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## *Bosh* and the Constitutional Cause of Action: The Corridor to Civil Liberties

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## NOTES

### *Bosh* and the Constitutional Cause of Action: The Corridor to Civil Liberties

#### *I. Introduction*

The year 2012 saw 142,976 arrests in Oklahoma.<sup>1</sup> Put simply, prior to *Bosh v. Cherokee County Building Authority*,<sup>2</sup> 2012 offered nearly 143,000 opportunities for law enforcement to disregard Oklahomans' civil rights by imposing excessive force on pre-incarcerated arrestees. These citizens had no way, either through statute or judicially created remedy, to recover against the State of Oklahoma in tort. If the primary purpose of tort law is to make the victim whole again, it had been derelict in its duty.<sup>3</sup> Oklahoma law had acknowledged a wrong but offered no remedy.

Imagine. Officers are booking you into an Oklahoma jail for a nonviolent crime.<sup>4</sup> You stand at the booking desk, hands in cuffs behind your back, while the jail employee (clearly in no hurry) methodically plows his way through the necessary paperwork. Granted, you are in no rush to be booked. But the jailer's lack of sympathy towards you—a first time arrestee—is annoying. Tempers flare. You utter a snarky comment under your breath. The jailer at your side takes offense. More words are traded. The encounter leaves you, still with your hands restrained behind your back, on the ground—battered, bruised, beaten.

You are the victim of an unnecessary, violent attack by a government employee. You would sue Oklahoma, whose jailer left you with gashes on your face, bruised ribs, and broken limbs, if not for one problem: the State of Oklahoma is immune from suit under the Oklahoma Governmental Tort Claims Act (OGTCA).

This Note examines a citizen's right to bring a private cause of action against Oklahoma for violating the Oklahoma Constitution, despite the existence of state sovereign immunity codified in the OGTCA. Part II narrates this right's evolution up until *Bosh v. Cherokee County Building Authority*.<sup>5</sup> Part III details *Bosh*'s facts and the Oklahoma Supreme Court's

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1. OKLA. STATE BUREAU OF INVESTIGATION, STATE OF OKLAHOMA UNIFORM CRIME REPORT: ANNUAL REPORT JANUARY—DECEMBER 2012, at 1-4, <http://www.ok.gov/osbi/documents/2012%20UCR%20Annual%20Report.pdf>.

2. 2013 OK 9, 305 P.3d 994.

3. 74 AM. JUR. 2D *Torts* § 2 (2012).

4. Perhaps you forgot to pay for a traffic ticket.

5. 2013 OK 9, 305 P.3d 994.

analysis finding that a private cause of action exists under the Oklahoma Constitution. Part IV does three things. First, it demonstrates the now widespread confusion in state and federal courts regarding *Bosh*'s scope. Second, and more importantly, it examines the drastic implications for state liability and civil liberties that will ensue when the Oklahoma Supreme Court clarifies *Bosh*'s holding. Finally, Part IV also houses the thesis of this Note. Because Oklahomans' civil rights depend on *Bosh*'s scope, the Oklahoma Supreme Court should unanimously acknowledge that the Oklahoma Constitution provides other private causes of action despite the OGTCAs. This decision will have two effects. First, it will bestow upon Oklahomans the same rights that many other states already grant their own citizens. Two, it will promote responsible law enforcement and government conduct.

## II. Law Before *Bosh*

### *A. Sovereign Immunity Is Codified: Birth of the Oklahoma Governmental Tort Claims Act*

In 1978, Oklahoma enacted the Oklahoma Governmental Tort Claims Act (OGTCA).<sup>6</sup> In theory, the Act waives governmental immunity. But in practice, it provides several instances where the state, its municipalities, and their employees still enjoy immunity. One such instance is in operating jails and correctional facilities. Section 155 of the OGTCA provides that “[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [p]rovision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries . . . .”<sup>7</sup> Prior to 1978, the judiciary had immunized the state from all liability.<sup>8</sup> The OGTCA was the state’s way of voluntarily chiseling away at that immunity.

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6. 51 OKLA. STAT. § 151 (Supp. 2014). The Act provides,

(A) The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.

(B) The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.

*Id.*

7. *Id.* § 155.

8. *See, e.g., Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153, 1157.

Then in 1983, the Oklahoma Supreme Court abrogated the *judicially created* doctrine of sovereign immunity in *Vanderpool v. State*.<sup>9</sup> In *Vanderpool*, a lawnmower, operated by an Oklahoma Historical Society employee, propelled a rock into a co-worker's eye.<sup>10</sup> The accident robbed the plaintiff of her vision, and she sought recovery.<sup>11</sup> By overturning the trial court's summary judgment to the State, the Oklahoma Supreme Court refused to immunize the state from tort liability in the absence of a statute expressly conferring sovereign immunity.<sup>12</sup> To the court, the presence of the OGTCa meant that judicially created sovereign immunity no longer had a purpose; it was "no longer supportable in reason, justice or in light of the overwhelming trend against its recognition . . . ." <sup>13</sup> And because the "reason for the rule no longer exists, that alone should toll its death knell."<sup>14</sup>

And with that, the Oklahoma Supreme Court discarded the common law doctrine of sovereign immunity, and the OGTCa became the "exclusive remedy for an injured plaintiff to recover against a governmental entity in tort."<sup>15</sup>

*B. Washington v. Barry: The Court Finally Recognizes the Constitutional Cause of Action*

Nearly twenty years passed before the landscape of state sovereign immunity was again shaken up in *Washington v. Barry*.<sup>16</sup> In *Washington*, the plaintiff, a prisoner at a state penitentiary in McAlester, sued the prison employees under the OGTCa, alleging they used "unreasonable force" when they removed his handcuffs and leg irons.<sup>17</sup> The OGTCa, however, barred plaintiff's claim because the Act provided immunity to the state *and its employees* for operating any jail or correctional facility.<sup>18</sup> But the court added a caveat: though petitioner had not claimed it, a cause of action still existed under the Oklahoma Constitution so long as the force was so excessive that it qualified as cruel and unusual punishment, which is prohibited by the Oklahoma Constitution's article 2, section 9.<sup>19</sup> Granted,

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9. *Id.*

10. *Id.* ¶ 2, 672 P.2d at 1153.

