essentially states the obvious and is inconsequential to the determination of the appropriateness of the panel majority's rule. The en banc majority's use of that quotation mischaracterizes the panel majority's rule as denying plaintiffs recovery for excessive force claims stemming from an unlawful arrest or detention.[311] Indeed, the panel majority's rule allows plaintiffs to recover for law enforcement officers' use of excessive force in effecting an unlawful arrest or detention, as the officers' use of force becomes an element of a plaintiff's damages claim.[312] However, the rule simply does not articulate the excessive force claim as an entirely separate cause of action because of the collateral nature of the claim.[313] In other words, the rule recognizes that but-for the unlawful seizure, the plaintiff would not have been subjected to any force, and thus allows for consideration of the egregiousness of the force used when apportioning damages without the need to try a separate cause of action that is inextricably linked.

While the en banc majority argued that the panel majority's rule interferes with a court's duty to "engage in careful balancing and examine excessive force claims under a Fourth Amendment reasonableness standard," it fails to articulate why that is allegedly so.[314] On the contrary, the panel majority's rule fully allows courts to assess all of the facts surrounding a particular use of force through the lens of objective reasonableness and to apportion damages accordingly. Simply because the excessive force claim is not identified as an entirely separate cause of action does not mean that the same, established method of analysis cannot be applied.

Similarly, the en banc majority criticized the panel majority's rule as "imposing artificial limits on constitutional claims without any basis other than a fear that such a distinction might be too fine for a jury."[315] However, it is the en banc majority's rule that stands out as strikingly artificial, which its explanation of the rule firmly establishes. In explaining the operation of its rule, the en banc majority stated that:

> [i]f the plaintiff can prove that the officers lacked probable cause, he is entitled to damages for the unlawful arrest, which includes damages resulting from any force reasonably employed in effecting the arrest. If the plaintiff can prove that the officers used greater force than would have been reasonably necessary to effect a lawful arrest, he is entitled to damages resulting from that excessive force.[316]

Judge Hartz effectively addressed the artificiality of that rule in his separate opinion, noting that "under the pigeonhole framework it is...necessary to determine ...how much force would have been proper for a (*totally hypothetical*) lawful arrest. That additional effort accomplishes nothing."[317] Indeed, nothing is more artificial

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curiam); Motes v. Myers, 810 F.2d 1055, 1059 (11th Cir. 1987) (finding that "[i]t is obvious that if the jury finds the arrest unconstitutional, the use of force and the search were unconstitutional and they become elements of damages for the § 1983 violation").

311. *See Cortez*, 478 F.3d at 1127.

312. *Cortez*, 438 F.3d at 996.

313. *See id.*

314. *See Cortez*, 478 F.3d at 1127.

315. *Id.*

316. *Id.*

317. *Id.* at 1134 (emphasis added).

than imagining a lawful arrest where there was none and divining the reasonable amount of force that would have been required to effect that arrest had it occurred. This approach strays from the required fact-specific analysis for excessive force claims[318] and delves into the realm of the imaginary as the jury would be required to imagine circumstances that did not exist.

Similarly, application of the en banc majority's rule promotes the creation of a subjective and artificial line of reasonableness that encourages the piecemeal analysis of police-citizen encounters rather than a "totality of the circumstances" analysis that the Supreme Court has repeatedly encouraged.[319] Essentially, under the en banc majority's approach the jury would be required to pick the precise moment in the encounter where the amount of force used became excessive and apply exactly the kind of 20/20 hindsight against which the Supreme Court has cautioned.[320] This kind of second-guessing of law enforcement officers' conduct is unjust, and is contrary to well-established precedent.[321] Conversely, under the panel majority's approach, the jury could recognize the absence of authority to use any force to effect an unlawful arrest and consider the reasonableness of the officer's conduct during the totality of the encounter when deciding how to assess damages.[322]

Finally, applying the en banc majority's approach in the qualified immunity context reveals an additional shortcoming. As discussed more fully above,[323] one of the core purposes of qualified immunity is to serve as an "entitlement not to stand trial or face the other burdens of litigation."[324] However, the en banc majority adopts an approach that negates this important purpose. Under the en banc majority's approach in which a plaintiff can assert two independent causes of action arising from the same underlying conduct, it is conceivable that a district judge may grant qualified immunity on one claim but not the other. Consequently, the defendant officer would still be forced to bear the burden of trial with respect to the remaining claim. As such, the grant of qualified immunity on one claim would be of little use to the officer who would continue to bear the burden of litigation and face the daunting prospect of trial where the entirety of his conduct would be subjected to adversarial scrutiny. Hence, the en banc majority's framework could in many cases produce results that nullify the usefulness of the qualified immunity defense.

