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Tort Law -- *Norton v. United States*: Federal Government's Liability Coterminous with That of Its Agents Under Federal Tort Claims Act Amendment

Donald A. Kirkman

practical results of the decision will not, of course, be apparent for some time, given the enormous problems in implementing the complicated orders issued in right-to-habilitation decisions.[82] *Pennhurst*'s importance, however, lies in its potentially broad application in future litigation more than in its results for the particular institution. First, and least controversially, *Pennhurst* is another in a growing number of cases recognizing the institutionalized retardates' right to habilitation. Second, it provides authority for a new means of achieving habilitation—complete closure of the institution and substitution of community care facilities—based upon judicial recognition of changes in medical theory about what constitutes minimally adequate habilitation for the retarded. *Pennhurst* will undoubtedly be a potent and often-used weapon for the institutionalized retarded; however, because it is not a precisely formulated decision, it may not be a weapon easy to wield. And finally, *Pennhurst* at least begins a redefinition of the circumstances giving rise to the right to habilitation. Such a redefinition is necessary to establish the applicability and scope of the right to habilitation in the noninstitutional contexts that will be created by the condemnation of institutions and the consequent widespread establishment of community facilities. Because *Pennhurst* serves not only as a blueprint for future litigation but as a warning about the constitutionality of future provision of facilities for the mentally retarded, its influence ought to be far-reaching.

NANCY M. P. KING

Tort Law—*Norton v. United States*: Federal Government's Liability Coterminous with That of Its Agents Under Federal Tort Claims Act Amendment

Prior to the 1970's a United States citizen had no remedy against the United States Government or individual federal law enforcement

classification requiring heightened judicial scrutiny, *see, e.g.*, Mason & Menolascino, *supra* note 1, at 160-64; this intermediate scrutiny in equal protection cases is not yet an established test.

82. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). Most of the important cases are all still struggling with implementation and challenge of their courts' orders. *See generally* MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES, *supra* note 18; cases cited note 59 *supra*.

agents for the "constitutional torts"[1] of these agents. In 1971, however, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[2] the United States Supreme Court held that a cause of action existed against individual federal officers for fourth amendment violations;[3] on remand the United States Court of Appeals for the Second Circuit determined that the agent would be liable when he had not acted in good faith and with a reasonable belief that his actions were lawful.[4] Moreover, in 1974 Congress amended the Federal Tort Claims Act (FTCA),[5] which had limited the United States' waiver of sovereign immunity to the negligent torts of federal employees,[6] to make the federal government independently liable for many intentional torts committed by its law enforcement agents.[7] In *Norton v. United States*[8] the United States Court of Appeals for the Fourth Circuit was faced with the question whether the United States was able to assert the good faith and reasonable belief of its agents, a defense that the agents could individually claim, as a defense in a lawsuit against the Government for a fourth amendment violation committed by federal agents. Reversing the trial court, the court held that the Government could use as a defense to the action the good faith and reasonable belief of its agents.[9]

On March 15, 1975, the Alexandria, Virginia police received an anonymous tip that Patricia Hearst, a nationally-sought fugitive, was

1. "Constitutional torts" are tortious acts that violate an individual's constitutional rights. The most typical infringements by government agents involve fourth or fifth amendment rights.

2. 403 U.S. 388 (1971).

3. *Id.* at 397.

4. 456 F.2d 1339, 1341 (2d Cir. 1972). Recently, in Butz v. Economou, 98 S. Ct. 2894 (1978), the Supreme Court acknowledged that under *Bivens* federal officers were not entitled to an absolute or unqualified immunity for their actions.

5. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (Supp. V 1975)). Through this Act the United States became liable only for the negligent acts or omissions of federal employees; the Act did not make the government liable for any intentional torts committed by its agents.

6. Federal Tort Claims Act, ch. 753, § 421, 60 Stat. 812 (1946).

7. The amendment explicitly makes the federal government liable for some types of offenses that were exempt under the original Act. The language of the amendment reads as follows:

> Provided That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (Supp. V 1975).

8. 581 F.2d 390 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3383 (U.S. Dec. 5, 1978) (No. 78-461).

