

# THE RIGHT REMEDY TO RIGHT CONSTITUTIONAL WRONGS: IOWA’S NEW *GODFREY* ACTION AND UNANSWERED QUESTIONS

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## I. INTRODUCTION

A civil cause of action to recover damages against persons acting under color of state law who violate a plaintiff's federal constitutional rights has been available to plaintiffs since Congress created a statutory remedy for such wrongs as part of the Civil Rights Act of 1871.<sup>1</sup> One hundred years later, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the U. S. Supreme Court recognized a cause of action to recover money damages against *federal* officers who violated a plaintiff's Fourth Amendment constitutional rights.<sup>2</sup>

But what about violations of a person's rights under the Constitution of the State of Iowa? Should such a remedy for money damages exist for victims who have been injured due to state constitutional violations? The Iowa Court of Appeals addressed that question in the case of *Conklin v. State* and answered in the negative, affirming the trial court's decision.<sup>3</sup> The appellant in that case sought further review to the Iowa Supreme Court, which denied such review.<sup>4</sup> Recently, however, the Iowa Supreme Court, in the case of *Godfrey v. State*, decided definitively, in a 4–3 decision, that a private cause of action for money damages does exist for violations of a plaintiff's rights under the Iowa constitution.<sup>5</sup>

The purpose of this Article will be to examine the basis and scope of the Iowa Supreme Court's opinion in *Godfrey*, and to further examine some of the questions which the court in *Godfrey* left unanswered that will assuredly be faced by trial courts going forward when litigating these new

1. 42 U.S.C. § 1983 (2012).

2. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397–98 (1971).

3. *Conklin v. State*, No. 14-0764, 2015 WL 1332003, at \*6 (Iowa Ct. App. Mar. 25, 2015).

4. *Further Review Results*, IOWA JUD. BRANCH (July 13, 2017), <http://www.iowacourts.gov/wfData/files/FurtherReviews/2017%20further%20reviews/July%2013%202017.pdf>.

5. *Godfrey v. State*, 898 N.W.2d 844, 879–80 (Iowa 2017).

“*Godfrey* actions.”<sup>6</sup> Some of those questions could have been answered by the Iowa Supreme Court had the court accepted further review of the court of appeal’s decision in *Conklin*.<sup>7</sup>

## II. *GODFREY V. STATE, ET AL.*

Christopher J. Godfrey was appointed as the Iowa Workers’ Compensation Commissioner for a six-year term by then-Governor of Iowa Chet Culver, and his appointment was confirmed by the Iowa Senate on March 30, 2009.<sup>8</sup> His term was set to expire on April 30, 2015.<sup>9</sup>

According to Godfrey, the newly elected Governor, Terry Branstad, demanded Godfrey’s resignation in December of 2010.<sup>10</sup> Godfrey claimed that he refused to resign and alleged that on two other occasions, Branstad and other political appointees of his demanded Godfrey’s resignation.<sup>11</sup> Godfrey alleged that after his continued refusal, Branstad attempted to intimidate and harass Godfrey by informing him that if he did not resign, his pay would be substantially decreased.<sup>12</sup> Godfrey did not resign and his pay was decreased.<sup>13</sup>

Godfrey filed suit against the State of Iowa, Governor Branstad, and other individuals.<sup>14</sup> In his petition, “Godfrey allege[d] defendants deprived him of his constitutionally protected property interest in his salary without due process of law because of partisan politics and/or his sexual orientation in violation of article I, section 9 of the Iowa Constitution.”<sup>15</sup> Godfrey also “allege[d] the defendants damaged his protected liberty interest in his reputation without due process of law in violation of article I, section 9 by

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6. Actions for money damages against federal officials for violations of a person’s federal constitutional right are commonly referred to as *Bivens* actions or *Bivens* claims, named after the U.S. Supreme Court decision recognizing such a cause of action in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*. *Bivens*, 403 U.S. at 400. See, e.g., *Godfrey*, 898 N.W.2d at 847 (referring to the plaintiff’s claim as a *Bivens* claim). It is, therefore, fitting that the Iowa counterpart also be named after the decision which recognized its validity.

7. See *infra* Part III.

8. Appellant’s Reply Brief at 15, *Godfrey*, 898 N.W.2d 844 (No. 15-0695), 2015 WL 9582400, at \*15.

9. *Id.*

10. *Id.*

11. *Id.* at 15–16.

12. *Id.* at 17.

13. *Id.*

14. *Id.*

15. *Godfrey v. State*, 898 N.W.2d 844, 846 (Iowa 2017).

falsely claiming poor work performance.”<sup>16</sup> In his petition, Godfrey further claimed that “the State of Iowa deprived [him] of equal protection of the laws in violation of article I, section 6 by discriminating against [him] because of his sexual orientation.”<sup>17</sup> Finally, Godfrey alleged in his petition that “the individual defendants deprived him of equal protection of the laws by treating homosexual appointed state officers or homosexual individuals differently than heterosexual appointed state officers or heterosexual individuals, also in violation of article I, section 6 of the Iowa Constitution.”<sup>18</sup>

The Iowa district court granted defendants’ motion for summary judgment on the claims alleging violations of the Iowa constitution.<sup>19</sup> The district court noted that there was federal case law supporting a due process violation claim for wrongful termination of employment, and it further noted that there were public policy arguments favoring the recognition of a private cause of action for violations of the Iowa constitution.<sup>20</sup> Nevertheless, the district court dismissed Godfrey’s state constitutional violation claims based on the Iowa Court of Appeals’s decision in *Conklin*.<sup>21</sup> Godfrey filed an application for interlocutory appeal to the Iowa Supreme Court, which it granted.<sup>22</sup>

### III. *CONKLIN V. STATE*

The suit in *Conklin v. State* “stem[med] from a warrant for Conklin’s arrest, issued during the child-in-need-of-assistance (CINA) proceedings and the termination of Conklin’s parental rights to his four sons.”<sup>23</sup> Conklin was residing in Nebraska, and the state of Iowa

issued an arrest warrant for Conklin, alleging a misdemeanor tampering-with-witness charge relating to a witness in the children’s CINA proceedings. The warrant provided “No Bail until seen by Magistrate.” Conklin made several attempts to resolve the bail issue but did not do so until . . . one day prior to the termination hearing. On that date, the children’s mother picked Conklin up from a bus station in Sioux City, Iowa, and drove him to the Cherokee County jail where he

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 846–47.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Conklin v. State*, No. 14-0764, 2015 WL 1332003, at \*1 (Iowa Ct. App. Mar. 25, 2015).

turned himself in. He was released the same day, and the outstanding warrant was resolved. Because of his efforts to resist the warrant and not enter Iowa, Conklin had no physical contact with the children [for nearly 13 months].

