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Damage Remedy for Federal Violation of Fourth Amendment Rights: *Bell v. Hood*, Chapter Two

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& Co.,[35] the decision was that "[S]tate action [is] essential to show a direct violation of . . . Fourteenth Amendment equal protection rights . . . ."[36] The fact that the Court skirted any decision in *Griffin* on the contention that section five of the fourteenth amendment empowers Congress to reach purely private actions may indicate that this avenue of expansion may not have been as completely rejected as *Adickes* would seem to indicate.

Therefore, the *Griffin* decision must be viewed both as a culmination of the decisional law in this area over the past twenty years as well as an indication that private conspiracies, on a case-by-case basis, may be redressable in the federal courts under 42 U.S.C. section 1985(3). In addition, *Griffin v. Breckinridge* may indicate that future expansion of the scope of the Civil Rights Statutes under section five of the fourteenth amendment is still a possibility.

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DAMAGE REMEDY FOR FEDERAL VIOLATION OF FOURTH AMENDMENT RIGHTS: BELL v. HOOD, CHAPTER TWO

Plaintiff brought an action in a federal district court for damages alleging that federal officers acting under color of federal law had violated his fourth amendment rights. Defendants, federal narcotics agents, had entered and searched plaintiff's apartment without a warrant and had manacled and humiliated the plaintiff in the presence of his family. The defendants threatened the members of the entire household with arrest and later interrogated, booked, and strip-searched the plaintiff at the federal courthouse. The district court dismissed the action on two grounds: lack of subject matter jurisdiction and want of a claim upon which relief might be granted.[1] On appeal, the Court of Appeals for the Second Circuit[2] ruled that the district court did have jurisdiction over the subject matter,[3] but affirmed on the grounds that the plaintiff had not set forth a claim upon which relief might be granted. On certiorari

35. 398 U.S. 144 (1970).

36. *Id.* at 152.

1. Bivens v. 6 Unknown Named Agents Of the Federal Bureau Of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967).

2. Bivens v. Six Unknown Named Agents Of the Federal Bureau Of Narcotics, 409 F.2d 718 (2d Cir. 1969).

3. *Id.* at 720. The court based its conclusion on Bell v. Hood, 327 U.S. 678 (1946), where it was held that a "complaint . . . drawn as to seek recovery directly under the Constitution or laws of the United States, . . ." constitutes a federal question so as to confer jurisdiction on the court. *Bell* at 681-82. The Court also held that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* at 682.

to the United States Supreme Court, *held*, reversed and remanded: Violation of a fourth amendment right by a federal officer acting under color of federal authority gives rise to a federal claim for damages. *Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics*, 91 S. Ct. 1999 (1971).

Bivens is the first case since *Bell v. Hood*[4] which has addressed itself to the question of the possibility of a money damage claim for violation of a fourth amendment right. In *Bell*, it was held that a claim which seeks recovery directly under the Constitution of the United States is of "sufficient merit to warrant [the] exercise of federal jurisdiction. . . ."[5] However, the Court specifically left open the question of whether such a complaint stated an actionable claim since such a determination was thought more properly "decided after and not before the court had assumed jurisdiction over the controversy."[6]

When *Bell* was remanded, the federal district court accepted jurisdiction as ordered, but dismissed the complaint on the merits, finding that "neither the Constitution nor the statutes of the United States give rise to any cause of action" for damages resulting from the violation of fourth amendment rights by federal agents acting under color of federal authority.[7]

Two questions which had been left open by *Bell* were before the Court in *Bivens;* first, whether the claim advanced was a state or federal claim, and second, whether a remedy for money damages could be fashioned for a violation of fourth amendment rights if a federal claim were present.

In regard to the first of these two questions, the Second Circuit held that Biven's claim constituted only a common law state action for trespass, and that the fourth amendment would apply only "to increase the efficacy of the trespass remedy by preventing federal law enforcement officers from justifying a trespass as authorized by the national government."[8] Consequently, fourth amendment rights and claims would serve only to limit the defenses available to a defendant in a state trespass action.