11. *Id.*

12. *Id.* ¶¶ 24-25, 672 P.2d at 1156.

13. *Id.* ¶ 27, 672 P.2d at 1157.

14. *Id.*

15. *Bosh v. Cherokee Cty. Bldg. Auth.*, 2013 OK 9, ¶ 15, 305 P. 3d 994, 1000.

16. 2002 OK 45, 55 P.3d 1036.

17. *Id.* ¶ 2, 55 P.3d at 1038.

18. 51 OKLA. STAT. § 151 (Supp. 2014).

19. OKLA. CONST. art. II, § 9.

*Washington*'s holding was ostensibly limited to instances where a prisoner experienced excessive force. But the significance remained: for the first time in its nearly century-long existence, the Oklahoma Supreme Court declared that a private cause of action exists when the state violates a constitutional right.

### III. Statement of the Case

In a sense, *Bosh* is unsurprising. The Oklahoma Supreme Court had already declared, albeit eleven years earlier in *Washington*, that even prison inmates could sue for excessive force under the Oklahoma Constitution's prohibition against cruel and unusual punishment.<sup>20</sup> It followed that a cause of action could exist for arrestees, or "persons who were not already incarcerated inmates, because they have significantly broader rights."<sup>21</sup> The inmate in *Washington* only lost because he did not bring an excessive-force claim.<sup>22</sup> Regardless, *Washington* advanced civil rights—an advancement not forgotten by the *Bosh* court when it noted that *Washington* portended the court's decision.<sup>23</sup>

#### A. The Facts of Bosh

*Bosh*'s facts do not garner sympathy for the state jailers. And his experience illustrates the dangers of immunizing certain governmental functions. After his May 2011 arrest, Daniel Bosh stood at the booking desk of the Cherokee County Detention Center, a facility operated by the Cherokee County Governmental Building Authority (Authority).<sup>24</sup> His hands were secured in restraints behind his back.<sup>25</sup> He was "[p]resumably" being booked into the jail, but it is unclear (1) why Bosh was standing at the booking desk; (2) why he was restrained; (3) what he was restrained with; (4) what crime he was charged with, if any; or (5) whether he had even been convicted.<sup>26</sup>

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20. *Washington v. Barry*, 2002 OK 45, ¶ 10, 55 P.3d 1036, 1039 (finding that cause of action existed under article 2, section 9 of the Oklahoma Constitution, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.").

21. *Bosh*, ¶ 21, 305 P.3d at 1001.

22. *Id.* ¶ 10, 305 P.3d at 998.

23. *Id.* ¶ 26, 305 P.3d at 1002.

24. *Id.* ¶ 2, 305 P.3d at 996.

25. *Id.*

26. *Id.* Strangely, the lower court had explained that Bosh was arrested for failure to pay a traffic ticket. *Id.* While standing at the booking desk, Bosh asked to have his handcuffs

What is clear is what video surveillance captured next.<sup>27</sup> One jailer approached the restrained Bosh, grabbed the back of Bosh's neck, and slammed Bosh's head into the booking desk.<sup>28</sup> But the jailer was not finished. He placed Bosh's head underneath his arm and deliberately fell backwards, causing Bosh to strike the crown of his head on the floor.<sup>29</sup> Other jailers joined in and moved Bosh to the showers, outside of video surveillance.<sup>30</sup> The assault continued off camera.<sup>31</sup>

Bosh's injuries were severe. The jailers left Bosh to "languish" in his cell for two days before taking him to the hospital, where physicians discovered fractured vertebrae and attempted to surgically fuse several of the discs along Bosh's spinal cord.<sup>32</sup> Bosh is today supported by two rods and ten screws implanted into his back and neck and has difficulty walking. He can neither cook for nor play with his two young sons without pain.<sup>33</sup>

#### *B. Procedural History and Issue Presented*

Bosh sued the Authority, the assistant jail administrator, and his attackers in state court.<sup>34</sup> He asserted two types of claims: (1) civil rights claims under 42 U.S.C. § 1983 against the individuals and (2) state tort-law claims against the Authority.

The Authority removed the case to federal court and moved to dismiss the state tort claims based on exemptions from liability provided by the OGTCA. The federal district court granted the motion but allowed Bosh to amend his complaint to add an excessive-force claim under article 2, section 30 of the Oklahoma Constitution.<sup>35</sup> That provision, a corollary to the U.S. Constitution's Fourth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against

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loosened, and the jailer initiated the attack. *Bosh v. Cherokee Cnty. Bldg. Auth.*, No. 11-CV-376-JHP, 2012 WL 3758155, at \*1 (E.D. Okla. Aug. 30, 2012).

27. Bosh's counsel would later proffer video footage of the attack to local news sources. Russell Hulstine & Lori Fullbright, *Booking Video Released In Lawsuit Against Cherokee County Jail*, NEWSON6 (Dec. 14, 2011), <http://www.newson6.com/story/16320948/booking-video-released-in-lawsuit-against-chokeee-county-jail>.

