2018

# State Constitutional Litigation in New Mexico: All Shield and No Sword

The Honorable Linda M. Vanzi

Andrew G. Schultz

Melanie B. Stambaugh

# STATE CONSTITUTIONAL LITIGATION IN NEW MEXICO: ALL SHIELD AND NO SWORD

Linda M. Vanzi,* Andrew G. Schultz,** and Melanie B. Stambaugh***

## INTRODUCTION

In his dissent in *New State Ice Co. v. Liebmann*, Justice Brandeis rhapsodized that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] That quixotic prediction has not borne full fruit with regard to the manner in which the guarantees and protections afforded by the New Mexico Constitution are enforced.

This article discusses the New Mexico Supreme Court's consideration of rights under the state Constitution as distinct from those afforded under the federal Constitution. What is clear is that our appellate courts have not shied away from independently evaluating and expanding state constitutional protections for criminal defendants, and that the opposite has been true in civil cases. It appears that our courts interpret the state Constitution as providing only a shield protecting criminal defendants and not as a sword protecting individual civil rights. There are several reasons why this may be. First, as Dean Chemerinsky lamented at the 2017 Symposium, law schools do not teach state constitutional law, and lawyers are therefore ill prepared to advocate for expanding judicial protection of individual liberties under their state constitutions. More importantly, there are few—or no—incentives for private attorneys to take on state constitutional cases in the civil context in New Mexico. We attempt to explain how the New Mexico Constitution might better protect the rights of its citizens in civil cases in the same manner it has extended those guarantees to criminal defendants.

## I. THE NEW MEXICO CONSTITUTION'S SUCCESS AS A SHIELD

The greatest use of the New Mexico Constitution as a protection against unwarranted government action can be seen in the criminal law context. In the 1970's, as a more conservative U.S. Supreme Court began to restrict federal protections for individual rights, Justice William Brennan urged state courts to interpret their state constitutions independently, rather than simply mirror federal

* Chief Judge, New Mexico Court of Appeals and a graduate of the University of New Mexico School of Law.

** Director and Shareholder, Rodey, Dickason, Sloan, Akin & Robb, P.A. and a graduate of the University of New Mexico School of Law.

*** Director and Shareholder, Rodey, Dickason, Sloan, Akin & Robb, P.A. and a graduate of the University of New Mexico School of Law.

1. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

precedents defining rights under the United States Constitution, in order to protect and maximize individual liberties.[2] As state courts throughout the country set about developing an alternative jurisprudence focusing on their state constitutions, the New Mexico Supreme Court also began to break with federal constitutional interpretation. In 1976, the Court announced, in *State ex rel. Serna v. Hodges*,[3] that it was rejecting the "lock-step" approach to constitutional interpretation, pursuant to which state courts conform the meanings of state constitutional provisions to the corresponding federal provisions. And, in 1989, in *State v. Cordova*,[4] the Court rejected the totality-of-the-circumstances test for determining the sufficiency of probable cause for issuance of a search warrant, elucidated by the United States Supreme Court in *Illinois v. Gates*,[5] instead continuing to follow the *Aguilar/Spinelli*[6] test as the test to be applied as a matter of state constitutional law.[7]

It was not until some twenty years after *Hodges*, and eight years after *Cordova*, that the New Mexico Supreme Court articulated, in *State v. Gomez*,[8] an analysis for determining when the protections afforded under the state constitution should be considered independently of the analogous federal constitutional provision—the so-called "interstitial approach"—thereby laying the foundation for a new state constitutional jurisprudence. *Gomez* adopted the interstitial approach in the context of determining the scope of individual rights in search-and-seizure cases, pursuant to which the court looks first to the Fourth Amendment and federal case law interpreting it to determine whether the Fourth Amendment protects the right asserted and, if it does not, the court analyzes the issue under article II, section 10 of the New Mexico Constitution.[9] New Mexico courts have since routinely applied the *Gomez* analysis to expand the constitutional rights of criminal defendants under the New Mexico Constitution beyond those afforded by the United States Constitution, especially in numerous cases determining that article II section 10 of the New Mexico Constitution affords greater protections than the United States Supreme Court has held to be available under the Fourth Amendment.

---

2. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501–502 (1977).

3. 1976-NMSC-033, 552 P.2d 787, *overruled on other grounds by* State v. Rondeau, 1976-NMSC-044, 553 P.2d 688.

4. 1989-NMSC-083, 784 P.2d 30.

5. 462 U.S. 213 (1983).

6. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). These cases were abrogated by *Illinois v. Gates*, 462 U.S. 213 (1983).

