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BIVENS v. FEDERAL BUREAU OF NARCOTICS:
A NEW DIMENSION FOR THE FOURTH AMENDMENT

"Let the remedial process be inadequate or unjust and the meaning of judicial review ceases to be clear."1

INTRODUCTION

In recent years, the courts have tended to provide protections for the vindication of constitutional rights. This is true despite the fact that the United States Constitution is almost completely silent concerning the remedies to be employed for its implementation.2 The Supreme Court recognized some years ago,3 with regard to the Fourth Amendment,4 that state courts are inadequate to provide viable protections for a violation of the Amendment's commands. To further the interests protected by the Fourth Amendment, the recent history of the Court's treatment of the Amendment has been preoccupied with the question of remedies for its violation5 when federal officials act in excess of their authority.

The Fourth Amendment provides that, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . ."6 In an attempt to guarantee the very words of the Amendment, the Court has recently held in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics7 that the remedy to be employed on the occasion of federal misconduct is an appropriate action for damages in a federal court. The Court said:

In Bell v. Hood, 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.8

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2 A conspicuous exception is the reference to habeas corpus in U.S. CONST. art. 1, §9.
4 U.S. CONST. amend. IV.
6 U.S. CONST. amend IV.
8 Id. at 389.
Apart from the holding of the case, the decision left unanswered the question of whether federal officials are immune from suit, although, apparently, a cause of action still lies. This article will discuss the immunity issue, along with other issues. However, in order to appreciate what would otherwise appear to be a simple holding, a brief history of case law prior to Bivens is appropriate.

DEVELOPMENT BEFORE BIVENs

Pleading a Cause of Action in Federal Court

Although the protection of federally granted rights was a primary purpose for the establishment of a system of federal courts, the principle established by the first Judiciary Act was that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the Supreme Court. In the course of time, exceptions were made for matters of a peculiarly federal nature or where political exigencies demanded. Thus, when it came to suits for damages for abuse of power, federal officials were usually governed by local law. Federal law, however, supplied the defense,
if the conduct complained of was done pursuant to a federally imposed duty.¹⁵

The initial difficulty, then, was the inability to plead a cause of action sufficient to enable a federal court to acquire jurisdiction. For example, in a trespass action at law, the traditional declaration could allege only the plaintiff's interest and the defendant's intrusion. That the defendant was discharging an official duty was a defense which could be raised only in answer.¹⁶ That the act was nevertheless unconstitutional was an attack on the defense to be made in the replication.¹⁷ For purposes of federal jurisdiction, such an action did not satisfy the requirement that a federal question be stated in the complaint.¹⁸ Thus, a damage action for a constitutional violation was always cast in terms of a state created right and had to be

15 This is specifically granted by 28 U.S.C. §1442(a) (1) (1948), which reads in part:
A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
(1) Any officer of the United States or agency thereof, or person acting under him, for any act under color of such office . . .
This provision gives the federal defendant a choice of forums which the plaintiff does not have. See Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1867); cf. Tennessee v. Davis, 100 U.S. 257 (1879); Wheeldin v. Wheeler, 373 U.S. 647 (1963).
17 Note 16 supra.
18 This is a subject unto its own. Several tests have been advanced to determine whether a case or controversy arises under the Constitution or laws of the United States. Bearing in mind that 28 U.S.C. §1331 (a) confers jurisdiction upon a district court "wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States," the following are notable examples of determining whether the jurisdictional statute is satisfied:

(A) Jurisdiction is obtained whenever some element of federal law is an "ingredient" of the cause of action. Osborn v. United States, 22 U.S. (9 Wheat.) 738 (1824).
(B) Justice Holmes' statement that "a suit arises under the law that creates the cause of action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).
(C) "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws. for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." Schulthis v. McDougal, 225 U.S. 561, 569 (1912). Cf. First National Bank v. Williams, 252 U.S. 504, 512 (1920).
(D) Jurisdiction must be determined from plaintiff's well-pleaded complaint. Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877). For problems with this test, see McGoon v. Northern Pac. Ry., 204 F. 998 (D.C.N.D. 1913), cited approvingly in