28. *Bosh*, ¶ 3, 305 P.3d at 996.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* ¶¶ 3-4, 305 P.3d at 996.

33. Hulstine & Fullbright, *supra* note 27.

34. *Bosh*, ¶ 4, 305 P.3d at 996.

35. *Id.* ¶ 5, 305 P.3d at 997.

unreasonable searches or seizures shall not be violated . . . .”<sup>36</sup> After Bosh added the recommended excessive-force claim, the Authority again moved to dismiss.<sup>37</sup> The federal court then certified several questions to the Oklahoma Supreme Court, including, “Does the Okla. Const. art. 2, § 30 provide a private cause of action for excessive force, notwithstanding the limitations of the Oklahoma Governmental Tort Claims Act?”<sup>38</sup> In other words, may a nonincarcerated Oklahoma citizen sue the state under article 2, section 30 of the Oklahoma Constitution—which prohibits unreasonable searches and seizures—for damages suffered during an attack by its jailers despite the jail’s apparent immunity under the OGTC?

### C. *The Court’s Decision*

The Oklahoma Supreme Court said yes. It first acknowledged the obvious: the Oklahoma Constitution clearly conflicts with the OGTC, which seemingly “allow[s] the state, or, in this case the Authority, to elude tort liability when its employees beat and injure a citizen who is detained in one of its facilities.”<sup>39</sup> In the face of this conflict, the OGTC bows to the Oklahoma Constitution, whose “art. 2, § 30 protects citizens from being physically abused by the employees of state and local entities that operate jails and correctional facilities, and such protection includes legal liability for such conduct.”<sup>40</sup>

The court then grappled with whether respondeat superior applied.<sup>41</sup> If it did, the Authority was liable for its jailers’ misconduct. If it did not, recognizing Bosh’s right to sue for excessive force would be futile because Bosh would not be able to recover from the Authority. The court admitted that while claims brought under 42 U.S.C. § 1983 cannot impose vicarious liability, “Oklahoma is not bound by the constraints of federal law when determining whether the doctrine of respondeat superior serves as a basis for municipal liability under a cause of action for excessive force pursuant to the Okla. Const. art. 2, § 30.”<sup>42</sup> Besides, Oklahoma already used respondeat superior to hold municipalities liable under the OGTC.<sup>43</sup> In

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36. OKLA. CONST. art. II, § 30.

37. *Bosh*, ¶ 6, 305 P.3d at 997.

38. *Id.* ¶ 0, 305 P.3d at 995-96 (internal citation omitted).

39. *Id.* ¶ 7, 305 P.3d at 997-98 (footnote omitted).

40. *Id.* ¶ 8, 305 P.3d at 997.

41. *Id.* ¶ 28, 305 P.3d at 1003.

42. *Id.* ¶ 29, 305 P.3d at 1003 (emphasis omitted).

43. *Id.* ¶ 30, 305 P.3d at 1003.

other words, Oklahoma was not required to mirror the federal government's standards for governmental liability.

To show that respondeat superior applied, the court rehashed the facts of *Washington v. Barry*, where the court first acknowledged that a prisoner could sue for excessive force under article 2, section 9 of the Oklahoma Constitution.<sup>44</sup> The *Bosh* court reviewed its constitutional tort jurisprudence by framing its three observations from *Washington*. One, the OGTCAs bars tort claims for assault and battery and intentional infliction of mental anguish and emotional distress.<sup>45</sup> But, two, prisoners can still sue for excessive force under the Oklahoma Constitution so long as the force was so excessive that it qualified as cruel and unusual punishment under the Oklahoma Constitution.<sup>46</sup> And, three, arrestees and pre-incarcerated inmates have a lower burden of proof for excessive force claims because they have broader rights than prison inmates.<sup>47</sup> Thus, the court's hypothetical from *Washington* served as precedent; in *Bosh*'s case, the Authority could not flout responsibility by using the OGTCAs as a shield or by claiming respondeat superior did not apply.<sup>48</sup>

But the *Bosh* court then appeared to narrow its answer to the federal court's certified question. Article 2, section 30, it explained, applies to seized citizens, or "arrestees and pre-incarcerated detainees."<sup>49</sup> And because even *incarcerated* individuals may bring excessive-force claims under article 2, section 9, "it would defy reason to hold that pre-incarcerated detainees and arrestees are not provided at least the same protections of their rights, the same cause of action for excessive force under the Okla. Const. art 2, § 30."<sup>50</sup> For the first time, the Oklahoma Supreme Court held a citizen could recover against a municipality for violating his constitutional rights. True, *Washington* had recognized that right. But *Bosh* would actually be able to impose liability in federal court. The Oklahoma Supreme Court, however, was seemingly unwilling to recognize constitutional claims where there was no (1) excessive force or (2) "seizure."<sup>51</sup>

So there was hope for *Bosh*: while the OGTCAs barred his *tort* claim, he could still sue under article 2, section 30 of the Oklahoma Constitution.

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44. *Id.* (discussing *Washington v. Barry*, 2002 OK 45, ¶¶ 9-18, 55 P.3d 1036, 1039-42).

45. *Id.* ¶ 20, 305 P.3d at 1001.

46. *Id.*

47. *Id.* ¶ 21, 305 P.3d at 1001.

48. *Id.* ¶¶ 16-20, 305 P.3d at 1000-01.

49. *Id.* ¶ 22, 305 P.3d at 1001.