7. *Cordova*, 1989-NMSC-083, ¶ 17 ("We conclude that our present court rules better effectuate the principles behind Article II, Section 10 of our Constitution than does the 'totality of circumstances' test set out in *Gates*."). Although the Court held it was deciding the case based on the state constitution, in fact, the *Aguilar/Spinelli* test was derived from prior decisions of the Supreme Court interpreting the warrant requirement of the Fourth Amendment, and not from any independent protections afforded by article II, section 10 of the New Mexico Constitution.

8. 1997-NMSC-006, ¶¶ 19–20, 932 P.2d 1.

9. N.M. CONST. art. II, § 10 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.").

For example, the New Mexico Court of Appeals held in *State v. Ochoa*[10] that pretextual stops violate article II, section 10, notwithstanding the United States Supreme Court's decision in *Whren v. United States*,[11] which upheld the constitutionality of such stops under the Fourth Amendment. Similarly, New Mexico appellate courts have held, based on article II, section 10, that passengers may not be questioned absent individualized reasonable suspicion of criminal activity or dangerousness,[12] despite the United States Supreme Court's decision in *Arizona v. Johnson*,[13] holding that officers may ask questions unrelated to the reason for a traffic stop as long as the questioning did not prolong the length of the detention. And although United States Supreme Court's decisions authorize police to conduct warrantless vehicle searches in various contexts, such as protective sweeps for weapons, searches incident to arrest, probable cause related to vehicles containing contraband or evidence of a crime, and inventory searches,[14] New Mexico appellate courts repeatedly have determined that the New Mexico Constitution affords greater protections against such searches.[15]

The New Mexico Supreme Court continues to reject federal constitutional precedent and analysis affording less protection than our own Constitution in other criminal contexts,[16] even recognizing a right to privacy under article II, section 10, notwithstanding that the Fourth Amendment affords no such privacy right.[17]

---

10. 2009-NMCA-002, 206 P.3d 143.

11. 517 U.S. 806 (1996).

12. *See* State v. Leyva, 2011-NMSC-009, ¶ 62, 250 P.3d 861; State v. Portillo, 2011-NMCA-079, 256 P.3d 466 (extending *Leyva*, which used article II, section 10 in limiting the questioning of drivers, to apply to the questioning of passengers); State v. Affsprung, 2004-NMCA-038, 87 P.3d 1088.

13. 555 U.S. 323, 333 (2009).

14. JACQUELINE R. KANOVITZ & MICHAEL I. KANOVITZ, CONSTITUTIONAL LAW 207 (10th ed. 2005).

15. *See, e.g.*, State v. Jones, 2002-NMCA-019, ¶ 13, 40 P.3d 1030 (departing from the federal rule by holding invalid the warrantless seizure of evidence in plain view in a vehicle under the New Mexico Constitution); State v. Warsaw, 1998-NMCA-044, ¶ 18, 956 P.2d 139 (holding that warrantless search was not conducted under exigent circumstances and was therefore invalid under article II, section 10); State v. Arredondo, 1997-NMCA-081, ¶ 23, 944 P.2d 276 (holding that the search based on probable cause was invalid because there was no showing of exigent circumstances), *overruled in part on other grounds by* State v. Steinzig, 1999-NMCA-107, 987 P.2d 409.

16. *See, e.g.*, Montoya v. Ulibarri, 2007-NMSC-035, ¶ 23, 163 P.3d 476 (holding that New Mexico's due process clause requires that habeas petitioners must be permitted to assert freestanding claims of actual innocence); State v. Vallejos, 1997-NMSC-040, ¶ 32, 945 P.2d 957 (holding that all forms of entrapment violate New Mexico's due process clause; rejecting widely criticized U.S. Supreme Court precedent to the contrary as to the federal counterpart); *see also* State v. Leyva, 2011-NMSC-009, ¶ 51, 250 P.3d 861 (departing from Fourth Amendment analysis when construing analogous article II, section 10); State v. Garcia, 2009-NMSC-046, ¶ 34, 217 P.3d 1032 (rejecting widely criticized United States Supreme Court decision weakening a right "beyond a point which may be countenanced under our state constitution"); State v. Rowell, 2008-NMSC-041, ¶¶ 20–23, 188 P.3d 95 (declining to follow United States Supreme Court decisions criticized in legal literature as "devoid of a reasoned basis in constitutional doctrine"); State v. Gutierrez, 1993-NMSC-062, ¶¶ 32, 50–56, 863 P.2d 1052 (discussing "a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees" and rejecting federal constitutional rule as incompatible with the guarantees of the New Mexico Constitution).