9. *Id.* at 397.

hiding in an Alexandria apartment. Acting on this tip, several FBI agents, in conjunction with local officers, went to plaintiff's apartment without seeking or obtaining a search warrant.[10] Plaintiff Norton was residing alone in the apartment at that time.[11] The agents knocked on the door and orally identified themselves, whereupon plaintiff informed them that she would call their office to verify their identities.[12] As she attempted to call for verification, the officers began to strike the door in an attempt to open it forcibly. Fearing her door would be destroyed, Norton removed the catch and the agents entered with weapons drawn.[13] After an exhaustive search of plaintiff's apartment uncovered no evidence of Hearst, the agents realized their tip had been inaccurate.[14]

Plaintiff instituted an action against the local agents based on 42 U.S.C. § 1983[15] and against the federal officers directly under the fourth amendment to the Constitution of the United States.[16] In addition, she filed suit against the United States under the FTCA, as amended.[17] Both the local and federal officers defended their actions on the ground that they acted in good faith and with reasonable belief that their actions were lawful.[18] The United States also defended on the ground that its agents had acted in good faith and with a reasonable belief in the lawfulness of their actions.[19] On cross-motions for sum-

10. Norton v. Turner, 427 F. Supp. 138, 142 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).

11. Local police, using telephone locator crisscrosses, thought the apartment was occupied by a man whom they had investigated for carrying a concealed weapon. That person, however, had vacated the apartment over five months earlier, at which time plaintiff had moved in. *Id.* at 141-42.

12. The details of this interchange were disputed, but both parties agreed that at no time did Norton view the credentials of the officers. *Id.* at 142.

13. *Id.*

14. *Id.*

15. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16. 581 F.2d at 392.

17. The specific provisions on which she based her suit were 28 U.S.C. §§ 1346(b), 2674, 2680(h) (1970 & Supp. V 1975). 427 F. Supp. 138, 140 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978). Section 1346(b) is the basic jurisdictional statute for federal tort claims, § 2674 sets forth the scope of federal liability under the FTCA, and § 2680(h) eliminated the exclusion of Government liability for the intentional torts of its employees. The text of § 2680(h) appears in note 7 *supra*.

18. 581 F.2d at 392.

19. *Id.*

mary judgment the district court determined that the actions of the law enforcement officers violated plaintiff's fourth amendment rights because the officers had no probable cause to believe that Hearst was present.[20] The court concluded, however, that because further fact-finding was necessary with regard to the good faith and reasonable belief defense of the agents, summary judgment against the individual agents was inappropriate.[21] The court entered summary judgment against the United States, however, on the ground that the United States could not, as a matter of law, assert the good faith defense of its agents in an action brought under the FTCA.[22] Subsequently, the suit against the individual local and federal officers was dismissed and judgment was entered against the United States.[23]

On appeal the Government did not contest the district court's finding that a fourth amendment violation had occurred,[24] nor did it dispute the application of the FTCA and 28 U.S.C. § 2680(h)[25] to the action.[26] The sole issue on appeal was whether the Government could raise in defense the good faith and reasonable belief of its agents.[27] Relying exclusively on the legislative history of the amendment to section 2680(h),[28] the United States Court of Appeals for the Fourth Circuit reversed the trial court and held that because there was no clear statement of a legislative policy to expand the Government's vicarious liability beyond the scope of the agent's direct liability, the court should not impose liability on the federal government when its agents have acted in good faith with a reasonable belief in the legality of their actions.[29]

Tort actions have been available against state officials who violate the constitutional rights of citizens since Congress passed section 1983.[30] Recently this liability has been extended to suits against municipalities.[31] The liability of the United States and its individual agents

20. 427 F. Supp. 138, 144 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).
21. *Id.* at 146.
22. *Id.* at 152.
23. *See* 581 F.2d at 392.
24. *Id.*
25. 28 U.S.C. § 2680(h) (Supp. V 1975).
26. 581 F.2d at 392.
27. *Id.* at 393.
28. *Id.* at 395 n.7.
29. *Id.* at 397.
30. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970), *quoted in* note 15 *supra*). For examples of actions brought under this statute, see Sorenson, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95.
31. Monell v. Department of Social Servs., 98 S. Ct. 2018 (1978).