This contention was squarely rejected by the Supreme Court[9] which

4. 327 U.S. 678 (1946). *See* note 3 *supra.*

5. *Id.* at 684. The Court held that jurisdiction could be properly invoked under the general federal question jurisdiction provisions of 28 U.S.C. § 41(1) (1940), which provided that the federal district courts had original jurisdiction of

> all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . . [forerunner of 28 U.S.C. § 1331 (1970)].

6. *Id.* at 682.

7. Bell v. Hood, 71 F. Supp. 813, 821 (S.D. Cal. 1947).

8. Bivens v. Six Unknown Named Agents Of the Federal Bureau Of Narcotics, 409 F.2d 718, 721 (2d Cir. 1969).

9. Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics, 91 S. Ct. 1999, 2002-04 (1971).

pointed out that the fourth amendment was not limited to the proscription of conduct prohibited by state law if engaged in by a private person.[10] The rights protected by that amendment and the rights protected by state trespass laws were not only dissimilar at times, but might even be mutually repulsive.[11] As an example, the Court pointed to decisions where federal fourth amendment rights have been abridged, while at the same time state law has not been violated.[12] Also emphasized were the many wiretapping cases which have established that the rights under this amendment are not to be measured in terms of "technical trespass under the local property law" or by "ancient niceties of tort . . . law."[13]

The majority of the Court in *Bivens* firmly stated that not only were fourth amendment protections not tied to state-protected rights, but that the interests protected by common law trespass and invasion of privacy actions "may be inconsistent or even hostile" to "those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures. . . ."[14]

It was further reasoned that while a private citizen is free to deny or allow access to his home by another, the existence of such alternatives is not to be presumed when a federal officer is demanding entry.[15] Indeed,

> [t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police;

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10. *Id.* at 2002-03.

11. *Id.* at 2003.

12. In Gambino v. United States, 275 U.S. 310 (1927), it was held that liquor improperly seized by state officers without a warrant and turned over to federal authorities for prosecution under federal law was improperly admitted as evidence and should have been excluded regardless of the existence of probable cause at the time of seizure. Evidence was also excluded where a federal officer participated with a state officer in a search and seizure which was illegal by federal constitutional standards, though not necessarily illegal by state standards. Byars v. United States, 273 U.S. 28 (1927).

13. Silverman v. United States, 365 U.S. 505, 511 (1961). In that case it was held that evidence acquired as a result of a spike microphone planted in a heating duct was inadmissible since the actual penetration of such a device constituted a physical intrusion of the premises in violation of the fourth amendment. Earlier cases had held that electronic eavesdropping which was accomplished without the unauthorized physical penetration of an area protected by the fourth amendment would not constitute a violation of that provision. On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942). *See also* the progenitor of the penetration requirement, Olmstead v. United States, 277 U.S. 438 (1928).

In Katz v. United States, 389 U.S. 347 (1967), the rubrics of penetration set down in *Goldman, On Lee,* and *Olmstead* and scrupulously distinguished in *Silverman* were abandoned. There the Court rejected the " 'trespass' doctrine . . . as controlling" and stated that "[t]he fact that the electronic device . . . did not happen to penetrate . . . can have no constitutional significance." *Katz* at 353. In so ruling, the Court reversed a conviction based upon evidence obtained from electronic monitoring of a conversation on a public telephone.

14. *Bivens,* 91 S. Ct. at 2003.

15. *Id.* at 2003-04.

> and a claim or authority to enter is likely to unlock the door as well.[16]

Although an action for trespass is barred when entry is allowed (even after demand),[17] an action based on a violation of fourth amendment rights is not necessarily abrogated under identical circumstances.

