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Reticent Revolution: Prospects for Damage Suits under the New Mexico Bill of Rights

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I. INTRODUCTION

On January 21, 1911, the territorial legislature ratified the constitution for the new state of New Mexico. In article II, the constitution laid out the New Mexico bill of rights, codifying twenty-three basic principles as diverse as religious freedom, free elections, and the rights guaranteed by the Treaty of Guadalupe Hidalgo. In its present form, the constitution retains all of the original sections of the bill of rights and has only two significant additions, which prohibit discrimination based on gender and recognize crime victims' rights.

The authority of the state constitution in matters such as criminal procedure and annexations of property by the state has never been questioned. Nevertheless, a review of New Mexico case law reveals a dearth of precedent providing compensation for the infringement of a right guaranteed by the state constitution. With the exception of the “takings” clause found in section 20, no part of the bill of rights provides for monetary damages to compensate for the infringement of a right guaranteed by the New Mexico Constitution. No such provision was considered by the Constitutional Conventions in 1910 or 1967.

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Annotated Constitution and Enabling Act of the State of New Mexico (on file with the University of New Mexico School of Law Library).

1. N.M. CONST. art. II, § 11.
2. N.M. CONST. art. II, § 8.
3. N.M. CONST. art. II, § 5.
7. See, e.g., State v. Gutierrez, 116 N.M. 431, 435, 863 P.2d 1052, 1056 (1993) (finding that the “good faith” exception to the exclusionary rule is incompatible with the New Mexico Constitution’s article II, section 10 (search and seizure provision)).
8. See, e.g., International Paper Co. v. Farrar, 102 N.M. 739, 700 P.2d 642 (1985). Because article II, section 20 of the constitution explicitly provides for compensation for property taken by the government, cases based on that article will not be discussed in this article.
Despite the much-heralded ""constitutional revolution' in the judicial interpretation of individual rights provisions since the early 1970s,'" New Mexico litigants, it seems, have not found a new avenue for recovering monetary damages.

This article first examines existing New Mexico statutory and case law, specifically addressing the unique situation of sovereign immunity in New Mexico and how it might relate to implied constitutional causes of action. The article then addresses federal and other states’ approaches to implied constitutional rights of action. This analysis emphasizes the different jurisdictions’ rationales for accepting or rejecting an implied cause of action. Finally, this article explores the potential treatment of claims for damages for violations of the New Mexico Bill of Rights.

II. EXISTING NEW MEXICO LAW

In order to determine how New Mexico should approach the issue of fashioning a damages remedy for violations of the state constitution, an examination of the current state of New Mexico law is necessary. Such an examination includes New Mexico statutory law, federal case law discussing the New Mexico Bill of Rights, and New Mexico case law.

A. New Mexico Human Rights Act

New Mexico has no statute specifically authorizing suits for damages for violations of the New Mexico bill of rights. The only existing statute providing redress for actions which might otherwise be actionable under the New Mexico Constitution is the New Mexico Human Rights Act.13 The Human Rights Act prohibits discrimination based on ""race, age, color, religion, national origin, ancestry, sex and physical or mental handicap"" in numerous situations, ranging from employment15 to housing.16 If a complainant follows the proper administrative procedures and subsequently prevails in the suit, the court can award damages for violations of the Human Rights Act.17

The Human Rights Act does not include language recognizing a right to sue for violations of the New Mexico Constitution independent of the discrimination expressed in the Act. Consequently, a litigant seeking monetary redress for violations of his state constitutional rights other than discrimination lacks a statutory mechanism.18

14. § 28-1-7(B).
15. § 28-1-7(B).
16. § 21-1-7(G).
18. N.M. STAT. ANN. § 41-4-4(D) (Repl. Pamp. 1989) (providing a limited waiver of sovereign immunity for violation of state constitutional rights, thus seemingly providing a monetary remedy when law enforcement officers are the perpetrators).
B. The Tort Claims Act

Sovereign immunity represents a major barrier to the recognition of an implied cause of action. Under sovereign immunity in New Mexico, the state and persons acting under color of state law are immune from tort liability except as specifically provided by the Tort Claims Act (the "Act"). That act was created in response to the New Mexico Supreme Court's wholesale abolishment of sovereign immunity in *Hicks v. State.*

The plaintiff in *Hicks* brought suit against the state highway department for negligence in maintaining a bridge, seeking damages for the death of his wife and minor son. The court examined the history of sovereign immunity in general and in New Mexico and concluded that it was a common law doctrine that had become antiquated and anachronistic. Consequently, the court abolished sovereign immunity in all cases.

The legislature responded immediately to *Hicks* by enacting the Tort Claims Act. The Act reinstated sovereign immunity for any governmental entity and any public employee for all torts except as specifically waived by the Act.

The constitutionality of the Act was subsequently upheld in *Ferguson v. New Mexico State Highway Commission.* The Ferguson court considered the unique problem posed by the abolition of common law sovereign immunity in *Hicks* and its subsequent revival by the legislature. The Fergusons claimed that the legislature had acted beyond its authority by overruling *Hicks.* The Ferguson court disagreed, stating that:

> [t]he legislature acted well within its authority in abrogating the common law to the extent provided for in the Act. It substituted statutory partial immunity for common law total immunity and the court's denial of any immunity. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards.

The Ferguson court held that the Act does not deny equal protection despite the fact that a plaintiff injured by a government officer may

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19. N.M. STAT. ANN. § 41-4-4(A) (Repl. Pamp. 1989), provides that:
[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.
21. Id. at 588, 544 P.2d at 1153.
22. Id.
23. Id. at 590-92, 544 P.2d at 1155-57.
26. 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).
27. Id. at 195, 656 P.2d at 245.
28. Id.
not have the same right to sue as a plaintiff injured by a private citizen. 29 Thus, the court concluded that because the legislature's re-instatement of sovereign immunity was within its power and the Act does not deny equal protection, the Act is a valid revival of sovereign immunity. 30

Although the legislature's treatment of causes of action against the state for traditional torts is reasonably clear, ambiguity remains with regard to injuries which are not commonly recognized as torts. Accordingly, the Tort Claims Act's assertion of immunity for torts 31 becomes ambiguous when applied to violations of state constitutional rights. Arguably, a deprivation of a constitutional right is not a tort; a right is created by the constitution and a corresponding duty not to infringe upon that right is imposed upon the government. 32 Because Hicks abolished sovereign immunity generally and the legislature reasserted it only for torts, it is arguable that there is no immunity for violations of state constitutional rights.

The flaw in this argument becomes clear, however, upon recognition that the legislature did specifically mention state constitutional violations in two sections of the Tort Claims Act. Indeed, section 41-4-4(D)(2) of the Act mandates that a governmental entity must pay any damage award assessed against a government employee acting within the scope of his employment if that award was a result of a violation of rights secured by the New Mexico Constitution. Nevertheless, the Act fails to detail the specific causes of action which are appropriate to state a claim for the "violation of rights" noted in section 41-4-4(D)(2).