Overall, the en banc majority's approach suggests a formalistic desire to maintain two separate causes of action ostensibly for the sake of having two causes of action, even where a single cause of action would provide a more logical and precedentially supported analytical framework. This formalistic approach represents a highly theoretical creation with serious practical flaws that stem largely from the

318. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).
319. *See, e.g.*, Tennessee v. Garner, 471 U.S 1, 8–9 (1985).
320. *See Graham*, 490 U.S. at 396.
321. *See id.* at 396–97.
322. *Cf.* Cortez v. McCauley, 438 F.3d 980, 996 (10th Cir. 2006).
323. *See supra* Part II.A.ii.
324. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); *supra* note 49 and accompanying text.

majority's failure to provide any guidance concerning how to apply its approach.[325] As articulated, the majority's approach lends itself to arbitrary application and subjectivity, particularly with respect to the analysis concerning the amount of force reasonably necessary to effect the hypothetically lawful arrest.[326] Each trial judge considering a motion for summary judgment and each impaneled jury will have a different idea about how much force is reasonably necessary to effect an arrest, meaning that the existence of a second cause of action will hinge on that subjective assessment. The arbitrary results produced by this approach will not only yield inequitable results but also frustrate litigation strategy for both plaintiffs and defendants. With no legal guidance and a guarantee of subjectivity, the pressure to settle before trial increases dramatically, forcing plaintiffs with potentially meritorious claims to accept compensation below that which they may rightfully deserve, and forcing defendants whose conduct may have been perfectly lawful to pay a settlement figure above the actual value of the case to avoid a potentially excessive and arbitrary adverse jury verdict. Although these consequences are potentially present in any pre-trial settlement, the likelihood of them occurring increases significantly where the law governing a particular cause of action lends itself to subjective assessment and arbitrary results in every case.

Undoubtedly, the majority did not intend these negative consequences by adopting its approach. However, the current articulation of this approach will allow such consequences to plague joint excessive force/wrongful arrest cases until the court revisits its analytical framework.

2. Judge Hartz's Unified Cause of Action

Judge Hartz's formulation of a unified cause of action is initially enticing as it appears to simplify the analysis articulated by the majority. However, consideration of its practical application reveals its shortcomings in two main areas: its complexity and invasiveness. With respect to the former, the bifurcated trial process Judge Hartz proposed appears both intricate and time consuming.[327] The first session of the trial would require the court and the attorneys representing each party to agree on the disputed material facts in the case that are of consequence to the ultimate determination of probable cause or reasonable suspicion, which may be easier said than done.[328] The mere process of agreeing on the facts that the jury would be charged with deciding in its special interrogatories[329] could occupy a significant amount of the court's resources as such a process would undoubtedly entail hearings and possibly briefing. Once the parties finally agreed, another dispute would arise with respect to the proper wording of the special interrogatories, which could again require intervention by the court. Upon resolution of this likely dispute, the court could begin the first portion of the trial, which admittedly would be the one part of this complex process without any foreseeable glitches.

325. *See* Cortez v. McCauley, 478 F.3d 1108, 1127–29 (10th Cir. 2007) (en banc).
326. *See id.* at 1127.
327. *See id.* at 1135.
328. *See id.*
329. *See id.*

Although the first portion of the trial would likely be non-problematic, the problems would return in the "intermediate stage."[330] Specifically, this stage would seemingly be lengthy and overly burdensome on the jury. As Judge Hartz explained, this stage would require the court to determine, based on the jury's answers to the special interrogatories regarding disputed facts, what alleged conduct by the law enforcement officers was unlawful and whether the officers were entitled to qualified immunity.[331] Such a determination would certainly require the court at least to hear oral arguments and likely to allow time for the parties to brief the issues, particularly with respect to qualified immunity. This lengthy process would require the jury to recess and, upon reconvening, to endure again the hardship of leaving jobs and families to serve. As a practical matter, especially in New Mexico, such hardship would not be minimal as a federal jury draws from a pool of citizens that may have to travel hundreds of miles from their homes to serve.