Faced with the limited effectiveness of state trespass actions, the unsettling nature of the federal intrusion, and the inability of state law to either absolve federal agents of constitutional restrictions on conduct[18] or to limit the "extent to which federal authority can be exercised,"[19] the Court found that "the federal question becomes not merely a possible defense to [a] state action, but an independent claim both necessary and sufficient" to constitute an actionable federal claim.[20]

Having recognized the existence of a federal claim, the Court then turned to the question of whether a remedy could be fashioned for a violation of this right. While the *Bell* Court had left the question unanswered, that Court had set out some general guidelines.

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done.[21]

The Second Circuit had expressed much concern over the absence of any case or statute expressly authorizing money damages for the violation of fourth amendment rights. The appeals court cited several appellate authorities in support of its position "that statutory authority is a prerequisite for a federal cause of action for damages, even though the wrong complained of is the violation of a constitutional right. . . ."[22] However, the Supreme Court looked to and followed a long line of decisions which adopted a contrary view.[23]

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16. *Id.* at 2004.

17. *Id.* at 2003. For a discussion of "consent" as a bar to a tort action, see W. PROSSER, THE LAW OF TORTS § 18 (4th ed. 1971).

18. *Bivens*, 91 S. Ct. at 2004. The first federal exclusionary evidence cases held that evidence seized as a result of a lawful state search and seizure, and which was otherwise admissible in state courts, would not be admissible in federal courts if the circumstances of acquiring the evidence fell below fourth amendment standards. Byars v. United States, 273 U.S. 28 (1927) and Gambino v. United States, 275 U.S. 310 (1927). *See* note 12 *supra*. *See also* Weeks v. United States, 232 U.S. 383 (1914); and *In re* Ayers, 123 U.S. 443, 507 (1887), which held that "[t]he State has no power to impart . . . any immunity from responsibility to the supreme authority of the United States."

19. *Bivens*, 91 S. Ct. at 2004. *See In re* Neagle, 135 U.S. 1 (1890). *See also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816).

20. *Bivens*, 91 S. Ct. at 2004.

21. Bell v. Hood, 327 U.S. 678, 684 (1946).

22. Bivens v. Six Unknown Named Agents Of the Federal Bureau Of Narcotics, 409 F.2d 718, 720 (2d Cir. 1969).

23. *Bivens*, 91 S. Ct. at 2004-05.

As early as 1886, the Court recognized that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen."[24] Even earlier, appropriate remedies had been fashioned when a citizen's property was taken from him by the government without lawful authority.[25] In the latter part of the nineteenth and the early part of the twentieth centuries, the Court frequently shaped remedies to redress wrongful acts which violated the constitutional rights of the citizen.

In *Wiley v. Sinkler*,[26] the Court suggested that the refusal to allow a man to exercise his constitutional right to vote made out a federal claim for money damages. Two years later in a similar voting rights case, it was held that jurisdiction of the federal courts was properly invoked if the claim arose under the Constitution, even if such a right of action was not specified in any statute or in the Constitution itself.[27]

It became well established that remedies created by the federal judiciary do not necessarily require statutory recognition to be valid.[28] Even where a claim arises under a specific statute which does not provide a particular remedy, the courts may still fashion one under certain circumstances.[29] The right of federal courts to grant injunctive relief for constitutional violations has been repeatedly upheld when such a remedy was indicated.[30]

Before *Bivens* was decided, several remedies were available for violations of fourth amendment rights. These included: injunctions against further violations, exclusion of evidence in a criminal proceeding,[31] criminal prosecution of the federal officers responsible for the violation,[32] and injunctive and monetary relief in certain instances involving state officers.[33] However, none of these remedies were effective

24. Boyd v. United States, 116 U.S. 616, 635 (1886).

25. United States v. Lee, 106 U.S. 196 (1882).

26. 179 U.S. 58 (1900).

27. Swafford v. Templeton, 185 U.S. 487 (1902).

28. Jacobs v. United States, 290 U.S. 13 (1933). *See also* Seaboard Air Line R.R. v. United States, 261 U.S. 299 (1923); Phelps v. United States, 274 U.S. 341 (1927).