A cogent analysis becomes more difficult when considering the damage award provision 33 in conjunction with section 41-4-12. That section specifically waives immunity of law enforcement officers for violations of "any rights, privileges or immunities secured by the constitution and laws of . . . New Mexico . . . ." In comparing these two sections, it would seem that the state would be immune from liability for a violation of a state constitutional right unless it was a law enforcement officer who had committed the violation.

The importance of the legislature's mention of state constitutional violations twice in the Act was noted by the court of appeals in Begay v. State. 34 The court noted that the provisions of sections 41-4-4(D)(2) and 41-4-12 indicated the intention of the legislature to include state constitutional violation provisions.

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29. Id. at 195-96, 656 P.2d at 245-46.
30. Id. As the New Mexico Supreme Court similarly noted in a later case, Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 177 n.2, 793 P.2d 855, 859 n.2 (1990), "The 'common law' partially abrogated by the legislature was clearly the common law existing before Hicks. But the common law now recognizes a constitutionally valid statutory imposition of sovereign immunity, and such immunity must be honored by the courts where the legislature has so mandated."
34. 104 N.M. 483, 723 P.2d 252 (Ct. App. 1986).
constitutional rights violations in its grant of immunity. In Begay, the plaintiffs brought suit against the state and the state medical investigator for, in part, a violation of their free exercise of religion. The suit was based on an autopsy performed on the plaintiffs' relative.

On the state constitutional issue, the court ruled:

The state has given no consent to be sued under Article II § 11 of the New Mexico State Constitution. The Tort Claims Act specifically includes state constitutional violations committed by public officers and governmental entities within the torts for which liability may be found, provided that the violations are committed by an entity or officer included in the Act's waivers.

Accordingly, the court found that both the state and the medical examiner were immune from suit because the Tort Claims Act did not explicitly waive liability for the state or the medical examiner for violations of state constitutional rights. Begay seems to indicate that the state and all of its officers (except law enforcement officers) are immune from liability for damage claims based on state constitutional rights.

C. Federal Cases Discussing The Possibility Of Damages For Violations Of The New Mexico Bill Of Rights

Courts in the Tenth Circuit have considered claims brought under the New Mexico bill of rights. They have found classifications that violate the New Mexico bill of rights and fashioned equitable remedies accordingly. In suits for damages, the federal courts have not been consistent, possibly because of the lack of guidance from New Mexico statutory and case law.

Specifically noting the lack of guidance, the federal district court in Roybal v. City of Albuquerque declined to exercise pendent jurisdiction over the plaintiff's state equal protection claim because the issue of whether to allow damages for violations of that clause had not been settled by New Mexico courts. In Lucero v. City of Albuquerque, the court, presented with a claim for damages based on alleged violations

35. Id. at 487, 723 P.2d at 256.
36. Id. at 485, 723 P.2d at 254.
37. Id.
38. Id. at 488, 723 P.2d at 257.
39. Id.
40. See, e.g., Robertson v. Regents of University of New Mexico, 350 F. Supp. 100 (D.N.M. 1972) (Statute creating classifications for tuition purposes held violative of the due process and equal protection clauses of the federal and New Mexico constitutions). Federal courts have not always considered the New Mexico constitutional claims even when they have been raised in suits for equitable relief. See, e.g., Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985), in which claims for damages for violations of the New Mexico constitutional prohibition of the state establishment of religion and free exercise of religion were raised but not reached by the court. Id. at 780.
41. 653 F. Supp. 102 (D.N.M. 1986).
42. Id. at 108.
of the New Mexico Constitution's guarantee of the right to associate, avoided discussing the merits of the state constitutional claim altogether.  

On the other hand, one federal court in this circuit has awarded damages for violations of the New Mexico bill of rights. In *Montes v. Gallegos*, the plaintiffs sued city and county officials based on an arrest which the plaintiffs claimed violated the New Mexico bill of rights' guarantee of natural rights, prohibitions against unreasonable search and seizure and deprivation of property rights without due process of law. Initially, the court granted summary judgment on the plaintiff's search and seizure claim. While the court provided its reasoning for granting summary judgment on the federal search and seizure claim, it supplied limited rationale concerning the award for damages under the state constitution. Subsequently, the court granted summary judgment on the deprivation of property claim. It held that because the defendants violated New Mexico trespass law, they had also violated the New Mexico constitutional protection from deprivation of property without due process. Finally, the court rejected the plaintiff's claim for damages under article II, section 4 of the New Mexico Constitution, stating that New Mexico courts had "not 'reach[ed] the issue of whether, and under what circumstances, violation of [article II, section 4] provisions give rise to a cause of action for damages . . . '"

44. *Id.* at 457.  
46. *Id.* at 1169 (citing N.M. Const. art. II, § 4). N.M. Const. art. II, § 4 provides:
   All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.
47. *Id.* (citing N.M. Const. art. II, § 10).  
48. *Id.* (citing N.M. Const. art. II, § 18).  
49. *Id.* at 1170.  
50. The court reasoned that because the warrant that the officers were relying upon was facially invalid, the search of plaintiffs' home and seizure of their persons was in violation of the federal Fourth Amendment.  
51. *Id.* at 1170. The only statement as to the violation of the New Mexico Constitution's prohibition against search and seizure was that "[s]ummary judgment should also be granted in Maria Montes' favor on her claim under article II, section 10 of the New Mexico Constitution which protects all New Mexicans from unreasonable searches and seizures." *Id.* The court did note that the New Mexico Tort Claims Act provision waives immunity for violations of the New Mexico Constitution by law enforcement officers.  
52. *Id.* at 1170. The court reasoned that the entry into the home constituted a trespass, as defined by New Mexico case law and the Restatement (2d). Thus, in deliberately and unlawfully entering the Montes' home, defendant Pacheco deprived Maria Montes' of her property rights without due process of law. Plaintiff Maria Montes' motion for summary judgment on her claims under . . . Art. II, Section 18 to the New Mexico Constitution should be granted.  
53. *Id.* at 1171 (quoting California First Bank v. State, 111 N.M. 64, 76, 801 P.2d 646, 658 (1990)) (brackets in original) (citation omitted).
The effect of the Montes holding was to allow the plaintiffs' claims for damages based on violations of two provisions of the New Mexico bill of rights while denying a claim based on another. Because all claims were brought against law enforcement officers, the waiver of sovereign immunity applied to all three state constitutional claims. The court failed to provide precedent or reasoning for the recognition of a damages remedy prior to an analysis of the applicability of sovereign immunity. Accordingly, the schizophrenic decision in Montes provides little guidance to litigants seeking to recover damages for violations of the New Mexico bill of rights.

D. New Mexico Case Law

A major impediment to the development of state constitutional law jurisprudence in New Mexico has been the failure of parties bringing claims under the New Mexico bill of rights to develop arguments in support of their positions. As a result, New Mexico courts have refused to consider those claims. The courts have not ignored the existence of the state constitutional actions in equity, however. As previously noted, New Mexico courts have used the state constitution to review criminal procedure and annexations of property by the state.