50. *Id.*

51. *Id.*

Both precedent and a concern for constitutional liberties bolstered the court's decision. Precedent held the OGTCA could not "provid[e] blanket immunity."<sup>52</sup> And to find for the Authority would "render the Constitutional protections afforded the citizens of this State as ineffective, and a nullity."<sup>53</sup> At the least, *Bosh* says that Oklahoma cannot immunize the reckless conduct of its jailers when doing so conflicts with the Oklahoma Constitution.

*Bosh* thus illuminated the rights of arrested and incarcerated individuals—who are no longer "at the mercy of their captors to be beaten, assaulted, and left without medical attention without any remedy to deter such conduct."<sup>54</sup> But *Bosh* left the constitutional rights of non-arrested citizens to sue under the Oklahoma Constitution in the dark.

#### *IV. Bosh's Ramifications: Unlocking the Door to Civil Liberties*

##### *A. In the Wake of Bosh, Questions Abound*

Since *Bosh*, the Oklahoma Supreme Court has delivered only one clarification: "claim[s] for excessive force, as applied to police officers and other law enforcement personnel, may not be brought against a municipality when a cause of action under the OGTCA is available."<sup>55</sup> Draconian? Yes. Commonsensical? Moreso. After all, there is "no rationale requiring the extension of a *Bosh* excessive force action" brought under the constitution when one already exists under the OGTCA.<sup>56</sup>

But *Bosh's* scope is still unclear. For one, the Oklahoma Supreme Court recognized a citizen's constitutional right to bring excessive-force claims against the state under article 2, section 30 of the Oklahoma Constitution.<sup>57</sup> Confusingly, though, article 2, section 30 makes no mention of excessive force, and ensures only that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated . . . ."<sup>58</sup>

True, *Washington* previously acknowledged that prison inmates could sue for excessive force under article 2, section 9—which also makes no

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52. *Id.* ¶ 23, 305 P.3d at 1001.

53. *Id.*

54. *Id.* ¶ 17, 305 P.3d at 1000.

55. *Perry v. City of Norman*, 2014 OK 119, ¶ 1, 341 P.3d 689, 689.

56. *Id.* ¶ 19, 341 P.3d at 693.

57. *Bosh*, ¶ 32, 305 P.3d at 1004.

58. OKLA. CONST. art. II, § 30.

mention of excessive force.<sup>59</sup> Yet that decision at least made more sense because that provision prohibits using cruel and unusual punishment. It also made sense because recognizing this right in *Washington* was not unprecedented. Oklahoma is far from the first state to recognize a private cause of action under its state constitution.<sup>60</sup> States have recognized causes of action for a variety of claims, including for illegal search and seizure and the use of cruel and unusual punishment.<sup>61</sup> In other words, it was not surprising that the *Washington* court found a constitutional claim for excessive force in the constitution's prohibition on cruel and unusual punishment. But *Bosh*'s reliance on section 30—a provision that makes no mention of excessive force or cruel and unusual punishment—is strange.

And adding to the confusion, the court's lofty language regarding constitutional liberties,<sup>62</sup> especially when contrasted with its cursory analysis, calls *Bosh*'s scope into question.

#### *1. Do Bosh Claims Require an Arrest?*

The court's decision to allow *Bosh* to sue for excessive force under a constitutional provision that does not mention excessive force is undoubtedly odd. But just as curious is the court's limiting of its holding, restrictively labeling those who were the subjects of "excessive force" as "arrestees and pre-incarcerated detainees," rather than those who are merely seized but not officially arrested.<sup>63</sup> Hopefully this phrasing does not signal the inability of *non-arrested* individuals to sue for excessive force or that *no* constitutional remedy exists for those who are unlawfully searched and seized but do not experience excessive force.

Perhaps noteworthy is that the *Bosh* court, in declaring that article 2, section 30 provides a private cause of action for *excessive force* despite the OGTCa, cites to *Binette v. Sabo*—a Connecticut case recognizing a

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59. *Washington v. Barry*, 2002 OK 45, ¶ 10, 55 P.3d 1036, 1039.

60. Sharon N. Humble, Annotation, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th 619 (2000).

61. See, e.g., *Binette v. Sabo*, 710 A.2d 688 (Conn. 1998) (search and seizure). *But see*, e.g., *Giraldo v. Calif. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), *review denied*, (Feb. 11, 2009) (finding no private right of action for damages arising out of an alleged violation of the California Constitution's cruel and unusual punishment clause).

62. *Bosh*, ¶ 23, 305 P.3d at 1001 ("The OGTCa cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens. To do so would not only fail to conform to established precedent which refused to construe the OGTCa as providing blanket immunity, but would also render the Constitutional protections afforded the citizens of this State as ineffective, and a nullity.").