... [T]he juvenile court terminated Conklin's parental rights to his four sons ... given he had not maintained consistent and meaningful contact with the children.<sup>24</sup>

The Iowa Court of Appeals affirmed the juvenile court's order terminating Conklin's parental rights.<sup>25</sup>

Following a decision by the Iowa Court of Appeals affirming the juvenile court's order terminating Conklin's parental rights, Conklin filed a petition in the Iowa district court seeking money damages and alleging, in addition to federal constitutional violations, various violations of his rights under the Iowa constitution.<sup>26</sup> The Iowa constitutional rights Conklin alleged were violated included: (1) the right to bail and access to a surety; (2) the right to be free from excessive bail; (3) the right to parental liberties and familial association; (4) the right to be free from unreasonable search and seizure.<sup>27</sup>

The court acknowledged that the issue of whether a private cause of action for Conklin's alleged violations of the Iowa constitution was a matter of first impression.<sup>28</sup> In reaching its decision that no private cause of action for state constitutional violations should be implied by the judiciary, the court of appeals placed particular reliance on article XII, section one of the Iowa constitution.<sup>29</sup> That provision states in part, "The general assembly shall pass all laws necessary to carry this constitution into effect."<sup>30</sup> The court of appeals concluded that this phrase implies "that the constitution itself does not create a cause of action for a violation of its terms; rather, the legislature must pass laws in order for a remedy to exist."<sup>31</sup> The court further reasoned that recognizing a private cause of action would create a significant

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24. *Id.*

25. *Id.* (footnote omitted) (citing *In re G.C.*, No. 12-0709, 2012 WL 3590182, at \*2 (Iowa Ct. App. Aug. 22, 2012)).

26. *Id.* at \*2.

27. *Id.*

28. *Id.* at \*3 (footnote omitted).

29. *Id.* (citing IOWA CONST. art. XIII, § 1).

30. IOWA CONST. art. XII, § 1.

31. *Conklin*, 2015 WL 1332003, at \*3.

separation of powers issue.<sup>32</sup>

Finally, the court of appeals declined to follow a *Bivens*-type model and adopt a judicially implied remedy for state constitutional violations because it believed that recent case law in the U.S. Supreme Court has indicated moving away from the holding in *Bivens*.<sup>33</sup>

#### IV. THE MAJORITY OPINION IN *GODFREY*

The majority opinion addressed three issues related to Godfrey's claims: First, the court examined whether the constitutional provisions under which Godfrey sought compensation are of a self-executing nature so as to allow enforcement by way of a money damage action—or rather—whether article XII, section one of the Iowa constitution requires the legislature to enact such a remedy before one can be pursued.<sup>34</sup> That was the holding in *Conklin*, which the defendants in *Godfrey* argued foreclosed Godfrey's direct claims under the Iowa bill of rights.<sup>35</sup> Second, the court analyzed whether the Iowa Civil Rights Act (ICRA) preempted Godfrey's Iowa constitutional claims.<sup>36</sup> Third, the court examined whether an adequate legislative remedy existed for Godfrey's claims—specifically, the Iowa Civil Rights Act—that prevented Godfrey from directly pursuing his Iowa constitutional violation claims.<sup>37</sup>

##### *A. Self-Execution of Constitutional Provisions and Iowa Constitution Article XII, Section 1*

This begs the question: what exactly are the requirements for a provision to be self-executing? The first instance of the *Godfrey* majority's explanation of what it means for a constitutional provision to be self-executing is when the court explains the positions of the parties.<sup>38</sup> When the court outlines Godfrey's position, it points out that Godfrey relies on the U.S. Supreme Court case of *Davis v. Burke*, which held that “a constitutional provision may be said to be ‘self-executing’ if it ‘supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.’”<sup>39</sup> The majority reiterated this opinion later in

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32. *Id.* at \*4.

33. *Id.* at \*4–5.

34. *Godfrey v. State*, 898 N.W.2d 844, 848 (Iowa 2017).

35. *Id.* at 868.

36. *Id.* at 873–74.

37. *Id.* at 875–80.

38. *Id.* at 847–48.

39. *Id.* at 847 (quoting *Davis v. Burke*, 179 U.S. 399, 403 (1900)).

the section titled “Standard for determining self-execution.”<sup>40</sup> The court also quoted another line from *Davis*, which stated simply: “In short, if [it is] complete in itself, it executes itself.”<sup>41</sup> The majority also stated, “Ordinarily, a self-executing provision does not contain a directive to the legislature for further action.”<sup>42</sup> The court further reasoned, “A provision is self-executing when it takes effect immediately ‘without the necessity for supplementary or enabling legislation.’”<sup>43</sup>

### 1. *U.S. Supreme Court Approach*

The court began its analysis by considering the U.S. Supreme Court’s approach in past decisions to questions regarding the self-executing nature of various constitutional provisions, keeping in mind that “[a]lthough the precedents of the United States Supreme Court under the United States Constitution are not binding upon us in our interpretation of the Iowa Constitution, we may nonetheless give them respectful consideration in our independent analysis.”<sup>44</sup>

In looking at the U.S. Supreme Court’s approach, the court spent much time reviewing the U.S. Supreme Court’s decision in *Bivens* (where the claim was a Fourth Amendment violation)—particularly the reasoning of Justice John Marshall Harlan in his concurring opinion.<sup>45</sup> The court also reviewed two other cases decided after *Bivens*. Those cases are *Davis v. Passman*, a Fifth Amendment sex discrimination claim,<sup>46</sup> and *Carlson v. Green*, an Eighth Amendment cruel and unusual punishment claim.<sup>47</sup> All three cases espoused the view that the court is empowered to provide a money damage remedy for the particular constitutional violation being alleged.<sup>48</sup>

Godfrey and the defendants made competing arguments using a collection of federal cases, since the three precedential decisions tended to show either a retreat from *Bivens*, as the defendants argued, or the continued

40. *Id.* at 870 (quoting *Davis*, 179 U.S. at 403).

41. *Id.* (quoting *Davis*, 179 U.S. at 403) (alteration in original).

42. *Id.* (citing *Convention Ctr. Referendum Comm. v. Bd. of Elections & Ethics*, 399 A.2d 550, 552 (D.C. Cir. 1979)).

43. *Id.* (quoting *Brown v. State*, 674 N.E.2d 1129, 1137 (N.Y. 1996)).

44. *Id.* at 851 (quoting *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010)).

45. *Id.* at 851–52 (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 399–400 (1971)).

46. *Id.* 852 (citing *Davis v. Passman*, 442 U.S. 228, 248 (1979)).

47. *Id.* at 854 (citing *Carlson v. Green*, 446 U.S. 14, 16 (1980)).

48. *Id.* at 852–55.

vitality and application of *Bivens*, as Godfrey argued.<sup>49</sup> The court was not convinced that the U.S. Supreme Court was retreating from *Bivens* and believed that, at best, the case law only showed the high court's unwillingness to expand the *Bivens* remedy beyond the circumstances set forth in *Bivens*, *Passman*, and *Carlson*, i.e., Fourth Amendment search and seizure, Fifth Amendment equal protection and due process, and Eighth Amendment cruel and unusual punishment, respectively.<sup>50</sup> In addition to the three U.S. Supreme Court decisions noted above, the majority also considered two federal district court cases from the Northern District of Iowa predicting the Iowa Supreme Court would recognize a *Bivens* analog for Iowa constitutional violations.<sup>51</sup>

## 2. Hartman v. Moore—*An Expansion of Bivens*

On the above conclusion—that the U.S. Supreme Court has been unwilling to expand *Bivens* beyond the circumstances of *Bivens*, *Passman*, and *Carlson*—this Author challenges the Iowa Supreme Court's finding.<sup>52</sup> In *Hartman v. Moore*, only 11 years ago, the U.S. Supreme Court did, in fact, recognize that a *Bivens* action exists when federal officers subject a speaker to retaliatory action when exercising the speaker's First Amendment rights.<sup>53</sup> Justice David Souter, writing for the Court, was very plain in his words: "When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*."<sup>54</sup> In *Hartman*, the Court ultimately affirmed a dismissal of the case on qualified immunity grounds because the Court held that in order to maintain a *Bivens* action for First Amendment retaliation by inducing criminal prosecution, the plaintiff must plead and prove an absence of probable cause.<sup>55</sup> In *Hartman*, the plaintiff did not do that.<sup>56</sup>

*Hartman* is, of course, supportive of Godfrey's position and the holding of the majority in *Godfrey*, but the court made no mention of it.<sup>57</sup> *Hartman* also contradicts the dissenting opinion's conclusion that there has been "over

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49. *Id.* at 854–55.