Although attempts to use the New Mexico bill of rights to recover damages have been few in number, some authority exists to support implying a cause of action for violations of the state bill of rights. In Territory of New Mexico v. Taylor, the court indicated that an injured party may recover damages for a violation of his/her state constitutional rights. The court considered whether an instruction given in a criminal case correctly stated the law regarding warrantless arrests. The court stated that an officer "must use no more force than the nature of the case warrants, and if he exceeds such limits then he may be liable for damages in a civil suit." The issue in Taylor was not whether damages could be awarded, however, and the above language has seen only one other use.

In a subsequent criminal case, City of Albuquerque v. Patrick, the defendant sought to overturn a conviction for driving while intoxicated.
The defendant claimed, in part, that his equal protection and due process rights under the state constitution were violated by the officers’ use of excessive force during the arrest. The supreme court affirmed the trial court, concluding that the trial judge likely dismissed the charge of resisting arrest because the police used excessive force. The court quoted from Taylor in its discussion of the trial judge’s concern regarding the use of excessive force. However, the court held that no constitutional violation existed. No other New Mexico court has used language directly approving a claim for damages under the New Mexico bill of rights.

Another factor in favor of recognizing an implied cause of action is that the New Mexico courts have interpreted at least one provision of the New Mexico bill of rights to be self-executing. In State v. Rogers, the court found that the provision of the New Mexico bill of rights requiring an indictment or information was self-executing. In its analysis, the court provided criteria for determining whether a provision is self-executing:

A constitutional provision may be said to be self-executing when it takes immediate effect and ancillary legislation is not necessary to the enjoyment of the right given, or the enforcement of the duty imposed. In short, if a constitutional provision is complete in itself, it executes itself.

However, the issue in Rogers was not whether damages could be recovered for the government’s failure to present the defendant’s case to a grand jury. Thus, the extension of the Rogers language concerning self-executing provisions of the constitution to imply a cause of action for damages would not be direct.

A final factor in favor of implying a cause of action for damages may derive from New Mexico case law. New Mexico has a tradition of independently enforcing its bill of rights. An illustrative example of this tradition may be found in Skaggs Drug Center v. General Electric Co. The plaintiff in Skaggs was seeking a declaratory judgment and an injunction preventing the enforcement of a price-fixing statute. The plaintiff claimed that the statute violated the natural rights, equal

62. Id. at 232, 316 P.2d at 246.
63. Id. at 233, 316 P.2d at 246.
64. Id.
65. 31 N.M. 485, 247 P. 828 (1926).
66. Id. at 497, 247 P. at 833. The provision discussed by the Rogers court states “No person shall be held to answer for a capital felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or Attorney General . . . .” N.M. Const. art. II, § 14.
67. Id. at 493, 247 P. at 831 (quoting Lanigan v. Gallup, 17 N.M. 627, 131 P. 997 (1913)).
68. Id. at 490-91, 247 P. at 830.
69. Notably, however, this tradition has been hampered by parties’ failure to fully develop state constitutional arguments for the courts. See supra note 55 and accompanying text.
70. 63 N.M. 215, 315 P.2d 967 (1957).
71. Id. at 216-17, 315 P.2d at 967-68.
protection, and due process protections of the New Mexico Constitution. Although the court considered precedent from other state jurisdictions, it did not discuss parallel federal constitutional provisions or their interpretations. Instead, the court engaged in an independent analysis of the constitutionality of the statute and held that because the statute bound persons who were not in privity to the contracts at issue, the statute violated the natural law. Additionally, the court stated that the statute violated the due process and equal protection clauses of the New Mexico constitution. Even though the Skaggs plaintiff sought an equitable, not a monetary remedy, the independent use of the state constitution illustrates the New Mexico courts' tradition of interpreting their constitution independently of any federal right that might be implicated.

Finally, New Mexico has considered the issue of allowing damages for violations of state constitutional rights by law enforcement officers. It is doubtful, however, that the waiver of sovereign immunity for violations of some constitutional rights by law enforcement personnel authorizes suits for damages for violation of all constitutional rights. Article II, section 4 of the constitution provides that persons have the right "of seeking and obtaining safety and happiness." New Mexico courts have consistently refused to allow suits under this section brought under the auspices of the waiver of sovereign immunity for violations by law enforcement officers found in the Tort Claims Act.

The New Mexico Supreme Court first considered this issue in California First Bank v. State. Because the court found the defendant police officers immune from suit for the primary claims of wrongful death and personal injury, it did not rule on the state constitutional claims. Although the plaintiff included a claim for damages for violation of his article II, section 4 rights, the court declined to reach the issue of "whether, and under what circumstances, violation of its provisions gives rise to a cause of action for damages under the provisions of the Tort Claims Act."

The court directly addressed this issue in Caillouette v. Hercules, Inc. In Caillouette, the plaintiff brought claims for wrongful death and violations of the decedent's state constitutional rights to safety and happiness. The court held that there was no waiver of sovereign immunity for violations of article II, section 4, claiming that "[i]f we were to base a waiver of immunity on these provisions, the exception

72. Id. at 220-21, 315 P.2d at 970.
73. Id. at 226-27, 315 P.2d at 974-75.
74. See id.
75. N.M. Const. art. II, § 4.
77. 111 N.M. 64, 801 P.2d 646 (1990).
78. Id. at 76, 801 P.2d at 658.
80. Id. at 495-96, 827 P.2d at 1309-10.
thus created would eliminate the principle of sovereign immunity." 81
The court failed to elaborate on why it believed that a waiver of
immunity for violations of article II, section 4 would swallow the whole
concept of sovereign immunity. Presumably, the article II, section 4
protections are so ambiguous as to encompass any wrongful act. Ap-
parently, the court failed to distinguish between wholesale acceptance
of claims for violations of article II, section 4, and limited claims
based on specifically waived immunity. Instead, the court determined
that an official's immunity for violation of article II, section 4 precluded
that section from providing cognizable rights.82
One additional case has discussed the issue of whether a claim can
be brought against law enforcement officers for violations of state
constitutional rights based on the waiver of immunity in the Tort Claims
Act. In Bea v. City of Española,83 claims for wrongful death, personal
injuries, and violations of article II, sections 4 and 18 of the New
Mexico Constitution were brought against police officers.84 The court
summarily dismissed the issue of the officers' liability under article II,
section 4, stating that a "[w]aiver of immunity based on such consti-
tutional grounds would emasculate the immunity preserved in the Tort
Claims Act."85 The court declined to rule on the article II, section 18
due process claim, however, and remanded the issue to the trial court
to determine whether the plaintiff could raise a claim for a violation
of the state due process clause and whether that claim would fit within
the Tort Claims Act's waiver of immunity.86 Nevertheless, the Bea
court did recognize the distinction between a plaintiff claiming that an
interest protected by the state constitution had been violated and finding
that sovereign immunity barred that claim.87