63. *Bosh*, ¶ 22, 305 P.3d at 1001.

constitutional tort claim for *unreasonable search and seizure*.<sup>64</sup> *Bosh* characterizes *Binette* as (1) creating a “private, Constitutional right of action for money damages against officials stemming from [sic] alleged violations of search and seizure and arrest” and (2) “recogniz[ing] that compelling policy considerations favored the creation of a constitutional tort to ensure the citizens a remedy when their constitutional rights were violated by a police officer or similar actor.”<sup>65</sup> So unlike *Bosh*, *Binette* recognizes a private cause of action to be free from *unreasonable searches and seizures*—not excessive force, as *Bosh* facially does. Though the *Bosh* court ostensibly limits its holding to arrestees and pre-incarcerated individuals, its cite to *Binette* implicitly suggests that recognition of other causes of action under the Oklahoma Constitution might lie on the judicial horizon. Or at least the Oklahoma Court of Civil Appeals agrees; it holds that *Bosh* is not limited to excessive force claims under article 2, section 30.<sup>66</sup>

## 2. *Bosh’s Reasoning: Unique or Unclear?*

More perplexing is that *Bosh’s* analysis, or the lack of it, does not fit the mold of other state supreme court decisions that have recognized constitutional rights of action. According to American Law Reports, state courts recognizing these rights usually pattern their reasoning on section 874A of the Restatement (Second) of Torts, common law, or analogies to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, where the U.S. Supreme Court first recognized a private cause of action under the Fourth Amendment.<sup>67</sup>

*Bosh*, then, is either unique or unclear. It is not rooted in tort law—the court certified the question of whether a private cause of action exists under article 2, section 30 of the Oklahoma Constitution only *after* the federal district court granted the Authority’s motion to dismiss *Bosh’s* state tort claims.<sup>68</sup> This makes sense: because of the OGTC, *Bosh’s* right to sue could not rest in statutory tort law.

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64. *Bosh*, ¶ 23, 305 P.3d at 1001 n.33; *Binette*, 710 A.2d at 688.

65. See *Bosh*, ¶ 23, 305 P.3d at 1001 n.33; see also *White v. City of Tulsa*, 979 F. Supp. 2d 1246, 1249-50 (N.D. Okla. 2013) (discussing *Bosh* footnote 33 and why *Bosh* should be interpreted as providing a cause of action for all provisions of article 2, section 9 of the Oklahoma Constitution).

66. *GJA v. Okla. Dep’t of Human Servs.*, 2015 OK CIV APP 32, ¶¶ 30-32, 347 P.3d 310, 316.

67. 403 U.S. 388 (1971).

68. *Bosh*, ¶¶ 1, 5, 305 P.3d at 996-97.

Still, the decision could be based on common law—but there was no mention of any common law right to sue the state. It could be based on *Bivens* since footnote 33 acknowledges that *Binette* is based on *Bivens*. But *Bosh* omits any other reference to *Bivens* or the right to sue under the U.S. Constitution.<sup>69</sup>

Acknowledging that *Bosh* recognizes a private cause of action is not enough. More important is the court's reasoning; understanding *how* the court found a private cause of action under the Oklahoma Constitution is essential to understanding *Bosh* and discerning whether the court will recognize additional constitutional claims in the future.

*a) No Reliance on the Second Restatement of Torts*

Though some state courts recognize a private cause of action under the state constitution by citing the Restatement (Second) of Torts, Oklahoma did not.<sup>70</sup> Section 874A of the Restatement (Second) of Torts encourages courts to create a remedy where a statute has not provided one:

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 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.<sup>71</sup>

While not dispositive, the court's decision not to ground its holding in section 874A could suggest a limited holding. The court might have realized that if it recognized *Bosh*'s claim on the basis of the broad language of section 874A, it would open the constitutional floodgates. Plaintiffs could then use *Bosh*'s citation to the Restatement to press many never-before-recognized claims under statutes and constitutional provisions that—perhaps deliberately—provide no remedy. But this reasoning is superficial, mostly because a primary purpose of a constitution is to check

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69. *Id.* ¶ 23, 305 P.3d at 1001 n.33.

70. Humble, *supra* note 60, § 3[a].

71. RESTATEMENT (SECOND) OF TORTS: TORT LIABILITY FOR VIOLATION OF LEGISLATIVE PROVISION § 874A (AM. LAW INST. 1979).

political branches.<sup>72</sup> After all, the Bill of Rights (and Oklahoma's equivalent in Article 2) is "intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . ."<sup>73</sup>

Perhaps the court thought it better in *Bosh's* case to recognize a *limited* instance where a claimant might recover for a violation of constitutional right rather than have its broad analysis used to argue that *every* statute, whether it offered a remedy or not, provided a cause of action. In other words, it was better to methodically expand its *Bosh* holding in due time than to abruptly limit its scope months from now to the detriment of an unsuspecting plaintiff. Regardless, this reasoning contradicts the spirit of constitutional rights.

*b) In Search of Common Law*

Also absent from *Bosh* is any mention of common law. This omission is troubling, particularly because common law is founded on the notion that a remedy exists for every wrong.<sup>74</sup> That a wrong is a constitutional violation should only bolster, not undermine, the right to relief. Recognizing this, some courts find causes of action using reasoning based on historical common law provisions.<sup>75</sup> For example, in determining whether a cause of action exists, the New York Court of Appeals asks whether its constitution adopted particular common law principles from English common law and whether those principles suggest grounds for relief.<sup>76</sup> Thus, because the prohibition on unlawful searches and seizures began with the Magna Carta, and at common law "[t]he civil cause of action was fully developed in England and provided a damage remedy for the victims of unlawful searches," New York recognizes a similar cause of action under its constitution.<sup>77</sup>

It is frustrating that *Bosh* is not grounded in common law. The English Crown was not immune at common law. And if the crown could face liability under English common law,<sup>78</sup> then surely Oklahoma's state

72. T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1529 (1997).

73. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

74. *Hibbard v. Halliday*, 1916 OK 649, ¶ 8, 158 P. 1158, 1160.

75. *Humble*, *supra* note 60, § 3[c].

76. *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996).

77. *Id.* at 1139.