50. *Id.* at 855.

51. *Id.* at 856 (discussing *McCabe v. Macaulay*, 551 F. Supp. 2d 771, 785 (N.D. Iowa 2007) and *Peters v. Woodbury Cty.*, 979 F. Supp. 2d 901, 971 (N.D. Iowa 2013)).

52. *See id.* at 855.

53. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

54. *Id.* (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)).

55. *Id.* at 261.

56. *Id.* at 265–66.

57. *See id.* at 256; *Godfrey*, 898 N.W.2d at 850–56 (failing to mention *Hartman*).



three decades of Supreme Court jurisprudence declining to expand *Bivens* remedies beyond the specific circumstances of *Bivens*, *Davis*, and *Green*.”<sup>58</sup>

### 3. Other State Decisions

The majority opinion also surveyed other state decisions addressing whether their state constitutional provisions are self-executing, and thus, permit money damage claims for violations.<sup>59</sup> The majority noted state courts that have considered the issue are nearly equally divided in recognizing a cause of action or rejecting it.<sup>60</sup> The majority opinion reviewed three cases from other jurisdictions which permitted money damage claims under their state constitutions<sup>61</sup> and three cases from other states which rejected the argument that money damages claims are available for state constitution violations.<sup>62</sup>

### 4. Prior Iowa Case Law

The majority then reviewed prior Iowa case law on self-executing constitutional claims.<sup>63</sup> The court reasoned that, with respect to search and seizure under Iowa constitution article I, section 8, several prior cases have upheld damage claims against the offending officers and concluded, “[A] damages action for constitutional violations of search and seizure under the Iowa Constitution was thoroughly well settled in Iowa law decades before the United States Supreme Court embraced the same concept in *Bivens*.”<sup>64</sup> The majority opinion analyzed search and seizure cases going back as early as 1904.<sup>65</sup> The majority then acknowledged that in other cases, the court has not found the claimed provisions to be self-executing and did not allow a

58. *Godfrey*, 898 N.W.2d at 888–89 (Mansfield, J., dissenting); see *Hartman*, 547 U.S. at 256 (recognizing the existence of a *Bivens* claim in a First Amendment context).

59. *Godfrey*, 898 N.W.2d at 856–62 (majority opinion).

60. *Id.* at 856–57.

61. *Id.* at 858–60 (discussing *Dorwart v. Caraway*, 58 P.3d 128, 137 (Mont. 2002), *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 292 (N.C. 1992), and *Brown v. State*, 674 N.E.2d 1129, 1131–32 (N.Y. 1996)).

62. *Id.* at 861–62 (discussing *Bd. of Cty. Comm’rs v. Sundheim*, 926 P.2d 545, 553 (Colo. 1996) (en banc), *Hunter v. City of Eugene*, 787 P.2d 881, 884 (Or. 1990), and *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995)).

63. *Id.* at 862–64.

64. *Id.* at 863.

65. *Id.* at 862–63 (discussing the following cases: *Girard v. Anderson*, 257 N.W. 400, 403 (Iowa 1934); *State v. Tonn*, 191 N.W. 530, 535 (Iowa 1923), *abrogated by State v. Cline*, 617 N.W.2d 277, 291 (Iowa 2000); *Krehbiel v. Henkle*, 121 N.W. 378, 380 (Iowa 1909); *McClurg v. Brenton*, 98 N.W. 881, 882 (Iowa 1904)).

damage claim.<sup>66</sup>

The dissent criticizes the majority's use of those earlier search and seizure cases and believes that the majority has confused common law tort damage claims with those based only on the Iowa constitution.<sup>67</sup> The dissent argues that the court has, in the past, allowed "common law tort claims, such as trespass, conversion, malicious prosecution, and abuse of process," but not damage actions based on constitutional violations.<sup>68</sup> The dissent acknowledges that those decisions cited by the majority do discuss Iowa constitution article I, section 8, but the dissent believes those damage claims would exist even if article I, section 8 was not in the Iowa constitution.<sup>69</sup>

#### 5. *Coger v. N.W. Union Packet Co.—A Missed Opportunity*

What this Author finds interesting with regard to the discussion by both the majority and the dissent on the topic of prior Iowa case law is the lack of analysis of one of the Iowa Supreme Court's premier early decisions on civil rights—*Coger v. N.W. Union Packet Co.*<sup>70</sup> The majority opinion lists the case when introducing the Iowa Supreme Court's storied history on civil rights decisions but makes no further mention of it.<sup>71</sup> This is surprising given that *Coger* was a case involving a civil action for damages.<sup>72</sup>

*Coger* involved a suit for personal injury damages which Emma Coger, a woman of African descent, sought against a Mississippi River steamboat company, a public carrier, for refusing equal public accommodations to her based on her race and national origin.<sup>73</sup> Ms. Coger was traveling in the

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66. *Id.* at 862–64 (discussing the following cases: *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996), *abrogated by Godfrey*, 898 N.W.2d 844 (involving an equal protection claim by a terminated police officer); *Cunha v. City of Algona*, 334 N.W.2d 591, 595 (Iowa 1983) (discussing a due process claim against city by former jail prisoner); *Pierce v. Green*, 294 N.W. 237, 243 (Iowa 1940), *abrogated by Godfrey*, 898 N.W.2d 844 (involving a petition for writ of mandamus to require the state tax commission to meet and exercise its power to fairly levy taxes); *Halbach v. Claussen*, 250 N.W. 195, 200 (Iowa 1933) (considering whether holding elections to fill vacancies for office under article IV, section 10 of the Iowa constitution is self-executing)).

67. *Id.* at 886–88 (Mansfield, J., dissenting).

68. *Id.* at 887.

69. *Id.*

70. *Id.* at 862 (majority opinion) (failing to discuss *Coger v. N.W. Union Packet Co.*, 37 Iowa 145 (1873) in depth); *id.* at 886–93 (Mansfield, J., dissenting) (failing to mention *Coger v. N.W. Union Packet Co.*, 37 Iowa 145 (1873)).

71. *Id.* at 861–62 (majority opinion).

72. *Coger*, 37 Iowa 145, 155–56 (1873).