III. OTHER JURISDICTIONS' APPROACHES TO SUITS FOR
DAMAGES UNDER STATE CONSTITUTIONS

Given the uncertain state of the law in New Mexico, an examination
of other jurisdictions' approaches is helpful in understanding the options
New Mexico might take when confronted with the issue of fashioning
a remedy for violations of the state constitution. Four models that
New Mexico might use in considering whether to fashion damages
remedies for violations of the state constitution emerge from other

81. Id. at 497, 827 P.2d at 1311. Plaintiff also claimed that the defendant police officer had violated N.M. STAT. ANN. § 74-4B-5 by breaching his duty to investigate automobile accidents, creating a negligence cause of action. Id. at 496, 827 P.2d at 1310. The court proceeded to discuss in detail why violating the general duty to investigate did not give rise to a negligence cause of action, but failed to provide reasoning as to why violating N.M. CONST. art. 2, § 4 did not fit within the waiver of immunity in N.M. STAT. ANN. § 41-4-12. Id. at 496-97, 827 P.2d at 1310-11.
82. Id. at 495, 827 P.2d at 1310.
84. Id. at 219-22, 870 P.2d at 757-60.
85. Id. at 221, 870 P.2d at 759.
86. Id. at 221-22, 870 P.2d at 759-60.
87. Id.
jurisdictions: 1) statutorily-created causes of action; 2) judicially-created causes of action based primarily on state law; 3) judicially-created causes of action with heavy reliance on the federal model; and 4) judicial refusal to recognize a cause of action for damages absent direction from the legislature. These models will be fully developed below.

A. The Federal Solution

Any person whose federal constitutional rights are violated by a person acting under the authority of state law has a statutorily-created cause of action.\textsuperscript{88} 42 U.S.C. § 1983 only addresses violations by state, not federal officials. The federal constitution thus seems to parallel the New Mexico Constitution; while the federal constitution provides protections against intrusions on individual liberties, there is no codification of a possible action for damages against federal officials for violations of individuals’ federal constitutional rights. Absent direction from Congress, the federal courts were left to fashion remedies for those violations or leave injured plaintiffs without redress.

In \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics},\textsuperscript{89} the plaintiff presented the U.S. Supreme Court with an action for damages against a federal official for violations of the plaintiff’s federal constitutional rights. Bivens sued narcotics officers for damages incurred as the result of a search and seizure conducted in violation of the federal Fourth Amendment.\textsuperscript{90} The Court found, in part, that the action for damages was appropriate and that “petitioner [was] entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment.”\textsuperscript{91} These findings were central to the Court’s holding that damages had historically been afforded in cases based on “invasion[s] of personal interests in liberty;”\textsuperscript{92} and that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”\textsuperscript{93} Because the federal constitution’s Fourth Amendment granted a general right of access to federal courts, the Court reasoned, the federal courts had the power to grant damages for invasions of that amendment.\textsuperscript{94}

\textsuperscript{88} 42 U.S.C. § 1983 (1988) states:
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 .

\textsuperscript{89} 403 U.S. 388 (1971).

\textsuperscript{90} \textit{Id.} at 389.

\textsuperscript{91} \textit{Id.} at 397.

\textsuperscript{92} \textit{Id.} at 395.

\textsuperscript{93} \textit{Id.} at 396.

\textsuperscript{94} \textit{Id.} at 397.
The *Bivens* Court recognized that allowing a claim for damages against federal officers for violations of the federal constitution might not be appropriate in all instances. For example, no remedy would be implied when Congress addressed specific types of constitutional violations by creating a statutory scheme intended to be a substitute for a judicial remedy.\(^9\) No such scheme was found in the *Bivens* case.

The Court also considered the fact that Congress had not explicitly authorized suits for damages against federal officials. However, given the federal courts' general power to grant relief for violations of the federal constitution, the Court held that because there were "no special factors counseling hesitation,"\(^9\) the use of a damage remedy was appropriate. The Court provided two examples of special factors that would cause it to hesitate. The first is when a question of "federal fiscal policy" is involved.\(^9\) The second is in actions against congressional employees for ultra vires actions.\(^9\)

The Court has subsequently clarified the limitations on judicially-created remedies for violations of the federal constitution. First, the Court has held that it will consider whether the defendant's position enjoys special treatment by the federal constitution that would convince a court not to allow a damages remedy against the defendant.\(^9\) Second, the Court also will consider whether allowing the suit will constrain federal officers in the performance of their duties because of the fear of liability.\(^10\) Third, the Court has noted that actions for damages for federal constitutional violations have not been allowed where an alternative remedy exists and was intended by Congress to be the exclusive remedy for violations of federal constitutional rights.\(^10\) This third factor has caused considerable confusion in the lower federal courts as the Supreme Court failed to fashion a standard indicating when a statutory remedy is intended by Congress to preclude an action for damages under the federal constitution.\(^10\)

An important factor to consider is that while a suit for damages against a federal officer based on violations of the federal constitution

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\(^9\) *Bivens*, 403 U.S. at 396.

\(^9\) Id.

\(^9\) Id.

\(^9\) Carlson v. Green, 446 U.S. 14, 18 (1980).

\(^10\) Id. at 19.

\(^10\) See *Bush v. Lucas*, 462 U.S. 367 (1983). The Court held that because the suit arose out of a federal employment dispute, and the administrative remedies available for plaintiff's claims were so comprehensive, Congress intended them to be the sole recourse for a litigant in plaintiff's position. Id. at 390. *See also* Schweiker v. Chilicky, 487 U.S. 412 (1988), in which the administrative remedies available to a person with a grievance related to the denial of Social Security Benefits alleged to be in violation of the federal constitution were held to have been intended by Congress to be the only remedy, precluding an action for damages based on that denial. Id. at 428-29.

\(^10\) See discussion in Chemerinsky, *supra* note 95, at 461-64. Chemerinsky postulates that the United States Supreme Court has hinted in recent cases that it is more likely to find that a statutorily-created administrative remedial scheme was intended by Congress to be the exclusive remedy for violations of federal constitutional rights. Such an approach is indicated by the *Bush* and *Chilicky* courts' refusal to allow damage suits under *Bivens*, Chemerinsky concludes, and reflects "the Court's retreat from the *Bivens* cause of action." Id.
might otherwise be appropriate, the officer may still be immune from suit. Numerous official immunities, both absolute and qualified, have developed around § 1983 and Bivens suits.103

B. Other States’ Approaches

Short of an explicit state constitutional provision for damages under a state bill of rights, the most direct way to provide such a remedy is in a statute. At least two states, Arkansas and Maine, have fashioned Civil Rights Acts which provide for direct causes of action for damages for violations of their state constitutions. In the absence of such provisions, however, individuals seeking damages for infringements of their state constitutional rights must persuade their state judiciary to imply such a remedy.

As more litigants turn to the state courts for vindication of their individual rights, more states have been forced to address the issue of whether to allow actions for damages under their state constitutions. In the last nine years, the number of states allowing such actions has risen to twelve. The states that have recognized a cause of action have done so in two ways. Six have relied almost solely upon their state constitutional and common law, concluding that a person whose state constitutional rights have been violated have a cause of action for damages directly under the state constitution. Those states are Alabama, California, Florida, Illinois, Mississippi, and Penn-

103. A comprehensive discussion of those immunities, however, is beyond the scope of this article, which focuses instead on the threshold question of whether damage suits are appropriate. For an excellent discussion of those immunities, see Chemerinsky, supra note 95, at §§ 8.6, 9.1.
106. See Bull v. Armstrong, 48 So. 2d 467, 470 (Ala. 1950) (recognizing that “a law enforcement officer who makes an illegal search [under the Alabama Constitution] of a person’s premises is liable to that person in an action at law for damages”).
110. See Stringer v. State, 491 So. 2d 837, 849 (Miss. 1986) (stating that “[t]he citizen, vis a vis the searching law enforcement officer, has at least the theoretical possibility of a remedy in the
The second way that states have recognized a cause of action for damages directly under their state constitution is through the use of their own constitutional law precedent and the federal Bivens line of cases. Those states are Louisiana, Maryland, Massachusetts, Michigan, New Jersey, and North Carolina. These approaches are illustrated by two cases that are particularly useful in attempting to understand possible avenues that New Mexico might take in recognizing a right of action under its bill of rights.

Maryland follows the first model, relying heavily and almost exclusively on its own state constitutional law precedent to recognize a cause of action for damages for violations of the state constitution. In *Widgeon v. Eastern Shore Hospital Center*, Mr. Widgeon brought suit against a state hospital and various individuals, seeking damages for violations of the Maryland Constitution’s due process provision and prohibition against warrantless searches. The court first noted that “under the common law of England, where individual rights, such as those now protected by [the constitutional section at issue], were preserved by a fundamental document (e.g., the Magna Carta), a vi-

form of a civil action for damages”); Mayes v. Till, 266 So. 2d 578, 581 (Miss. 1972) (accepting without discussion the principle that police officers could be liable for damages caused by theft as a result of their intrusive search if “loss by theft [was] a reasonably foreseeable consequence of their unlawful acts”).

111. See Harley v. Schuylkill County, 476 F. Supp. 191, 196 (E.D. Pa. 1979) (holding that a person whose state constitutional due process rights have been violated may maintain a direct cause of action under that section); Hunter v. Port Authority, 419 A.2d 631, 636, n.6 (Pa. Super. Ct. 1980) (noting that “a cause of action arises directly under the [Pennsylvania] Constitution for the violation of rights guaranteed under article 1, section 1, and no affirmative legislation is needed for the vindication of those rights in the civil courts”).

112. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); see also supra notes 89-103 and accompanying text.

113. See Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092-93 (La. 1990) (concluding that “damages may be obtained by an individual for injuries or loss caused by a violation of [the Louisiana constitutional search and seizure provision]).


115. See Phillips v. Youth Dev. Program, 459 N.E.2d 453, 457-58 (Mass. 1983) (recognizing that, in theory at least, “a person whose [state] constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief” but declining to address plaintiff’s claims because of a lack of briefing on the question of state action).


117. See Lloyd v. Stone Harbor, 432 A.2d 572, 579-83 (N.J. Super. Ct. Ch. Div. 1981) (allowing an employment discrimination claim for damages under the New Jersey Constitution and finding that the claim was unaffected by the availability of other remedies and that state officials are not immune from such a suit).

118. See Corum v. University of North Carolina, 413 S.E.2d 276, 289-90, 292 (N.C.) (finding a strong independent line of state cases emphasizing the importance of state constitutionally protected free speech, noting that “in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution,” and holding that sovereign immunity does not bar such a suit against a state official acting in his official capacity), cert. denied, Durham v. Corum, 113 S. Ct. 493 (1992).

oliation of those rights generally could be remedied by a traditional action for damages.' The court then examined Maryland common law and constitutional history and concluded that not only did Maryland have an illustrious history of enforcing individual rights and allowing actions for damages under the Maryland Constitution, but also that the framers of the constitution intended that actions for damages be allowed. The court also referred to the *Bivens* line of cases, and cited numerous other states that had recognized similar claims.

After examining the relevant law, the court addressed some of the hospital’s concerns. First, the court directed its attention to the concern that it would be “inappropriate” to allow a remedy for a violation of the state constitutional rights in light of the existing federal remedies and state tort remedies. The court observed that

> It is a well-settled rule ... that where a particular set of facts gives rise to alternative causes of action, they may be brought together in one declaration, and where several remedies are requested, an election is not required prior to final judgment .... Additionally, under some circumstances, a state constitutional provision may recognize and preserve an interest that is wholly unprotected under state common law and statutes.

Second, the court responded to the assertion that allowing Widgeon to proceed on his constitutional claims would force the court to create a new cause of action. Instead of relying wholly on federal or other precedent, the court reasoned that “where a statute establishes an individual right, imposes a corresponding duty on the government, and fails to provide an express statutory remedy, a traditional common law action will ordinarily lie.” Because the Maryland constitution did establish an individual right and impose a duty upon the government to avoid infringing that right, the court found that a suit for damages was appropriate based solely on the “liberty and property interest” sections of the Maryland Constitution.

The second model of implying a cause of action for damages for violations of a state constitution is illustrated by Michigan’s approach to the issue, which relies upon both Michigan state constitutional law and the *Bivens* line of cases. In *Smith v. Department of Public Health*, the Michigan Supreme Court held that “[a] claim for damages against the state arising from violation by the state of the Michigan Constitution

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120. *Id.* at 924.
121. See *id.* at 925-27.
122. See *supra* notes 89-103 and accompanying text.
124. *Id.* at 928-30.
125. *Id.*
126. *Id.* at 929.
127. *Id.*
may be recognized in appropriate cases.’” The court did not, however, specify what those appropriate cases might be. The brief memorandum opinion merely stated the principles of law on which the justices agreed. No rationale or guidelines for the stated principles were discussed in the memorandum opinion, leaving it to the lower courts to develop the criteria of what might constitute “appropriate cases.” This approach illustrates the practical difficulties of providing damages through an implied cause of action.

In the most recent Michigan case to address the issue of what circumstances might be appropriate to justify a court’s award of damages for constitutional violations, 77th District Judge v. State, the equal protection clause of the Michigan constitution was at issue. A district court judge sued the state, claiming that the different rates of compensation of district judges throughout the state based on a statutory classification scheme violated the equal protection provision of the Michigan Constitution. After noting that the Smith opinion was nonbinding because of a lack of a “majority rationale,” the court examined the Smith concurring opinions and adopted Justice Brinkley’s analysis to determine when damages should be awarded in state constitutional violation cases. That analysis requires a consideration of four factors: whether precedent supports the fashioning of a remedy; whether the fashioning of such a remedy would deter similar conduct in the future; the fact that “[t]he courts should defer to the policy-making expertise of the Legislature in devising remedies;” and whether there are any “special factors counseling hesitation” in fashioning a remedy.

The 77th District Judge court refused to allow an action for damages, applying the four factors as follows:

[F]irst[,] . . . the parties [did] not cite any precedential authority for a damages remedy for the type of constitutional violation at issue here, nor are we aware of any such authority. Second, deterrence of tortious conduct is not at issue in this case. Third, issues of judicial compensation would appear to be uniquely directed to the policy-making expertise of the Legislature. Fourth, . . . [a specific provision in the Michigan constitution empowers] the [l]egislature to implement enforcement mechanisms for equal protection.

Although the court recognized the Smith’s principle that damages may be appropriate in some cases, it severely limited such actions by using

129. Id. at 751. The opinion noted that “[t]his memorandum opinion is signed by the six participating Justices. There are separate concurring and dissenting opinions. However, at least four Justices concur in every holding, statement and disposition of this memorandum opinion.” Id.
131. Id. at 334.
132. Id. at 338-39.
133. Id. at 339. These factors were “the product of four distinct reasons derived from the Bivens line of cases and applied to the facts in [Smith].” Id.
134. Id.
Justice Brinkley's factors. As in the development of the federal case law following Bivens, it remains unclear in which situation, if any, the Michigan court would be amenable to allowing a plaintiff to recover damages for an infringement of rights guaranteed under the Michigan constitution.

Despite the apparent trend toward recognition of a right to sue for damages under state bills of rights, six state courts have declined or refused to create such a remedy: Alaska, Connecticut, Hawaii, New Hampshire, Ohio, and Oregon. Of these six, Ohio and Hawaii illustrate two similar approaches to a denial of recognition of a right to sue for damages under a state constitution.

In Provens, the plaintiff brought suit against a county board of mental retardation seeking damages for violations of her rights guaranteed by the Ohio Constitution. Addressing the state constitutional argument, the court first noted that the "constitutional provision does not set forth an accompanying cause of action for a violation ... [and] the Ohio General Assembly has not authorized such an action." The court then examined the Bivens line of cases, noting that the federal judiciary "has generally exercised extreme caution" in fashioning monetary remedies for violations of individual constitutional rights. Additionally, the court approvingly cited an Alaska decision which declined to fashion a new tort because of the existence of "a comprehensive scheme of employee rights and remedies" under the Alaskan constitution. Finally, the court examined the remedies available to a plaintiff claiming injuries similar to Provens' injuries. Because various remedies already existed through state tort and administrative law, the court reasoned, it should not create an independent cause of action based upon the state constitution. Instead, the court deferred to the

135. See Farmer v. State, 788 P.2d 43, 50 n.17 (Alaska 1990) (declining to address the issue of whether "the state constitution gives rise to an implied right of action").
136. See Kelley Property Dev. v. Town of Lebanon, 627 A.2d 909, 922 (Conn. 1993) (declaring to "construe our state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy").
138. See Rockhouse Mountain Property Owners Ass'n v. Town of Conway, 503 A.2d 1385, 1388-89 (N.H. 1986) (refusing to allow a direct cause of action under the New Hampshire constitution because of the availability of alternative remedies and the existence of official immunity).
139. See Provens v. Stark County Bd. of Mental Retardation, 594 N.E.2d 959 (Ohio 1992). For discussion, see infra notes 141-47 and accompanying text.
140. See Hunter v. City of Eugene, 787 P.2d 881, 884 (Or. 1990) (holding that "if an implied private right of action for damages for governmental violations of Article I, Section 8, and other nonself-executing state constitutional provisions is to exist, it is appropriate that it come from the legislature, not by action of this court.").
141. Provens, 594 N.E.2d at 960.
142. Id. at 961.
143. Id. at 962.
144. Id. at 963 (quoting Walt v. State, 751 P.2d 1345 (Alaska 1988)).
145. Id. at 964-65.
146. Id. at 965-66.
legislature the task of creating a cause of action for damages for violations of the Ohio Constitution.\textsuperscript{147}

The Hawaii courts have taken a different approach to denying claims for damages under the state bill of rights. In \textit{Figueroa v. State},\textsuperscript{148} the plaintiff brought suit against the state for injuries received, in part, by the state’s alleged violations of his state constitutional rights.\textsuperscript{149} In discussing the state constitutional claims, the court proceeded directly to a discussion of the state’s immunity from suit.\textsuperscript{150} The court noted that the “[S]tate as sovereign is immune from suit except as it consents to be sued,”\textsuperscript{151} and the fact that the Hawaii bill of rights provisions are textually self-executing did not constitute a waiver of that immunity.\textsuperscript{152} Finally, the court addressed the Hawaii State Tort Liability Act, calling it “a specific waiver of tort immunity.”\textsuperscript{153} The court reasoned that the effect of the Act was to waive immunity only for those causes of action specifically mentioned by the Act, \textit{not} to “visit the sovereign with novel liabilities.”\textsuperscript{154}

C. Options for a New Mexico Remedy—Models From Other States and the Federal Courts

An examination of existing federal and state law precedents provides four distinct options that New Mexico could follow in considering whether to allow monetary remedies for violations of state constitutional rights. First, New Mexico could create a statutory cause of action specifically authorizing suits for damages for violations of the state constitution. This option is supported by the existence of similar statutes in other states\textsuperscript{155} and the federal statutory cause of action.\textsuperscript{156} Two existing statutes might be appropriate vehicles for authorizing such suits. As the New Mexico Tort Claims Act\textsuperscript{157} already authorizes suits against law enforcement officers for violations of state constitutional rights, an extension to other officers would not be without precedent. The New Mexico Human Rights Act,\textsuperscript{158} which authorizes suits for damages caused by discrimination, also might be an appropriate place to legislatively authorize suits for damages for violations of rights guaranteed by the state constitution. This approach, which is similar

\begin{itemize}
  \item \textsuperscript{147} \textit{Id.} at 965.
  \item \textsuperscript{148} 604 P.2d 1198 (Haw. 1979).
  \item \textsuperscript{149} \textit{Id.} at 1200.
  \item \textsuperscript{150} \textit{Id.} at 1205.
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} “Article XIV, Section 15 of the [Hawaii] State Constitution . . . provides that all its provisions are ‘self-executing to the fullest extent that their respective natures permit.’” \textit{Id.} at 1206 (citation omitted).
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.} at 1207.
  \item \textsuperscript{155} \textsc{Ark. Code Ann.} \textsection{} 16-123-103 (Michie Supp. 1993); 5 \textsc{Mo. Rev. Stat.} \textsection{} 4682 (1993).
  \item \textsuperscript{156} 42 \textsc{U.S.C.} \textsection{} 1983 (1979).
  \item \textsuperscript{157} \textsc{N.M. Stat. Ann.} \textsection{} 41-4-2 (1978).
  \item \textsuperscript{158} \textsc{N.M. Stat. Ann.} \textsection{} 28-1-1 to 28-1-15 (1978).
\end{itemize}
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to the federal statutory scheme,\textsuperscript{159} would give significant guidance to
the New Mexico courts when confronted with suits for damages under
the state constitution.

Second, New Mexico courts could imply the existence of a cause of
action by relying upon existing New Mexico case law, other states' case
law, New Mexico constitutional history and general principles of rem-
edies. This argument finds support in the principle that if the constitu-
tional provision creates a right and imposes a corresponding duty
upon the state, a remedy for a violation of that right should be
recognized.\textsuperscript{160}

Third, New Mexico could imply a cause of action by relying upon
both its own jurisprudence and the \textit{Bivens} line of cases.\textsuperscript{161} \textit{Bivens} implied
a damages action based on the general availability of the federal courts
for violations of federal constitutional rights and subsequent federal
cases have set forth limits on the availability of such a remedy.\textsuperscript{162}
Similarly, state courts using \textit{Bivens} to imply a remedy have extricated
other distinct factors to consider in deciding whether to imply a remedy.\textsuperscript{163}

Fourth, the New Mexico courts could explicitly refuse to recognize
a damage cause of action for violations of the state bill of rights.
That refusal could be based on a decision to leave the matter to the
legislature,\textsuperscript{164} or on a finding that the principle of sovereign immunity
precludes liability for violations of state constitutional rights.\textsuperscript{165}

A fifth option open to New Mexico is not found in any other state
or the federal system. In April, 1993, an act creating a New Mexico
constitutional revision commission went into effect.\textsuperscript{166} The Act created
a commission and charged it to

examine the constitution of New Mexico and the constitutions of
other states to recommend changes in the constitution of New Mexico
as it deems desirable and necessary. Upon majority approval of the
fifteen members appointed by the governor, legislation shall be
drafted in accordance with the provisions of Article 19 of the
constitution of New Mexico.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{159} See discussion of 42 U.S.C. 1983 (1979), \textit{supra} note 88 and accompanying text.
\item \textsuperscript{160} Such a course was followed by the Maryland courts in \textit{Widgeon v. Eastern Shore Hosp.
Ctr.}, 479 A.2d 921 (Md. 1989). See discussion \textit{supra} notes 119-27 and accompanying text.
\item \textsuperscript{161} See \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics}, 403 U.S. 388
(1971) and its progeny. For discussion, see \textit{supra} notes 89-103 and accompanying text.
\item \textsuperscript{162} See discussion \textit{supra} notes 89-103 and accompanying text.
\item \textsuperscript{163} See, e.g., \textit{77th District Judge v. State}, 438 N.W.2d at 339 (Mich. Ct. App. 1989). The
factors and their application are explained \textit{supra} notes 130-34 and accompanying text.
\item \textsuperscript{164} See, e.g., \textit{Provens v. Stark County Bd. of Mental Retardation}, 594 N.E.2d 959 (Ohio 1992),
see discussion \textit{supra} notes 141-47 and accompanying text.
\item \textsuperscript{165} The Court could find that sovereign immunity precludes liability either through the general
principle of sovereign immunity or because the New Mexico Tort Claims Act does not explicitly
waive sovereign immunity for violations of state constitutional rights. See, e.g., \textit{Figueroa v. State},
604 P.2d 1198 (Haw. 1979); see discussion \textit{supra} notes 148-54 and accompanying text.
\item \textsuperscript{166} \textit{N.M. STAT. ANN.} §§ 12-15-1 to 12-15-7 (Repl. Pamp. 1994) [hereinafter "the Act"]).
\item \textsuperscript{167} \textit{N.M. STAT. ANN.} § 12-15-3 (Repl. Pamp. 1994).
\end{itemize}
The Act placed no restrictions upon the scope of review of the Commission. It may recommend that language be added to the New Mexico bill of rights that authorizes suits for damages for violations of its provisions. If such a recommendation is made, any resulting legislation would have to undergo the process for constitutional amendment, including approval by the legislature and people of New Mexico before it would become part of the constitution of the State of New Mexico. The temporal scope of the Commission is limited, however; the Act also charges the Commission to make its report to the 1995 legislature. Any proposal would have to be considered quickly in order to get the Commission's approval and start the amendment process.

IV. PROSPECTS FOR THE TREATMENT OF CLAIMS FOR DAMAGES FOR VIOLATIONS OF THE NEW MEXICO BILL OF RIGHTS

A. Prospects for the Recognition of Claims for Damages

Given that New Mexico has historically recognized that a state official may be liable for violations of state constitutional rights, that portions of the bill of rights have been explicitly read to be self-executing, and that New Mexico has a tradition of enforcing its bill of rights independently of federal jurisprudence, a strong case may be made for implying a cause of action for damages for violations of the state bill of rights. A court taking such a course could also draw support from the facts that twelve states currently recognize a cause of action for damages for violations of their bills of rights and that the federal system has recognized a similar cause of action in the Bivens line of cases.

Bivens can be read to directly support the recognition of a damages cause of action for violations of the state bill of rights. The two main rationales which the Bivens Court used to imply a cause of action are also present in New Mexico—an historical basis for awarding damages for invasions of personal liberty, and courts which have traditionally

169. See Territory of New Mexico v. Taylor, 11 N.M. 588, 71 P. 489 (1903). For discussion, see supra notes 58-60 and accompanying text.
170. See State v. Rogers, 31 N.M. 485, 247 P. 828 (1926). For discussion, see supra notes 65-68 and accompanying text.
172. A similar list of factors was used to justify implying a cause of action in Maryland in Widgeon v. Eastern Shore Hospital Ctr., 479 A.2d 921 (Md. 1984). For discussion, see supra notes 119-27 and accompanying text.
173. See supra notes 106-18 and accompanying text.
174. See supra notes 88-103 and accompanying text.
175. There is historical precedent for allowing damages for similar cases, Bivens, 403 U.S. at 395-96, and the general principle that "where legal rights have been violated, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 396 (citation omitted) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946).
been available for suits in equity. Based upon the confluence of these
two lines of cases, one could argue that the courts should expand their
power to remedy constitutional violations through damage awards where
appropriate.

Of course, Bivens also contained a caveat; if special factors weigh
against implying a cause of action, the courts should reject fashioning
such a remedy. Since the Bivens line of cases includes cases declining
to recognize a cause of action and other states' refusal to fashion a
remedy, a strong case can also be made to limit an implied remedy.

Additionally, damages for many of the injuries for which a plaintiff
might seek redress under the state bill of rights may already be com-
parable through other avenues. These include traditional tort actions
such as trespass, contract actions, and actions under the New Mexico
Human Rights Act and the federal section 1983. The availability of other
means of remedying an injury is a factor which should counsel hesitation
in the courts in fashioning a new remedy.

B. Limitations on the Availability of Claims for DAMAGES

Despite the possibility that a plaintiff may be able to seek redress
under the state bill of rights, two specific structural barriers and limitations
to the recognition of an implied cause of action exist. The first is a
state action requirement. In State v. Johnston the New Mexico Court
of Appeals held that a private hospital employee, acting for purposes
of medical treatment and not under instruction of a state official, was
not subject to the prohibitions against unreasonable search and seizure
as found in article II, section 10 of the New Mexico Constitution. The
practical effect of the Johnson holding is to limit any rights that an
individual might have under the state bill of rights against violations by
state officials.

The second major impediment to implying a cause of action for damages
for violations of state constitutional rights in New Mexico is sovereign
immunity. New Mexico courts currently seem firmly wedded to the concept
that if a waiver of sovereign immunity is not found in the Tort Claims
Act, even for violations of the state constitution, then the assertion of
sovereign immunity bars suits for those violations. The courts have
failed to confront the issue, however, of whether a statutory imposition
of sovereign immunity can overcome a right of action rooted in the state
constitution. Clearly, as indicated in Ferguson v. New Mexico State
Highway Commission, the Tort Claims Act's reimposition of sovereign

176. Bivens, 403 U.S. at 399.
177. See id. at 396.
179. Id. at 780, 779 P.2d at 558.
180. New Mexico courts have recently held that although N.M. STAT. ANN. § 41-4-12 specifically
waives immunity for violations of state constitutional rights, certain rights are not covered by that
waiver. See Blea v. City of Española, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117
immunity following its common law abolition in *Hicks* is constitutional. However, if *Hicks* completely abolished sovereign immunity and the Tort Claims Act reinstated it, that legislative pronouncement of immunity may not have been sufficient to create immunity for violations of the state constitution. *Blea,* *Caillouette,* and *California First Bank* all held that the Tort Claims Act’s sovereign immunity could preclude a claim for violations of the state constitution, but they did not address the issue of how statutory immunity overcomes a constitutional right of action.

New Mexico’s position on sovereign immunity can be contrasted with Hawaii’s position, which found that because sovereign immunity in Hawaii is a common law concept, it precludes suits even for constitutional violations, unless that immunity has been specifically waived. While the Hawaii court held that it was not able to abolish sovereign immunity, the New Mexico courts did not feel so constrained. Thus, the relevant question may not be whether the courts can *abolish* sovereign immunity, but whether the legislature can *establish* sovereign immunity for violations of the constitution.

General support for this proposition may be found in the recent case of *Campos v. State,* in which the court, considering a statute authorizing warrantless arrests, stated: “To give the statute conclusive effect would be to abdicate our duty as the primary interpreters of our constitution and would give the legislative branch the power to define constitutional provisions in violation of separation of powers.” Similar language is found in the Court of Appeals opinion of *State v. Armijo,* in which the court, considering the constitutionality of a statute authorizing appeals from dismissals without prejudice in criminal cases, stated: “The legislature, by statute, may not diminish a right expressly provided by the constitution; no branch of government may add to, nor detract from the constitution’s clear mandate.” Significantly, both of the above cases considered statutes dealing with criminal rights.

The most recent and authoritative statement on the subject of the legislature’s power to limit civil damages remedies under the state constitution is found in *Ford v. New Mexico Department of Public Safety.*

181. 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982); see also Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 177 n.2, 793 P.2d 855, 858 n.2, and discussion supra notes 26-30 and accompanying text.


186. *Id.* at 1205.


188. 117 N.M. 155, 870 P.2d 117 (1994).

189. *Id.* at 158, 870 P.2d at 120.


191. *Id.* at 805, 887 P.2d at 1272 (quoting State v. Santillanes, 96 N.M. 482, 632 P.2d 359, 363 (Ct. App. 1980) (internal quotation and citation omitted)).

The *Ford* court flatly rejected the plaintiff's claims for damages for violations of his state constitutional rights argued under a *Bivens*-type theory. Particularly relevant to the issues in this article, the court stated:

If the state legislature deems it in the public interest not to permit damage actions under state law for violations of state or federal constitutional rights, there appears to be no obstacle to a statute enacting that immunity . . . Although the legislature cannot eliminate or limit a constitutional right, it need not provide a damage remedy for a violation of that right. (Of course, the federal Civil Rights Act provides a federal remedy for violations by state and local officials of federal constitutional rights. 42 U.S.C. § 1983.)

Plaintiffs seeking damage remedies under the state constitution need not give up hope. Although the New Mexico Supreme Court has declined to review the Court of Appeals' decisions that expressly reject plaintiffs' rights, given the supreme court's recent trend of broadening the avenues in which plaintiffs may bring suit, a plaintiff that persuades the court to consider the questions presented herein might well prevail in his argument that the Tort Claims Act does not restrict the right to sue for damages under the state constitution.

The issue of whether a litigant may sue for damages under the New Mexico bill of rights might be more properly framed as *when* a litigant may sue for damages. The precedents of *Taylor* and *Patrick* suggest that such a remedy has historical support. The holding in *Montes* suggests that allowing damages remedies is appropriate in suits against law enforcement officers based on the waiver of immunity in the Tort Claims Act. Finally, while the *Blea* court did not allow a suit based on the article II, section 4 guarantees of safety and happiness, it left the question open as to whether damages could be allowed for violations of the state due process clause by law enforcement officers. When all of New Mexico law, including state, federal, and territorial is considered, there is more than a suggestion that *under some circumstances* New Mexico would recognize the awarding of damages for state constitutional violations. The hesitancy derives from a concern for limits, including a

193. *Id.* at __, 891 P.2d at 553.
194. *Id.*
196. *See* *Territory of New Mexico v. Taylor*, 11 N.M. 588, 71 P. 489 (1903).
200. *Id.*
state action requirement and sovereign immunity, which have not yet been fully considered or developed.

V. CONCLUSION

Although a persuasive argument can be made for the recognition of an implied right to recover damages for violations of a state constitutional right, an equally persuasive one has taken shape in opposition to that position. Based on the existence of alternate remedies for injuries for which a plaintiff might seek damages under the state bill of rights, a state action requirement, and the existence of sovereign immunity for state constitutional violations, the argument that an implied remedy should not be recognized seems to have swayed the New Mexico courts thus far. However, the courts have not squarely considered the issue of whether the statutory sovereign immunity of the Tort Claims Act precludes suits for damages for constitutional violations.

Consequently, a recognition of a right to sue for damages for violations of the New Mexico constitution can take three routes. First, the courts could imply a cause of action, either by using state law or by analogizing to Bivens. Implying a cause of action would require revisiting the issue of whether the Tort Claims Act bars suits for damages based on constitutional violations. Second, the legislature could create a cause of action. This could be done by amending the Human Rights Act to authorize suits for damages for violations of the state constitution. Third, the state constitution could be amended, specifically providing that individuals may sue for damages for violations of provisions of the constitution.\(^{201}\)

If either of the second two options are pursued, the Tort Claims Act’s provision of immunity must be considered. The Act must either be revised by the legislature to specifically exempt violations of state constitutional rights from the immunity established in the act or the courts must revisit the issue of whether the legislature’s creation of immunity bars suits for violations of the constitution.

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\(^{201}\) Such an amendment could receive its genesis under the auspices of the Constitutional Revision Committee.