for violation of constitutional rights has also been a recent development. The liability of individual federal agents arose out of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the Supreme Court held a cause of action to exist against federal law enforcement officers who violate citizens' fourth amendment rights.[32] Under *Bivens* victims of this constitutional tort are entitled to recover money damages against individual federal agents for injuries suffered as a result of the agent's violation of the amendment.[33] On remand the United States Court of Appeals for the Second Circuit held that the individual officer could escape liability by showing that he had a good faith and reasonable belief that his actions were legal under the circumstances.[34] Without this defense law enforcement agents would be inhibited in performing their discretionary duties by the possibility of civil lawsuits.[35]

Originally the FTCA waived sovereign immunity[36] only for the negligent torts of federal employees; the Government retained its immunity for intentional torts committed by its law enforcement agents. Realizing that judgments against individual officers would often produce no recovery, Congress amended the FTCA in 1974, making the United States liable for the intentional torts of its agents. The language of the amendment does not specifically delineate the scope of the Government's liability, however. The court in *Norton*, interpreting the statute, held that "the liability of the United States under section 2680(h) is coterminous with the liability of its agents under *Bivens*,"[37] and there-

32. 403 U.S. at 389.

33. *Id.* at 397.

34. 456 F.2d 1339, 1341 (2d Cir. 1972). The court explained that this defense consisted of two distinct parts: first, a subjective good faith belief in the legality of the officer's actions; and second, an objective standard of the reasonableness of that belief under all of the circumstances. *Id.* at 1348.

35. Many cases and commentators have pointed out the necessity of freeing law enforcement officers from pressures of civil lawsuits.

> We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Barr v. Matteo, 360 U.S. 564, 564-65 (1959). *See also* Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.14 (1956).

36. For a general treatment of the development of the doctrine of sovereign immunity, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Scheuer v. Rhodes, 416 U.S. 232 (1974).

37. 581 F.2d at 393.

fore permitted the Government to retain immunity when its agents acted in good faith and with a reasonable belief.

The court rejected the arguments presented by both plaintiff and defendant at the trial court level.[38] Two other approaches were available to the court, however. Because the original FTCA made the Government liable for negligence "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred,"[39] the courts have traditionally looked to a particular state's doctrine of *respondeat superior* in determining the liability of the United States in FTCA cases.[40] In *Norton*, however, the court rejected this traditional state law negligence approach to FTCA cases because constitutional torts based on the fourth amendment were essentially questions of federal law.[41] Finding the issue of federal liability under the amendment sui generis,[42] the court resolved to rely upon the intent of Congress in enacting the amendment to ascertain the extent of the waiver of sovereign immunity.[43]

The specific language considered by the court to be controlling appears in a Senate Report that accompanied the amendment to section

38. The court explicitly rejected the policy arguments relied upon by the lower court to hold the good faith and reasonable belief defense unavailable. The district court distinguished the justification for qualified individual immunity from that of sovereign immunity. The former is based on protecting a public servant from fear of civil lawsuit while performing his official duties, while the latter was transplanted from a feudalistic system based on the divine right of kings, suggesting that the rationale for sovereign immunity may no longer be applicable to tortious acts by federal agents. 427 F. Supp. 138, 150-52 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978). The appellate court also refused to accept the arguments presented by the Government. 581 F.2d at 395 n.8. The Government argued three alternative defenses. First, they argued that no tort was committed at all because the agents did not act in bad faith or with an unreasonable belief. Second, they suggested that imposing liability without regard to the motives of the individual agents was tantamount to imposing absolute liability on the Government, which contravened two decisions of the Supreme Court. *See* Laird v. Nelms, 406 U.S. 797 (1972); Dalehite v. United States, 346 U.S. 15 (1953). Finally, the Government argued that the good faith and reasonable belief defense constituted a privilege rather than an immunity, thereby making the defense available to the principal under the *respondeat superior* doctrine. For a discussion of the *respondeat superior* doctrine see note 40 and text accompanying notes 39-41 *infra*.

39. 28 U.S.C. § 1346(b) (1970).