73. *Id.* at 147–49.

steamboat from Keokuk, Iowa, to her home in Quincy, Illinois.<sup>74</sup> It was the custom of that steamboat company to prevent nonwhite passengers from eating meals at dinner tables in the cabin; rather, they could only eat meals in the pantry or by the guard rails.<sup>75</sup>

Coger was forcibly removed when she demanded the same service as white patrons and refused to leave her dinner table.<sup>76</sup> Coger later filed suit for assault and battery; the case was tried to a jury in Lee County, Iowa, which awarded her damages.<sup>77</sup> The steamboat company appealed, claiming the court wrongfully instructed the jury and that the company was entitled to impose different accommodation rules for people of different races.<sup>78</sup> The Iowa Supreme Court held that to deny Coger equal public accommodations was contrary to the principles of equality guaranteed to Coger under Iowa constitution article I, section 1.<sup>79</sup>

Chief Justice Joseph Beck's<sup>80</sup> opinion stated the simple issue before the court: "[A]re the rights and privileges of persons transported by public carriers affected by race or color?"<sup>81</sup> Chief Justice Beck's philosophical underpinning for the court's decision was that Coger's "rights and privileges rest upon the equality of all before the law, the very foundation principle of our government."<sup>82</sup> Chief Justice Beck quoted the portion of Iowa constitution article I, section 1, which stated, "All men are, by nature, free and equal" and held, "Upon it we rest our conclusion in this case."<sup>83</sup>

As further support, Chief Justice Beck discussed federal provisions such as the Privileges and Immunities Clause of the recently ratified

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74. *Id.* at 147.

75. *Id.* at 147–48.

76. *Id.* at 148–49.

77. *Id.* at 146–47.

78. *Id.* at 152.

79. *Id.* at 154–55. At that time, Iowa constitution article I, section 1 stated, "All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." IOWA CONST. art I, § 1 (amended 1998). In 1998 that article was amended to read "All men *and women* . . ." IOWA CONST. art I, § 1 (amended 1998) (emphasis added).

80. Joseph M. Beck resided in Lee County, Iowa, and served on the Iowa Supreme Court from 1868–1891. *Joseph M. Beck (1868–1891)*, IOWA JUD. BRANCH, <http://www.iowacourts.gov/wfdata/frame1206-1434/pressrel16.asp> (last visited Sept. 5, 2017). He served as chief justice for five of those years. *Id.*

81. *Coger*, 37 Iowa at 152.

82. *Id.* at 153.

83. *Id.* at 155.

Fourteenth Amendment to the U.S. Constitution, as well as the Civil Rights Act of 1866.<sup>84</sup>

The Iowa Supreme Court's decision in *Coger* proved to be far ahead of similar reasoning on the part of the U.S. Supreme Court.<sup>85</sup> The infamous case of *Plessy v. Ferguson* also involved the refusal by a public carrier to accommodate an African American with the same service as white passengers.<sup>86</sup> There the U.S. Supreme Court did not follow the Iowa Supreme Court's lead, but upheld the public carrier's actions.<sup>87</sup> It was more than 90 years after *Coger*, in the case of *Heart of Atlanta Motel v. United States*, that the U.S. Supreme Court required equal public accommodations to people across the nation regardless of race.<sup>88</sup>

*Coger* was not a case where a common law tort would have been tenable absent Iowa Constitution article I, section 1 as the dissent in *Godfrey* argues would be the case regarding the early search and seizure cases.<sup>89</sup> The court's opinion in *Coger* is clear that it rested its conclusion on the protections of equality guaranteed in Iowa constitution article I, section 1.<sup>90</sup> Emma Coger's judgment for damages was upheld, not because the assault she suffered offended general notions of common decency; rather, it was because it offended Coger's right to equality guaranteed under Iowa constitution article I, section 1.<sup>91</sup> To this Author, *Coger* appears to be the first record in Iowa's history of a money damage remedy being provided to a plaintiff for a direct violation under the Iowa constitution.<sup>92</sup> The decision, affirming this remedy only 16 years following the adoption of the 1857 Iowa constitution, provides strong precedent to support the majority's conclusion

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84. *Id.* at 155–56. Interestingly, Chief Justice Beck refers to the opinion of U.S. Supreme Court Justice Samuel Miller in the *Slaughter-House Cases*, 83 U.S. 36 (1872). *Id.* at 155. Samuel F. Miller was also a resident of Lee County, Iowa, from the city of Keokuk. *THE BIOGRAPHICAL DICTIONARY OF IOWA* 370 (David Hudson et al. eds., 2008). Appointed by President Abraham Lincoln, he has been the only Iowan to serve on the U.S. Supreme Court. *Id.* at 370–71.

85. *See id.* at 153–56.

86. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

87. *Compare Coger*, 37 Iowa at 160 (holding that Coger was entitled to the same rights as a white person), *with Plessy*, 163 U.S. at 552 (“If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

88. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

89. *See Coger*, 37 Iowa at 154–155; *Godfrey v. State*, 898 N.W.2d 844, 887–88 (Iowa 2017).

90. *Coger*, 37 Iowa at 154–55.

91. *Id.*

92. *See id.*

in *Godfrey* that a money damages remedy for Iowa constitutional violations is available.<sup>93</sup>

### 6. *Iowa History and Tradition*

The majority opinion then moved to the historical basis and tradition for recognizing a damage remedy for Iowa constitutional violations.<sup>94</sup> The majority emphasized that the Iowa bill of rights was so important to Iowa's governmental scheme that the framers of the Iowa constitution placed it at the very beginning of the document.<sup>95</sup> The court found the Iowa framers intended to limit the power of the legislative branch while protecting the independence of the judiciary.<sup>96</sup> The court declared, "We cannot imagine the founders intended to allow government wrongdoers to set their own terms of accountability through legislative action or inaction."<sup>97</sup> The court also discussed several English common law cases establishing that unconstitutional actions by government officials are compensable to a plaintiff who suffers damages and noted that "in the common law regime, remedies at law—or damages—were usually the first choice to remedy a protected right. It is equitable remedies, not damage remedies, which reflected the innovation in the common law."<sup>98</sup>

### 7. *Impact of Iowa Constitution Article XII, Section 1*

Iowa constitution article XII—the last article in the document—is entitled "Schedule."<sup>99</sup> Section one provides, "This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect."<sup>100</sup> The defendants in *Godfrey* argued that this provision of the Iowa constitution requires that a cause of action for money damages based on Iowa constitutional violations must be made pursuant to legislative enactment, rather than created by the judiciary.<sup>101</sup> The dissent shares this view and devotes much attention of its opinion to explaining its position.<sup>102</sup>

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93. *See id.*; *Godfrey*, 898 N.W.2d at 879–80.

94. *Godfrey*, 898 N.W.2d at 863–70.

95. *Id.* at 864–65.

96. *Id.* at 865–66.

97. *Id.*

98. *Id.* at 867–68.

99. IOWA CONST. art. XII.

100. IOWA CONST. art. XII, § 1.

101. *Godfrey*, 898 N.W.2d at 849–50.

102. *Id.* at 882–87 (Mansfield, J., dissenting).