(1949) ("personal liability . . . sounding in tort." Id. at 686); ("liability . . . imposed by the general law of torts." Id. at 695); Belknap v. Schild, 161 U.S. 19, 18 (1896) ("tort"); Stanley v. Schwalby, 147 U.S. 508, 518-19 (1893) ("tort"); Cunningham v. Macon and Brunswick Ry., 109 U.S. 446, 452 (1883) ("tort").
brought in a state court because the federal right could not be pleaded in the complaint. However, in equity, the traditional bill\(^9\) could anticipate defenses, and the constitutional claim could justify the extraordinary grant of equitable relief.\(^{20}\)

**Jurisdiction of a Federal Court in Suits of This Kind**

The 1946 decision in *Bell v. Hood*\(^{21}\) alleviated the problem of pleading a cause of action in the federal court. On facts similar to *Bivens*, the Supreme Court in *Bell* characterized the issue of law as "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments."\(^{22}\) Recognizing that "that question has never been specifically decided by this Court,"\(^{23}\) the Court did not decide it. Rather it held:

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\(^9\) Concerning the contents of the bill, see generally, 1 E. Daniel, Chancery Practice 411-503; C. C. Langdell, A Summary of Equity Pleading, ch. 1 (2d ed. 1883). The mere availability of equitable relief supported the nonexistence of a legal remedy to redress violations of Fourth Amendment rights, under the well-established principle that an injunction will issue only if there is no adequate remedy at law. See *Bell v. Hood*, 71 F. Supp. 815, 819 (S.D. Cal. 1947). At that time the principle was codified, 28 U.S.C. §384 (1940).


\(^{22}\) Id. at 684.

\(^{23}\) Id. Prior to *Bell*, one court dismissed a constitutional claim for damages on the ground that the asserted constitutional rights merely "lurk[ed] in the background ..." in a manner not specified, *Viles v. Symes*, 129 F.2d 828, 831 (10th Cir. 1942), cert. denied, 317 U.S. 71 (1942). Another court rejected such a claim in the apparent belief that federal question jurisdiction was lacking under what is now 28 U.S.C. §1331(a), unless the case presents an issue of constitutional or statutory construction. *Taylor v. DeHart*, 22 F.2d 206 (W.D. Mo. 1926), writ of error dismissed for want of jurisdiction, 274 U.S. 726 (1927).
"[w]here 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." While failing to grant a specific remedy, the Bell Court indicated a willingness to accept jurisdiction of suits of this kind, declaring: "[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction." On remand, the district court held that the complaint failed to state a claim upon which relief could be granted, stating that in the absence of federal common law, the right of action must be given either by the Constitution or by statute, and neither granted such a right. For fourteen years the reasoning of the district court has been followed, with little examination or consideration.

The problematic approach to the issue of jurisdiction as an independent consideration seems at best strange. That a United States district court has jurisdiction in a suit for damages against federal officers acting in excess of their authority appears to have been settled much earlier than Bell. Indeed, cases beginning with Little v. Barrene upheld damages against a United States Naval officer for his unlawful seizure of a vessel. So in Tracey v. Swartwout such jurisdiction was assumed. Again, in Mitchell v. Harmony, a judgment was affirmed by the Supreme Court against military officers for unlawful seizure of private property. In any event, Bell would seem to be dispositive on the issue of federal jurisdiction.

REMEDIES AVAILABLE — PRE-BивенС

Suppression Doctrine

Evidence obtained in violation of the Fourth Amendment

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24 327 U.S. at 684.
25 Id. at 685 (Emphasis added).
27 Id. at 817.
29 6 U.S. (2 Cranch) 170 (1804).
31 54 U.S. (13 How.) 115 (1851); See also Cammeyer v. Newton, 94 U.S. 225 (1876); Belkamp v. Schild, 161 U.S. 10 (1895); Cf. Taylor v. DeHart, 22 F.2d 206 (D.C. Mo. 1926), which appears to state the sole opposing view.
32 Significantly, in the damage action against government officers in
has long been held inadmissible in federal courts. The primary controversy has been over whether the remedy of an exclusionary rule was sufficiently important to the scheme of the Fourth Amendment to require its application to state prosecutions as well.

The ultimate resolution of this constitutional dispute turned in large part on the Court's altered view of the viability of other remedies for protecting the Fourth Amendment rights against official lawlessness. The majority opinion in Wolf v. Colorado, in refusing to hold the exclusionary remedy applicable to the states by way of the Fourteenth Amendment, remanded those whose rights had been infringed to "the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford." The dissenters in Wolf warned that these alternative remedies were illusory. In Mapp v. Ohio, the Court observed that the other remedies had been "worthless and futile" and held that the remedy of exclusion was required by the interests embodied in the Fourth Amendment.