17. *See* State v. Crane, 2014-NMSC-026, ¶ 28, 329 P.3d 689; State v. Granville, 2006-NMCA-098, ¶ 19, 142 P.3d 943.

## II. THE NEW MEXICO CONSTITUTION'S FAILURE AS A SWORD

### A. Recent Case Law

In stark contrast to its vigorous use as a shield to protect criminal defendants from illegal government actions, the New Mexico Supreme Court has never interpreted the New Mexico Constitution as an equal source of individual civil rights. Indeed, in the twenty years since *Gomez* was decided, our Supreme Court has considered only three civil cases involving a claim under the state Constitution, and has not decided any case based on a determination that the New Mexico Constitution affords greater rights than federal courts have held are available under an analogous federal constitutional provision.[18]

In *New Mexico Right to Choose/NARAL v. Johnson*,[19] plaintiffs challenged a state regulation limiting assistance to indigent women in need of medically necessary abortions as violative of the state constitutional guarantees of due process, inherent rights, equal protection, and equal rights. Although the plaintiffs prevailed, the New Mexico Supreme Court made no attempt to reach a different result from the United States Supreme Court's holding in *Harris v. McRae*[20] based on an analysis of New Mexico's Equal Protection Clause as providing greater protections than the analogous federal provision. Instead, our Supreme Court decided the case based on a provision of the New Mexico Constitution with no federal analogue—the Equal Rights Amendment.[21]

Almost fifteen years later, in *Griego v. Oliver*,[22] same-sex couples brought a declaratory judgment action against county clerks, alleging that they had a constitutional right to enter into civil marriages under the New Mexico Constitution's Due Process and Equal Protection Clauses. Our Supreme Court began its opinion in *Griego* by reciting the state constitution's Inherent Rights Clause.[23] But the Court did not base its decision on that provision, or on an analysis that interpreted the state constitution's Equal Protection Clause as providing greater protection than the analogous federal provision. Instead, the Court applied traditional

18. We note that in 2016, the New Mexico Supreme Court held that the New Mexico Workers' Compensation Act, N.M. STAT. ANN. §§ 52-1-1 to -70 (1929, as amended through 2015), which generally applied to agricultural workers but excluded farm and ranch laborers from coverage, violated the Equal Protection Clause of article II, section 18 of the New Mexico Constitution. *See* Rodriguez v. Brand West Dairy, 2016-NMSC-029, ¶ 2, 378 P.3d 13. However, that case did not present a constitutional claim affecting all New Mexicans, but rather only a discrete minority of its citizens. Further, unlike in cases requiring heightened scrutiny, the court utilized the least restrictive rational basis test in reaching its decision. *See id.* ¶¶ 24, 31.

19. 1999-NMSC-005, ¶ 1, 975 P.2d 841.

20. 448 U.S. 297, 317 (1980).

21. N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.").

22. 2014-NMSC-003, 316 P.3d 865.

23. *Id.* ¶ 1 ("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." (quoting N.M. CONST. art. II, § 4)).

federal equal protection analysis in holding that excluding same-gender couples from civil marriage violated "the equality demanded by the Equal Protection Clause of the New Mexico Constitution."[24]

Most recently, in *Morris v. Brandenburg*,[25] physicians and a patient brought a declaratory judgment action alleging that a statute criminalizing "assisted suicide" violated the New Mexico Constitution. Specifically, they argued that aid in dying is not assisted suicide, but rather a fundamental liberty interest protected by the Due Process Clause of the state constitution and also a right protected under the New Mexico Constitution's Inherent Rights Clause.[26] In what might be read as a wholesale return to the "lockstep" approach of state constitutional analysis, our Supreme Court followed the 20-year old decision of the United States Supreme Court in *Washington v. Glucksberg*,[27] paying no heed to the record in the case, or to comprehensive data and a standard of care developed in other jurisdictions in the two decades since *Glucksberg* was decided, or to other United States Supreme Court decisions concerning analysis of fundamental liberty interests.

### B. The Lack of a Means to Assert State Constitutional Rights

For the most part, the provisions of the New Mexico Constitution are not self-executing.[28] The State Bill of Rights[29] sets out the essential principles that are the bedrock of the freedoms and rights granted to New Mexico citizens.[30] Yet these same provisions fail to supply the means by which they can be effectuated. Thus, an individual who has been deprived of the rights expressly guaranteed by the New Mexico Constitution has no means to remedy that violation based solely on the language of the constitution. Some external enactment is necessary to serve as the vehicle for fulfilling those constitutional guarantees.