As explained earlier in this Article, the court of appeals in *Conklin* held this same view.<sup>103</sup>

The majority believes it is important that the language of article XII, section 1 uses the term “this” twice:<sup>104</sup> “*This* Constitution [and not any earlier constitution] shall be the supreme law of the state,”<sup>105</sup> and, “The general assembly shall pass all laws necessary to carry *this* constitution into effect.”<sup>106</sup> The court reasoned, “The double use of the term ‘this’ in section 1 suggests a focus on transition issues and not a fundamental reworking of the power of courts to fashion remedies.”<sup>107</sup> In other words, the court believed “the clear meaning of article XII, section 1 is to require the general assembly to put ‘this’ new constitution into operation and to provide for the transition from government under the prior constitution to the new regime.”<sup>108</sup> The majority vigorously defends the independence of the judiciary to provide remedies for constitutional violations and stated:

We think it clear that section 1 of the schedule article cannot swallow up the power of the judicial branch to craft remedies for constitutional violations of article I. The rights established in the Iowa Bill of Rights are not established by legislative grace, but by the people in adopting the constitution. The Iowa Bill of Rights was a big deal to the framers. We divine no desire of the 1857 framers to prevent the Iowa judiciary from performing its traditional role from a schedule article requiring the general assembly to enact necessary laws for the transition to the new constitutional government.<sup>109</sup>

The dissent strongly criticizes the majority’s analysis.<sup>110</sup> The dissent believes the use of the word “this” in article XII, section 1 merely refers to the constitution it is part of, as opposed to a different constitution—nothing more.<sup>111</sup> According to the dissent, “[T]he constitution has both negative and positive force. On the negative side, the constitution is a brake that invalidates contrary laws. On the positive side, the constitution empowers

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103. *Conklin v. State*, No. 14-0764, 2015 WL 1332003, at \*3 (Iowa Ct. App. Mar. 25, 2015).

104. *Godfrey*, 898 N.W.2d at 868–69 (majority opinion).

105. IOWA CONST. art. XII, § 1 (emphasis added); *Godfrey*, 898 N.W.2d at 868–69.

106. IOWA CONST. art. XII, § 1 (emphasis added).

107. *Godfrey*, 898 N.W.2d at 868–69.

108. *Id.*

109. *Id.* at 869–70.

110. *Id.* at 882–87 (Mansfield, J., dissenting).

111. *Id.* at 886–67.

the general assembly to enact any laws needed to achieve its purposes.”<sup>112</sup> To the dissent, it is the role of the judiciary to enforce the negative check by invalidating unconstitutional laws and actions of state and local governments, and the dissent claims that it crafts remedies in furtherance of this negative check by way of the exclusionary rule and declarative and injunctive relief.<sup>113</sup>

But how can the exclusionary rule be characterized as a remedy in furtherance of the court’s negative check on unconstitutional acts, whereas an action for compensatory damages to remedy those same unconstitutional acts cannot? In *State v. Cline*, the court went through a lengthy discussion of the history of the exclusionary rule as applied in Iowa and a similarly lengthy discussion of the federal “good faith exception” to the exclusionary rule.<sup>114</sup> The court ultimately concluded that despite a good faith exception to the exclusionary rule that exists based on interpretations by the U.S. Supreme Court of the Fourth Amendment, no such exception exists under article I, section 8 of the Iowa constitution, and the exclusionary rule applied in that case.<sup>115</sup>

Permitting a plaintiff in a civil action to recover damages for violations of the Iowa constitution is consistent with the purpose of a judicially created remedy such as the exclusionary rule. In *Cline*, the court explained: “As with many civil remedies, the exclusionary rule merely places the parties in the positions they would have been in had the unconstitutional search not occurred . . . .”<sup>116</sup> “[T]he principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty . . . .”<sup>117</sup> Therefore, allowing a *Bivens* analog for Iowa constitutional violations remedies the same concerns the judicially created remedy of the exclusionary rule is designed to address.<sup>118</sup> A remedy, which the dissent acknowledges is an appropriate remedy, was crafted by the court in furtherance of its negative check on unconstitutional acts.<sup>119</sup>

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112. *Id.* at 882–83.

113. *Id.* at 883–84.

114. *State v. Cline*, 617 N.W.2d 277, 283–93 (Iowa 2000).

115. *Id.* at 293.

116. *Id.* at 289.

117. *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 20 (Iowa 1975).

118. *See Godfrey*, 898 N.W.2d at 862–63 (majority opinion).

119. *Id.* at 883–34 (Mansfield, J., dissenting).

8. *Access to Redress Wrongs—Further Support for the Majority Opinion in the Iowa Bill of Rights*

Two provisions of the Iowa constitution bill of rights indicate that persons have a right to seek a judicial remedy from the court for state constitutional violations. Those provisions are found in article I, section 1<sup>120</sup> and article I, section 20.<sup>121</sup>

Under section 1, the applicable language relates to the peoples' right to "defend[] . . . liberty."<sup>122</sup> Chief Justice Mark S. Cady discussed how, prior to 1857, the language of section 1 read "[a]ll men are, by nature, free and independent" and that the drafters of the 1857 Iowa constitution sought to replace the word "independent" with "equal," primarily for the purpose of putting blacks on equal footing with whites in giving testimony in court.<sup>123</sup> This debate demonstrates how important the framers of the Iowa constitution viewed citizens' access to the courts to defend their rights as guaranteed under article I, section 1.<sup>124</sup>

The chairman of the Committee on the Bill of Rights at the 1857 convention, R.L.B. Clarke, spoke of how the guarantees of section 1 are natural rights, and under a constitutional government, man "depends upon the laws as administered by the courts of justice."<sup>125</sup> Chairman Clarke eloquently reported to the convention of 1857 this important right of presenting testimony in court to defend life, liberty, and protect property.

The right of protecting life, liberty and property, being guaranteed by the constitution to every man, it follows as a consequence, that everyone is entitled to exercise all these rights necessary to the full enjoyment of the right thus guaranteed. This point being determined, it

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120. IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.").

121. IOWA CONST. art. I, § 20 ("The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances.").

122. IOWA CONST. art. I, § 1 (emphasis added).

123. Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133, 1138 (2012) (alteration in original) (footnotes omitted).

124. See *id.*

125. 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 651 (1857).



follows that the citizen thus having the right guaranteed to him of protecting his life, liberty and property, by application to the courts of justice, he also has the right to introduce testimony; for without this right, the protection held out to him by the constitution, would be no better than heartless mockery—it would be but to invite him into the temple of Justice, while the doors are bolted and barred against him.<sup>126</sup>

Likewise, to hold as the court of appeals did in *Conklin* and to argue as the dissent did in *Godfrey* that the court can hear a complaint regarding a public officer's violation of rights under the Iowa constitution, but to then conclude that the court is powerless to remedy that constitutional wrong, is to, as Chairman Clarke described, “invite him into the temple of Justice, while the doors are bolted and barred against him.”<sup>127</sup>

The applicable language under article I, section 20 is “to petition for a redress of grievances.”<sup>128</sup> This clause of the Iowa bill of rights mirrors the last clause in our federal Constitution's First Amendment.<sup>129</sup> The U.S. Supreme Court has described the right to petition government for redress of grievances as “among the most precious of the liberties safeguarded by the Bill of Rights.”<sup>130</sup> The right of petition applies with equal force to a person's right to seek redress from all branches of government.<sup>131</sup> Thus, as the U.S. Supreme Court has noted, the constitutional right of unfettered access to the courts “is indeed but one aspect of the right of petition.”<sup>132</sup>

The plain meaning of the word “redress” is “to set right” (remedy) or “to make up for” (compensate).<sup>133</sup> Based on the plain text of article I, section 20, Iowa's constitutional history, and the longstanding precedent from the U.S. Supreme Court interpreting the analogous federal clause to include unfettered access to the courts in order to redress wrongs, it is plain to see that article I, section 20 provides further support in favor of the majority's opinion in *Godfrey* and against the conclusion of *Conklin* that the only

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126. *Id.* at 651–52.