78. *Jefferson*, *supra* note 72.

government should not be permitted to hide behind immunity. If *Bosh* signals that the Oklahoma Supreme Court will honor the legislature's deliberate decision not to craft a statutory remedy for common law offenses, its reasoning is inimical to the liberty of Oklahoma citizens.

c) *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics: A Potential Framework?*

The U.S. Supreme Court first recognized the right to bring a private cause of action under the U.S. Constitution in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>79</sup> The plaintiff in *Bivens* brought suit under the Fourth Amendment,<sup>80</sup> asserting that federal agents violated his constitutional right to be free from unreasonable search and seizures when they entered his apartment without a warrant or probable cause and arrested him for alleged possession of narcotics.<sup>81</sup> Because *Bosh* suggests that neither common law nor tort law provides a remedy, *Bivens* provides a blueprint to expand the right of citizens to bring actions under other state constitutional provisions.

The *Bivens* opinion is rooted in a rather obvious but rarely acknowledged notion: a state actor “possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”<sup>82</sup> One way the Bill of Rights limits this harm is by preventing unreasonable searches and seizures by federal authority.<sup>83</sup> When this right has been invaded, it is a court’s duty to “adjust [its] remedies so as to grant the necessary relief.”<sup>84</sup> In *Bivens*’s case, for instance, the Fourth Amendment demanded that the Court adjust the remedy. The Fourth Amendment, after all, reaches farther than tort law; it prohibits some conduct that is permissible for private persons.<sup>85</sup> And because of this, “[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable

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79. 403 U.S. 388 (1971).

80. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

81. *Bivens*, 403 U.S. at 389.

82. *Id.* at 392.

83. *Id.*

84. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

85. *See id.* (“Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law.”).

searches and seizures, may be inconsistent or even hostile.”<sup>86</sup> Consider: the private citizen who demands entrance into another person’s home and is admitted is not usually liable for trespass, while a person “who demands admission under a claim of federal authority stands in a far different position.”<sup>87</sup>

In other words, tort law intends to regulate the behavior between *private* citizens. But this limited purpose should not preclude constitutional relief when the *state* acts illegally. Damages should of course be available for violating the Fourth Amendment because damages are “the ordinary remedy for an invasion of personal interests in liberty.”<sup>88</sup> The Fourth Amendment may not expressly authorize a court to impose monetary liability on those who violate it, but this does not matter.<sup>89</sup> As Chief Justice John Marshall noted, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>90</sup>

So the U.S. Supreme Court did not rely on tort law or historical common law to find for *Bivens*. Rather, it relied on the civil liberties embodied in the Fourth Amendment. That the legislature had not afforded a statutory remedy to its citizens was of no concern. As Justice Harlan’s concurring opinion framed the issue, “I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.”<sup>91</sup> Congress could of course create statutory remedies for violations of civil rights.<sup>92</sup> But congressional inaction or the lack of statutory remedy cannot deprive injured citizens of just compensation.

With *Bosh* now barring causes of action against the state under tort law, citizens still need a vehicle to bring claims other than those for excessive force. Oklahoma should follow other states and adopt reasoning analogous to *Bivens* to ensure its citizens may sue under constitutional provisions other than article 2, section 30.

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86. *Id.* at 394.

87. *Id.*

88. *Id.* at 395.

89. *Id.* at 396.

90. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

91. *Id.* at 403 (Harlan, J., concurring).

92. *See e.g.*, 42 U.S.C. § 1983 (1996).

### *B. The Implications of Bosh*

Both state and federal district courts are already grappling with *Bosh*'s applicability to other claims.<sup>93</sup> This is largely because the scope of Oklahoma's Bill of Rights, like the federal one, is far-reaching. The Oklahoma Constitution's Article II guarantees freedom of religion (section 5), due process (section 7), and peaceable assembly and petition (section 3).<sup>94</sup> It also protects the rights to vote without interference (section 4) and bear arms (section 26).<sup>95</sup> And considering that the OGTC immunizes the state from more than operating a jail like in *Bosh*, the OGTC and the Oklahoma Constitution will likely conflict again—this time implicating a constitutional provision other than the ban on unreasonable searches.<sup>96</sup> This is especially probable because the OGTC confers broad immunity on the state; operating a jail is not the only immunized activity. Indeed, if it were, the constitutional implications of the *Bosh* decision would be noteworthy but not momentous.

Instead, the OGTC immunizes the state from liability for many other acts of state employees, including: enforcement of a court's lawful order, acts of state-employed independent contractors, operation of a juvenile detention facility, placement of children in foster homes, and the use of reasonable force and other actions taken by school employees.<sup>97</sup>

The point is this: *Bosh*'s tremors will eventually be felt outside of a correctional facility. The Oklahoma Supreme Court will one day take another case where the OGTC and Oklahoma Constitution conflict.

### *C. At a Crossroads: The Court's Options Moving Forward*

Moving forward, the Oklahoma Supreme Court's chief objective should be providing clarification to district courts. It could first identify other

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93. See, e.g., *Koch v. Juber*, No. CIV-13-0750-HE, 2014 WL 2171753, at \*3 (W.D. Okla. May 23, 2014) ("*Bosh* does not serve to create a private right of action for all claims arguably arising under the Oklahoma Constitution."); *Jackson v. Okla. City Pub. Sch.*, 2014 OK CIV APP 61, ¶ 10, 333 P.3d 975, 979 (dismissing *Bosh* claim because plaintiff had not been seized or arrested); *Wright v. Stanley*, No. CIV-11-1235-C, 2013 WL 6827946, at \*2 (W.D. Okla. Dec. 20, 2013) (declining jurisdiction "[g]iven the importance of allowing the Oklahoma courts to decide novel and significant issues of Oklahoma law, such as the breadth of the recent *Bosh* opinion"), *vacated by* No. CIV-11-1235-C, 2014 WL 1668534 (Apr. 25, 2014).

94. OKLA. CONST. art. II.

95. *Id.*

96. *Id.* art. II, § 30.

97. 51 OKLA. STAT. § 155 (Supp. 2014).

places where the OGTCa and the Oklahoma Constitution conflict.<sup>98</sup> Granted, the court did not expressly decide that immunizing the state from liability for operating a jail is unconstitutional per se. But *Bosh*'s language suggests it is.<sup>99</sup>

The court could also limit private causes of action to violations of article 2, sections 9 (cruel and unusual punishment) and 30 (unreasonable force). Or, it could further narrow state liability to instances where excessive force was used. What seems more likely, however—considering the court's citation to Connecticut's *Binette* opinion and its lofty language on constitutional rights—is that it will gradually expand the number of Oklahoma Bill of Rights provisions under which citizens can bring private suits against state entities. It was *Bosh*'s broad language on constitutional rights, after all, that persuaded the Court of Civil Appeals that constitutional causes of action are not limited to article 2, section 30 claims.<sup>100</sup>

But one legal hurdle presents another. If the court plans to formally opine, case by case and provision by provision, which specific constitutional provisions permit a citizen to recover from the state, this could span decades. Instead, district courts need a standard by which they can determine if a constitutional provision allows a citizen to sue. Here, Oklahoma should look to other states.

### *1. The Self-Executing Constitutional Provision*

*Bosh* demonstrates that legislative obstructionism cannot prevent citizens from bringing constitutional causes of action. This obstructionism was futile; *Bosh* did not need the legislature to act in order to recover. Essentially, *Bosh* declared article 2, section 30 of the Oklahoma Constitution to be self-executing. A self-executing provision is one that is

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98. OKLA. CONST. art. II.

99. *Bosh v. Cherokee Cty. Bldg. Auth.*, 2013 OK 9, ¶ 23, 305 P.3d 994, 1001 (noting that “immunizing the state completely from all liability for violations of the constitutional rights of its citizens . . . would also render the Constitutional protections afforded the citizens of this State as ineffective, and a nullity”).

100. *GJA v. Okla. Dep't of Human Servs.*, 2015 OK CIV APP 32, ¶ 30, 347 P.3d 310, 316 (“[T]he Court has not only adjudicated a specific claim based upon a set of facts, but also the Court made a statement of policy (upholding constitutional guarantees and protections) as its broader holding. The Court then specifically applied that broader policy statement holding to the facts of the case.”). Still, the Court of Civil Appeals explained that because “[n]ot every malfeasance, misfeasance, or nonfeasance rises to the level of a violation of constitutional rights,” a court must act as a “gatekeeper.” *Id.* ¶¶ 33-34, 347 P.3d at 316.

effective immediately without the need for any type of implementing action.<sup>101</sup> These provisions bind government actors, and violating them automatically permits an injured party to sue.<sup>102</sup>

Other states have identified their constitutional self-executing provisions, such as those guaranteeing voting rights and the rights to free speech and press.<sup>103</sup> Oklahoma, though, already has standards to decide whether a constitutional provision is self-executing. But these standards conflict when applied to Oklahoma Bill of Rights provisions. For example, “A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated to render it operative.”<sup>104</sup> In the case of article 2, no further legislation is theoretically needed to protect citizens from unreasonable searches and seizures. Granted, law enforcement—so as to act lawfully—requires courts to decide what searches are unreasonable. But no additional legislation is needed to enforce the right.

On the other hand, the court holds that a “constitutional provision is not self-executing when it merely lays down general principles and does not supply a sufficient rule by means of which the right which it grants or reserves may be enjoyed and protected.”<sup>105</sup> This seems hostile to the spirit of constitutional rights; a constitution chiefly aims to lay down general principles that will govern the legislature. Under this definition, then, no Bill of Rights provision in the Oklahoma Constitution is self-executing. Fortunately, *Bosh* quashes this notion by ruling for Bosh. His case “center[ed] around” the conflict between the Oklahoma Constitution and the OGTCA.<sup>106</sup> But it also revolved around the tension between constitutional liberty and the court’s earlier conceptions of what qualifies as self-executing.

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101. *Self-executing*, BLACK’S LAW DICTIONARY (9th ed. 2009).

102. David M. Gareau, *Opening the Courthouse Doors: Allowing a Cause of Action to Arise Directly from a Violation of the Ohio Constitution*, 43 CLEV. ST. L. REV. 459, 477 (1995).

103. See, e.g., *Laguna Publ’g Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813, 835 (Cal. Ct. App. 1982) (free speech provision of California Constitution); *Fenton v. Groveland Cmty. Servs. Dist.*, 185 Cal. Rptr. 758 (Cal. Ct. App. 1982) (voting right clause of California Constitution); *Schreiner v. McKenzie Tank Lines*, 408 So.2d 711 (Fla. Dist. Ct. App. 1982), *aff’d*, 432 So. 2d 567 (Fla. 1983) (equal protection clause of Florida Constitution); *Shields v. Gerhart*, 658 A.2d 924, 934 (Vt. 1995) (free speech clause of Vermont Constitution).

104. *Latting v. Cordell*, 1946 OK 217, ¶ 6, 172 P.2d 397, 399.

105. *Maddox v. Hunt*, 1938 OK 495, ¶ 9, 83 P.2d 553, 556.

106. *Bosh v. Cherokee Cty. Bldg. Auth.*, 2013 OK 9, ¶ 7, 305 P.3d 994, 997.

Without expressly saying it, the court declared article 2, section 30 to be self-executing when it decided that “[t]he OGTCGA cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens.”<sup>107</sup> To shield the state would “render the Constitutional protections afforded the citizens of this State as ineffective, and a nullity.”<sup>108</sup>

The Oklahoma Bill of Rights contains thirty-seven provisions.<sup>109</sup> It grants thirty-seven rights to Oklahoma citizens—rights that are all self-executing in some fashion. *Bosh* was explicit: the legislature could not employ the OGTCGA to run roughshod over the constitutional right of *Bosh* to be free from excessive force. This reasoning should apply equally to other constitutional rights.

## 2. *Concerns of the State*

The court’s faithfulness to the constitution’s spirit is laudable. But it does present two manageable problems for the state. First, while the OGTCGA caps a plaintiff’s damages, *Bosh* offers no limit.<sup>110</sup> The OGTCGA’s ceiling on damages instead depends on numerous factors, such as who brings the claim, how many claims are being brought, and the particular state entity being sued.<sup>111</sup> For example, the OGTCGA caps damages at “One Hundred Twenty-five Thousand Dollars (\$125,000.00) to any claimant for a claim for any other loss arising out of a single act, accident, or occurrence.”<sup>112</sup> Thus, if the jailers’ conduct in *Bosh* had not been immunized under the OGTCGA, *Bosh*’s damages would be limited to \$125,000 for each claim. *Bosh*, however, provides no guidance on the state’s potential monetary liability for constitutional violations. Until the court finds a constitutional limit on damages, perhaps under due process,<sup>113</sup> recovery is theoretically limitless. For budgetary purposes, the state must know the amount of its potential liability.

A second concern is whether a statute of limitations exists for constitutional violations like it does for the OGTCGA, which is one year.<sup>114</sup>

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107. *Id.* ¶ 23, 305 P.3d at 1001.

108. *Id.*

109. OKLA. CONST. art. II.

110. 51 OKLA. STAT. § 154 (2011).

111. *Id.* § 154(A)(2).

112. *Id.*

113. *See, e.g.,* Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 (2008).

114. 51 OKLA. STAT. § 156(B) (“A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs.”).

This one-year statute of limitations allows the state Attorney General to immediately investigate claims against the state.<sup>115</sup> The Attorney General does not have the same luxury for state constitutional violations because *Bosh* offers no statute of limitations. Citizens are currently free to amend their complaints to add or bring *Bosh* claims years after the actual constitutional violation occurred. With the constitutional violations having begun years before, the state lacks notice to investigate the possibly ongoing improper conduct of its employees. Without knowledge that its entities are acting unconstitutionally, the state cannot be expected to discipline or fire its employees. Unconstitutional conduct will continue undisturbed.

The court should adopt a framework to determine an appropriate statute of limitations and damages for *Bosh* claims. Federal courts provide guidance. When deciding 42 U.S.C. § 1983 claims, they simply apply the statute of limitations for the most analogous state statute.<sup>116</sup> That *Bosh* claims are brought under the state constitution should not matter—the government still requires notice. Likewise, some state courts apply the most analogous state statute when deciding state constitutional claims.<sup>117</sup> Maryland actually applies the statute of limitations for its own governmental tort claims act.<sup>118</sup> Regardless of where the statute of limitations comes from, Oklahoma needs one.

Second, like the U.S. Supreme Court, the Oklahoma Supreme Court should adopt a framework for determining a cap on damages, at least for punitive damages. To decide the constitutionality of a punitive damages award, the U.S. Supreme Court considers the degree of reprehensibility of the defendant's conduct, as well as any disparity between the actual and potential harm suffered by the plaintiff and the amount of punitive damages awarded.<sup>119</sup> For example, an award significantly exceeding a single-digit ratio between punitive and compensatory damages will likely not survive a

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115. *Id.* § 156(C).

116. *See* *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995); *Kurinsky v. United States*, 33 F.3d 594, 599 (6th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991); *Bieneman v. City of Chicago*, 864 F.2d 463, 469-70 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987).

117. *See, e.g., Brown v. New York*, 250 A.D.2d 314, 318 (N.Y. 1998).

118. *Rounds v. Md. Nat'l Capital Park & Planning Comm'n*, 75 A.3d 987, 997, *cert. granted*, 81 A.3d 457 (2013), *aff'd in part, rev'd in part sub nom. Rounds v. Md.-Nat'l Capital Park & Planning Comm'n*, 109 A.3d 639 (Md. 2015).

119. *BMW v. Gore*, 517 U.S. 559, 575-81 (1996).

due process challenge.<sup>120</sup> Should Oklahoma fail to impose any cap on damages, an award to an injured plaintiff might fall victim to a due process challenge.

#### *V. Conclusion*

With *Bosh*, Oklahoma significantly advanced civil rights by acknowledging that the state cannot immunize itself while trampling on the constitutional rights of its citizens. But to limit *Bosh*'s scope to prisoners and arrestees would stall that progress. Immunizing the state for its unconstitutional conduct undermines *Bosh*'s lofty language on civil liberties. Perhaps the most noteworthy early challenge to sovereign immunity was brought by Sir Edward Coke in the seventeenth century. The King was not above the law, Coke argued. Rather, the "common law protecteth the King."<sup>121</sup> That axiom is no less cogent today than it was centuries ago. The law protecteth the King. And today, the constitution protects the people.

*Nick Coffey*

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120. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) (quoting *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003)).

121. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 17 (8th ed. 2013).