40. Under a *respondeat superior* theory "both the precipitating tort and the scope of the government's vicarious liability were to be governed by 'the law of the [state] where the act or omission occurred.'" 581 F.2d at 394 (citing Laird v. Nelms, 406 U.S. 797, 801 (1972)). *See, e.g.*, James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); Yates v. United States, 365 F.2d 663, 667 (4th Cir. 1966); Jennings v. United States, 291 F.2d 880 (4th Cir. 1961).

41. 581 F.2d at 394-95.

42. *Id.* at 395 n.8.

43. *Id.* at 394-95.

2680(h).[44] The passage stated:

> [T]his provision should be viewed as a counterpart to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).[45]

The court emphasized the parenthetical phrase and interpreted this passage to be evidence of congressional intent to impose liability on the Government only when liability is imposed on the individual defendants in constitutional tort cases like *Bivens*.[46]

It seems, however, that the court did not give adequate weight to the evidence from the legislative history that the intent of Congress in submitting the legislation was indeed to expand the liability of the United States in the *Bivens*-type case beyond the liability of the individual defendant. First, the language of the amendment itself suggested no limitation based on the individual liability of the agent.[47] Taken literally, therefore, this waiver of immunity is intended to cover all of the specified intentional torts of federal law enforcement officers irrespective of their defenses.[48]

Moreover, there is ample evidence in the legislative record to support an argument that the liability of the United States should be broader than the liability of the individual officer under *Bivens*. Senate Report Number 93-588,[49] on which the majority in *Norton* relied, stated that "the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause."[50] This passage makes no reference to a defense of good faith and reasonable belief, and clearly applies to the fact situation in *Norton*. Yet the court in *Norton* attributed this language to "imprecise draftsmanship"[51] and disregarded it.

There is other evidence in the legislative record that supports the

44. S. REP. NO. 93-588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789.

45. *Id.* at 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

46. 581 F.2d at 395.

47. *See* note 7 *supra*.

48. 581 F.2d at 398 (Butzner, J., dissenting).

49. S. REP. NO. 93-588, *supra* note 44.

50. *Id.* at 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

51. 581 F.2d at 396 n.12.

conclusion that Congress intended to expand the liability of the United States beyond the liability of the individual officers under *Bivens*. Senator Percy, in his remarks to the committee as sponsor of the amendment, recognized that the *Bivens* remedy alone was inadequate because it "is severely limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause."[52] Clearly implied in his statement was his intent to impose liability on the Government, even when the individual agent can successfully raise the defense of good faith and reasonable belief.[53] Although the majority in *Norton* recognized that this evidence was contrary to their holding, they regarded it as insignificant.[54] The court also overlooked evidence in the record that states explicitly that it was not the intent of the Senate committee that sponsored the legislation to allow the United States to assert the good faith and reasonable belief defense available to the individual defendants under *Bivens*. In a memorandum written by the Senate Committee on Government Operations,[55] in which the amendment originated, the committee observed:

> It is not the intention of this amendment to allow any other defenses that may be available to individual defendants by state or federal law, custom or practice to be asserted against the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous with that of the individual defendants.[56]

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52. S. REP. No. 93-469, 93d Cong., 1st Sess. 36 (1973).

53. *Id.* at 37.

54. 581 F.2d at 396.

55. Senate Comm. on Government Operations, Memorandum on "No-Knock" Legislation (Aug. 28, 1973) (copy on file in office of *North Carolina Law Review*). This memorandum is discussed in Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. REV. 497, 514-15 (1976).

56. Senate Comm. on Government Operations, *supra* note 55, at 5. Based on this memorandum Boger, Gitenstein & Verkuil, *supra* note 55, concluded:

> On one point, however, the Senate committees were clearly insistent on distinguishing their recommendation from prior law. The federal government was not to be allowed to escape liability under the new statute by retreating behind various "defenses" that had been created under *Bivens* or section 1983 . . . . Thus, despite the constant reference in legislative documents to *Bivens* and section 1983, the proposed federal liability was meant to differ in this very crucial aspect from its historical analogues.