The effectiveness of the exclusionary rule, although questioned as of late, does much to implement the Fourth Amendment's commands. But that remedy cannot be realized unless

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35 Id. at 31.
36 The dissenting opinion by Justice Murphy, joined by Justice Rutledge, discussing the inadequacy of the state remedial process, went on to say that: The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Id. at 44.
38 The Court concluded: Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.
Id. at 660. For further comment on the basis for, purpose, effectiveness, and limitations of the exclusionary rule, see Terry v. Ohio, 392 U.S. 1 (1968); Berger v. New York, 388 U.S. 41, 70 (1967) (dissenting opinion, Black, J.); Linkletter v. Walker, 381 U.S. 618 (1965). Justice Black felt that "the exclusionary rule formulated to bar such evidence in the Weeks case is not rooted in the Fourth Amendment but rests on the 'supervisory power' of this Court over other federal courts ...". Id. at 76.
39 E.g., Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 667 (1970) where the author states that there is no empirical evidence to support the claim that the rule deters illegal conduct of law enforcement officials. For the most recent criticism of the exclusionary rule, see Coolidge v. New Hampshire, 403 U.S. 443, 510-27 (1971) (dissenting opinion).
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a criminal prosecution is ultimately undertaken against a victim of a Fourth Amendment intrusion. Conversely, the exclusionary rule is no guarantee of the rights of those who are not prosecuted. In some instances, then, the remedy may very well do little to implement the Fourth Amendment.

Equitable and Legal Remedies

Federal judicial power to issue injunctions and writs of habeas corpus in proper cases is beyond dispute, although the target of an excessive violation of Fourth Amendment rights is rarely aware of the planned action before it is consummated. While a common law action for damages, primarily based on the theory of trespass, is available, that remedy is often more conceptual than real. Although a litigant is denied redress in a federal court against federal officials, state officials are subject to suit in federal courts by virtue of the Civil Rights Act.

Thus, prior to Bivens, a litigant could avail himself of three

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40 Evidence obtained in violation of the Fourth Amendment will generally support a motion to suppress. The number of illegal arrests is, with all candor, frightening. One author puts the number as several million annually, and quotes other estimates as high as 3-1/2 million. Hall, Police and Law in a Democratic Society, 28 Ind. L.J. 133, 152, 154 (1953). Another commentator estimated that 75% of all arrests were illegal in some particular. Wainer, Investigating the Law of Arrest, 26 A.B.A.J. 161 (1940).

41 Philadelphia Co. v. Stimson, 223 U.S. 605, 620 (1912), held that a federal court has jurisdiction over federal officers to enjoin threatened action that is in "abuse of power." See also Ex parte Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882).


44 For indicative examples of inadequate state remedial process, see Mason v. Wrightson, 109 A.2d 1028 (Md. 1954) (an award of one cent); Goodwin v. Allen, 89 Ga. App. 187, 78 S.E.2d 804 (1953) (obvious false imprisonment but jury returned verdict for the defendant); Butcher v. Adams, 310 Ky. 205, 220 S.W.2d 398 (1949) (plaintiff who had a record of prior arrests, could not have been humiliated and therefore was not damaged); Trahan v. Breaux, 212 La. 457, 32 So. 2d 845 (1947), (in the absence of special damages, only nominal damages allowed for false imprisonment).

45 J.S.C. §1983 (1964) provides that:

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 right, 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. See generally, id., §§1981-88. Section 1983 is applicable only to state officers, not federal officials. Cf. the recent case, Griffin v. Breckenridge, 403 U.S. 88 (1971), which held that 42 U.S.C. §1985 does not apply only to conspiracies operated under color of state law but also includes unconstitutional private action. Whether this case will have any bearing on §1983 situations remains to be seen. Presently, a state officer is liable under 42 U.S.C. §1983 for his acts in connection with an arrest if (1) he acts under color of state law, and (2) he deprives the arrested person of a right secured by
remedies: the exclusionary rule, but only in a federal prosecution; equitable remedies, but only if he could show continued federal misconduct; and a damage action in a state court. The latter remedy is criticized on jurisdictional grounds. How a state court can assume jurisdiction over federal officials acting under color of federal authority and in furtherance of federal purposes, albeit in excess of their authority, is not apparent. In re Neagle held that state courts do not have jurisdiction to issue injunctions against federal officials. If a state court does not have power to prevent such acts for want of jurisdiction, it would seem to lack power over federal officials once they have so acted. While there is federal jurisdiction to issue injunctions to prevent the commission of federal official lawlessness, a person seeking both equitable and damage relief could only invoke federal court jurisdiction at the cost of splitting his claim.

The discussion above should indicate that had the Fourth Amendment never been written, exclusive recourse to the traditional common law remedy of trespass might be understandable. But in light of the Fourth Amendment, suits of this kind are uniquely federal in nature, and this was to be the mood of the Bivens Court.

**CONSTITUTIONAL REMEDIES — THE BIVENS CASE**

At about 6:30 on the morning of November 26, 1965, the respondents, as agents of the Federal Bureau of Narcotics, forced their way into Webster Bivens' home with drawn firearms and proceeded to search the premises. The agents forcibly hand-
cuffed Bivens in the presence of his wife and children, placing him under arrest for violation of the narcotics law. Bivens was taken into custody to be questioned, fingerprinted, photographed and booked, as well as subjected to a thorough and humiliating search of his person. A United States Commissioner, finding that the agents acted without the authority of a search or arrest warrant, dismissed the complaint.50

Bivens, acting pro se, filed a civil complaint in the United States district court. He alleged that the arrest and subsequent search were made without a warrant, that unreasonable force was employed, and that the arrest was made without probable cause. Bivens alleged, as Bell had done some years before, that the court had jurisdiction by virtue of 42 U.S.C. §1983, 51 28 U.S.C. §1343(3),52 28 U.S.C. §1343(4),53 and 28 U.S.C. §1331(a).54

The district court55 and the court of appeals56 dismissed the complaint. The court of appeals, however, gave the subject a more extensive analysis than it had theretofore received in any court. The court did not question its power to devise remedies

50 Brief for Appellants at 2-3.
51 Note 45 supra.
52 28 U.S.C. §1343(3) (1952) provides that:
The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .
(3) To redress the deprivation, under color of any State law, statute, ordinance or regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
Like §1983, only action under color of state law is reached by this section.
53 28 U.S.C. §1343(4) (1952) provides that:
The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .
(4) To recover damages or to secure equitable relief or other relief under any Act of Congress provided for the protection of civil rights, including the right to vote.
To come within the above section, plaintiff must be seeking relief “under any Act of Congress.” In this case, plaintiff sought relief which was not extended by any Act of Congress, but rather based on the Fourth Amendment.
54 28 U.S.C. §1331(a) (1958) provides that:
The district court shall have original jurisdiction of all civil action wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.
Bivens satisfied the jurisdictional amount, seeking $15,000 from each of the six agents. It is striking that, prior to 1875, Congress deemed it neither necessary nor appropriate to provide a federal court for the litigation of rights under the Constitution. The general federal question jurisdiction was first created by the Act of March 3, 1875, §2, 18 Stat. 470-71, now embodied in the above statute. There has always been a minimum jurisdictional amount, unless so dispensed with by special statutory provision, as in the Civil Rights Act, 42 U.S.C. §1983; see 28 U.S.C. §1343 and note 18 supra.
56 409 F.2d 718 (2d Cir. 1969).
for the enforcement of constitutionally protected rights, but the court, as did the courts before, thought this primarily to be the prerogative of Congress, and indicated that only a showing of great necessity would justify independent judicial action. The opinion is replete with statements that judicial development of constitutional remedies can proceed only when such a course is "essential"; otherwise, a failure to act when essential would leave the protection of the Constitution "illusory" and "only a 'form of words'."

The Supreme Court rejected the "essential" test of the court of appeals in its reversal. Rather, it saw the heart of the question as whether a federal right was in issue. "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." If the federal officer is acting beyond his authority, the litigant's remedy is by an injunction on the equity side of the federal court; if the federal right has been abridged, the remaining judicial remedy against the federal officer is by an action for damages on the law side of the federal court. Thus, it would seem to make no difference whether the suit against a federal officer for "abuse of power" is for damages resulting from an abuse committed, or is for an injunction to restrain an abuse threatened, for in either case, "[T]he interest which Bivens claims — to be free from official conduct in contravention of the Fourth Amendment — is a federally protected interest."
The apparent ease with which the Court granted the remedy in the absence of a statute providing the same may perhaps appear to be unrealistic, especially in light of the fact that so many lower federal courts had denied the remedy. In an obvious distaste for such cases, the Court simply stated that:

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 effect of Bivens cannot be understated. However, the opinion may raise more questions than those which it answered. This leads to a consideration of those issues which the Court may inevitably face.

THE DOCTRINE OF SOVEREIGN IMMUNITY

Although Bivens upheld a right of suit against federal agents who had violated Fourth Amendment rights while acting under color of their authority, the Court reversed the issue as to the federal officials' immunity to suit. The Court held that:

"... [T]he District Court ruled that... respondents were immune from liability by virtue of their official position. 276 F. Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here."

Obviously, if the Bivens decision is to render federal officials subject to damage actions in a federal court they, like state officials, must be free from any immunity. As the doctrine of sovereign immunity is a broad one indeed, only a few remarks will be made here, as it is fully discussed elsewhere.

It is well established that the United States may not be

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64 Note 28 supra.
65 403 U.S. at 395. In addition the Court said:
That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.
66 403 U.S. at 397-98.
sued without its consent.\(^{68}\) Absolute immunity to suit has been applied to federal officers in respect of "... action... taken... within the outer perimeter..."\(^{69}\) of his line of duty. But it has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed "manifestly or palpably beyond his authority."\(^{70}\) Therefore, when the federal officer is within the scope of his authority, no suit will lie because the United States may not be sued.\(^{71}\) Conversely, a federal officer whose acts are "flagrant and patently unjustified"\(^{72}\) loses his immunity to suit and in such a case he is "[s] tripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."\(^{73}\)

Quite apart from the rationale of the above,\(^{74}\) it is manifestly clear that, when an officer is acting unconstitutionally, he is not acting within his federal authority and has therefore lost his substantive immunity from suit.\(^{75}\) But it does not follow


\(^{69}\) The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the "outer perimeter" of the officer's "line of duty." Barr v. Matteo, 360 U.S. 564, 575 (1959). See also Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949); cert. denied, 339 U.S. 949 (1949); Restatement of Torts §656 comment d (1938) extends immunity only as far as public prosecutors; the privilege "does not apply to all persons whose function it is to aid in the enforcement of the criminal law."


\(^{71}\) The district court in Bivens confused the question of federal authority with the question of governmental immunity. The distinction between the two was made in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). The Supreme Court held that, if the actions of federal officers create personal liability, the mere fact of their office will not bar an action against them; personal liability arises where the officer exercises power beyond the limits imposed by the definition of his authority or where his authority or its exercise is unconstitutional. See Pierson v. Ray, 386 U.S. 547 (1967) which qualified this statement. However, if the remedy to be applied requires official action it constitutes relief running directly against the government, which may not be had in the absence of the government's consent to be sued, an unlikely event.

\(^{72}\) Bivens, 403 U.S. 411 (concurring opinion, Harlan, J.).

\(^{73}\) Ex parte Young, 209 U.S. 123, 159-60 (1908).

\(^{74}\) See C. Warren, THE SUPREME COURT IN THE UNITED STATES HISTORY, 717 (2nd ed. 1926), where the author states that the decision in Ex parte Young rests on pure fiction and is illogical. However, "[t]he authority and finality of Ex parte Young can hardly be overestimated." Hutcheson, A Case for Three Judges, 47 HARV. L. REV. 795, 799 n.5 (1934).

that he has lost his character as a federal officer. He is still acting under color of federal law. If the Court admits that it has equitable power over a federal officer preparing to act unconstitutionally, it must follow that the Court has power over him when he has so acted. The proposition that individuals are protected by the Bill of Rights only against the prospective unconstitutional activity of federal agents is patently absurd. Indeed, the reluctance of the majority in Bivens to assert the absence of immunity where it is alleged that the federal officer has acted "under color of federal authority" leaves the plaintiff in a position not far removed from the position that he was in prior to the Court's opinion.

**EXPRESS NEGATIVE THEORY — IMPLICATIONS AND RAMIFICATIONS OF BIVENS**

The concurring opinion of Justice Harlan and the dissenting opinion of Chief Justice Burger indicate that the Bivens decision may have a far-reaching effect not consciously noted by the majority. Indeed Harlan implies that a remedy in damages for violation of other constitutional provisions may lie:

The contention that federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment.

Thus Harlan would say that mere silence on the part of Congress is not decisive at all. Where statutes have been silent as to any private relief, federal courts have found a cause of action to exist for violation, for example, of the Fair Labor Standard Act, the Securities Exchange Act, the National

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77 Bivens, 409 F.2d at 723 (1969); see note 41 supra.
78 Consider the language in United States v. Lee, 106 U.S. 196 (1882):
No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it.
Id. at 220.
79 403 U.S. 388, 398-411.
80 Id. at 411-27. The Chief Justice, while recognizing that "[t]his case has significance far beyond its facts and its holdings," Id. at 412, suggested a number of alternatives to the holding in Bivens.
81 403 U.S. at 402.
83 J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Pratt v. Robinson, 203 F.2d 627 (9th Cir. 1953); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951);
Banking Act,\textsuperscript{84} the Federal Communications Act,\textsuperscript{85} the National Labor Relations Act,\textsuperscript{86} the Federal Aviation Act,\textsuperscript{87} and the Rivers and Harbor Act.\textsuperscript{88} "If a private action is necessary to carry it into effect, the legislature must be credited with intent to provide such a remedy."\textsuperscript{89} It is suggested here that the same statement may be made for the Constitution in those instances where a private action is necessary to carry into effect the intent of its provisions, independent of Congressional sanction.

Three cases may support this proposition, although no one case is dispositive without the reasonable implications inherent in \textit{Bivens}. The case of \textit{Jacobs v. United States}\textsuperscript{90} may present the purest example of a constitutional right with a necessarily implied remedy. In \textit{Jacobs}, the construction of a dam by the government caused repeated overflows onto the plaintiff's land, which the Court found to constitute a taking of private property within the meaning of the Fifth Amendment.\textsuperscript{91} It may be doubted whether plaintiff could have sued for just compensation absent in the \textit{Tucker Act},\textsuperscript{92} which grants to the district courts and the court of claims jurisdiction over claims against the government "founded on the Constitution," and on an implied contract. But given this general jurisdictional grant, analogous to 28 U.S.C. §1331(a)\textsuperscript{93} in \textit{Bivens}, the damage remedy was implied from the constitutional right itself.\textsuperscript{94} The right to just compensation can scarcely be vindicated other than by securing just compensation. Thus, the Court read the Fifth Amendment as self-executing, creating a duty to pay upon the government, despite the absence of specific statutory authorization for suits to

\begin{footnotesize}
\begin{enumerate}
\item Baird v. Franklin, 141 F.2d 238, 240-47 (2d Cir. 1944) (Judge Clark, dissenting in part but writing for the court on this issue).
\item Deitrick v. Greaney, 309 U.S. 190 (1940), rehearing denied, 309 U.S. 697 (1940).
\item Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).
\item Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).
\item United States v. Perma Paning, 322 F.2d 754 (2d Cir. 1964).
\item Thayer, \textit{Public Wrong and Private Actions}, 27 HARV. L. REV. 317, 331 (1914).
\item 290 U.S. 13 (1933).
\item Initially, the language of the Fourth and Fifth Amendments is strikingly dissimilar. The language of the Fifth Amendment — "... nor shall private property be taken for public use, without just compensation..." — certainly creates a duty to pay and that duty inescapably implies a right to recover. However, the certainty of such remedy, absent judicial construction, is more fiction than fact. See note 94 infra.
\item U.S.C.§§1346(a) (2), 1491 (1948).
\item Note 54 supra.
\item Substantial doubt has been expressed about the validity of this holding. See Note, \textit{Developments in the Law — Remedies Against the United States and Its Officials}, 70 HARV. L. REV. 827, 876-81 (1957).
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\end{footnotesize}
enforce the right to just compensation.95

The voting rights cases are also helpful in the analysis. Both of these cases, Swafford v. Templeton96 and Wiley v. Sinkler,97 involved the same issues. Plaintiffs sued election officials in federal court for damages for denial of their right to vote in congressional elections, based primarily on the Fifteenth Amendment.98 The Court held that the right to vote had "its foundation in the Constitution of the United States"99 and that "[t]he action sought the vindication or protection of the right to vote for a member of Congress, a right . . . 'fundamentally based upon the Constitution . . .'"100 Although the voting rights decisions were addressed to jurisdiction rather than the right to relief, they have precedent value as recognizing a constitutional basis for a claim to damages.