127. *Id.*; see *Godfrey v. State*, 898 N.W.2d 844, 897–98 (Iowa 2017).

128. IOWA CONST. art. I, § 20.

129. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); IOWA CONST. art. I, § 20.

130. *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

131. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

132. *Id.*

133. *Redress*, MERRIAM WEBSTER, [www.merriam-webster.com/dictionary/redress](http://www.merriam-webster.com/dictionary/redress) (last visited Sept. 30, 2017).

branch of Iowa's state government that can remedy violations of state constitutional rights is the legislative branch.<sup>134</sup>

### 9. *Self-Execution and Godfrey's Claims*

The majority opinion then discussed whether the due process and equal protection claims of Godfrey, in particular, are self-executing.<sup>135</sup> The court examined U.S Supreme Court precedent, other state decisions, and prior Iowa case law to determine whether those provisions provide Godfrey with an enforceable right in the courts.<sup>136</sup> The court found that both the due process and equal protection rights that exist in the Iowa constitution have been implemented for many years in our courts and, thus, are self-executing providing Godfrey with an available remedy for damages.<sup>137</sup>

#### B. *Does the Iowa Civil Rights Act Preempt a Godfrey Action?*

The court next considered the argument by the defendants that the Iowa Civil Rights Act (ICRA) preempts Godfrey's particular civil claims for damages.<sup>138</sup> The defendants argued that if discrimination is an element of the claim, then the ICRA is the exclusive remedy and preempts any other action, much like common law torts are preempted by the ICRA.<sup>139</sup>

After clarifying that some, but not all, common law torts are preempted by the ICRA, the majority of the court refused to accept the preemption argument.<sup>140</sup> The court concluded, "If we held that a statute might preempt an otherwise valid constitutional action, this would in effect grant ordinary legislation the power to cabin constitutional rights. The Iowa Constitution would no longer be the supreme law of the state."<sup>141</sup>

#### C. *Does an Adequate Legislative Remedy Exist for Godfrey's Claim, Thereby Precluding His Direct Constitutional Claims?*

Although the majority did not find that the ICRA preempted Godfrey's constitutional claims of discrimination, a majority of the court did find that the ICRA provides Godfrey with an adequate legislative remedy,

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134. See IOWA CONST. art. I, § 20; *supra* Part IV.

135. Godfrey v. State, 898 N.W.2d 844, 870–73 (Iowa 2017).

136. *Id.*

137. *Id.* at 871, 873.

138. *Id.* at 872–74; see IOWA CODE ANN. § 216 (West 2017).

139. Godfrey, 898 N.W.2d at 872–73.

140. *Id.* at 873–75.

141. *Id.* at 874–75.

thereby precluding his discrimination claims based on the Iowa constitution.<sup>142</sup> The majority of the court on this issue, however, was made up of a different majority of members than the majority that held a private action for damages existed for Iowa constitutional violations.<sup>143</sup> The majority holding that Godfrey's discrimination claims were adequately served and protected by the ICRA was made up of Chief Justice Cady, Justice Edward M. Mansfield, Justice Thomas D. Waterman, and Justice Bruce B. Zager.<sup>144</sup> The majority of the lead opinion that recognized the new *Godfrey* action was made up of Chief Justice Cady, Justice Brent R. Appel, Justice David S. Wiggins, and Justice Daryl L. Hecht.<sup>145</sup>

Chief Justice Cady wrote a concurring opinion in which he explained why he believed the ICRA provided a sufficient remedy for Godfrey.<sup>146</sup> The lead opinion, which discussed why the minority of the court did not believe that the ICRA provides an adequate remedy, focused much attention on the fact that the ICRA does not make punitive damages available, while in constitutional tort cases, punitive damages have largely been viewed as important to the social enforcement of constitutional rights against violators.<sup>147</sup> The absence of punitive damages in the ICRA did not trouble Chief Justice Cady in Godfrey's particular case.<sup>148</sup>

Since Godfrey's claims were largely monetary and based on (what he claimed were) adverse actions regarding his employment, Chief Justice Cady felt the ICRA provided a sufficiently robust remedy which includes attorney fees.<sup>149</sup> That is not to say that Chief Justice Cady believed punitive damages can never be a necessary item to vindicate a person's constitutional rights.<sup>150</sup> The chief justice made clear that in cases involving physical invasion, assault, or violations of other liberty interests, attorney fees are no replacement for punitive damages.<sup>151</sup> However, in Godfrey's case the chief justice reasoned as follows:

[W]hen the claimed harm is largely monetary in nature and does not

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142. *Id.* at 875–76.

143. *Id.* at 880–81 (Cady, C.J., concurring).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 876–79 (majority opinion).

148. *Id.* at 881–82 (Cady, C.J., concurring).

149. *Id.*

150. *Id.*

151. *Id.*

involve any infringement of physical security, privacy, bodily integrity, or the right to participate in government, and instead is against the State in its capacity as an employer, the ICRA exists to vindicate the constitutional right to be free from discrimination. While not providing punitive damages, it provides full compensation and attorney fees. On these facts, I do not believe an independent *Bivens*-type action is necessary for the sole purpose of providing a punitive-damages remedy.<sup>152</sup>

Therefore, the end result for Godfrey was that private causes of action for damages are available to him for some of his Iowa constitutional claims, but on his equal protection claims, in particular, he must proceed only under the ICRA.<sup>153</sup>

#### V. SOME IMPORTANT UNANSWERED QUESTIONS

The court's opinion, which recognized a new *Godfrey* action for state constitutional violations, left some important unanswered questions which courts will undoubtedly have to resolve going forward. The Iowa Supreme Court had the opportunity to address some of these questions had it accepted further review of *Conklin*, but the court chose not to do so.<sup>154</sup>

One of the unresolved issues pertains to whether other existing legislative remedies will preclude a *Godfrey* action. In particular, what if a plaintiff has an available claim under 42 U.S.C. § 1983 for federal constitutional violations because of acts committed by the state or local official which also constitute an Iowa constitutional violation?<sup>155</sup> Likewise, what if the acts committed also avail the plaintiff of a claim under the Iowa Tort Claims Act<sup>156</sup> or the Iowa Municipal Tort Claims Act?<sup>157</sup>

The other unresolved issue pertains to whether state and local defendants will be able to defend these new *Godfrey* actions by asserting a defense of absolute or qualified immunity.<sup>158</sup> If so, what are the requirements and who bears the burden of proving such immunity?

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152. *Id.*

153. *Id.*

154. *Further Review Results*, *supra* note 4.

155. *See Godfrey*, 898 N.W.2d at 880–81.

156. *See id.*

157. *See IOWA CODE ANN.* § 670.2 (West 2017).

158. *Godfrey*, 898 N.W.2d at 879 (majority opinion).

