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ACTIONABLE WRONGS—Fourth Amendment Held to Be Basis of Cause of Action for Damages Against Federal Officers for Illegal Search and Seizure.

On the morning of November 26, 1965, six agents of the Federal Bureau of Narcotics entered the apartment of Webster Bivens without a search or arrest warrant. After searching the entire apartment from stem to stern, the agents arrested Bivens, placed him in manacles in front of his wife and children, and threatened to arrest the entire family. Bivens was then taken to the Federal Court Building in Brooklyn where he was interrogated, fingerprinted, photographed, subjected to a visual strip search, and booked. The complaint filed against him was ultimately dismissed by a United States Commissioner.

On July 7, 1967, Bivens filed suit in a federal district court. His complaint alleged that the search and arrest were effected without a warrant and that unreasonable force was employed in making the arrest. He asserted that the events surrounding the search and arrest caused him great humiliation, embarrassment, and mental suffering, and thus he sought $15,000 damages from each of the agents for his unlawful actions.

The district court dismissed the complaint on the ground that it lacked federal question jurisdiction under 28 U.S.C. §1331, which grants jurisdiction to the district courts over actions which arise under “the Constitution, laws or treaties of the United States.” In the alternative, the district court rested its disposition on the merits for failure to state a claim upon which relief can be granted. On appeal to the Second Circuit, the court, while holding that the district court clearly had jurisdiction over the suit, affirmed on the ground that the complaint failed to state a federal cause of action.

2. The complaint advanced several other bases of jurisdiction, but they were inapposite. 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) apply only to action under color of state law. 28 U.S.C. § 1343(4) applies only to relief under an Act of Congress. Here the action took place under color of federal law, and relief is not accorded under any Act of Congress.
3. FED. R. CIV. P. 12(b)(6).
The Supreme Court reversed. In the opinion of the Court, Mr. Justice Brennan asserted that the complaint stated a cause of action under the fourth amendment which 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." Thus, violation of that command by a federal officer acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.

Mr. Justice Brennan based his opinion on the difference in scope between the protection afforded by the fourth amendment and that provided by state trespass laws. It is his belief that the interests secured by state laws regulating trespass and those preserved by the fourth amendment's guarantee against unreasonable searches and seizures "may be inconsistent or even hostile." As a result, a state cause of action in tort would not necessarily redress the injury which Petitioner Bivens had suffered. Thus, because "... damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," Mr. Justice Brennan felt that the complaint stated a federal cause of action founded directly on the fourth amendment, and that this amendment consequently authorized a private suit for injuries caused by an unreasonable search and seizure.

In a concurring opinion, Mr. Justice Harlan considered the issue of implying a damage remedy for the enforcement of constitutional rights in general, and the fourth amendment in particular. He concluded that explicit congressional authorization is not a prerequisite to the power of a federal court to accord compensatory relief. Thus, the real question presented by the case was whether a damage remedy was "necessary or appropriate" in this particular situation. This, Justice Harlan maintained, must be answered in the affirmative: "For people in Bivens' shoes, it is damages or nothing."

Chief Justice Burger and Justices Black and Blackmun dissented, each filing a separate opinion. The Chief Justice, in a rather lengthy opinion, criticized the Court for impinging on the legislative and policy functions which the Constitution vests in Congress. He censured the Court's previous attempts to fashion remedies for unlawful conduct by

6. U.S. CONST. amend. IV.
7. 403 U.S. at 394.
8. Id. at 395.
9. Id. at 410.
government officials in violation of the fourth amendment, particularly the formulation of the Exclusionary Rule. "Legislation is the business of Congress, and it has the facilities and competence for that task—as we do not." Mr. Justice Black agreed that creating such a right of action is a matter for Congress rather than for the Court. He also suggested that permitting a federal court to entertain a suit against federal officials for violation of fourth amendment rights might encourage "frivolous lawsuits," thereby increasing the already voluminous number of cases on the courts' dockets. In addition, Justice Black expressed concern that such damage suits might deter officials from the proper performance of their duties.

Mr. Justice Blackmun's dissent was primarily predicated upon Chief Judge Lumbard's opinion in the court of appeals. Justice Blackmun also added his fear of an "avalanche of new federal cases" which he felt would result from the creation of a new federal cause of action.

A NEW FEDERAL CAUSE OF ACTION

_Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics_ involves two distinct questions. The first is whether the fourth amendment authorizes a private suit for damages caused by an unreasonable search and seizure. If this is answered in the affirmative, the second issue arises. That is, whether federal agents acting in their official capacity, but in violation of their lawful and constitutional authority, are immune from suit. Although deciding that a damage suit may be predicated directly on a violation of fourth amendment rights, the Supreme Court did not consider the immunity issue as this was not passed on by the court of appeals. Instead, however, the Court has remanded the case for determination of this question. The significance of this fact and its relevant aspects will be discussed later.

In deciding whether the complaint stated a federal cause of action, the first problem which confronted the district court was that of fed-

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10. This rule, as set out in Weeks v. United States, 232 U.S. 383 (1914), and extended to the states in Mapp v. Ohio, 367 U.S. 642 (1961), provides that evidence obtained in violation of the fourth amendment is inadmissible at trial.
11. 403 U.S. at 412.
12. _Id._ at 430.
eral question jurisdiction. This issue was resolved in Bell v. Hood, where the complaint sought recovery squarely on the basis of a violation of petitioner's rights under the fourth and fifth amendments. The Court held that:

Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States.

Thus, the determinative factor with respect to federal question jurisdiction is whether the claim is founded upon the Constitution or federal laws. Whether or not an appropriate cause of action exists is a question going to the merits and therefore decided only after a court has assumed jurisdiction. Since in Bivens, the claim arose under the Constitution, the district court erred in its dismissal of the complaint for lack of jurisdiction.

Mr. Justice Brennan began the opinion of the Court with an examination of the scope and purposes of the fourth amendment. He addressed himself to respondents' contention that the rights petitioner asserts are primarily rights of privacy and are thus creations of state rather than federal law. In this view, the fourth amendment merely serves as a limit to the agents' defense in an action in tort under state law. If the agents are found to have exceeded the bounds of reasonableness under the amendment, they stand before the law as private citizens. Mr. Justice Brennan recognized this as being an "unduly restrictive view," however, and made it clear that the fourth amendment is an "independent limitation upon the exercise of federal power." Thus, the command of the fourth amendment does more than limit federal defenses to a state claim. It is operative whether or not the conduct in question violates state law.

State laws regulating trespass deal with a situation involving two private individuals. This is clearly different, however, from circumstances involving a federal agent and a private individual. For while one may deny entry to another individual, it is highly unlikely that one could merely bar his door against a federal agent demanding admission.

15. 327 U.S. 678 (1946).
16. Id. at 681.
17. 403 U.S. at 394.
Thus, the individual is helpless to protect himself from the unwarranted and unlawful entry of a federal agent. Furthermore, the interests protected by state laws regulating trespass and the invasion of privacy are manifestly dissimilar from those protected by the fourth amendment’s guarantee against unreasonable searches and seizures. Consequently, a state trespass remedy may not really be an effective substitute in a Bivens-type situation.

The major thrust of Mr. Justice Brennan’s opinion is directed to this issue of the scope of the fourth amendment. He is concerned with the interests it is designed to vindicate in contrast to those protected by state trespass laws. Although this is a legitimate area of inquiry, it is not the area wherein the significance of the decision lies. For once it is determined that the case presents an issue under the fourth amendment, the real matter in dispute becomes whether or not the courts can imply a damage remedy to vindicate the interests protected by this constitutional provision. The resolution of this problem is the most significant aspect of this case. It is to this point, therefore, that the other justices address themselves: Mr. Justice Harlan in his concurring opinion, and Chief Justice Burger and Justices Blackmun and Black in their respective dissenting opinions.

Mr. Justice Brennan, however, has little difficulty in accepting the idea of implying a remedy. He merely states that “Historically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”19 As authority for this proposition, he cites four cases,20 none of which is very convincing on this point. Swafford v. Templeton and Wiley v. Sinkler dealt with actions brought against state election officers to recover damages for alleged unlawful rejection of the right to vote in a federal election. In the court of appeal’s decision of Bivens,21 however, Chief Judge Lumbard called attention to the fact that the Supreme Court had considered only the question of jurisdiction in these cases. In addition, he noted that the damage claims were authorized by the Civil Rights Act.22 The Court did not, therefore, address itself to the idea of implying a damage remedy, and “. . . thus, these cases are not persuasive authority for the legitimacy of such a course.”23 The other two cases cited by Justice

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19. 403 U.S. at 395.
21. 409 F.2d at 724.
23. 409 F.2d at 724.
Brennan\textsuperscript{24} on this issue suggest the common law as a basis for a remedy. Yet in these cases, the Court did not directly concern itself with the novelty of implying a remedy. Rather, both opinions were addressed principally to violations of the fourteenth amendment's guarantee of equal protection. Consequently, it does not appear that the cases relied upon are determinative of this question. The weakness of these cases as authority intimates that the action taken by the Court in\textit{Bivens} is indeed more novel than the tone of Mr. Justice Brennan's opinion suggests. Nevertheless, he simply concludes that in the absence of a Congressional declaration to the contrary, Petitioner Bivens is entitled to recover money damages for injuries incurred as a result of a violation of his fourth amendment rights by federal agents.

It is therefore apparent that the point at issue is not a question of the \textit{power} of the federal courts to award a remedy for the violation of constitutionally protected interests. For as Mr. Justice Harlan states in his concurring opinion, this ability of federal courts to accord damages does not depend upon specific statutory authorization. This point is illustrated by \textit{J. I. Case Co. v. Borak}\textsuperscript{25} where the petitioner claimed damages as a result of a violation of Section 14 of the Securities Exchange Act. Although the Act itself makes no explicit reference to a private right of action, the Court held that one of the chief purposes of the Act is protection of investors. It was decided that the realization of this purpose necessarily implies the availability of judicial relief where appropriate. "It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."\textsuperscript{26} The\textit{Borak} court then quoted\textsuperscript{27} the broad language of \textit{Deckert v. Independence Shares Corp.}:

\begin{quote}
The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures normally available to the litigant according to the exigencies of the particular case.\textsuperscript{28}
\end{quote}

This theory of implying a damage remedy to effectuate Congressional policy has also been employed in other situations involving the violation of a federal statute.\textsuperscript{29}

\textsuperscript{25} 377 U.S. 426 (1964).
\textsuperscript{26} \textit{Id.} at 433.
\textsuperscript{27} \textit{Id.} at 433-34.
\textsuperscript{28} 311 U.S. 282, 288 (1940).
There are two different implications of the Court's decision to imply a damage remedy in *J. I. Case v. Borak.*\(^{30}\) Firstly, the holding in the *Borak* case negates the contention that specific statutory authorization is necessary to imply a remedy to make effective the right of recovery afforded by the particular act involved. Secondly, the decision makes it clear that it is not the particular nature of the damage remedy which is incapable of accurate determination by the federal courts. It is also noteworthy\(^{31}\) on the subject of the nature of the remedy that under the Civil Rights Act\(^{32}\) Congress has left to the courts the task of developing a damage remedy. The statute merely creates a civil action for damages to redress deprivation of federal rights by persons acting under color of state law. No guidelines are given to aid the courts in fashioning a remedy and yet, the courts have been able to shape the content of the relief. On the basis of experience with this statute, as well as with cases in which the Court has implied a remedy in damages, it is clear that the granting of compensatory relief does not involve policy considerations insusceptible of judicial discernment.

Having established that the problem is not the particular remedy of damages which demands explicit Congressional authorization, Mr. Justice Harlan adverts to the possibility that it is the status of the interest as constitutionally protected that creates the difficulty of implying a remedy. He suggests that because equitable relief is available against threatened invasions of constitutionally protected interests,\(^{33}\) it does not appear to be the nature of the interest that is controlling. This discussion seems to be a rather academic one. For it would be difficult to accept a determination which concluded that the federal courts are empowered to devise a remedial system to enforce Acts of Congress but not the Bill of Rights.\(^{34}\) Thus, it is clearly not the fact that the right Bivens claims is constitutionally protected that prevents the court from providing a damage remedy.

It is therefore evident that there is no actual issue as to the power of the Court to authorize a damage remedy for a violation of the

\(^{30}\) 377 U.S. 426 (1964).
fourth amendment. It is apparent that the federal courts have power under a general grant of jurisdiction to imply a remedy for the enforcement of a constitutional right. Thus to say, as do Mr. Justice Black and Chief Justice Burger, that the Court lacks the power to accord relief in this situation in the absence of Congressional authorization does not even deal with the most significant issue in the suit. Similarly, the opinion of the Court does not reach the crux of the problem presented by merely stating that the Court does have the power and will therefore imply a remedy. The important issue is that with which Mr. Justice Harlan in the concurring opinion and Chief Judge Lumbard in the opinion for the court of appeals concern themselves:

General grants of jurisdiction have been used on rare occasions to formulate rules or remedies revolving around an established federal right, even absent explicit statutory authority for the evolution of federal common law in these areas. The question before us is whether a similarly appropriate occasion for the implication of a federal remedy is presented by this complaint.\(^{35}\)

Thus the Court was actually presented with a policy question of whether it should make a damage remedy available in this sort of fact situation. The resolution of this issue involves a consideration of those situations in the past in which the Court has implied a remedy for the vindication of fourth amendment rights. The Court must determine whether these other remedies which have been devised provide sufficient relief for the invasion of rights guaranteed by the fourth amendment.

The initial determination that must be made in deciding if a remedy should be implied is the selection of the proper test to be applied to this situation. Is relief accorded only when it is "essential" or "indispensable for vindicating constitutional rights?"\(^{36}\) Or is a remedy made available only if, in the absence of relief, the right is but a "mere form of words?"\(^{37}\) It is Mr. Justice Harlan's opinion that a different standard should govern in this area: "The question then is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."\(^{38}\) As contended by Professor Hill,\(^{39}\) "The test surely must be whether the constitutional right is impaired substantially, not whether it is impaired virtually to the vanishing point." Indeed it seems unreasonable to apply such a stringent test in

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35. 409 F.2d at 722.
36. 403 U.S. at 406.
38. 403 U.S. at 407.
according relief for rights which are so basic as to be embodied in the Bill of Rights.

This analysis calls into question the rationale underlying the granting of a remedy for a violation of fourth amendment rights. Is the purpose of according relief merely to deter future unlawful behavior and to induce police to conform to the requirements of the law? Should Bivens' right to relief turn simply on the deterrent effect which liability will have on federal official conduct? Justice Harlan feels otherwise:

I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.40

Yet it is not only the theory underlying the furnishing of a remedy which is at issue. More importantly, the philosophy behind the Bill of Rights in general, and the fourth amendment in particular, becomes the subject of inquiry. Is the primary thrust of the Bill of Rights merely to shield citizens from certain unlawful conduct by officers of the government? Or is it perhaps a sword directed against government officials? If indeed the fourth amendment embodies a right to privacy against unwarranted governmental action, should it not be enforceable against those officers who violate this right?

These are some of the questions which are relevant to consider before arriving at a determination of this issue. Yet Mr. Justice Brennan did not even mention these points. Mr. Justice Harlan, in contrast, examined these problems, and he concluded that compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted.

This conclusion may perhaps reflect a lack of faith in the efficacy of existing remedies.41 As noted by the court of appeals, "The existing remedies for an unconstitutional search and seizure may not provide a totally effective enforcement scheme for Fourth Amendment rights..."42 The court of appeals reasoned, nevertheless, that these remedies do "substantially vindicate the interests protected by the Amendment."43

The first of these other remedies available for a violation of the fourth amendment is the Exclusionary Rule44 which protects the victim of an illegal search and seizure against prosecutorial use of illegally

40. 403 U.S. at 408.
42. 409 F.2d at 725.
43. Id. at 725.
44. Supra note 10.
seized evidence. The primary purpose of this rule is to deter future unconstitutional conduct. It is noteworthy that this remedy affords no compensatory relief and is of no value to the innocent victim. A second possibility is that the plaintiff may seek injunctive relief to protect himself against future invasions of privacy; yet this provides no remedy for past violations. Thirdly, a plaintiff may have a damage action for violation of state trespass laws, but as discussed earlier, there are several disadvantages in pursuing such a course. In addition to those reasons previously mentioned, a civil action in trespass has been described as an "illusory remedy," due to other factors as well. Officers can often avoid all but nominal damages because the measure of recovery is usually limited to the extent of injury to physical property. In addition, it is difficult to collect punitive damages because if permitted at all, the award often depends on a showing of malice which is ordinarily not an element in an honest pursuit.

The only other possible remedy for a violation of the fourth amendment is criminal prosecution of federal officers; yet this, too, offers no compensatory relief. Moreover, as the Court has recognized, it is highly unlikely that a United States Attorney will prosecute his subordinate.