29. J. I. Case Co. v. Borak, 377 U.S. 426 (1964). In that case the Court held that a money damage remedy could be fashioned for a complaint claiming under The Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1964).

30. Ex parte Young, 209 U.S. 123 (1908); *But see* Younger v. Harris, 91 S. Ct. 746 (1971). *See also* City of Mitchell v. Dakota Central Tel. Co., 246 U.S. 396 (1918); Central Kentucky Gas Co. v. Railroad Comm., 290 U.S. 264 (1933).

31. Weeks v. United States, 232 U.S. 383 (1914); Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961). *See also* notes 12-13 *supra*. It is interesting to note that Chief Justice Burger addressed his entire dissent in *Bivens* to an attack on the exclusionary evidence rule. The Chief Justice suggested that the rule should be abolished and proposes, in its stead, a statutory enactment which would provide (1) a waiver of sovereign immunity as to illegal acts of police, (2) damage action created for damages sustained as the result of violations of the fourth amendment, (3) creation of a quasi-judicial body to adjudicate claims, (4) a provision indicating that this remedy is in lieu of exclusion of evidence, and (5) a provision that no evidence will ever be excluded from criminal proceedings due to a fourth amendment violation. *Bivens*, 91 S. Ct. at 2012-21 (dissenting opinion).

32. 18 U.S.C. § 2236 (1970).

33. 42 U.S.C. § 1983 (1970).

for the person whose rights were violated by a federal officer and against whom no criminal charges had been preferred.

The Court thus concluded that absent an explicit congressional mandate to the contrary, Webster Bivens was entitled to redress his injury through a particular remedial mechanism available in the federal courts, namely money damages. Thus, twenty-five years after the Court first addressed itself to this question in *Bell*, the Court ruled that the violation of fourth amendment rights by a federal agent acting under color of federal authority states a federal claim for money damages upon which relief may be granted.[34]

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MANDATORY REFERENDUM AND APPROVAL FOR LOW-RENT HOUSING PROJECTS: A DENIAL OF EQUAL PROTECTION?

The United States Housing Act of 1937[1] established a federal housing agency authorized to offer aid in the form of loans and grants to state agencies for slum clearance and low-rent housing projects. California was one of many states to take advantage of the Federal Housing Act through the creation of local agencies.[2] However, two of California's local agencies were prohibited from applying for funds[3] under the federal act by operation of a California constitutional provision[4] requiring ap-

34. Apart from the practical problem of finding a jury that will award money against federal officers while engaged in their official capacities, a more serious problem may face Webster Bivens on remand, namely the defense of immunity from prosecution. In response to the federal district court's ruling that it would bar the action (*Bivens*, 276 F. Supp. at 15), Petitioner argued extensively in his brief that the sovereign immunity defense ought not to be permitted. However, the Supreme Court noted the Second Circuit had not ruled on the point and declined to consider it.

In 1946, the Court in *Bell* reversed a district court for dismissing a fourth amendment damage claim for lack of subject matter jurisdiction. The Court did not, however, determine whether such a claim was actionable because that point was not before the Court. On remand, the lower court dutifully accepted jurisdiction, but dismissed the cause on the grounds that an actionable claim had not been presented.

Twenty-five years later, the *Bivens* Court has advanced the argument begun in *Bell*, and ruled that such a claim is actionable. The Court, however, failed to address itself to the defense of immunity because, like *Bell*, the issue was not before it. Whether Webster Bivens will get his day in court and a remedy for his injuries is yet to be seen.

1. 42 U.S.C. § 1401 (1970).

2. *See* CAL. HEALTH AND SAFETY CODE § 34240 (West 1970).

3. This occurred twice in San Mateo County in 1966 and once in Santa Clara County in 1968.

4. CAL. CONST. art. XXXIV, § 1 provides in pertinent part:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop,