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The Constitution as Positive Law

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THE CONSTITUTION AS POSITIVE LAW:

*BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*¹

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.²

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution . . . of the United States.³

Employing only the foregoing pronouncements, the Supreme Court of the United States in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*⁴ fashioned a private civil cause of action for damages⁵ against federal officials who violate the commands of the Fourth Amendment. In so doing, the Court proclaimed a body of doctrine that could easily revolutionize the role of the Constitution in the American legal system.

On July 7, 1967, Webster Bivens, acting *pro se*, brought a civil suit for damages against six unknown agents of the Federal Bureau of Narcotics in the United States District Court for the Eastern District of New York.⁶ His complaint alleged that the six agents, acting under color of federal law, had entered his apartment on the morning of November 26, 1965, and had arrested him for alleged narcotic violations.⁷ He further claimed that the agents had manacled him in front of his fam-

1. 403 U.S. 388 (1971).

2. U.S. CONST. amend. IV.

3. 28 U.S.C. § 1331(a) (1970) (originally enacted as Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470).

4. 403 U.S. 388 (1971). The title of the case derives from the fact that the plaintiff did not know the agents' names until they were supplied by the United States Attorney after the filing of the complaint. Five agents were ultimately served. *Id.* at 390 n.2.

5. The Supreme Court did not discuss the types or extent of damages recoverable. It would appear, however, that a fairly liberal damage scheme will be necessary to prevent their decision from being an empty gesture. See note 169 *infra* and text accompanying notes 165-72, 256-60 *infra*.

6. 403 U.S. at 389, 398.

7. *Id.* at 389.

ily, had threatened to arrest the entire family, and had searched the apartment from stem to stern.⁸ The arrest and search were said to have been accomplished without a warrant and without probable cause, and the arrest was alleged to have been effected with unreasonable force.⁹ Bivens was taken to the federal courthouse in Brooklyn, where he was interrogated, booked and subjected to a visual strip search.¹⁰ Bivens claimed to have suffered great humiliation, embarrassment and mental suffering as a result of the agents' unlawful conduct, and sought damages in the amount of \$15,000 from each defendant.¹¹

Bivens, by filing his complaint, had entered upon a difficult task. Since no federal statute existed which could provide him with a remedy,¹² his only hope of recovery in the federal courts was in an action founded directly upon the prohibitions of the Fourth Amendment. The Constitution, however, has assumed a rather unpretentious position in the traditional scheme of American law. While admittedly the "supreme Law of the Land,"¹³ only rarely has it been utilized as a source of offensively-oriented private rights of action.¹⁴ The Consti-

8. *Id.*

9. *Id.*

10. *Id.* The charges against Bivens were dismissed by a United States Commissioner. Brief for Petitioner at 3, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

11. 403 U.S. at 389-90. Since Bivens did not allege any specific intent on the part of the agents to deprive him of a constitutional right, the Court's ultimate recognition that he stated a valid cause of action impliedly indicates that intent is not an essential element of a civil cause of action under the Fourth Amendment. This would be consonant with the approach taken by the courts regarding 42 U.S.C. § 1983, whereunder a similar cause of action against state officers can be maintained without any allegation of intent or motive. *Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Jenkins v. Averett*, 424 F.2d 1228, 1232-33 (4th Cir. 1970); *Whirl v. Kern*, 407 F.2d 781, 786-89 (5th Cir. 1969).

12. The Civil Rights statutes are concerned primarily with action under color of state law. See 403 U.S. at 398 n.1. 28 U.S.C. § 2680 specifically excludes governmental liability for false arrest, abuse of process, and the performance of discretionary functions by government employees. The court of appeals recognized that these categories might well encompass Bivens' claim. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 725 (2d Cir. 1969). But see 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.08, at 469-70 (1958). The court of appeals did note the existence of 18 U.S.C. § 2236, which provides criminal penalties for certain searches made without a warrant. 409 F.2d at 724-25. The criminal sanction, however, does not afford any relief to the person injured. Furthermore, it is unrealistic to expect it to be enforced. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 493-94 (1955).

13. U.S. CONST. art. VI, cl. 2.

14. See, e.g., *Wiley v. Sinkler*, 179 U.S. 58 (1900), and *Swafford v. Templeton*, 185 U.S. 487 (1902) (cause of action for damages for deprivation of constitutional

tution's character as a political document has obscured its function as positive, pre-eminent law.¹⁵

Bivens' fundamental constitutional claim was confronted from the outset with a sextet of formidable barriers. First, could his claim for damages, based solely upon the Fourth Amendment (which fails to provide expressly for its enforcement), be said to "arise under" the Constitution¹⁶ so as to vest jurisdiction in the district court? Second, does the Fourth Amendment, which prohibits only *governmental* action,¹⁷ apply to an individual federal official who has exceeded his lawful authority by engaging in conduct forbidden by the amendment? Third, is the Fourth Amendment the source of an independent *federal* right to be free from unreasonable searches and seizures, or is it merely a limitation on the defenses a federal official can set up against a claim brought under state tort law? Fourth, assuming jurisdiction and the existence of a federal right, do the federal courts have the power to afford a damage remedy for the violation of that right, or must they await explicit congressional authorization? Fifth, what criteria should be used in deciding whether or not to exercise that remedial power, if it is found to exist? And sixth, to what extent does the doctrine of official immunity apply?¹⁸

The district court found Bivens' claim to be entirely without merit.¹⁹

right to vote sustained in both cases). The court of appeals in *Bivens* attempted to distinguish these cases on the ground that they could have been brought under the Civil Rights Act of 1871. 409 F.2d at 724. It seems apparent, however, that the *Wiley* and *Swofford* decisions were based upon the Constitution and not upon any statute (other than the statute conferring general federal question jurisdiction). Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1125-26 n.74 (1969) [hereinafter cited as Hill]. The only portion of the Constitution which has been consistently utilized as the source of offensively-oriented private rights of action is the Fifth Amendment's prohibition against the taking of land by the federal government without paying just compensation therefor. See, e.g., *Jacobs v. United States*, 290 U.S. 13 (1933) (value of land, plus interest, recoverable) and *United States v. Lee*, 106 U.S. 196 (1882) (recovery of possession allowed).

15. See generally Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968) [hereinafter cited as Katz]; Hill, *supra* note 14.

16. 28 U.S.C. § 1331(a) (1970).

17. *Feldman v. United States*, 322 U.S. 487, 490 (1944).

18. The doctrine of official immunity should be distinguished from that of sovereign immunity. Sovereign immunity precludes suits against the government, while official immunity is a more recent development devised to shield individual officials from vexatious lawsuits. When specific relief is being sought, the distinction tends to blur. See text accompanying notes 216-21 *infra*. But when, as in the instant case, damages are sought, the suit is clearly against the individual official and the doctrine of sovereign immunity is inapplicable. See Hill, *supra* note 14, at 1147.

19. 276 F. Supp. 12, 16 (E.D.N.Y. 1967). In fact, the court denied a motion for

Judge Bruchhausen held that (1) Bivens' claim did not come within the general federal question jurisdiction;²⁰ (2) federal agents who exceed their authority no longer represent the government and therefore cannot be charged with the requisite governmental action prohibited by the Fourth Amendment;²¹ (3) the amendment did not create a new federal right, but merely gave constitutional protection to the pre-existing common-law rights found in the states' tort law;²² (4) the federal courts cannot afford a remedy for the violation of a constitutional provision without express authorization from Congress or the Constitution;²³ and (5) federal agents are immune from suit for actions which would ordinarily fulfill the purposes of the authority granted to them.²⁴ Bivens' complaint was dismissed for want of jurisdiction²⁵ and for failure to state a claim upon which relief could be granted.²⁶

The Court of Appeals for the Second Circuit²⁷ expressly disagreed with three of the district court's conclusions. In particular, it found that (1) the district court had jurisdiction;²⁸ (2) the agents, even if without actual authority as a result of their alleged unconstitutional conduct, would still be acting under color of law so as to be within the scope of the amendment;²⁹ and (3) the federal courts have the power to remedy the deprivation of established federal rights even absent specific congressional authorization.³⁰ Additionally, the court apparently classified the right to be free from unreasonable searches and seizures as a federal right.³¹ However, the district court's dismissal on the merits was affirmed³² on the ground that, absent express authorization, the

leave to appeal in forma pauperis on the ground that the appeal would be "frivolous." *Id.* The denial was reversed by the court of appeals on July 12, 1968, at which time Bivens' motion for assignment of counsel was also granted. 409 F.2d at 720.

20. 276 F. Supp. at 14-16.

21. *Id.* at 15.

22. *Id.*

23. *Id.*

24. *Id.* at 15-16.

25. *Id.* at 13.

26. *Id.* at 16; *see* *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 719 (2d Cir. 1969).

27. 409 F.2d 718 (2d Cir. 1969).

28. *Id.* at 720.

29. *Id.* at 721.

30. *Id.* at 722.

31. *Id.* The court of appeals never described the right as being state-created. On the contrary, it repeatedly described it as a federal constitutional right. *See, e.g.*, 409 F.2d at 725. Further, the court's recognition of its power to afford a remedy necessarily depended upon the existence of some federal right.

32. 409 F.2d at 726. Judge Waterman, concurring specially, felt that the federal

federal courts should not afford a remedy unless it is essential to the vindication of the constitutional right.³³ The court did not reach the immunity issue.³⁴

The Supreme Court, in an opinion by Justice Brennan,³⁵ rejected the essentiality standard of the lower court and held that the federal courts may use any normally available remedy to ameliorate wrongs done.³⁶ Under this test, Bivens was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."³⁷ Justice Harlan filed a separate concurring opinion which elaborated certain of the issues covered cursorily by the majority.³⁸ The Chief Justice and Justice Black each filed separate dissenting opinions, questioning the constitutional power of the Court to afford a damage remedy for Fourth Amendment violations in the absence of legislation creating such a cause of action.³⁹ Justice Blackmun dissented in a separate opinion which primarily adopted the reasoning of the court of appeals.⁴⁰ Since the immunity issue had not been decided by the court of appeals, the Supreme Court did not consider the issue either, but reversed the decision of the court of appeals and remanded the case for further proceedings.⁴¹

The district court clearly erred in its disposition of the jurisdictional and governmental action issues. It has been the rule since the Supreme Court's decision in *Bell v. Hood*⁴² that:

[W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit. . . .

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled 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.⁴³

courts *should* entertain the cause of action without waiting for express statutory authorization. *Id.*

33. *Id.*

34. *Id.* at 720.

35. Majority opinion by Justice Brennan with whom Justices Douglas, Marshall, Stewart and White joined, 403 U.S. at 389.

36. *Id.* at 397.

37. *Id.*

38. *Id.* at 398.

39. *Id.* at 411, 427.

40. *Id.* at 430.

41. *Id.* at 397-98.

42. 327 U.S. 678 (1946).

43. *Id.* at 681-82. The Court noted two situations where a dismissal for want of

The basic issues raised in *Bell* were identical to those raised in the instant case. The petitioners in *Bell* were seeking, solely on the authority of the Fourth and Fifth Amendments and the general grant of federal question jurisdiction,⁴⁴ to recover damages for alleged unreasonable searches and seizures and unauthorized and unjustified imprisonments.⁴⁵ The *Bell* Court held that the district court had jurisdiction,⁴⁶ since "the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed jurisdiction over the controversy."⁴⁷ The court of appeals in *Bivens* recognized the *Bell* decision as clearly compelling the conclusion that the district court had jurisdiction over *Bivens*' claim.⁴⁸ The Supreme Court did not discuss the issue.⁴⁹

The district court also improperly applied the requirement of governmental action. The fact that the government official has exceeded his authority by engaging in constitutionally impermissible conduct does not thereby deprive his activities of their governmental character. He continues to wear the same uniform; that is, he continues to act "under color of" law.⁵⁰ The court of appeals in *Bivens* emphatically reiterated this principle as applied to unconstitutional searches by federal officials:

jurisdiction would be justified: (1) where the alleged claim under the Constitution or federal statutes is clearly immaterial and was made solely for the purpose of obtaining jurisdiction and (2) where the claim is wholly insubstantial and frivolous. *Id.* at 682-83.

44. *Id.* at 683.

45. *Id.* The addition of the Fifth Amendment claim of "unjustified imprisonment" added nothing to the underlying issues of law raised by the Fourth Amendment claim.

46. *Id.* at 685.

47. *Id.* at 683-84. Upon the remand, the district court ruled against the petitioners on every one of the non-jurisdictional issues. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947). No appeal was taken, despite the encouraging tenor of the Supreme Court's opinion. See text accompanying notes 105-116 *infra*.

48. 409 F.2d at 720.

49. The sole reference to this issue is contained in Justice Harlan's summary of the court of appeals' decision. 403 U.S. at 398-99.

50. A famous statement of this principle is contained in *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913):

[T]he proposition is that the [Fourteenth] Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. . . . [The amendment] provides . . . for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the Federal judicial power is competent to afford re-

The fact that the officers were acting in violation of the Fourth Amendment's restraints upon governmental action does not belie the plain fact that they were acting as governmental officials, and not in a private capacity. It was from the federal government that they drew their apparent authority, such that reasonable citizens could not have been expected to resist their unconstitutional intrusion. Action under color of law, which utilizes the power of official position, must be deemed within the scope of the Fourth Amendment.⁵¹

The governmental action issue, like the jurisdictional issue, was not explicitly discussed by any of the members of the Supreme Court.⁵² Rather, the two issues having been properly disposed of by the court of appeals, the Supreme Court turned immediately to a consideration of the remaining non-jurisdictional issues left unresolved in *Bell*.

I. THE SOURCE OF THE RIGHT

The respondents contended that the Fourth Amendment is not itself the source of any independent federal right upon which a federal cause of action could be based. The amendment, they asserted, serves merely to preclude the defense of federal authority in state tort suits.⁵³ Therefore, the only rights violated by an unreasonable search and seizure are rights under *state* law.⁵⁴ The amendment did not establish any *federal* right to be free from unreasonable searches and seizures and thus can-

dress for the wrong by dealing with the officer and the result of his exertion of power. *Id.* at 287.

See *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941); *Hill*, *supra* note 14, at 1146-47. The failure of some of the federal courts to distinguish between the officer's authority and his official character has led them to assert equitable power over him when he threatens to act unconstitutionally while rejecting any power over him once he has actually acted, on the ground that, by his unconstitutional act, he has transformed himself (unbeknownst to the victim, of course) from a federal official into an everyday private individual. *Johnston v. Earle*, 245 F.2d 793, 796 (9th Cir. 1957); *Koch v. Zuieback*, 194 F. Supp. 651, 656 (S.D. Cal. 1961), *aff'd*, 316 F.2d 1, 2 (9th Cir. 1957); *Bell v. Hood*, 71 F. Supp. 813, 817 (S.D. Cal. 1947). The logic of such a position has been characterized as "patently absurd." *Katz*, *supra* note 15, at 4.

51. 409 F.2d at 721.

52. The majority, however, while discussing the effects of an unconstitutional exercise of federal authority, noted that "power, once granted, does not disappear like a magic gift when it is wrongfully used." 403 U.S. at 392.

53. Brief for Respondents at 10-12, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) [hereinafter cited as Respondents' Brief].

54. The rights would ordinarily be asserted in a trespass action. See, e.g., *Bates v. Clark*, 95 U.S. 204 (1877); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851).

not be the basis for a federal cause of action. Three arguments were advanced in support of this assertion.

The first argument was based upon a strict interpretation of four English cases which were decided less than thirty years prior to the adoption of the Bill of Rights in America.⁵⁵ These cases, and especially *Entick v. Carrington*,⁵⁶ have been generally acknowledged as the primary source of the Fourth Amendment.⁵⁷ They arose from trespass actions brought against British officers who had executed general warrants issued by Lord Halifax. The officers sought to avoid liability under the "special justification" that their actions were authorized by the general warrants.⁵⁸ In each case, however, the courts found the warrants to be unlawful, rejected the defense of special justification, and sustained substantial damage awards.⁵⁹ The respondents in *Bivens* argued that the Fourth Amendment should be read only as a reaffirmation of the principle *expressly* established in those cases, *i.e.*, "that an unlawful warrant could not serve as a defense to a common law trespass action."⁶⁰

The second argument was based upon the wording of the amendment itself, which "did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed."⁶¹ Assuming that this prior-existing right was a creature of state law rather than a fundamental or "natural" right which individuals hold against the power of the government,⁶² the respondents concluded that the Fourth Amendment by its very words merely protects certain state-created rights from federal encroachment.⁶³

55. *Money v. Leach*, 97 Eng. Rep. 1075 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763).

56. 95 Eng. Rep. 807 (K.B. 1765).

57. *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937) [hereinafter cited as LASSON].

58. Respondents' Brief, *supra* note 53, at 9.

59. *Id.* at 10.

60. *Id.* The respondents' recognition of the fact that the Fourth Amendment was intended as a guarantee that federal officials would be liable in damages for common law trespass even if acting pursuant to a warrant, if the warrant were unlawful, seems more than a little inconsistent with their claim of official immunity from suit for searches allegedly conducted without any warrant or probable cause. See text accompanying notes 194-96 *infra*.

61. Respondents' Brief, *supra* note 53, at 11 n.7, quoting LASSON, *supra* note 57, at 100 n.77.

62. See note 96 and text accompanying note 102 *infra*.

63. Respondents' Brief, *supra* note 53, at 11 & n.7.

The third argument was based upon Congress's failure to grant the lower federal courts jurisdiction over cases arising under the Constitution until late in the nineteenth century.⁶⁴ If the framers intended to create a new federal action for damages, reasoned the respondents, they surely would have provided a federal forum to entertain the actions.⁶⁵

The respondents' restrictive reading of the Fourth Amendment was not adhered to by any of the Justices. It was expressly rejected by Justice Brennan, writing for the majority,⁶⁶ and Justice Harlan, concurring.⁶⁷ Justice Blackmun adopted the opinion of the court of appeals,⁶⁸ which had characterized the right to be free from unreasonable searches and seizures as "an established *federal* right."⁶⁹ The Chief Justice and Justice Black failed to discuss the issue, but both apparently acknowledged the federal source of the right.⁷⁰

Justice Brennan rejected the respondents' view of the Fourth Amendment as being contrary to a large body of decisional law which demonstrates that (1) the relationship between a private individual and a federal agent who unconstitutionally asserts his authority is more one-sided than the similar relationship between a private individual and a private trespassor;⁷¹ (2) state tort law and the Fourth Amendment, being concerned with different relationships, often protect interests which may be inconsistent or even hostile;⁷² (3) the Fourth Amendment is an independent limitation on the exercise of federal authority that applies

64. General "federal question" jurisdiction was not conferred on the lower federal courts until 1875. Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470.

65. The respondents invoked the words of Chief Justice Marshall:

And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law . . . for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved . . . could be prosecuted only in the state court. . . . Congress has refused to the courts of the Union the power of deciding on the conduct of their officers, in the execution of their laws, in suits at common-law, until the case shall have passed through the state courts, and have received the form which may there be given it. Respondents' Brief, *supra* note 53, at 12-13, quoting *Slocum v. Mayberry*, 15 U.S. 1, 9, 2 Wheat. 1, 10 (1817).

Chief Justice Marshall appears merely to have been reciting the lack of federal question jurisdiction. The statement says nothing about the reasons for withholding that jurisdiction. It also sheds no light on the source of the right. See text accompanying notes 103-04 *infra*.

66. 403 U.S. at 391.

67. *Id.* at 400.

68. *Id.* at 430.

69. 409 F.2d at 722 (emphasis added). See note 31 *supra*.

70. 403 U.S. at 415, 429.

71. *Id.* at 392, 394-95.

72. *Id.* at 394,

even when the conduct in question is not condemned by state law;⁷³ and (4) state law cannot limit the extent to which federal authority is exercised.⁷⁴

The Court has recognized, Justice Brennan explained, that a person confronted with an intrusion under color of government authority is in a far different position than a person confronted with an intrusion by a private citizen.⁷⁵ In the latter situation, the attempted intrusion usually can be fended off by locking the door or by resort to the local police.⁷⁶ But a person faced with an unlawful intrusion by a government agent will ordinarily find resistance to be futile,⁷⁷ and perhaps unlawful in itself,⁷⁸ even assuming he would have the boldness to question the agent's authority. Usually the mere assertion of governmental authority will unlock the door.⁷⁹ The attempt to treat a federal agent who has violated the Fourth Amendment as just another private citizen "ignore[s] the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used."⁸⁰

Since the relationships created by governmental intrusions are markedly different than those created by private intrusions, it should hardly be surprising to find that the interests protected by state tort law are often different than those protected by the Fourth Amendment.⁸¹ State tort law, being concerned with the relationships between private individuals, assumes that ordinarily a person will be willing and able to resist undesired intrusions. Thus, a private individual, relying only on his own authority, will ordinarily not be liable in trespass if he demands, and is granted, admission to another's home.⁸² Furthermore, the same individual will usually not be liable for trespass beyond the

73. *Id.* at 392-94.

74. *Id.* at 395.

75. *Id.* at 394.

76. *Id.*

77. *Id.*; *see, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 644-45 (1961); *cf. United States v. Lee*, 106 U.S. 196, 219 (1882).

78. 403 U.S. at 395 n.8; *see People v. Curtis*, 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969).

79. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting); *see Amos v. United States*, 255 U.S. 313, 317 (1921) (assertion of governmental authority by federal agents resulted in implied coercion); *Weeks v. United States*, 232 U.S. 383, 386 (1914).

80. 403 U.S. at 392.

81. *Id.* at 394.

82. *Id.*, *citing* W. PROSSER, *THE LAW OF TORTS* § 18, at 109-10 (3d ed. 1964); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.11 (1956).

bounds of his invitation absent clear notice to that effect.⁸³ Yet the same conduct by a government agent is prohibited by the Fourth Amendment.⁸⁴

Justice Brennan contended that the Fourth Amendment operates independently of state law as a limitation on the exercise of federal authority,⁸⁵ and in support thereof discussed two cases decided twenty years before the Fourth Amendment was applied to the states in *Wolf v. Colorado*.⁸⁶ In *Gambino v. United States*⁸⁷ the petitioners were arrested by state police officers for the sole purpose of enforcing federal law.⁸⁸ The arrests, although made without probable cause, were valid under state law.⁸⁹ The Supreme Court nevertheless reversed the subsequent federal convictions, which were based upon evidence seized incident to the arrest, since the Fourth Amendment prohibits any searches and arrests made for the purpose of enforcing *federal* law unless they are supported by probable cause.⁹⁰ Similarly, in *Byars v. United States*⁹¹ a federal prohibition agent, along with state law enforcement officers, engaged in a search pursuant to a state warrant. The warrant had been issued without probable cause by a state judge for a state law offense.⁹² The petitioner was convicted of a federal crime as the result of evidence seized in the search.⁹³ The Supreme Court reversed the conviction, expressly refusing to consider whether or not the warrant was valid under state law "since in no event could it constitute the basis for a federal

83. 403 U.S. at 394-95 n.7, citing 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.11 (1956).

84. *Marron v. United States*, 275 U.S. 192, 196 (1927) (officer executing search warrant must stay strictly within the bounds set by the warrant); *Amos v. United States*, 255 U.S. 313, 317 (1921) (consent of wife to search was obtained through "implied coercion" in violation of Fourth Amendment). For a case carving out an exception to the *Marron* rule for instrumentalities of the crime, see *United States v. Alloway*, 397 F.2d 105 (6th Cir. 1968). But see *People v. Baker*, 23 N.Y.2d 307, 244 N.E.2d 232, 296 N.Y.S.2d 745 (1968).

85. 403 U.S. at 392.

86. 338 U.S. 25 (1949). Until *Wolf*, the Fourth Amendment was construed as a limitation on the federal government only. Thus, actions of state officials in accordance with state law could come under scrutiny only if they violated a limitation on federal power independent of state law.

87. 275 U.S. 310 (1927).

88. *Id.* at 314-15.

89. 403 U.S. at 393 n.5. The state officers had apparently been directed by the Governor to assist in the enforcement of federal law. *Id.* at 393.

90. 275 U.S. at 313, 319.

91. 273 U.S. 28 (1927).

92. *Id.* at 29.

93. *Id.* at 28-29.

search and seizure."⁹⁴ In both cases the Court found conduct which did not impinge on any state-created rights to have been in violation of the Fourth Amendment. Furthermore, Justice Brennan observed, the Court's recent decisions on electronic surveillance⁹⁵ "have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws."⁹⁶

Finally, Justice Brennan pointed out that state law cannot limit the extent to which federal power is exercised.⁹⁷ Since state law can neither limit the valid exercise of federal power nor authorize its invalid exercise, the right to be free from unreasonable searches and seizures perpetrated by federal agents must derive from the Fourth Amendment itself.⁹⁸

Justice Harlan, concurring, initially noted that the presumed⁹⁹ availability of federal equitable relief for threatened violations of the Fourth Amendment depends upon the presence of a substantive right derived from federal law.¹⁰⁰ He then addressed himself to the historical argu-

94. *Id.* at 29.

95. *Katz v. United States*, 389 U.S. 347, 353 (1967) (judicially unauthorized electronic bug on phone booth violates reasonable expectation of privacy); *Berger v. New York*, 388 U.S. 41 (1967) (state statute authorizing indiscriminate use of electronic eavesdropping devices is unconstitutional); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (eavesdropping via "spike mike" unconstitutional even if no technical trespass under local property law relating to party walls).

96. 403 U.S. at 393-94. Consider also *Wolf v. Colorado*, 338 U.S. 25 (1949):

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples. *Id.* at 27-28.

97. 403 U.S. at 395, citing *In re Neagle*, 135 U.S. 1 (1890), wherein the Court ruled that a United States marshal who kills a person while protecting a United States judge cannot be held to answer for murder in the state courts since his acts were authorized by the laws of the United States. See *Feldman v. United States*, 322 U.S. 487, 490 (1944); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *Maun v. United States*, 347 F.2d 970, 974 (9th Cir. 1965). But cf. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

98. 403 U.S. at 395.

99. *Id.* at 400. The presumption seems to be bottomed on an assertion of its availability in *Bell v. Hood*, 327 U.S. 678, 684 (1946). For an example of such equitable relief under the Civil Rights Act, see *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966).

100. 403 U.S. at 400. See Hill, *supra* note 14, at 1124-31; note 144 *infra*.

ments advanced by the respondents:¹⁰¹

[As regards the source of the right], the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a "Bill of Rights" was the fear that individual liberties not specified expressly would be taken as excluded. . . . This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law.¹⁰²

Justice Harlan also discounted the significance of the framers' failure to provide for the enforcement of the right in the lower federal courts, noting that, at most, this failure merely reflected the framers' assumption that the common law remedies would adequately vindicate the federally protected interest.¹⁰³ In other words, the framers' choice of *forum* says nothing about the *source* of the right. The choice of forum was just a manifestation of the framers' belief that the then stronger states' courts would be more willing to protect the fundamental rights of their respective residents from overreaching by the fledgling federal government than would the courts of the federal government itself.¹⁰⁴

II. THE GENERAL REMEDIAL POWER

The next issue faced by the Court was the question of its power under a general grant of jurisdiction to award Bivens damages for the violation of his constitutional right to be free from unreasonable searches and seizures. The majority opinion by Justice Brennan harked back to the Court's broad assertion of power in *Bell v. Hood*:¹⁰⁵

101. See text accompanying notes 55-65 *supra*.

102. 403 U.S. at 400-01 n.3, *citing* LASSON, *supra* note 57, at 79-105.

103. 403 U.S. at 400-01 n.3. Two recent articles have pointed out that the Supremacy Clause makes the Constitution part of the common law of every state, enforceable through the normally available common law remedies. Hill, *supra* note 14, at 1131-35; Katz, *supra* note 15, at 9-12, 33-34, 42-43. Thus, the enforcement of constitutional commands by state suits does not imply that the underlying rights are necessarily state-created.

104. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.). When a spirit of nationalism finally emerged after the Civil War, Congress for the first time invested the lower federal courts with the broad "federal question" jurisdiction, encompassing all cases arising under the Constitution, laws, or treaties of the United States. See H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 727 (1953). This grant of jurisdiction enabled the federal courts for the first time to take a positive, offense-oriented approach toward the Constitution by entertaining original suits asserting individually vested constitutional rights as the basis for relief against threatened or consummated federal action. Unfortunately, the power has been largely unused for the past one hundred years.

105. 327 U.S. 678 (1946).

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."¹⁰⁶

Thus, in the majority's view, the power to afford a remedy is an inherent part of the judicial function. In the federal courts this power is limited by only two prerequisites: the invasion of a *federal* right (in non-diversity cases) and the existence of a federal statute giving the courts *jurisdiction* over cases revolving around that right. Once these two prerequisites are met, the federal courts may afford any of the normally available judicial remedies.¹⁰⁷

The majority placed great emphasis upon the Court's previous statements in *Bell*. Yet, as Justice Black pointed out in his dissent in *Bivens*, *Bell* decided only the jurisdictional issue and expressly left open the question of whether or not an unreasonable search by a federal officer in violation of the Fourth Amendment gave rise to a federal cause of action for damages against the officer.¹⁰⁸ Justice Black concluded that the Court did *not* have the power to afford the damage remedy to *Bivens*.¹⁰⁹ Since Justice Black was the author of the Court's opinion in *Bell*, he should speak authoritatively on questions concerning its interpretation. However, a careful analysis reveals that the *Bell* Court assumed the federal courts, given jurisdiction and the existence of a federal right, possessed the power to afford a remedy for a violation of that right. Justice Black explained in *Bell* that the right of the petitioners to recover depended upon both the interpretation given the statute

106. 403 U.S. at 396, *quoting* *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).

107. The majority's strong belief in the federal courts' general remedial power is evidenced by two additional references to the issue:

[The Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where 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." 403 U.S. at 392, *quoting* *Bell v. Hood*, 327 U.S. at 684 (footnote omitted).

The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 403 U.S. at 397 (citations omitted), *quoting* *Marbury v. Madison*, 5 U.S. 49-58, 1 Cranch 137, 163 (1803).

108. 403 U.S. at 427.

109. *Id.* at 428.

which then conferred federal question jurisdiction¹¹⁰ and a determination of the scope of the Fourth and Fifth¹¹¹ Amendments.¹¹² The answer to these questions was to be found in the resolution of two familiar issues: (1) does the Fourth Amendment embody independent federal rights or is it merely a limitation on official defenses in state trespass actions¹¹³ and (2) do federal officials who exceed their authority by violating the Fourth Amendment thereby become mere private citizens not covered by the amendment's prohibitions?¹¹⁴ These issues were to be determined by the district court upon the remand in *Bell*.¹¹⁵ If they were determined in favor of the petitioners, concluded Justice Black, "the right of the petitioners to recover under their complaint will be sustained."¹¹⁶ Thus, Justice Black apparently recognized that the only obstacles to the affording of a damage remedy in *Bell* were the possible absence of a federal right and the possible inapplicability of the Fourth Amendment to unauthorized acts of federal officials. Justice Black's views in *Bell* seem directly opposed to his position in the instant case.

Both Justice Black and the Chief Justice condemned the majority opinion in *Bivens* as an instance of judicial legislation.¹¹⁷ Their failure to elaborate on this point makes it difficult to discover the precise grounds of their objection. On the most fundamental level, the issue is whether the judicial power conferred by the Constitution on the federal courts was intended to include a general remedial authority to make good the deprivations of clearly established rights in cases where the courts have jurisdiction. An extremely narrow view of the judicial power would limit the federal courts to the granting of only those rem-

110. 28 U.S.C. § 41(1) (1940), now 28 U.S.C. § 1331(a) (1970).

111. The Fifth Amendment claim involved an asserted "deprivation of liberty without due process of law" resulting from an "unauthorized and unjustified imprisonment." 327 U.S. at 683, 685.

112. *Id.* at 684-85.

113. *Id.* at 681-83.

114. *Id.* at 683.

115. *Id.* at 684-85. The district court subsequently ruled against the petitioners on these and several other issues. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947). No appeal was taken.

116. 327 U.S. at 685. Justice Black cited several cases which supported the petitioners' position: *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (federal courts can issue injunctions against federal officials to protect rights guarded by the Constitution); *Swafford v. Templeton*, 185 U.S. 487 (1902) (jurisdiction over suit to recover damages for deprivation of constitutional right to vote was upheld); *Wiley v. Sinkler*, 179 U.S. 58 (1900) (same). For the complete list of cases cited see 327 U.S. at 684 nn. 3 & 4.

117. 403 U.S. at 428 (Black, J., dissenting); *id.* at 411-12, 418, 422 (Burger, C.J., dissenting).

edies expressly provided for in the definition of the right. This view was apparently adopted by the Chief Justice¹¹⁸ and there are indications that it was central to Justice Black's position.¹¹⁹ It is submitted that such a view is contrary to both the jurisprudential theory prevalent at the time the Constitution was adopted and the overwhelming weight of authority ever since.¹²⁰

The framers of the Constitution relied upon the traditional notions of the English common law. Their failure to provide expressly for specific remedies for the violation of constitutional provisions harmonized with the common law ethic.¹²¹ Indeed, the enumeration of specific remedies was probably not only thought of as unnecessary, but also as undesirable since it might be taken as evidence of an intention to exclude others.

In the landmark case of *Marbury v. Madison*,¹²² Chief Justice Marshall reaffirmed the common law principle "that every right, when with-

118. *Id.* at 411, 422.

119. *Id.* at 427-28. Justice Black's objection was concurrently phrased as disapproving the creation of a *remedy* and the creation of a *right* of action.

120. *See, e.g.*, Board of County Comm'rs v. United States, 308 U.S. 343, 349-50 (1939) (American Indian whose land was taxed contrary to treaty and supporting federal legislation was entitled to recover taxes despite absence of remedy for such a situation in both treaty and statute—remedy judicially implied); Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569-70 (1930) (statutory prohibition against coercive measures sufficient basis for issuance of injunction against employer attempting to force choice of particular union); Dooley v. United States, 182 U.S. 222, 229 (1901) (liability created by treaty or statute without a specific remedy can be enforced through any of the common law remedies). *See also* the discussion of the following cases elsewhere in this Note: *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *Wiley v. Sinkler*, 179 U.S. 58, 62 (1900); *United States v. Lee*, 106 U.S. 196, 218-20 (1882); *Marbury v. Madison*, 5 U.S. 49, 59, 1 Cranch 137, 163 (1803). *Cf.* *United States v. Morgan*, 346 U.S. 502, 506-10 (1954) (writ of *coram nobis* implied from general writ power in 28 U.S.C. § 1651(a) (1970)).

121. [T]he English judiciary had for centuries been implementing the substantive law by a remedial system that evolved through the common law process. I do not find it strange that eighteenth century men may not have supposed that there would be any difficulty of implementation so long as the Constitution was the "Supreme Law of the Land" applicable in ordinary courts. Particularly is this understandable given the fact that the interests in liberty were themselves the product of judicial development. *Katz, supra* note 15, at 43 (footnote omitted). *See Hill, supra* note 14, at 1131-35. For a thorough treatment of the development of the English remedial system, *see Katz, supra* note 15, at 8-29. Further insight into the thinking of the framers can be found in their reference to the writ of habeas corpus: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The language assumes the existence of the writ as a remedy inherent in the judicial power.

122. 5 U.S. 49, 1 Cranch 137 (1803).

held, must have a remedy, and every injury its proper redress."¹²³ The petitioner, invoking the original jurisdiction of the Supreme Court, had sought a writ of mandamus to compel the Secretary of State to deliver a judicial commission which had been signed by the President and sealed by the Secretary of State of the previous administration.¹²⁴ Marshall discussed various situations in which a federal statute imposed specific duties on the head of a department, with individual rights depending upon the performance of those duties.¹²⁵ No sanctions were imposed for the failure to perform the duties. But should the head of the department refuse to perform a duty, reasoned Marshall, "can it be imagined that the law furnishes to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition."¹²⁶ Turning to the case at hand Marshall held that Marbury, once he had been appointed to his judicial office by the President and had been confirmed by the Senate, had thereby acquired a vested right in his commission due to the constitutional limitations on removal of judicial officers. The Secretary of State's subsequent interference with that right was an injury for which Marbury was entitled to relief, but no remedy could be afforded by the Supreme Court because the case was not within the Court's original jurisdiction as defined in the Constitution.¹²⁷ That is, the remedial authority of the Court could not be exercised since one of the two prerequisites (jurisdiction) was lacking.

The majority in *Bivens* discussed two cases which evidence the remedial principle recognized in *Marbury*. In *Jacobs v. United States*,¹²⁸ the plaintiff sought compensation for the taking of his land by flooding that resulted from the construction of a federal dam. The Court allowed the recovery of the value of the land at the time of the taking, plus interest thereafter. The action was brought under the Tucker Act, which gave the district courts jurisdiction over claims against the United States "not exceeding \$10,000 founded upon the Constitution."¹²⁹ That act, however, merely conferred jurisdiction and did not in itself create any rights or remedies. The Court emphasized that the right to recover rested squarely upon the Fifth Amendment's prohibition against the taking of private property for public use with-

123. *Id.* at 59, 1 Cranch at 163, quoting 3 W. BLACKSTONE, COMMENTARIES *109.

124. *Id.* at 50, 1 Cranch at 138.

125. *Id.* at 59-60, 1 Cranch at 164-65.

126. *Id.* at 60, 1 Cranch at 165.

127. *Id.* at 66-68, 1 Cranch 172-75.

128. 290 U.S. 13 (1933).

129. 28 U.S.C. § 41(20) (1925).

out paying just compensation. Thus, the recovery of the interest could not be defeated on the ground that it was not authorized by statute as long as such recovery was appropriate to the vindication of the right to receive just compensation.¹³⁰

Similarly, in *J. I. Case Co. v. Borak*¹³¹ the Court in a unanimous opinion reaffirmed the *Bell* Court's assertion of a broad remedial power.¹³² The *Borak* Court declared that the grant of jurisdiction to the district courts in the Securities Exchange Act of 1934¹³³ was sufficient to enable the courts to enforce any duty or liability created by the act by affording to a private stockholder any normally available remedy that was necessary or appropriate to the protection of investors.¹³⁴ This was done, as Justice Harlan pointed out in his concurring opinion in *Bivens*, despite the existence of an elaborate and comprehensive administrative enforcement scheme which made it clear that Congress itself had not intended to create a private damage remedy. That is, rather than the remedy being implied through statutory construction, it was afforded pursuant to the power of the federal courts, given the requisite jurisdiction, to choose among "*traditionally available* judicial remedies . . . [to effectuate] the substantive social policy embodied in an act of positive law."¹³⁵

Borak went further than any of the cases previously mentioned. Instead of merely applying the federal courts' general remedial power to the vindication of a private right clearly established in the Constitution or a federal statute, the Court initially "implied" the private right from a broadly phrased duty and then applied the general remedial authority. Though the creation of a right seems more legislative than the affording of a remedy, no Justice argued that the result reached in *Borak* was an unconstitutional exercise of legislative power.¹³⁶ Furthermore, even bolder assertions of the power of the federal courts to create substantive law in areas of national concern have been made and have been generally accepted.¹³⁷

130. 290 U.S. at 16, 17.

131. 377 U.S. 426 (1964).

132. *Id.* at 433.

133. Securities Exchange Act of 1934, ch. 404, § 1, 48 Stat. 881 (codified at 15 U.S.C. § 78(a) (1970)).

134. 377 U.S. at 432-34.

135. 403 U.S. at 402-03 n.4.

136. An earlier assertion of the argument failed in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting). *Cf.* *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201-04 (1967); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944).

137. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (federal courts can

The *Bivens* majority is thus merely invoking well-settled principles of decisional law when it declares that a federal court, vested with the requisite jurisdiction, possesses the inherent power to remedy the deprivation of an individual's clearly established federal right by resort to any one of the traditional judicial remedies.¹³⁸ The Fourth Amendment was specifically created to protect each individual's federal right to be free from unreasonable searches and seizures.¹³⁹ *Bivens* has alleged a violation of this constitutional right, properly invoking the federal courts' general federal question jurisdiction. What, then, do the Chief Justice and Justice Black see in this particular claim which would place it outside the scope of the federal courts' general remedial power?

The peculiarity cannot be the supposed creation of a new federal right, since the federal nature of the right to be free from unreasonable searches and seizures has been recognized for some time.¹⁴⁰ Nor, as Justice Harlan pointed out,¹⁴¹ can it be the decision to afford a damage remedy without explicit congressional authorization, since that has been done many times.¹⁴² Nor could it be the constitutional status of

fashion rules to govern transactions in United States' commercial paper); see C. WRIGHT, *FEDERAL COURTS* § 60 (2d ed. 1970); Katz, *supra* note 15, at 58-74; Friendly, *In Praise of Erie—and the New Federal Common Law*, 19 *RECORD OF N.Y.C.B.A.* 64 (1964); cf. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) (federal courts have power to create a cause of action in favor of the United States against third parties who injure United States soldiers).

138. Some authorities have even suggested that both state and federal courts have the *duty*, in such a situation, to afford an appropriate traditional remedy, if one exists. Hill, *supra* note 14, at 1111-18; Katz, *supra* note 15, at 18, 35. See Justice Harlan's apparent acceptance of this proposition in *Bivens*, 403 U.S. at 408 n.8. Cf. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Testa v. Katt*, 330 U.S. 386 (1947); *Miles v. Illinois Central R.R.*, 315 U.S. 698 (1942), *rehearing denied*, 316 U.S. 708 (1942); *Marbury v. Madison*, 5 U.S. 49, 1 Cranch 137 (1803); C. WRIGHT, *FEDERAL COURTS* § 45 (2d ed. 1970).

139. See text accompanying notes 55-60 & 101 *supra*, and notes 143, 156, & 193-94 *infra*.

140. See text accompanying notes 53-104 *supra*. Furthermore, the federal courts have actually created new rights in several instances. See notes 136-37 *supra*.

141. 403 U.S. at 402.

142. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Jacobs v. United States*, 290 U.S. 13 (1933). Furthermore, to label the decision to afford a damage remedy for a violation of the Fourth Amendment as a question of policy is to ignore a basic purpose of the amendment, which was to protect the damage remedy as established by the English common law cases from nullification by the legislative and executive branches of the federal government. See text accompanying notes 55-60 *supra*. Policy questions seem much more evident in cases like *Barr v. Matteo*, 360 U.S. 564 (1959), where traditional rights and remedies were completely annihilated without any mandate from Congress or the Constitution. *Barr* is discussed in text accompanying notes 210-15 *infra*.

the right. In considering this possibility, Justice Harlan observed that:

[I]t would at least be anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution—is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.¹⁴³

Justice Harlan pointed out that federal equitable relief has traditionally been available when constitutional rights were threatened, so that the mere status of the right as constitutional does not render the courts powerless in the absence of congressional authorization.¹⁴⁴ Justice Harlan concluded there was no peculiarity involved in the case, and that, if the general grant of federal question jurisdiction can support equitable relief, it is also sufficient to empower the federal courts to grant a traditional remedy at law.¹⁴⁵

III. THE CRITERIA FOR EXERCISING THE POWER

Having determined that the federal courts have the power to afford any normally available remedy to a person who has been deprived of a constitutional right, the Court finally turned to the problem of deciding what criteria should govern the exercise of that power. The Government argued that the federal courts, in the absence of statutory authorization, should exercise their inherent power to afford a traditional remedy at the behest of a litigant only when the failure to do so would render the constitutional provision “a mere abstract pronouncement.”¹⁴⁶ This “essentiality” standard,¹⁴⁷ said the Government, was the basis for the extension of the exclusionary rule to the states in *Mapp v. Ohio*,¹⁴⁸

143. 403 U.S. at 403-04 (citations omitted).

144. *Id.* at 404. See cases cited in note 14 *supra*, two of which involved the awarding of damages. The cases are discussed in Hill, *supra* note 14, at 1125. As for the suggestion by the court of appeals that the injunctive remedy might be distinguishable from the other remedies since it is inherently necessary to the power of judicial review (409 F.2d at 723), consider Hill's claim that most of the major constitutional cases in the early history of the United States were actions at law, and that, furthermore, most of them were decided by *rejecting* the proposed remedy. Hill, *supra* note 14, at 1150 n.178.

145. 403 U.S. at 405.

146. Respondents' Brief, *supra* note 53, at 16.

147. See *id.* at 19.

148. 367 U.S. 643 (1961).

the affording of injunctive relief against the enforcement of unconstitutional state statutes in *Ex parte Young*,¹⁴⁹ and the awarding of compensation for the taking of land in *Jacobs v. United States*.¹⁵⁰

Both the court of appeals and Justice Blackmun supported the essentiality standard urged by the Government.¹⁵¹ The majority of the Court, however, refused to accept such a test. They held that the federal courts can redress a constitutional wrong by affording any normally available traditional remedy, at least absent an explicit congressional declaration establishing an exclusive remedy "equally effective in the view of Congress."¹⁵² Justice Harlan concurred in this view, noting that even the Government had conceded the standard for affording a damage remedy where statutory policies are concerned is one of necessity¹⁵³ or appropriateness.¹⁵⁴

The Government attempted to justify a stricter standard for constitutionally implied remedies on the ground that there would be substantial doubt concerning the power of Congress to revoke or even modify remedies bottomed on the Constitution.¹⁵⁵ Justice Harlan, though expressly declining to consider this question of congressional power, felt the argument for a more stringent standard in constitutional cases nevertheless could not prevail:

149. 209 U.S. 123 (1908).

150. 290 U.S. 13 (1933). Although the recovery of the value of the land at the time of the taking was considered essential to vindication of the Fifth Amendment, the additional recovery of interest was justified not as being essential but as being *appropriate*. See text accompanying notes 128-30 *supra*; cf. Board of County Comm'rs v. United States, 308 U.S. 343 (1939). The court of appeals in *Bivens* failed to make this distinction. 409 F.2d at 723.

151. 409 F.2d at 722-24; 403 U.S. at 430. But cf. Hill, *supra* note 14, at 1125.

152. 403 U.S. at 397 (emphasis added).

153. *Id.* at 406. Justice Harlan's juxtaposition of the word "necessary" with the word "appropriate" was in deference to the Court's previous opinions in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), and *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). The word "necessary," however, when used in this context, clearly does not import essentiality:

Does [the word "necessary"] always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (Marshall, C.J., construing the Necessary and Proper clause of the Constitution).

See *id.* at 413-15, 418-21. In *Bivens*, both the majority and Justice Harlan clearly proceeded on the assumption that the only criterion was appropriateness.

154. 403 U.S. at 406, citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947).

155. Respondents' Brief, *supra* note 53, at 21-22. See Katz, *supra* note 15, at 41 n.221; Hill, *supra* note 14, at 1116-18, 1152-53.

[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.¹⁵⁶

Justice Harlan also observed that *Mapp v. Ohio*¹⁵⁷ was inapposite, since the remedy afforded there was not a traditionally available form of judicial relief.¹⁵⁸

Both the majority and Justice Harlan determined that the damage remedy is appropriate to the vindication of Fourth Amendment rights. Justice Brennan pointed out that damages have been the remedy traditionally afforded for invasions of personal interests in liberty.¹⁵⁹ An individual is entitled to be compensated for his injuries regardless of whether or not such compensation will deter future injuries.¹⁶⁰ Further, the decision to afford the remedy does not involve policy considerations that would be better left to Congress,¹⁶¹ since the policy behind the Fourth Amendment is clear.¹⁶² Justice Harlan added that the damage remedy is the only possible remedy for an innocent victim of an illegal search.¹⁶³ The exclusionary rule aids only the criminal¹⁶⁴ and injunctive relief is only relevant when the intended victim has been subjected to repeated unconstitutional intrusions or when he has sufficient advance notice of the search.

The Government responded that, nevertheless, a federal damage remedy was unnecessary since federal officers can be sued as private

156. 403 U.S. at 407. See Katz, *supra* note 15, at 33, 40-41.

157. 367 U.S. 643 (1961).

158. See 403 U.S. at 408 n.8. The exclusionary rule was initially applied to the federal government in 1914. *Weeks v. United States*, 232 U.S. 383 (1914). It was not applied to the states until 1961. *Mapp v. Ohio*, 367 U.S. 643 (1961). An application of the rule involves the exclusion of relevant evidence from a criminal trial—hardly a traditional civil or equitable (or even criminal) remedy.

159. 403 U.S. at 395-96, citing *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900); *West v. Cabell*, 153 U.S. 78 (1894); *Lammon v. Feusier*, 111 U.S. 17 (1884); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 28 (1966); LASSON, *supra* note 57, at 43; Katz, *supra* note 15, at 8-33.

160. See 403 U.S. at 397; *id.* at 407-08 (Harlan, J., concurring).

161. *Id.* at 396. Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947), wherein the Court dealt with questions of federal fiscal policy.

162. See text accompanying notes 55-60, 101, 143 & 156 *supra*, 192-94 *infra*.

163. 403 U.S. at 409-10.

164. Chief Justice Burger's dissent was almost exclusively devoted to an elaboration of this point. See 403 U.S. at 411-27; text accompanying notes 241-45, 251-55 *infra*.

individuals under state tort law in order to obtain compensatory relief.¹⁶⁵ The Government conceded that often the compensation would be minimal, since many states required that actual physical harm or malice be shown before exemplary damages can be recovered. Some states further completely prohibit the recovery of punitive damages and restrict the recovery of damages for emotional harm (if any are allowed at all) to situations where the search took place in the owner's presence.¹⁶⁶ The Government attempted to minimize the obvious inadequacies of this remedial scheme, particularly as applied to surreptitious governmental intrusions, by the assurance that, absent the owner's consent or presence, it was "improbable" that a federal agent could gain entry without causing some actual damage.¹⁶⁷

Even admitting the inadequacy of state recoveries, continued the Government, there is no reason to believe that a federal cause of action would fare any better. It would no doubt be extremely similar to the already existing federal cause of action against state officers afforded by 42 U.S.C. section 1983.¹⁶⁸ Yet, claimed the Government, it could only find fifteen cases alleging illegal searches and seizures in the cumulative annotations to that statute, and such a dearth of suits should suggest that the proposed federal cause of action against federal officers would be no more effective than the existing actions under state tort law.¹⁶⁹

165. Respondents' Brief, *supra* note 53, at 34.

166. *Id.* at 34-37.

167. *Id.* at 35. The victim might appreciate this mixed blessing, but it doesn't say much for the training of government agents.

168. 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. 42 U.S.C. § 1983 (1970).

The statute was initially enacted in 1871, four years prior to the initial enactment of the statute conferring general federal question jurisdiction. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

169. Respondents' Brief, *supra* note 53, at 27. Although the cause of action under 42 U.S.C. § 1983 is gaining more in popularity each year, it will not become really effective until it completely rids itself of the remedial limitations borrowed from state tort law, thus making available the full range of the courts' general remedial power. Compare *Knuckles v. Prasse*, 435 F.2d 1255, 1257 (3d Cir. 1970) (prisoners subjected to cruel and unusual punishment for two and one-half days not even entitled to nominal damages) and *Wright v. McMann*, 321 F. Supp. 127, 143-44 (N.D.N.Y. 1970) (prisoner confined completely nude for several days in a segregation cell stripped of all furnishings was subjected to cruel and unusual punishment, but not entitled to punitive damages since no evidence of deliberateness or recklessness!) with *Donovan*

Justice Harlan was not impressed by this argument. The primary reason advanced by the Government for the failure of private individuals to bring damage actions was the perceived difficulty of recovery.¹⁷⁰ The majority had demonstrated the inability of state tort law—which is concerned primarily with privately inflicted injury—to properly provide for the substantially different injuries inflicted by government agents.¹⁷¹ Justice Harlan concluded that these differences in type and magnitude of injury argue in favor of a federal damage remedy unfettered by the limitations on state tort actions.¹⁷² Furthermore, federal law already controls the scope of the Fourth Amendment right¹⁷³ and the extent of official defenses to liability.¹⁷⁴ The forum will always be federal, since the government removes all state suits against its officers to the federal courts.¹⁷⁵ It would be anomalous to have state law control the damages recoverable in a federal trial for the violation of a federal right by a federal official. Since the states have little interest in the liability of federal officials, the extent of recovery for deprivation of a constitutional right should not depend fortuitously on the state in which the deprivation occurs, but should be determined by uniform rules of federal law.¹⁷⁶

v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (damages can be awarded for emotional and mental distress caused by police officers' intentional torts) and *Sostre v. Rockefeller*, 312 F. Supp. 863, 885-86 (S.D.N.Y. 1970) (punitive damages recoverable by prisoner subjected to punitive segregation in violation of his federal rights). See also *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 232-34 (1970) (Brennan, J., concurring) (denial of constitutional right by action clearly prohibited by federal statute or Supreme Court decision is, as a matter of law, reckless disregard of right and punitive damages may therefore be awarded); *Basista v. Weir*, 340 F.2d 74, 87 (1965) (exemplary or punitive damages recoverable without allegation of nominal damages).

170. Respondents' Brief, *supra* note 53, at 27-28.

171. See text accompanying notes 77-84 *supra*.

172. 403 U.S. at 409. See Hill, *supra* note 14, at 1151; note 169 *supra*.

173. See text accompanying notes 85-97 *supra*.

174. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *Monroe v. Pape*, 365 U.S. 167, 194-95 (1961) (Harlan, J., concurring); *Howard v. Lyons*, 360 U.S. 593, 597 (1959).

175. 403 U.S. at 391. Considering this policy of removal, Justice Brennan found it hard to understand Justice Blackmun's lament that recognition of the federal cause of action "opens the door for another avalanche of new federal cases." *Id.* at n.4. And, as Justice Harlan made clear, closing the doors on constitutionally protected interests solely for reasons of judicial economy is well-nigh indefensible. *Id.* at 410-11.

Justice Blackmun's belief that the decision will increase the burden on law enforcement officers is also hard to understand, since he himself assumed that "other quite adequate remedies have always been available." *Id.* at 430. Under that assumption, there should not be any increase in law suits.

176. 403 U.S. at 409. Cf. Hill, *supra* note 14, at 1121, 1145, 1151-53.

IV. THE OFFICIAL IMMUNITY DOCTRINE

In order to avoid a pyrrhic victory on the three preceding issues, Bivens must surmount one additional hurdle before he can return to the trial court to await an answer to the complaint he filed more than four years ago.¹⁷⁷ That hurdle is the question of the applicability of the doctrine of official immunity, an issue remanded by the Supreme Court for original determination by the court of appeals.¹⁷⁸

The doctrine of official immunity has been judicially devised to protect government officials from the burden of a multiplicity of vexatious damage suits based on actions taken or decisions made in the performance of their official duties.¹⁷⁹ If the official's action was within the scope of his duties, he enjoys an *absolute* immunity from suit for any injuries caused by the action.¹⁸⁰ The doctrine was initially limited to judges,¹⁸¹ but has since been extended to include executive¹⁸² and administrative¹⁸³ officers. The members of Congress, of course, enjoy a constitutionally mandated, but limited, immunity.¹⁸⁴

Several tests have been formulated to determine the applicability of the doctrine to any particular situation. The first test applied only to judicial officers and denied them immunity for actions taken when they "clearly [and knowingly possessed] no jurisdiction over the subject matter."¹⁸⁵ A subsequent test protected executive "action having more or less connection with the general matters committed by law to [the officer's] control or supervision," specifically excluding "matters which are manifestly or palpably beyond [the official's] authority."¹⁸⁶ A more recent test protects actions taken "within the outer perimeter of [the official's] line of duty."¹⁸⁷ These tests essentially mandate that the official will not be immune from suit when the challenged action

177. The complaint was filed on July 7, 1967, and was dismissed before any answer was filed. 403 U.S. at 389-90.

178. *Id.* at 398. For the distinction between official and sovereign immunity, see note 18 *supra*.

179. *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

180. See cases cited in note 179 *supra*.

181. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (Justice of the Supreme Court of District of Columbia).

182. *Spalding v. Vilas*, 161 U.S. 483, 493-99 (1896) (Postmaster General).

183. *Barr v. Matteo*, 360 U.S. 564, 574 (1959) (Acting Director of Office of Rent Stabilization).

184. U.S. CONST. art. I, § 6, cl. 1.

185. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871).

186. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

187. *Barr v. Matteo*, 360 U.S. 564, 575 (1959).

was clearly unrelated to or inconsistent with the duties imposed on the official by law.

Two questions arise in considering the applicability of the official immunity doctrine to the instant case. First, can an unconstitutional act ever be said to be within the scope of an official's duties? Second, should an official ever receive protection (and if so, how much) for acts taken beyond the scope of his authority?

It is submitted that an unconstitutional act can never be within the scope of official duty. A paramount duty of every United States citizen should be to follow the mandates of federal law, whether it be constitutional,¹⁸⁸ statutory,¹⁸⁹ or decisional¹⁹⁰ law. The framers of the Constitution took particular care to make this paramount duty binding on all government officials by requiring that all state and federal officials be bound by oath to support the Constitution of the United States.¹⁹¹ Unconstitutional action by a federal official is a direct repudiation of this oath. Such action, no matter how strongly related to the official's immediate responsibilities, is clearly inconsistent with the totality of duties imposed on him by federal law, and the doctrine of official immunity should not apply.

The Bill of Rights, as part of the Constitution, is the "supreme Law of the Land."¹⁹² It was added to the Constitution in order to guarantee that the federal government would never be able to justify the infringement of certain fundamental rights.¹⁹³ Nowhere is this purpose clearer than in the Fourth Amendment, as the Government itself emphasized in its brief:

In America, as in England, government officers were to be subject to the same common-law actions for damages as those applicable to private persons. And the Fourth Amendment insured that when the Amendment's proscriptions had not been followed, the officers would be precluded from justifying [the] infringement. . . .

188. U.S. CONST. art. VI, cl. 2; *see* *Testa v. Katt*, 330 U.S. 386, 391 (1949); *Montgomery v. State*, 55 Fla. 97, 45 So. 879 (1908).

189. *See* U.S. CONST. art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386 (1949); *Miles v. Illinois Central R.R.*, 315 U.S. 698 (1942); *Parker v. State*, 57 N.Y.S.2d 242, 185 Misc. 584 (1945).

190. *See* U.S. CONST. art. VI, cl. 2; *Cooper v. Aaron*, 358 U.S. 1 (1958); *Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962); *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961).

191. *See* U.S. CONST. art. VI, cl. 3; *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524-25 (1858).

192. U.S. CONST. art. VI, cl. 2.

193. *See* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.). *See* text accompanying notes 142 & 155 *supra*.

. . . [T]he purpose of the Fourth Amendment was to foreclose the defense of justification¹⁹⁴

Yet, in the court of appeals, the Government had insisted that, even if Bivens' complaint alleged a clear and conscious violation of his Fourth Amendment rights, he would nonetheless be precluded from bringing a suit for damages:

[T]he immunity doctrine represents a judgment that the withholding of a civil damages remedy in such cases is a necessary price to pay in order to protect law enforcement officials from the requirement of going to trial in every case in which an arrested person alleges a clear violation of his rights.¹⁹⁵

In other words, the mere possibility of inconveniencing the efficient functioning of the federal juggernaut outweighs the individual's right to be free from unreasonable searches and seizures. It is hard to imagine a contention so clearly in opposition to the words, purpose, and spirit of the Fourth Amendment.¹⁹⁶

The same contention was explicitly rejected by the Court of Appeals for the Ninth Circuit in *Hughes v. Johnson*.¹⁹⁷

The question is whether a search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view, it cannot, and accordingly immunity does not extend to such conduct.¹⁹⁸

However, in the amazing case of *Norton v. McShane*¹⁹⁹ the Court of Appeals for the Fifth Circuit held that federal officials were immune from suit despite allegations of (1) unlawful and malicious arrest

194. Respondents' Brief, *supra* note 53, at 10-11.

195. Brief for Respondents before the court of appeals at 27, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718 (2d Cir. 1969).

196. See text accompanying notes 55-60, 101, 143, 156, & 192-94 *supra*. The Government inadvertently suggested an appropriate response to its audacious assertion in its discussion of one of the early English search and seizure cases wherein

[the defendant officers] had claimed the verdict of £ 300 was excessive and moved for a new trial. But Chief Justice Pratt, later Lord Camden, although noting that £ 20 might have been sufficient, sustained the jury's award of exemplary damages on the basis that the "tyrannical and severe manner" in which the King's counsel and the Solicitor of the Treasury had insisted on the legality of the warrants justified the jury's response. Respondents' Brief, *supra* note 53, at 10 n.4, quoting *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C.P. 1763).

197. 305 F.2d 67 (9th Cir. 1962).

198. *Id.* at 70. *Accord*, *Allen v. Merovka*, 382 F.2d 589, 591-92 (10th Cir. 1967); *cf.* *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965).

199. 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). *Cf.* *Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967), *cert. denied*, 389 U.S. 1021 (1967).

without probable cause, (2) malicious detainment without charges for twenty-one hours (eighteen of which were spent in a forced rigid position with no food, drink, or speech allowed), (3) forced witnessing of horrible and nauseating mistreatment of others, (4) fingerprinting, (5) mugging, (6) further vile abuse and mistreatment, (7) malicious assault and battery with a large stick or billy club, and (8) conspiracy to deny equal protection of the laws, equal privileges and immunities under the laws, and equal protection by state authorities.²⁰⁰ The *Norton* case arose from several suits brought in the state courts which were subsequently removed to the federal courts by the defendant federal officials pursuant to 28 U.S.C. section 1442(a).²⁰¹ The *Norton* majority treated the allegations as simple tort claims, studiously avoiding any reference to constitutional rights. The holding in *Hughes* was dismissed in a footnote as dicta.²⁰² The majority then ruefully concluded that "consideration[s] of public policy [forced it to leave] the extremely aggravated wrongs as alleged in the complaint . . . unredressed."²⁰³

Judge Gewin filed a blistering dissent,²⁰⁴ stressing that the complaint did not allege mere negligent performance of official duties, but rather patent denials of fundamental constitutional rights, backed up by substantial factual allegations.²⁰⁵ He insisted that:

[N]o officer can *unlawfully, willfully, maliciously and without probable cause*—all as alleged in the complaint—deny a citizen his *constitutional rights* and then claim that the acts involved “. . . have more or less connection with the general matters committed by law to the officer’s control” It is a paradox to say that an unlawful, willful and malicious violation of the United States Constitution has ever, by any decree or any other authority, been “committed by law” to the control or supervision of any officer, regardless of his rank or station in the government. At the very instant a violation of the Constitution is shown by willful, malicious and unlawful acts, support of the law is removed. Such willful, malicious and unlawful conduct in violation of the Constitution can never reach the “outer perimeter” of any authority; it cannot be within the “scope of authority,” and no man is given “a dis-

200. 332 F.2d at 857.

201. *Id.*

202. *Id.* at 860 n.6. The so-called “dicta” was the sole reason for the reversal in *Hughes*. 305 F.2d at 70.

203. 332 F.2d at 861. The public policy was the familiar apprehension concerning a cascade of vexatious suits. See text accompanying note 179 *supra*.

204. 332 F.2d at 863.

205. *Id.* The distinction was clearly drawn in *Chavez v. Kelly*, 364 F.2d 113, 115 (10th Cir. 1966).

cretionary function" which constitutes a license to violate the most fundamental law of all—the Constitution of the United States.²⁰⁶

Norton's apparent adoption of absolute immunity for constitutional violations was rejected by the Court of Appeals for the First Circuit in *Kelley v. Dunne*.²⁰⁷ The *Kelley* court, however, like the majority in *Norton*, failed to reach the basic question of whether unconstitutional acts can ever be within the scope of a federal official's duties.²⁰⁸ The court in *Kelley* rested its decision instead on the determination that the public interest would be adequately served by granting the officer a qualified privilege. This privilege would be lost if the plaintiff could prove "actual malice," which includes "reckless indifference to the rights of the individual citizen."²⁰⁹

The respondents relied upon *Barr v. Matteo*²¹⁰ to support their claim of absolute immunity for unconstitutional actions. In *Barr*, two employees of the federal Office of Rent Stabilization alleged that the Acting Director of the agency had maliciously issued a defamatory press release concerning them.²¹¹ A closely divided Court²¹² decided that the issuance of the press release was "within the outer perimeter of [the Acting Director's] line of duty,"²¹³ and that the efficient administration of government required absolute immunity from suit for statements made within this outer perimeter.²¹⁴ The suit, however, was a

206. 332 F.2d at 866.

207. 344 F.2d 129, 133 (1st Cir. 1965).

208. The failure of the court to squarely face the constitutional issue may have been due to its unwillingness to disapprove the strong authority of *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In *Gregoire*, federal officials who had detained the plaintiff under an erroneous assumption that he was an enemy alien were held to be immune from suit for false imprisonment. The complaint in *Gregoire* involved further allegations of unconstitutional conduct (177 F.2d at 579); however, the propriety of overriding constitutional rights for public policy reasons does not appear to have been considered in *Gregoire*, either. Additionally, the basic premise of *Gregoire*, which is that government will falter without the aid of official immunity, seems completely unjustified. See text accompanying notes 238-39 *infra*.

209. 344 F.2d at 133.

210. 360 U.S. 564 (1959).

211. *Id.* at 567-68.

212. The Court split five to four. Justice Harlan wrote the Court's opinion, which Justices Clark, Frankfurter, and Whittaker joined. Justice Black concurred, based upon his belief in the importance of unfettered speech. Justice Stewart dissented because he felt the action of issuing the particular press release was not within the scope of the Acting Director's duties. Chief Justice Warren dissented in an opinion which Justice Douglas joined. Justice Brennan dissented in a separate opinion. The Chief Justice, Justice Douglas, and Justice Brennan thought that government officials should only be entitled to a qualified privilege, rather than an absolute immunity.

213. 360 U.S. at 575.

214. *Id.* at 574-75.

defamation action and did not involve any allegations of unconstitutional conduct. It could even be argued that the constitutional rights involved in *Barr* were those of the Acting Director—his rights under the First Amendment's guarantees of free speech and a free press.²¹⁵

Furthermore, the Supreme Court has consistently indicated that government officials are *not* immune from suit for constitutional violations. In *Malone v. Bowdoin*²¹⁶ a federal official was sued to recover possession of land allegedly owned by the plaintiff, a private citizen.²¹⁷ The Court determined the official was immune from suit only because the alleged taking was not unconstitutional, the plaintiff being able to recover just compensation in the Court of Claims:²¹⁸

[T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."²¹⁹

Before the advent of the Court of Claims, suits against individual officials were allowed as the only practical means of enforcing the Fifth Amendment's prohibition against the governmental taking of land without paying just compensation. Thus, in *United States v. Lee*²²⁰ an award of specific relief for the recovery of possession of land was upheld. *Lee* has been characterized as the "constitutional exception to the doctrine of sovereign immunity."²²¹

In *Pierson v. Ray*²²² the Court explicitly rejected the idea that state police officers could be absolutely immune from suits based upon their unconstitutional actions.²²³ Justice Frankfurter had previously expressed the constitutional basis for this rejection in his dissenting opinion in *Monroe v. Pape*.²²⁴

215. See Justice Black's concurring opinion in *Barr*, 360 U.S. at 577.

216. 369 U.S. 643 (1962).

217. *Id.* at 643-44.

218. *Id.* at 647.

219. *Id.*, quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949).

220. 106 U.S. 196 (1882).

221. *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949).

222. 386 U.S. 547 (1967).

223. *Id.* at 555.

224. 365 U.S. 167 (1961). The majority held that the petitioners, who had been subjected to unjustified searches and arrests, could maintain a cause of action under 42 U.S.C. § 1983. See note 168 *supra*. Justice Frankfurter dissented because he felt that section 1983 only covered situations where the denial of the right was

If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in [Wolf v. Colorado] was addressed: "[W]e have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."²²⁵

If state officers, aided by the guaranty of state sovereign immunity in the Eleventh Amendment, cannot constitutionally be afforded immunity for constitutional violations it seems clear that federal officials likewise cannot claim any such immunity. It has never been suggested that the Bill of Rights places a heavier burden on the states than it does on the federal government.

The second question is therefore the crucial one: should an official receive protection (and if so, how much) for acts beyond the scope of his authority? In *Kelley v. Dunne*²²⁶ protection was afforded in the form of a qualified privilege, which would be lost if the plaintiff could prove either actual malice or reckless indifference to the rights of the individual citizen.²²⁷ Although the criteria adopted for the qualified privilege seem reasonable, the spirit, if not the letter, of the Fourth Amendment would appear to demand that the burden of proof be shifted to the defendant officer. That is, instead of an immunity of any kind, the officer should be allowed the *defense* of reasonable reliance on statutes and prior court decisions. Conduct not meeting that standard would clearly amount to "reckless indifference." This is essentially the standard approved by the Supreme Court in *Pierson v. Ray*²²⁸ for actions under 42 U.S.C. section 1983.²²⁹ The *Pierson* Court held that state officers sued for unlawful arrests are entitled to assert the defense of good faith and probable cause, with good faith being equated to action *reasonably* believed to be constitutional.²³⁰ The test for

affirmatively sanctioned by the state. In the absence of state encouragement of the illegal act, he felt that the injured party should pursue his remedy in the state courts.

225. 365 U.S. at 211 (Frankfurter, J., dissenting), *quoting* Wolf v. Colorado, 338 U.S. 25, 28 (1949); *see* note 224 *supra*.

226. 344 F.2d 129 (1st Cir. 1965).

227. *Id.* at 133. *See generally*, H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1215-24 (1953).

228. 386 U.S. 547 (1967).

229. *See* note 168 *supra* for the text of this statute.

230. 386 U.S. 547, 555 (1967). *See* Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968). *See also* Beck v. Ohio, 379 U.S. 89, 97 (1964).

good faith is *objective* rather than subjective.²³¹ Under such a test, the additional requirement of probable cause seems to be superfluous, since it is elementary law that neither an arrest nor a search can be made without probable cause.²³² The result is that a state officer will be liable for an unconstitutional arrest or search unless he can demonstrate that his actions were reasonable in the light of the then prevailing state and federal law.²³³ The federal courts should not allow a broader defense or privilege to be asserted by federal officers, even assuming the courts could do so without running afoul of the Fourth Amendment.²³⁴

The adoption of the good faith defense in lieu of any immunity would serve the useful purpose of restoring to federal law the salutary principle of the personal accountability of government officials,²³⁵ while leaving them a zone of protection when their actions are the result of reasonable reliance on legal precedent. Indeed, the American Civil Liberties Union, as *amicus curiae* in *Bivens*, urged the adoption of such a standard for actions within as well as without the scope of governmental duties:

A qualified privilege, involving good faith belief by the government official that his action is consistent with his office and the United States Constitution, is harmonious both with the principle of personal accountability and with the broadest justifiable freedom of action for government officers. Conversely, the absolute privilege does not balance personal responsibility against government freedom, but simply relegates the former to irrelevancy in the most important instances. As such, the rule of *Barr v. Matteo* deviates seriously from settled principles of

231. See *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Kozlowski v. Ferrara*, 117 F. Supp. 650 (S.D.N.Y. 1954).

232. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Draper v. United States*, 358 U.S. 307 (1959).

233. *Carter v. Carlson*, 447 F.2d 358, 364-65 (D.C. Cir. 1971). Of course, if the law relied upon is obviously unconstitutional, no protection from suit will be afforded. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 232-34 (1970) (Brennan, J., concurring), discussed in note 169 *supra*.

234. *Carter v. Carlson*, 447 F.2d 358, 373-74 (D.C. Cir. 1971) (Nichols, J., concurring). See text accompanying notes 225 & 226 *supra*. The inviolability of constitutional rights, as protected against arbitrary government action, was reiterated in *Reid v. Covert*, 354 U.S. 1 (1957):

The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If . . . the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the methods which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there. *Id.* at 14 (footnotes omitted).

235. See note 260 *infra*.

accountability.²³⁶

Furthermore, the departure from these settled principles in *Barr* was based on an unjustified fear that the federal government would collapse if its officials were not heavily immunized. However, the government had not only survived, but had continuously grown in strength despite the traditional tort rules of responsibility, which hold the government official responsible unless he can establish the defense of good faith and probable cause.²³⁷ The states have retained these same rules without incurring any noticeable burden on the operation of their governments.²³⁸ Finally, the flexibility and power of the federal summary judgment mechanism should provide a relatively painless way to dispose of actually frivolous suits.²³⁹

Although the Court in *Bivens* did not rule on the immunity issue, one can hazard a guess as to its attitude. Justice Brennan, writing for the majority, described the right to be free from unreasonable searches and seizures as *absolute*.²⁴⁰ And it would be rather surprising should the Court allow the remedy it has afforded to be nullified by an overly broad zone of protection of federal officials.

CONCLUSION

The Chief Justice noted in his dissent that "[t]his case has signifi-

236. Brief for American Civil Liberties Union as Amicus Curiae at 13, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (citations omitted). Support for this proposal can be found in the Supreme Court's refusal to grant absolute immunity to the press in the defamation area. Liability will be imposed if printed statements concerning public figures or persons engaged in newsworthy conduct are actually false and if actual malice, broadly defined as above to include reckless indifference, exists. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). If the constitutional protections of speech and the press do not confer an absolute immunity, how can mere "public policy" do so, particularly a public policy devoid of any factual support? The anomalous situation today finds government officials with a broader protection than that afforded to the press. The framers of the Constitution would be amazed.

237. *Pierson v. Ray*, 386 U.S. 547 (1967); see *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *Belknap v. Schild*, 161 U.S. 10 (1896); *Bates v. Clark*, 95 U.S. 204 (1877).

238. W. PROSSER, *THE LAW OF TORTS* § 132, at 989 (4th ed. 1971); see *Katz*, *supra* note 15, at 44.

239. *FED. R. CIV. P.* 56; see *Kelley v. Dunne*, 344 F.2d 129, 135 (1st Cir. 1965); *Kozlowski v. Ferrara*, 117 F. Supp. 650, 653 (S.D.N.Y. 1954).

240. See note 107 *supra*. And Justice Harlan, who authored the plurality opinion in *Barr*, concluded his concurring opinion in *Bivens* with the thought that "at the very least [the damage] remedy would be available for the most flagrant and patently unjustified sorts of police conduct." 403 U.S. at 411.

cance far beyond its facts and its holding.”²⁴¹ He was referring primarily to the mounting controversy over the exclusionary rule,²⁴² “under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment.”²⁴³ On the day that *Bivens* was decided, several members of the Court sharply attacked the exclusionary rule for the first time since the Court’s decision in *Mapp v. Ohio*.²⁴⁴ Chief Justice Burger’s dissenting opinion in *Bivens* expounded the view that the exclusionary rule is “an unworkable and irrational concept of law.”²⁴⁵ Justice Black, dissenting in *Coolidge v. New Hampshire*,²⁴⁶ reiterated his belief that the exclusionary rule is bottomed on the Fifth Amendment, rather than the Fourth,²⁴⁷ and that the rule is necessarily limited in its scope by the language of the Constitution.²⁴⁸ Justice Blackmun joined Justice Black’s dissent insofar as it stated “that the Fourth Amendment supports no exclusionary rule.”²⁴⁹ And Justice Harlan, concurring in *Coolidge*, observed that:

From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of reevaluation by overruling *Mapp v. Ohio* and *Ker v. California*.²⁵⁰

Chief Justice Burger, dissenting in *Bivens*, was unwilling to “abandon the Suppression Doctrine until some meaningful alternative can be developed.”²⁵¹ The Chief Justice, analogizing to the inadequacies of state tort actions against police officers,²⁵² discounted the effectiveness of the damage remedy afforded by the *Bivens* majority.²⁵³ He proposed instead an administrative or quasi-judicial remedy against the government itself²⁵⁴—a step which could only be taken by Congress.²⁵⁵

241. 403 U.S. at 412.

242. The Chief Justice cited a host of articles which are critical of the exclusionary rule. 403 U.S. at 426-27.

243. *Id.* at 412.

244. 367 U.S. 643 (1961).

245. 403 U.S. at 420.

246. 403 U.S. 443 (1971).

247. *Id.* at 496-98.

248. *Id.* at 500.

249. *Id.* at 510.

250. *Id.* at 490.

251. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. at 420.

252. *Id.* at 421-22. See text accompanying notes 165-69 *supra*.

253. 403 U.S. at 421.

254. *Id.* at 422.

255. *Id.*

However, it would seem a little premature to be disregarding the remedy afforded in *Bivens*. The majority clearly intended a remedy that would be free of the nullifying limitations embedded in state tort law.²⁵⁶ It will be up to the federal courts to maximize the effectiveness of the remedy by fashioning liberal recovery mechanisms, including, *e.g.*, punitive damages and damages for emotional harm and public embarrassment.²⁵⁷ The officer should only be allowed the defense of objective good faith.²⁵⁸ There is even precedent for a disallowance of sovereign immunity when the violation of the constitutional right has been made possible by the cloak of government authority.²⁵⁹ The injured party could then join the government and the offending officer as defendants, greatly increasing the likelihood of recovery.²⁶⁰

Putting aside the ramifications the *Bivens* decision may have in the area of criminal procedure, it is clear that the decision has greatly expanded the legal role of the Constitution. The Court emphatically affirmed the power, and perhaps even the duty,²⁶¹ of the federal courts to treat the Constitution as a positive body of law that defines individually vested rights enforceable through the medium of private civil actions. If an individual right is secured in the Constitution, then a civil suit for its deprivation should be maintainable in the federal courts.²⁶² *Bivens* should thus serve as the basis for an "omnibus section 1983" that will protect constitutional rights from encroachments attempted under color of *federal* as well as state law.²⁶³ Taken together, *Bivens* and *Bell v. Hood* have gone a long way toward de-

256. See text accompanying notes 71-84 *supra*. See also the discussion of Justice Harlan's views on this point in text accompanying notes 170-76 *supra*.

257. See note 169 *supra*.

258. See text accompanying notes 226-40 *supra*.

259. *United States v. Lee*, 106 U.S. 196, 210-23 (1882); *Carter v. Carlson*, 447 F.2d 358, 367-72 (D.C. Cir. 1971); *id.* at 376 (Nichols, J., concurring). See text accompanying notes 220-21 *supra*. Furthermore, if sovereign immunity is considered to have been judicially created, it can also be judicially abolished. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 218-19, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 93 (1961).

260. It would not be advisable to shield the officer from all liability by substituting the government as the exclusive defendant, since then the officer need no longer feel accountable for his conduct. See W. PROSSER, *THE LAW OF TORTS* § 132, at 992 (4th ed. 1971). But see Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damages Actions*, 53 GEO. L.J. 889 (1965), wherein the authors would apparently retain individual liability only for unconstitutional actions which could not be characterized as within the scope of official duty. *Id.* at 907-08, 910.

261. See note 138 *supra*.

262. See note 107 and text accompanying notes 105-07 *supra*.

263. See note 168 *supra*.

veloping the long-ignored potential of the grant of general federal question jurisdiction.²⁶⁴

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264. See note 104 *supra*