The point to be made is this: that where the Constitution contains express negatives, as in the Bill of Rights and elsewhere,101 no other basis for the judicial creation of standards may be required. To draw a distinction between the fashioning of a remedy where a federal statute provides none102 and when the Constitution provides none is unjustified. In both cases the same problem exists, namely, one of construction.103 This is

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95 290 U.S. at 16. For other indicative instances where the courts have read the Fifth Amendment as self-executing, see Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (dictum), cert. denied, 335 U.S. 887 (1948); United States v. Lee, 106 U.S. 196, 216 (1882) (a common law action of ejectment against federal officers).
96 185 U.S. 487 (1902).
97 179 U.S. 58 (1900).
98 The applicable constitutional provision provides that "The right of citizens of the United States to vote shall not be denied . . . by the United States or by any State on account of race, color, or previous condition of servitude."
99 179 U.S. at 62.
100 185 U.S. at 492.
101 E.g., The Third Amendment provides:
No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law;
and the Twenty-fourth Amendment provides:
The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll or other tax.
These two amendments, as well as the Fourth, Fifth and Fifteenth Amendments, contain within them express negatives. Where, in order to effect the intent of these provisions a private action for damages is necessary, the text indicates that no specific legislation need be enacted as a condition precedent.
102 See notes 82-88 supra; see generally, Note, Federal Jurisdiction in Suits for Damages Under Statutes not Affording Such Remedy, 48 COLUM. L. REV. 1090 (1948).
103 The word "construction" has been used for lack of a better term. The exercise of judicial power involved in those cases cited at notes 82-88 supra simply cannot be justified in terms of statutory construction; see Hill, Constitutional Remedies, 69 COLUM. L. REV. 1109, 1120-21 (1969); nor did
especially true when it is considered that federal statutes gain all their source and authority from the Constitution itself.\textsuperscript{104}

Furthermore, no state's interests are frustrated by the judicial construction of an "express negative theory."\textsuperscript{105} "[A]ctions against federal officials . . . are necessarily of federal concern . . ."\textsuperscript{106} and no state interest is infringed by a generous construction of federal jurisdiction; rather, every consideration of practicality and justice argues for such a consideration.\textsuperscript{107}

Nor will judicial recognition of a private damage action under an express negative theory carry with it an undue burden of developing a body of federal common law. Recognition of a federal claim "... does not require the fashioning of a whole new body of federal law, but merely removes a bar to access ..." to existing law.\textsuperscript{108} A body of federal common law would govern such questions as the types of damages recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of actions.\textsuperscript{109}  

\textbf{CONCLUSION}

The theme of this comment is that where constitutionally defined interests are involved, they are particularly of a federal nature, and should be decided by federal law in a federal forum. The opinion in \textit{Bivens} would certainly support this statement.

\textsuperscript{104}U.S. CONST., art. I, §8.
\textsuperscript{105}This assumes, of course, that a state has a "true" interest in a damage action against federal officials, apart from the obvious interest of compensating its citizens for injuries suffered by federal lawlessness, which may not always be the case. See note 44 and text at note 46 supra.
\textsuperscript{109}The road has been well travelled in federal suits against state officials. See e.g., Pierson v. Ray, 386 U.S. 547 (1967) (immunity); Monroe v. Pape, 365 U.S. 167, 187-88 (1961) (immunity); O'Sullivan v. Felix, 233 U.S. 318 (1914) (statute of limitations); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (damages recoverable and injuries compensable).

The discussion in the text has dwelt on the compensatory aspect of the damage action. In theory, damages also serve the end of deterrence, but it is doubtful that, police misconduct is in fact deterred by such. Foote, \textit{Tort Remedies for Police Violations of Individual Rights}, 39 MINN. L. REV. 493 (1955); and it is not clear that the situation would materially changed by a stringent federal rule regarding exemplary damages, assuming this to be desirable. Conceivably, the deterrent aspect of the damage remedy assumes greater relevance in other classes of official misconduct.
Yet only a liberal interpretation of *Bivens* can support the proposition that in the absence of legislation specifically authorizing remedial relief, the Court should treat the Constitution no differently from a federal statute in permitting a private action to affect the policies embodied in the positive law. While the majority opinion does not reach this position, the Court may very well accept such a conclusion in the future.

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