In New Mexico, the only currently available mechanisms for enforcing a state constitutional right are provided by the New Mexico Rules of Civil Procedure. A plaintiff can seek injunctive relief[31] or file suit for a declaratory judgment.[32] Both of these forms of equitable proceedings allow a plaintiff to secure non-monetary relief for a violation of a right protected by the state constitution, and both have been utilized by plaintiffs attempting to implement provisions of the New Mexico Bill of

24. *Id.* ¶ 68.

25. 2016-NMSC-027, 376 P.3d 836.

26. *Id.* ¶ 12.

27. 521 U.S. 702 (1997).

28. Some state constitutional provisions are fully operative on their own. For example, the requirement that a State Senator "shall not be less than twenty-five years of age," N.M. CONST. art. IV, § 3(A), or the provision that "no school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes," *id.* art. IX, § 11, can be given effect without any legislative enactment.

29. N.M. CONST. art. II, §§ 1–24.

30. *See* Morris v. Brandenburg, 2015-NMSC-100, ¶ 31, 356 P.3d 564 ("Constitutions, including our New Mexico Constitution, are sacred because they were written to apply in perpetuity.").

31. Rule 1-066 NMRA.

32. Rule 1-057 NMRA.

Rights.[33] There is no legislative enactment or procedural rule authorizing a suit for damages to redress state constitutional violations.

The absence of this form of remedy creates a significant void in the ability to secure redress for state constitutional violations. "In New Mexico, as elsewhere, the purpose of compensatory damages is to make an injured person whole."[34] In the absence of means to assert a claim for monetary relief, a plaintiff loses the opportunity to be compensated for concrete injuries, such as property damage or loss, pain and suffering, mental and emotional distress, or loss of reputation or status. In addition, the plaintiff is without any opportunity to secure punitive damages. "The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others in a similar position from such misconduct in the future."[35]

New Mexico is not alone in lacking a statutory authorization affirmatively establishing a civil action to recover damages for the deprivation of state constitutional rights.[36] However, a significant number of other states have sought to ascertain and develop appropriate remedies for persons who have suffered infringement of a state constitutional protection. Thus, both the New Mexico legislature and New Mexico's appellate courts have a number of options at their disposal to ensure the full range of remedies that should be available when state constitutional rights are violated.

### *1. Legislative Enactments*

The New Mexico legislature could enact its own version of the federal Civil Rights Act[37] expressly to create a civil cause of action for damages for state constitutional law violations. Although not the norm,[38] a few jurisdictions have fashioned such a remedy.[39] Other states have crafted more narrow provisions which

33. *See, e.g.*, *Morris*, 2016-NMSC-027 (declaratory and injunctive relief pertaining to application of criminal laws to physician aid in dying); Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865 (declaratory judgment and injunction regarding legality of same sex marriage); New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 975 P.2d 841 [hereinafter *NARAL I*] (injunction to prevent implementation of Department of Human Services' rules restricting funding for medically necessary abortions).

34. Lovelace Med. Ctr. v. Mendez, 1991-NMSC-002, 805 P.2d 603, 616 (appended opinion of N.M. Ct. App.).

35. Rhein v. ADT Auto., Inc., 1996-NMSC-066, ¶ 30, 930 P.2d 783 (quoting Conant v. Rodriguez, 1992-NMCA-019, ¶ 18, 828 P.2d 425).

36. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES §§ 6.02, 6.04 (4th ed. 2006).

37. 42 U.S.C. § 1983 (2012).

38. FRIESEN, *supra* note 36, at § 7.08 ("Broad legislative authorizations for constitutional damage claims and attorney fees, long the rule with regard to federal constitutional rights asserted against state actors, is uncommon so far in the states.").

39. *See, e.g.*, Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-105(a) (2003); Massachusetts Civil Rights Act, MASS. GEN. LAWS ch. 12 §§ 11H-I (1986); NEB. REV. STAT. § 20-148 (1997).

allow claims for violations of only certain rights.[40] And some allow claims for damages in the context of state officials who act with a specific mindset.[41]

The New Mexico Tort Claims Act[42] contains a possible framework for a statute designed to allow monetary recovery for state constitutional violations. The Act requires a governmental entity both to provide a defense for, and to pay the settlement or any final judgment entered against, a public employee for a "violation of property rights or any rights, privileges or immunities secured by . . . the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty."[43] Despite this seemingly broad language, the appellate courts have made clear that "it is well established that 'absent a waiver of immunity under the Tort Claims Act, a person may not sue the state for damages for violation of a state constitutional right.'"[44] To extend the Tort Claims Act into a viable authorization to redress violations of the New Mexico Constitution would require the legislature significantly to amend the provisions and underlying policies of the Act.[45]

### *2. Judicially Created Remedies*

Even without legislative enactment, courts in other jurisdictions have recognized civil claims for damages based on the violation of state constitutional rights.[46] These judicially-crafted claims for relief often take two forms.

