

10-22-2022

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Grace Panicola

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Where There Is a Right, There Is a Remedy—Or Is There?

Grace Panicola

An ancient Roman maxim exists that reads: *ubi ius, ibi remedium*.¹ Where there is a right, there is a remedy.² But is this always true? Based on a recent Supreme Court decision, the answer seems to be “no”—not unless Congress has prescribed one.³ The Court has repeatedly declined to extend a *Bivens* cause of action,⁴ and has even failed to allow *Bivens* claims in cases of arguably “parallel circumstances.”⁵ Where there is a constitutional right violated, there should be an adequate remedy, and failing to provide one creates serious implications for plaintiffs injured at the hands of government officers.

A *Bivens* action generally refers to a lawsuit for damages when a federal officer who is acting in the color of federal authority allegedly violates the U.S. Constitution.⁶ The term comes from the case *Bivens v. Six Unknown Named Agents*,⁷ where the Supreme Court held that a violation of the Fourth Amendment by a federal agent gives rise to a cause of action for damages.⁸ Following *Bivens*, the Court extended the cause of action twice: first to a Fifth Amendment due process claim for sex discrimination, and then to an Eighth Amendment deliberate indifference claim for failure to provide

¹ Joseph Postel, *Where There Is a Right, There Is a Remedy—Except in Illinois*, IRMI (February 2001), <https://www.irmi.com/articles/expert-commentary/where-there-is-a-right-there-is-a-remedy-except-in-illinois#:~:text=An%20ancient%20Roman%20legal%20maxim,law%20will%20provide%20a%20means.>

² *Id.*

³ *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022).

⁴ *Id.* at 1802.

⁵ *Id.* at 1799.

⁶ Cornell Law School Legal Information Institute, *Bivens Action* (last visited Sept. 28, 2022), https://www.law.cornell.edu/wex/bivens_action.

⁷ *Id.*

⁸ *Egbert*, 142 S. Ct. at 1813.

proper medical attention.⁹ Initially, this was thought to be a broad remedy, but the Supreme Court has repeatedly held that it is a narrow remedy,¹⁰ and has worked to limit the analytical framework when considering a *Bivens* claim.¹¹

The most recent case where the Court declined to extend *Bivens* was in *Egbert v. Boule*.¹² In that case, the Court held that Boule, a Washington innkeeper, did not have implied causes of action against a federal agent for alleged First and Fourth Amendment violations.¹³ Boule is a U.S. citizen who owns and runs the Smuggler's Inn, a hotel in Washington abutting the Canadian border.¹⁴ Egbert is a Border Patrol agent who wished to speak with one of Boule's guests.¹⁵ Boule asked Egbert to leave his property, to which Egbert responded by throwing Boule against a nearby car and then to the ground.¹⁶ Boule complained to Egbert's superiors, which prompted an investigation, but no further action, so Boule filed First and Fourth Amendment claims under *Bivens*.¹⁷ The court reasoned that in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts.¹⁸ The argument is one rooted in separation of powers, as the Court notes the judiciary is not undoubtedly better positioned than Congress to authorize a damages action.¹⁹ However, this has proved detrimental to injured plaintiffs, as lower courts are heeding the

⁹ *Id.*; (citing *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)).

¹⁰ Short Circuit, *Constitutions and Common Law*, INST. FOR JUST. (September 8, 2022), <https://podcasts.apple.com/us/podcast/short-circuit/id309062019?i=1000578851544>.

¹¹ *Infra* note 3 at 1813.

¹² *Id.* at 1809.

¹³ Howard Wasserman, *Court again rejects extension of Bivens suits against federal officials*, SCOTUS NEWS (June 8, 2022 12:05 pm), <https://www.scotusblog.com/2022/06/court-again-rejects-extension-of-bivens-suits-against-federal-officials/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Wasserman, *supra* note 13.

¹⁹ *Infra* note 3 at 1804-05.

Supreme Court's warnings and preventing remedies when constitutional rights are being violated.²⁰

United States v. Silva portrays the serious implications plaintiffs can experience when they are unable to bring suit under *Bivens*.²¹ There, a prison guard went into a prisoner's cell and assaulted him by throwing him to the ground, jumping on his back, and applying painful pressure with his knee.²² According to the prison's protocol, guards are not supposed to enter prisoners' cells, as it takes them out of view of camera.²³ The prisoner brought suit against the guard and the United States itself, however, the court held that this would be an extension of *Bivens* and therefore the court heeded the Supreme Court's warning and did not allow it.²⁴ Further, the court found that the prisoner had an alternative remedy in the Bureau of Prisons (BOP) Administrative Remedy Program, so a remedy under *Bivens* was not warranted.²⁵

When there is a constitutional right violated, courts should be able to grant a remedy. Alternative remedies often prove to be "no remedy whatsoever," let alone adequate remedies.²⁶ For example, prisoners do not have access to counsel through the BOP Administrative Remedy Program, and must prepare the grievance on their own, which can be challenging—or virtually impossible—for prisoners who lack information and resources.²⁷ Failing to provide adequate remedies not only hurts plaintiffs, but hurts society at large as it creates adverse incentives for federal officers who are observed to have a "far greater capacity for harm" due to their positions of

²⁰ *Infra* note 10.

²¹ *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022).

²² *Id.* at 1136.

²³ *Id.*

²⁴ *Id.*

²⁵ *Silva*, 45 F.4th at 1141.

²⁶ *Infra* note 3 at 1821.

²⁷ Michael Santos, *What Should I Know About the Administrative Remedy Process?*, PRISON PROFESSORS (2022) <https://prisonprofessors.com/what-should-i-know-about-the-administrative-remedy-process-in-the-bop/>.

authority.²⁸ These adverse incentives essentially create pockets of governmental immunity, no matter how egregious the misconduct or resultant injury.²⁹

Further, courts allowing plaintiffs a remedy directly under the constitution does not equate to policymaking in violation of separation of powers. Where Congress has not acted, courts should default to a remedy under the constitution for violations of constitutional rights, like the Michigan Supreme Court has.³⁰ When courts start deciding when to enforce constitutional rights, that is what becomes policymaking, which is against the notion of separation of powers.³¹ Thus, courts should be responsible for granting remedies to plaintiffs in cases of violations of constitutional rights.

Edited by Allison Frisella

²⁸ *Infra* note 3 at 1812.

²⁹ *Id.* at 1821.

³⁰ *Infra* note 10.

³¹ *Id.*