### A. Other Legislative Remedies

#### 1. 42 U.S.C. § 1983

In *Conklin*, the court reasoned that Conklin had an alternative avenue for his claims in that he was able to pursue an action based on 42 U.S.C. § 1983 for violations of his federal rights.<sup>159</sup> This alternative remedy, the court of appeals found, was a “special factor counseling hesitation” when considering whether to imply a cause of action for a violation of the Iowa constitution.<sup>160</sup>

But the fact that many of the freedoms contained in the Iowa bill of rights are congruent with the federal Bill of Rights and that a remedy exists under federal law to obtain relief should not counsel against permitting a *Godfrey* action to go forward. Chief Justice Cady said it best in his lecture:

Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to actions by the federal government for most of our country’s history.<sup>161</sup>

Furthermore, there are rights people enjoy under the Iowa constitution that are not granted under the U.S. Constitution or which the U.S. Supreme Court has not addressed. As discussed previously, under *State v. Cline*, Iowa does not recognize the *Leon* good faith exception in search and seizure cases under article I, section 8.<sup>162</sup> With no U.S. Supreme Court decision addressing the issue, *State v. Baldon* held that a search, without suspicion, of a parolee violates article I, section 8 regardless of a parolee’s execution of a parole agreement consenting to such searches.<sup>163</sup> Article I, section 12 provides that “[a]ll persons shall, before conviction, be bailable, by sufficient sureties”—no corresponding right exists in the federal Bill of Rights.<sup>164</sup> Article I, section 19 grants people the right to be free from imprisonment for a civil debt, and no such right is contained in the federal Constitution.<sup>165</sup>

159. *Conklin v. State*, No. 14–0764, 2015 WL 1332003, at \*5 (Iowa Ct. App. Mar. 25, 2015).

160. *Id.* (quoting *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

161. Cady, *supra* note 123, at 1145.

162. *State v. Cline*, 617 N.W.2d 277, 293 (Iowa 2000).

163. *State v. Baldon*, 829 N.W.2d 785, 803 (Iowa 2013).

164. *Compare* IOWA CONST. art. I, § 12, *with* U.S. CONST. amends. I–X.

165. *Compare* IOWA CONST. art. I, § 19, *with* U.S. CONST. amends. I–X.

Particularly as it relates to search and seizure claims, will it be necessary for the court to decipher the various nuances between federal search and seizure protections and the protections and rationale of Iowa case law interpreting our search and seizure counterpart—contained in Iowa constitution article I, section 8—so that it can determine the adequacy of an existing legislative remedy? The fact that a remedy under federal law exists simultaneously with a *Godfrey* action does not appear to be a special factor counseling hesitation in permitting a *Godfrey* action to proceed.<sup>166</sup> Quite the contrary, federalism concerns would appear to be a special factor counseling *against* hesitation in permitting a *Godfrey* action to go forward.<sup>167</sup>

However, the court would not need to be concerned with the lack of availability of punitive damages when considering whether a § 1983 action is an adequate legislative remedy that would counsel the court to refrain from permitting a *Godfrey* action to proceed<sup>168</sup>—a concern which three of the justices in *Godfrey* found to disqualify the ICRA as an adequate legislative remedy.<sup>169</sup> The Iowa Supreme Court had the opportunity to address this question had it accepted further review of *Conklin*, but the court declined to accept further review.

## 2. The Iowa Tort Claims Act and the Municipal Tort Claims Act

Another related question is whether the Iowa Tort Claims Act or the Municipal Tort Claims Act will be adequate legislative remedies precluding the court from allowing a *Godfrey* action to go forward.

Neither chapter 669 nor chapter 670 of the Iowa Code allow for the recovery of punitive damages.<sup>170</sup> That will be a problem for at least three of the justices who argued that the ICRA's inability to award punitive damages did not provide an adequate legislative remedy.<sup>171</sup> Chapters 669 and 670 provide an exception to the state's waiver of sovereign immunity for certain

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166. See *Baldon*, 829 N.W.2d at 790.

167. See *id.* (“It would be inconsistent with our judicial role under the circumstances to eschew our state constitution and interpret the issue under the Federal Constitution unless relief would not be available to a claimant under our state constitution.”).

168. See *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987) (“In a § 1983 action, punitive damages may be awarded where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff.”).

169. *Godfrey v. State*, 898 N.W.2d 844, 876–79 (Iowa 2017).

170. IOWA CODE ANN. §§ 669.4(2), 670.4(1)(e) (West 2017).

171. See *Godfrey*, 898 N.W.2d at 876–79.

types of claims.<sup>172</sup> Thus, for those exceptions, if any such claims occur in the context of an Iowa constitution violation, the Tort Claims Acts would not serve as an adequate remedy.

For example, chapter 669 disallows any claim against a state employee for assault, battery, false imprisonment, or false arrest.<sup>173</sup> This would mean any type of excessive force claim under article I, section 8 and many other claims under that same constitutional provision would not be covered by the Iowa Tort Claims Act and would be inadequate to provide relief for the constitutional violations.<sup>174</sup> However, search and seizure under Iowa constitution article I, section 8 involve the invasion of a person's right to privacy.<sup>175</sup> Are the torts of invasion of privacy and trespass (which are not exempted under the Tort Claims Acts) sufficient tort remedies under chapters 669 and 670 for those search and seizure claims that do not involve excessive force or unlawful incarceration?

The statute also disallows claims against state employees for misrepresentation and deceit.<sup>176</sup> So if a state actor's fraudulent and intentionally deceitful conduct results in a loss of liberty or property to an individual, the plain language of the statute would appear to deny relief; thus, the statute would also be an inadequate remedy.<sup>177</sup>

Another question exists in relation to the Iowa Tort Claims Act and *Godfrey* actions. Is a *Godfrey* action a "claim" under chapter 669 of the Iowa Code, which requires a person making a *Godfrey* claim against a state actor to utilize the same administrative claim procedure as a person making a claim under the Iowa Tort Claims Act?<sup>178</sup> That administrative procedure requires submitting the claim to the Iowa Attorney General for review, and if no disposition is made after six months, the claimant is free to withdraw his claim and file suit.<sup>179</sup> In *McCabe v. Macaulay*, the U.S. District Court for the Northern District of Iowa held that Iowa constitutional violations are indeed "claims" under the Iowa Tort Claims Act which require plaintiffs to

172. IOWA CODE ANN. §§ 669.4(3), 670.4.

173. IOWA CODE ANN. § 669.14(4).

174. See IOWA CONST. art. I, § 8; IOWA CODE ANN. § 669.14(4).

175. *State v. Kern*, 831 N.W.2d 149, 164 (Iowa 2013) (citing *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009)) ("As we have recounted in other cases, the Fourth Amendment and article I, section 8 create a substantial expectation of privacy in the home.").

176. IOWA CODE ANN. § 669.14(4).

177. See *id.*

178. See *McCabe v. Macaulay*, 551 F. Supp. 2d 771, 786 (N.D. Iowa 2007).

179. IOWA CODE ANN. § 669.5.

exhaust their administrative remedies before filing suit.<sup>180</sup> Also, the dissent in *Godfrey* believes the new action for damages recognized by the majority is a “claim” against the state, as set forth in chapter 669 of the Iowa Code.<sup>181</sup>

This particular question was also addressed by the court of appeals in *Conklin*.<sup>182</sup> There, the court reached the opposite conclusion of the federal district court in *McCabe*, and held that “because the ITCA only provides a remedy for an already-established cause of action, the ITCA is inapplicable to the constitutional claims brought by Conklin.”<sup>183</sup> Now that the Iowa Supreme Court has declared that a cause of action for Iowa constitutional violations does exist—in contravention to the holding in *Conklin*—it would be helpful to trial courts for the supreme court to answer these questions regarding the interplay between such causes of action and the Iowa Tort Claims Act.

### B. Immunity Questions

In *Godfrey*, the majority opinion made reference to the issue of qualified immunity but did not address it because that particular issue was not before the court.<sup>184</sup> The majority opinion held, to the extent there is concern a direct action against public officials for constitutional violations could inhibit their ability to adequately perform their duties, qualified immunity is the appropriate vehicle to address that.<sup>185</sup>

Whether any type of immunity defense exists for government officers—and what elements must be proven by whom—is a big deal to future litigants, just as “[t]he Iowa Bill of Rights was a big deal to the framers.”<sup>186</sup> Guidance from the Iowa Supreme Court on this issue would be most helpful to trial courts and litigants. As the court in *Godfrey* noted, there is a divide among state courts that have considered the issue of qualified immunity.<sup>187</sup>

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180. *McCabe*, 551 F. Supp. 2d at 786.

181. *Godfrey v. State*, 898 N.W.2d 844, 897–98 (Iowa 2017) (Mansfield, J., dissenting).

182. *Conklin v. State*, No. 14-0764, 2015 WL 1332003, at \*5 (Iowa Ct. App. Mar. 25, 2015).

183. *Id.*

184. *Godfrey*, 898 N.W.2d at 879.

185. *Id.*

186. *See id.* at 869–70.

187. *Id.* at 879 (citing *Moresi v. State*, 567 So. 2d 1081, 1093 (La. 1990) (holding qualified immunity applies); and *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 291 (N.C. 1992) (holding no qualified immunity)).



There is a large body of case law concerning immunity questions as they relate to § 1983 actions and *Bivens* actions for the court to follow as persuasive authority.<sup>188</sup> Federal courts analyze qualified immunity with respect to *Bivens* claims the same as they do with respect to § 1983 claims.<sup>189</sup>

### 1. *Absolute Immunity*

Before the court addresses qualified immunity, it should reaffirm that absolute immunity exists in some cases and will continue to be applied in *Godfrey* actions. The Iowa Supreme Court went through a lengthy discussion of absolute immunity and the circumstances under which it applies in the case of *Minor v. State*.<sup>190</sup> “When faced with a question of whether a government official has absolute immunity from civil liability resulting from his or her acts, [the court] employ[s] a ‘functional approach’ to determine whether those actions ‘fit within a common-law tradition of absolute immunity.’”<sup>191</sup> In particular, the court must examine whether absolute immunity for the particular official performing this particular function will “free the judicial process from the harassment and intimidation associated with litigation.”<sup>192</sup> Typically, this has included the functions of judges, prosecutors, and witnesses.<sup>193</sup>

Reaffirming absolute immunity for judicial functions in the context of *Godfrey* actions would, I believe, alleviate some of the concerns that the dissent raised about the impact of the majority’s opinion. For example, the dissent anticipates “many claims from current and former inmates seeking damages for wrongful incarceration.”<sup>194</sup> Justice Mansfield argues an inmate can now bring a direct claim for damages under article I, section 10 (ineffective assistance of counsel), article I, section 9 (due process of law), or article I, section 17 (cruel and unusual punishment).<sup>195</sup> The dissent also expects individuals who have been resentenced because their earlier sentences violated article I, section 17, in the case of juveniles, to seek damages for the constitutional violation.<sup>196</sup> If absolute immunity for judges, prosecutors, jurors, and witnesses performing their judicial functions were

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188. *See id.* at 850–56.

189. *See, e.g.,* *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 932 n.2 (8th Cir. 2016).

190. *Minor v. State*, 819 N.W.2d 383, 393–97 (Iowa 2012).

191. *Id.* at 394 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)).

192. *Id.* (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991)).

193. *Id.* at 394–96.

194. *Godfrey v. State*, 898 N.W.2d 844, 899 (Iowa 2017) (Mansfield, J., dissenting).

195. *Id.*

196. *Id.*

applied, a plaintiff would have a difficult time maintaining a *Godfrey* action for a sentence which is later found to be unconstitutional.

## 2. *Qualified Immunity*

“[T]he doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>197</sup> A constitutional right is clearly established when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.”<sup>198</sup> If the law at the time of the alleged conduct did not clearly establish that the government official’s conduct would violate the Constitution, the government official is entitled to qualified immunity.<sup>199</sup>

If the court recognizes qualified immunity as an appropriate defense to *Godfrey* actions, the court will need to determine the parameters of what is to be considered “clearly established law.”<sup>200</sup> Some federal courts, such as the Eighth Circuit, subscribe “to a ‘broad view’ of what constitutes clearly established law.”<sup>201</sup> “There is no requirement that ‘the very action in question has previously been held unlawful,’ . . . but rather, ‘in the light of pre-existing law the unlawfulness must be apparent.’”<sup>202</sup> “[I]n the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts.”<sup>203</sup>

Other federal courts, such as the Fifth Circuit, take a somewhat more narrow approach to determining clearly established law.<sup>204</sup> In the Fifth Circuit,

When considering whether a defendant is entitled to qualified immunity, the court “must ask whether the law so clearly and unambiguously prohibited [the officer’s] conduct that ‘every reasonable

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197. *Minor*, 819 N.W.2d at 400 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

198. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

199. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

200. *See id.*

201. *Tlamka v. Serrell*, 244 F.3d 628, 634 (8th Cir. 2001) (citing *Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998)).

202. *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) (quoting *Anderson*, 483 U.S. at 640).

203. *Tlamka*, 244 F.3d at 634 (quoting *Buckley*, 133 F.3d at 1129).

204. *See, e.g., Turner v. Lieutenant Driver*, 848 F.3d 678, 686–87 (5th Cir. 2017).

official would understand that what he is doing violates [the law].” “To answer that question in the affirmative, we must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.” “Where no controlling authority specifically prohibits a defendant’s conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established.”<sup>205</sup>

The doctrine of qualified immunity would act as a reasonable means to protect public officers from overly aggressive litigation and would provide them with the liberty to perform their duties without fear that every potential error could subject them to a damage claim. Such a doctrine is well-steeped in federal civil rights litigation, and if the Iowa Supreme Court recognizes qualified immunity going forward in future *Godfrey* claims, it may bring some stability and predictability to the process.

## VI. CONCLUSION

Our Iowa Supreme Court has a rich tradition of enforcing civil rights.<sup>206</sup> This tradition includes upholding civil claims for damages based on violations of a plaintiff’s rights under the Iowa constitution ever since 1873, as demonstrated by the court’s decision in *Coger v. Northwest Union Packet Co.*<sup>207</sup> Recognizing that such a right exists more definitively and with more clarity—as the Iowa Supreme Court did in *Godfrey*—was long overdue. The court had the opportunity in *Conklin* to provide some much needed answers to the implementation of these new *Godfrey* claims at the trial court level, but those answers will need to come another day in another case.

A civil action for damages based on Iowa constitutional violations appropriately extols our state constitution, prizes our liberties, and maintains our rights.<sup>208</sup> It is the right remedy to right constitutional wrongs.

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205. *Id.* at 685–86 (second alteration in original) (emphasis in original) (footnotes omitted).

206. Cady, *supra* note 123, at 1136.

207. *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 154–55 (1873).

208. See *Iowa Official Register: State Symbols of Iowa*, ST. LIBR. IOWA, publications.iowa.gov/135/1/profile/8-1.html (last visited Sept. 7, 2017).