First, some states[47] have looked to the Restatement (Second) of Torts § 874(A),[48] which permits a court to create an appropriate remedy to ensure the

---

40. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51q (West 1983) (recognizing claim by employee disciplined or discharged because of exercise of right of expression or religious belief as provided by state constitution); N.H. REV. STAT. ANN. 98-E:1 (2017) (protecting state employees' right of freedom of speech).

41. *See, e.g.*, Tom Bane Civil Rights Act of 1993, CAL. CIV. CODE § 52.1(a) (West 2007) (allowing a plaintiff to file a lawsuit against those who interfere or attempt to interfere by "threats, intimidation, coercion or violence" with the plaintiff's exercise or enjoyment of any state constitutional right); New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:6-2 (West 2014) (private cause of action where interference state constitutional protections was made through "threats, intimidation or coercion").

42. N.M. STAT. ANN. §§ 41-4-1 to -30 (1981).

43. *Id.* § 41-4-4(B)(2), (D)(2).

44. Valdez v. State, 2002-NMSC-028, ¶ 12, 54 P.3d 71 (quoting Ford v. Dep't of Pub. Safety, 1994-NMCA-154, ¶ 26, 891 P.2d 546).

45. *See* § 41-4-2(A) ("[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act."); *see also* Castillo v. County of Santa Fe, 1988-NMSC-037, ¶ 13, 755 P.2d 48 (Stowers, J., dissenting) ("The public policy declaration of Section 41-4-2, and the immunities provision of Section 41-4-4, taken together, require that a plaintiff's cause of action must fit within one of the exceptions to the immunity granted to governmental entities and public employees.").

46. *See generally* FRIESEN, *supra* note 36 at § 7.07[1].

47. *See generally id.* at § 7.05[3]; *see, e.g.*, Brown v. State, 674 N.E. 2d 1129, 1138 (N.Y. 1996).

48. Section 874(A) states:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured

effectiveness of a legislatively created right that lacks a corresponding remedy.[49] In any number of other contexts, New Mexico has followed the Restatement (Second) of Torts, declaring it to be "persuasive authority entitled to great weight."[50] To the extent New Mexico courts can rely on the governing principle set forth in this portion of the Restatement, therefore, their ability and justification for fashioning a viable damages remedy for infringement of the New Mexico Constitution would appear to be well-grounded.

Second, analogizing to the United States Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[51] other state courts have authorized a cause of action for damages.[52] In *Bivens*, the Court recognized a claim for damages against federal law enforcement agents directly under the Fourth Amendment. This holding marked the first time that the Court recognized a type of lawsuit not authorized by any federal statute, but created solely by court decree — a right to sue for a claimed violation of one's constitutional rights, when there was no other available remedy. The motivation for this holding was the Court's recognition that "[t]he very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury."[53] The Court also noted that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[54] Despite these lofty observations, since 1971 the Court has taken a far more "cautious, case-by-case approach, recognizing some *Bivens*-type claims for relief, while denying others when 'special factors' counseled hesitation."[55] If New Mexico courts were to look to *Bivens* as a potential model for an implied state constitutional cause of action, they would need to focus primarily on the reasoning behind the Court's initial holding and not on the subsequent limitations that the Court has imposed. Such a course of action may not provide as workable a solution as would be required to address the robust development of this area of state constitutional law.

Individuals who suffer a violation of their state constitutional rights have limited options to seek redress for that harm. And although an award of damages cannot fully compensate for the intangible harm that flows from the denial of a basic

---

> member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A (1979).

49. Comment (a) clarifies that the term "legislative provision" "also includes constitutional provisions." *Id.* § 874A cmt. a.

50. Fikes v. Furst, 2003-NMSC-033, ¶ 14, 81 P.3d 545 (quoting Gabaldon v. Erisa Mortgage Co., 1999-NMSC-039, ¶ 27, 990 P.2d 197); *see also* Hicks v. Eller, 2012-NMCA-061, ¶ 33, 280 P.3d 304 (noting that "the principles articulated in the *Restatement (Second) of Torts* have been widely accepted in this jurisdiction").

51. 403 U.S. 388 (1971).

52. *See* Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592, 602 n.10 (Cal. 1979) (collecting cases that relied on *Bivens* in allowing a damage remedy); *see generally* FRIESEN, *supra* note 36, at § 7.5(c).

53. *Bivens*, 403 U.S. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)) (internal quotations omitted)).

54. *Id.* at 395.

55. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION STATUTORY ATTORNEY'S FEES § 1.05[D] (4th ed. 2018); *see also* Correctional Servs. Corp. v Malesko, 534 U.S. 61, 66 (2001) (referring to *Bivens* as a "limited holding").

freedom granted by the State's charter, allowing such an award demonstrates the State's awareness that wrongful conduct by state actors in contravention of the constitution deserves a legal remedy.

### C. The Lack of a Meaningful Fee Shifting Provision

Even in those cases where the New Mexico Constitution can be used as a sword for injunctive or declaratory relief, there is no effective provision for an award of attorney fees for prevailing plaintiffs in those cases. To determine whether an award of attorney fees is appropriate, New Mexico follows the American rule, which provides that in the absence of a statute or other authority, each party ordinarily bears its own attorney fees.[56] Thus, it is incumbent upon either the state legislature or the courts to create a uniform fee-shifting mechanism to allow a plaintiff who successfully brings an action for injunctive or declaratory relief to enforce a state constitutional right to recover attorneys' fees. Neither branch of government has done so. The absence of such a mechanism in our statutes and case law creates a significant economic barrier to the ability of parties to retain private legal counsel to vindicate their state constitutional rights. Put simply, many potential civil rights litigants cannot afford private counsel, there is no financial incentive for civil rights attorneys to take their cases, and few private attorneys have the resources to undertake these cases on a *pro bono* basis or without support from public interest groups.

#### *1. Only a Few Statutory Fee-Shifting Provisions Apply*

Of the few statutes by which a litigant can seek affirmative relief under the state constitution, only two contain fee-shifting provisions, and those provisions apply only in tightly circumscribed contexts. The first provision is in the New Mexico Human Rights Act.[57] Under that Act, when a complainant prevails in a district court appeal of an order of the Human Rights Commission, the court, in its discretion, may award reasonable attorney fees.[58] The second provision is incorporated by reference into the Tort Claims Act. Notably, that Act does not contain a fee-shifting provision.[59] However, it provides a basis for tort liability against a governmental entity or public employee where immunity is waived by the New Mexico Religious Freedom Restoration Act ("RFRA").[60] The RFRA, in turn, allows a person "whose free exercise of religion has been restricted by a violation of" the RFRA to recover reasonable attorney fees against a government agency.[61]

---

56. *See* N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 9, 986 P.2d 450 [hereinafter *NARAL II*]. Authority for fee awards typically comes from statute, court rule, or contractual agreement. *See* Paz v. Tijerina, 2007-NMCA-109, ¶ 9, 165 P.3d 1167.

57. N.M. STAT. ANN. §§ 28-1-1 to -13 (1969, as amended).

58. *Id.* § 28-1-13(D) ("If the complainant prevails in an action or proceeding under this section, the court in its discretion may allow actual damages and reasonable attorney fees. . . . ").

59. *See* N.M. STAT. ANN. § 41-4-19 (1976, as amended) (capping liability under the TCA). For more information on the Tort Claims Act, see Ruth L. Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M. L. REV. 1 (1983).

60. N.M. STAT. ANN. §§ 28-22-1 to -5 (1976, as amended).

61. *Id.* § 28-22-4(A) ("A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a

Thus, the only statutory grounds for recovering attorney fees exist in employment, public accommodation, housing, and consumer credit discrimination cases,[62] and in free exercise of religion cases.[63]

*2. Fee Recovery Prohibited by Common Law*

These few statutory provisions do not come close to exhausting the panoply of state constitutional rights which could be enforced. On its face, the New Mexico Constitution protects rights including, but not limited to, freedom of speech, freedom of the press, the right to bear arms, due process, equal protection, and "the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."[64] As discussed above,[65] over the past twenty years, civil litigants have invoked the New Mexico Constitution to advocate for such varied, non-statutory ends as (1) preventing "the Secretary of the New Mexico Human Services Department [from] restrict[ing] funding for medically necessary abortions under the State's Medicaid program"[66] (*NARAL I*); (2) legalizing same-gender marriage[67] (*Griego*); and (3) seeking to enjoin the State from criminally prosecuting physicians who provide aid in dying to mentally competent, terminally ill patients[68] (*Morris*). None of these cases fell under the limited statutory bases permitting fee recovery.

New Mexico does not recognize any viable common law exception to the American rule which would allow litigants who successfully seek declaratory or injunctive relief based on state constitutional provisions to recover attorney fees for their efforts. To the contrary, in *NARAL II*, the New Mexico Supreme Court declined to recognize "the private attorney general doctrine," which establishes "that private plaintiff's attorneys are entitled to fees in cases where, as a result of their efforts, rights of societal importance are protected to the benefit of a large number of people."[69] In doing so, the court emphasized the policies underlying the American rule: promoting equal access to the courts (i.e., moving away from the English system of awarding fees to the prevailing party because under that system "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel"), and preserving

judicial proceeding and obtain appropriate relief against a government agency, including: (1) injunctive or declaratory relief against a government agency that violates or proposes to violate the provisions of the New Mexico Religious Freedom Restoration Act; and (2) damages pursuant to the Tort Claims Act [§§ 41-4-1- to -27], reasonable attorney fees and costs.").

62. *See id.* § 28-1-7 (enumerating unlawful discriminatory practices under the Human Rights Act).

63. *See* N.M. STAT. ANN. § 41-4-4(A) (2001) (granting governmental entities and public employees acting within the scope of duty immunity from tort liability, and authorizing exceptions, including under the New Mexico Religious Freedom Restoration Act); § 28-22-4(B) (waiving governmental immunity where government agency or its employees have restricted a party's free exercise of religion).

64. N.M. CONST. art. II, §§ 4, 6, 10, 17, 18.

65. *See* discussion *supra* Part II(A).

66. *NARAL I*, 1999-NMSC-005, ¶ 1, 975 P.2d 841.

67. *See* Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865.

68. *See* Morris v. Brandenburg, 2016-NMSC-027, 376 P.3d 836.

69. *NARAL II*, 1999-NMSC-028, ¶¶ 8, 10, 986 P.2d 450.

judicial resources (by not promoting satellite litigation about what constitutes a "reasonable" attorney fee).[70]

The *NARAL II* court then considered whether "the development of state constitutional jurisprudence in New Mexico" justified the conclusion that the American rule had become unworkable. Noting that the bulk of state constitutional cases were "criminal matters involving the public defender or tort cases, in which attorney fees were not at issue," and that in civil rights cases, fees were awardable "when authorized by statute[,]" the Court concluded the rule was still workable.[71] It therefore did not justify overruling the precedent that created it.[72]

Finally, the *NARAL II* court noted that our courts "have strictly adhered to th[e American] rule since our territorial days[,]" recognizing exceptions which "are limited in number and narrow in scope."[73] Although the court noted that there were common law exceptions to the rule which arose from a court's inherent powers to sanction bad faith conduct or exercise certain equitable powers, or where judicial and legislative powers were jointly exercised, the court ultimately concluded that the circumstances at bar did not justify recognizing another common law exception.[74] Therefore, the "private attorney general" exception -- at least as it was framed in *NARAL II* -- fell by the wayside as a viable hook that civil rights litigants could use to recover attorney fees.

In light of the New Mexico Supreme Court's rejection of the "private attorney general" exception, it is no surprise that each of the three New Mexico state constitutional civil rights cases described above share a striking common feature: rather than being represented by private counsel, all of the plaintiffs were at least partially represented—and therefore ostensibly funded—by one or more public interest groups.[75] Although correlation alone does not establish causation, that common feature of New Mexico's recent state constitutional civil rights litigation may underscore the barrier that the common law bar on fee shifting imposes.

### *3. The Irony of the Status Quo*

For two reasons, it is surprising that the absence of a common law fee-shifting doctrine in state constitutional cases remains the status quo. First, the

---

70. *Id.* ¶¶ 12–13 (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)).

71. *Id.* ¶ 14.

72. *See id.*

73. *Id.* ¶¶ 9, 15.

74. *See id.* ¶¶ 15, 26.

75. In *NARAL I*, the Reproductive Freedom Project for the American Civil Liberties Union Foundation, the Center for Reproductive Law & Policy, the ACLU of New Mexico, and Legal Action for Reproductive Rights of Planned Parenthood Federation of America were involved in representing the plaintiffs. *See NARAL I*, 1999-NMSC-005, 975 P.2d 841. In *Griego*, it was the ACLU of New Mexico, American Civil Liberties Union Foundation, and National Center for Lesbian Rights. *See* Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865. And in *Morris*, the ACLU of New Mexico Foundation and Disability Rights Legal Center participated. *See* Morris v. Brandenburg, 2016-NMSC-027, 376 P.3d 836. In contrast, private attorneys represented the claimant in *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53, which—although containing defenses based on the New Mexico constitution—was brought and litigated under the New Mexico Human Rights Act, and was thus subject to its fee-shifting provision. *See* N.M. STAT. ANN. § 28-1-13(D) (2005).