The purpose behind the "intermediate stage" also raises the second shortcoming of Judge Hartz's approach, namely its invasiveness. Despite acknowledging the existence of precedent mandating otherwise, Judge Hartz explained that he believed it was the duty of the judge and not the jury to determine the existence of probable cause or reasonable suspicion.[332] However, the reasoning he used to support this belief was largely circular in the context of his proposed framework. Specifically, while he acknowledged that Tenth Circuit precedent "hold[s] that the issue of probable cause or reasonable suspicion is for the jury when the historical facts are disputed,"[333] he found that when the facts are undisputed, courts "should not leave to the jury to determine whether those facts establish probable cause or reasonable suspicion."[334] The latter finding, however, is misplaced because the first phase of the trial would only create the illusion that the historical facts of the case were undisputed. Once the case proceeds to trial, and does so largely because of a disputed factual record, it then becomes the province of the jury to resolve both the facts and the legal implications of those facts.[335] Allowing the trial judge, while undoubtedly the more apt legal scholar, to rule on the existence of probable cause or reasonable suspicion and subsequently decide the availability of qualified immunity where the factual record is clearly disputed would constitute an unprecedented invasion of the province of the jury. Without more than a desire for judges rather than juries to determine the existence of probable cause or reasonable suspicion, this approach appears untenable and contrary to established precedent.

Finally, the second trial session would appear to carry many of the same problems that plagued the lead-up to the first session. Since this session would be devoted to determining "what the officers did and the amount of damages, if any, to which the plaintiff is entitled,"[336] it is likely that to resolve the issue of what the officers did, special interrogatories would again be necessary. As discussed above,

330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* (citing DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990)).
334. *Id.* (citing Bell v. Irwin, 321 F.3d 637, 641 (7th Cir. 2003)).
335. *Cf. DeLoach*, 922 F.2d at 623.
336. *Cortez*, 478 F.3d at 1135.

the drafting of these interrogatories could potentially consume significant court resources. Furthermore, because the precise interrogatories needed could not be determined before the conclusion of the intermediate stage, these interrogatories would have to be drafted before the commencement of the second session thereby delaying the trial further and imposing greater hardship on the jury. Thus, the problems plaguing the beginning of the trial process would remain through its final stages, evincing the unworkable nature of this proposed "unified cause of action."

B. An Alternative Approach

As the above discussion demonstrates, both of the analytical frameworks suggested in the en banc decision are fraught with difficulties, both practical and theoretical. The en banc court, in its effort to correct what it perceived as an error in the panel majority's analytical framework, created a framework that only convolutes an already difficult legal analysis. The alternative approach suggested in this section essentially amounts to a more encompassing version of the panel majority's rule, and provides a more straightforward analytical approach that would result in more equitable results for all concerned parties.

Initially, it is important to recognize the two potential types of excessive force claims that a plaintiff could raise in connection with a Fourth Amendment seizure. In the first type, a plaintiff could allege excessive force solely because the underlying seizure was unlawful.[337] Conversely, in the second type of claim a plaintiff would allege excessive force regardless of the lawfulness of the underlying seizure.[338] The en banc majority seemingly viewed the panel majority's rule as applying only to the first kind of claim,[339] and the panel majority's wording of its rule could potentially support such a reading.[340] However, such a narrow application of the panel majority's proposed rule need not be so. Instead, the panel majority's rule could apply to both types of claims once it was determined that the underlying seizure was unlawful.

Under this suggested approach, an excessive force claim would always be subsumed within an unlawful seizure claim where the conduct at issue stems from a single encounter.[341] To apply this rule, a jury would only need to consider a simple analytical framework. First, the jury would determine what type of Fourth Amendment seizure, if any, occurred. Next, the jury would assess whether the officer effecting that seizure had the proper evidentiary basis to do so, i.e., reasonable suspicion or probable cause, which would determine whether the seizure was lawful or unlawful. Then the jury would assess, under the totality of the

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337. *See, e.g., id.* at 1127.

338. *Cf. id.*

339. *See id.*

340. *See* Cortez v. McCauley, 438 F.3d 980, 996 (10th Cir. 2006), *vacated on rehearing en banc by* 478 F.3d 1108.

341. In other words, a plaintiff could rightly assert two separate causes of action in a situation where he was unlawfully arrested with a minimal use of force then physically assaulted during transport to the police station. Under this scenario, the minimal use of force to effect the unlawful arrest would be subsumed in the unlawful arrest claim, but the physical assault during transport would form the basis of a separate excessive force claim. This situation would present two separate encounters for which two separate causes of action would be logical and appropriate.

circumstances presented, the objective reasonableness of the officer's conduct. Finally, and based on that assessment, the jury would determine the amount of damages, if any, to which the plaintiff is entitled. Hence, the final two elements are essentially merged as a mechanism to calculate damages.

Aside from its simplicity, a significant benefit of this approach is the strong assurance it provides against the double-counting of damages. For instance, under the en banc majority's approach, a highly probable result of that framework is that a plaintiff would twice recover damages for the same unlawful conduct. Specifically, it is unlikely that a jury apportioning damages would forget the part of the encounter that was purportedly reasonable when assessing damages for the conduct that was unreasonable or excessive. Hence, a plaintiff would recover for the "reasonable" use of force to effect the unlawful seizure both in the unlawful arrest and excessive force claim. Conversely, under the above-suggested approach, where the underlying seizure is unlawful, any force used in connection with that seizure becomes an element of damages. Thus, where an officer's conduct is either particularly benign or particularly egregious, the jury can assess damages accordingly without the need to artificially parse the damages into two separate claims.

Finally, this alternative approach offers a framework that comports with the core purpose of qualified immunity, namely the defense against standing trial.[342] The district judge initially deciding qualified immunity would not be faced with the potential result of granting qualified immunity on one claim but not the other. Instead, the judge would only have to decide whether the defendant was entitled to qualified immunity on the entire encounter. This suggested analysis would proceed as follows:

1) Examine the lawfulness of the detention—
   a) If the judge determines that the detention was lawful, then the judge considers the alleged excessive use of force.
   b) If the judge determines that the detention was unlawful, then the judge considers whether it was clearly established that the detention would have been unlawful.
      i) If the judge determines that it was clearly established that the detention would have been unlawful, then the qualified immunity analysis ends and the judge denies the defendant qualified immunity on the entire encounter.
      ii) If the judge determines that it was not clearly established that the detention would have been unlawful, then the judge considers the alleged excessive use of force.
2) If necessary, examine the use of force—
   a) If the judge determines that the use of force was appropriate, then the judge grants the defendant qualified immunity.
   b) If the judge determines that the use of force was excessive, then the judge considers whether it was clearly established that the use of force would have been excessive.

342. *See supra* Part II.A.ii.

i) If the judge determines that it was clearly established that the use of force would have been excessive, then the judge denies the defendant qualified immunity on the entire encounter.
ii) If the judge determines that it was not clearly established that the use of force would have been excessive, then the judge grants the defendant qualified immunity.

Therefore, where a defendant officer's decision to detain a plaintiff was unreasonable, the court would deny the defendant qualified immunity with respect to the entire encounter. Similarly, where a defendant officer's decision to detain a plaintiff was reasonable but his conduct in effecting the detention was unreasonable, the court would deny qualified immunity entirely. Hence, a defendant either receives qualified immunity or he does not, thus eliminating the artificiality of granting qualified immunity on one claim but forcing the defendant to stand trial on a second claim revolving around the same facts and conduct.

Overall, this alternative approach benefits from simplicity and fairness, and, as a consequence, workability. It provides an alternative to the overly rigid and artificial en banc majority approach and to the overly complex and invasive "unified cause of action" approach. In this regard, it acknowledges the legally sound framework established by the panel majority that was unfortunately overruled and extends that inherently sound framework to a broader range of claims.

V. CONCLUSION

While the needed change may be slow in coming, Fourth Amendment jurisprudence within the Tenth Circuit would certainly benefit from the Tenth Circuit Court of Appeals revisiting its en banc decision in *Cortez v. McCauley* and reformulating the analytical framework for excessive force claims that it established in that decision. The interests of justice and simplicity would be best served by a shift to the above-suggested approach.