Id. at 515. The court of appeals in *Norton* was not persuaded by this evidence, however. The court pointed out that the district court was unable to secure a copy of this memorandum, and further found it inexplicable that the Senate Committee in its report made no mention of this memorandum. 581 F.2d at 396 n.11. On the contrary, the record indicates a strong reliance on the memorandum on the part of the Senate Committee on Government Operations. The memorandum preceded, by three months, the publication of Senate Report 93-588 and most of the language appearing in the report is taken verbatim from the memorandum. Most important, the

Moreover, the policy behind allowing the individual employee to assert the good faith and reasonable belief defense is to protect him from lawsuits for money damages arising out of the performance of discretionary duties.[57] Therefore, the good faith and reasonable belief defense is available to the individual agent only in suits for money damages.[58] The "good faith defense in a suit for damages brought against any federal official . . . is not assertable in the face of a request limited to injunctive, declaratory, or mandamus relief,"[59] reflecting that the belief of the agent regarding the legality of the act does not mitigate its tortious character. Thus, the policy underlying the availability of the defense is inapplicable to the Government.

Norton is not the only case that has faced the issue whether the Government can assert the good faith and reasonable belief of its agents. *Downs v. United States*,[60] a federal district court case, noted the distinction in the underlying policies in declaring that the Government is not entitled to assert the individual defenses of its agents in FTCA actions.[61] In recognizing that the origins of qualified individual and sovereign immunity are distinct, the court concluded that

> the application of immunity sought by the Government would largely emasculate the purposes of the Tort Claims Act; it would be inconsistent with the Act's waiver of immunity for the Government to reclaim immunity merely because no action could be brought against the employee whose act of omission gave rise to a damage claim.[62]

As pointed out by a number of cases and commentators, it is indeed logical that because the rationales for qualified individual immunity and sovereign immunity are discrete, the two immunities need not ac-

language, set forth in text accompanying note 45 *supra*, that the court interpreted as evidence of an intent to limit the liability of the United States under the amendment, originally appeared in the memorandum. The Senate committee, then, placed great weight on the language in the memorandum, contrary to the conclusion of the appellate court in *Norton*. Although the specific language that referred to Congress' explicit intention to disallow the *Bivens* defense by the Government is omitted from Senate Report 93-588, it should not be concluded that it was purposefully omitted. There is certainly sufficient evidence in the report to suggest that the Committee intended to provide a remedy for citizens who were victims of law enforcement abuses, regardless of the defense of the individual agent.

57. Norton v. Turner, 427 F. Supp. 138, 146 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).

58. *Id.*

59. National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); *accord*, Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975).

60. 382 F. Supp. 713 (M.D. Tenn. 1974), *rev'd on other grounds*, 522 F.2d 990 (6th Cir. 1975).

61. *Id.* at 750.

62. *Id.*

company one another.[63] On the one hand law enforcement officers should not have to perform their duties with a perpetual fear of civil lawsuit; on the other, the victims of fourth amendment violations should not be totally denied compensation when the Government explicitly admits the constitutional violation. Making the Government liable even when the agent has a successful defense guarantees compensation for the victim while allowing law enforcement officers to perform free of the pressure of civil suit.

The clear intent of Congress in passing the FTCA amendment was to provide compensation to the innocent victims of unconstitutional law enforcement activities regardless of the defense of the original agent.[64] Contrary to this intent, the *Norton* decision, by allowing the Government to assert the good faith and reasonable belief defense of its agents, will permit victims of constitutional torts to go without a remedy when the agent has a successful good faith and reasonable belief defense. *Norton* has thus preserved the immunity of the United States for many of the intentional torts committed by its agents, thereby circumventing the effectiveness of the FTCA amendment. Furthermore, this decision unfortunately departed from the trend to expand governmental liability in constitutional tort cases and elevates the immunity of the United States above the policy of providing compensation to injured individuals.

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63. *See* note 35 *supra*.

64. *See generally* Boger, Gitenstein & Verkuil, *supra* note 55, at 532. This compensatory interest is represented in S. REP. NO. 93-588, *supra* note 44, at 2-3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790 (referring to Collinsville, Illinois raids), as well as in S. REP. NO. 93-469, *supra* note 52, at 36.