legislature's silence and the New Mexico Supreme Court's rejection of fee shifting in cases brought under the state constitution run contrary to both branches' actions in other legal contexts. Statutory claims in other areas of law in New Mexico have been enacted to protect parties' rights and contain fee-shifting provisions, and our courts have recognized the importance of allocating the cost burden as a way to incentivize private attorneys into taking cases with little to no monetary value. For example, in *Brooks v. Norwest Corp.*,[76] the New Mexico Court of Appeals affirmed the district court's denial of class certification in a case brought under to the New Mexico Unfair Practices Act.[77] The plaintiffs contended "that their claims are too small to justify the cost of individual actions so there is no other practical alternative to litigate their claims."[78] The *Brooks* court rejected that claim, reasoning that the legislature had enacted the Unfair Practices Act for the express purpose of encouraging small claims, and cited the statute's fee-shifting provision as support.[79] It seems ironic for the appellate courts to recognize the importance of a fee-shifting mechanism that allows consumers with claims worth only a diminutive amount to secure legal representation, but to fail to recognize the need for a similar provision with regard to claims asserted under New Mexico's constitution.

Second, New Mexico's approach to whether to recognize a fee shifting mechanism in state constitutional rights cases runs contrary to the federal parallel. Over twenty years before the New Mexico Supreme Court decided *NARAL II*, the United States Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*.[80] That case, widely thought to be "[a] watershed in the modern history of attorney's fees" for various reasons[81] strongly impacted the right to recover attorney fees in federal civil rights cases by abolishing the use of the "private attorney general" exception in cases brought under the federal Civil Rights Act.[82]

"The result was a crisis among both private and nonprofit attorneys who had relied on court-ordered attorney's fees to subsidize their representation of indigent plaintiffs in § 1983 suits seeking relief against state and local governmental defendants for federal constitutional and federal statutory violations."[83]

Congress acted quickly. The next year, it enacted the Civil Rights Attorney's Fees Awards Act of 1976,[84] which allowed a fee award to prevailing parties other than the United States. The legislative history recognized that "'civil rights litigants were suffering very severe hardships because of the *Alyeska* decision' and that 'private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.'"[85]

---

76. 2004-NMCA-134, 103 P.3d 39.

77. N.M. STAT. ANN. §§ 57-12-1 to -26 (2003).

78. *Brooks*, 2004-NMCA-134, ¶ 45.

79. *See id.*; *see also* Jones v. GMC, 1998-NMCA-020, ¶ 25, 953 P.2d 1104 (same).

80. 421 U.S. 240 (1975).

81. SCHWARTZ, *supra* note 55, § 1.02[B][1].

82. *See* 42 U.S.C. § 1983 (2012).

83. SCHWARTZ, *supra* note 55, § 1.02[B][1].

84. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2012)).

85. SCHWARTZ, *supra* note 55, § 1.02[C] (quoting H.R. REP. NO. 94-1558, at 2–3 (1976)).

The clear goal of the legislation was to eliminate the cost barrier of bringing suit to victims of civil rights violations with meritorious claims.

Since the enactment of Section 1988(b), the United States Supreme Court "has consistently recognized [its] public importance," even going so far as to acknowledge the provision's role in making certain types of civil rights claims viable in the first instance.[86] As the Supreme Court put succinctly in *Perdue v. Kenny A.*, "Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights."[87]

Without mentioning this well-known and well-documented course of events, the New Mexico Supreme Court in *NARAL II* cited *Alyeska*,[88] and chose to follow its same path in denying the "private attorney general" concept as a viable common law exception to the American rule. But unlike Congress, *NARAL II* has sparked no response from the New Mexico Legislature in the nearly twenty years since it was decided.

## CONCLUSION

The Law Review's symposium demonstrated the remarkable reservoir of essential freedoms and protections enshrined in the New Mexico Constitution. Yet except for a small portion of criminal defendants, those rights remain out reach for those citizens most in need of that charter's safeguards. New Mexico's appellate court and the New Mexico legislature need to act so that New Mexico can be that "single courageous State" Justice Brandeis hoped would emerge.

86. *Id.* § 1.02 [D].

87. 559 U.S. 542, 559 (2010); *see also, e.g.*, City of Riverside v. Rivera, 477 U.S. 566, 578 (1986) (recognizing Congress's goal of promoting "vigorous enforcement of civil rights" laws by private plaintiffs); Marek v. Chesny, 473 U.S. 1 (1985); Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

88. *See NARAL II*, 1999-NMSC-028, ¶ 30, 986 P.2d 450.