Thus, it appears that the remedies available prior to the adoption of the damage remedy in Bivens offer little consolation to the innocent victim of an illegal search and seizure. Therefore, these remedies do not substantially vindicate the rights protected by the fourth amendment. As noted by Mr. Justice Harlan, "[F]or people in Bivens' shoes, it is damages or nothing." One who suffers great humiliation, embarrassment and suffering can pursue no other remedy which will compensate him for the injuries he has incurred due to the violation of his constitutional rights. It is evident that implying a damage remedy is both "necessary" and "appropriate" to a fuller realization of fourth amendment rights.

45. See Bell v. Hood, 71 F. Supp. 813, 819 (S.D. Cal. 1947) where there is dicta to this effect.
46. See p. 205 supra.
48. Id. at 43; Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 498 (1955).
52. 403 U.S. at 410.
THE REASONING OF THE DISSENTS

Mr. Chief Justice Burger criticizes the holding as a contravention of the doctrine of separation of powers. It is his belief that the Court, in providing a damage remedy for violations of fourth amendment rights, is impinging upon the legislative and policy functions which are vested in Congress by the Constitution. The Chief Justice does not, however, address himself to this aspect of the issue. Rather, he takes advantage of this case as an opportunity to voice his vigorous opposition to the Exclusionary Rule. Chief Justice Burger feels this rule is a “drastic remedy” which is “conceptually sterile and practically ineffective in accomplishing its stated objective.” He describes it further as “... the universal capital punishment we inflict on all evidence when police error is shown in its acquisition.” Thus, it is his belief that the Court should not attempt to devise its own means for the enforcement of the fourth amendment. The Chief Justice made it clear that he is not advocating judicial abandonment of the Exclusionary Rule until Congress enacts a statute providing for an effective remedy and he thus proposed, in broad terms, a possible structure for a statute to effectuate this end. It provides a cause of action in damages which shall exist in lieu of the exclusion of illegally obtained evidence. Yet if this act were formulated and enacted by Congress, an individual could be sentenced to prison on the basis of unlawfully obtained evidence. In such a situation a person would be unlikely to succeed in a damage action due to procedural difficulties and moral stigma. To this degree a police officer would be less deterred from committing such illegal acts.

Perhaps the concern here is not affording redress to an individual convicted of a crime, but rather to the innocent victim of an illegal search. Yet was not the fourth amendment intended to protect all citizens? And is it possible to ignore the “guilty” and yet effectively protect the rights of the “innocent”? For if police deterrence is a goal, to the extent that one convicted might not effectively utilize the damage remedy, government officers who themselves are convinced that a suspect will be convicted are substantially less deterred from perpetrating an illegal search. It cannot be doubted that illegal

53. 403 U.S. at 415.
54. Id. at 419.
55. Id. at 422-23.
56. Foote, supra, note 48, at 507-08.
searches would thereby be increased. Thus, compensatory relief is certainly not an adequate substitute for the Exclusionary Rule.

It should be noted that Chief Justice Burger criticizes the Exclusionary Rule for its failure to penalize the officer whose illegal conduct resulted in the exclusion of the evidence in a criminal trial. Thus the sanction which results from the application of the Rule is visited upon the prosecuting official rather than upon the offending officer. This is, indeed, a valid observation. Yet it certainly does not address itself to the holding of the Court in *Bivens*. For predicking a damage action on the fourth amendment corrects this injustice and places the penalty directly on the guilty offender. Thus this aspect of the Chief Justice's argument is not convincing. The weakness of this point is most probably due to the fact that Chief Justice Burger is more concerned with the eventual abrogation of the Exclusionary Rule than with the action taken by the Court in *Bivens*.

The Chief Justice insists that the Exclusionary Rule has not resulted in meaningful redress for many of the innocent victims of police error. He cites many sources which support this view. Effective relief, he feels, should be provided. He emphasizes his belief, however, that Congress should rectify this situation and not the courts; for it is not within the province of the courts to legislate.

Mr. Justice Black, too, dissented from the majority holding as a result of his strict construction of the Constitution. He shares the conviction of the Chief Justice that the Constitution does not give the judiciary power to imply a remedy for a violation of the fourth amendment.

Mr. Justice Black reiterates the fact mentioned by the court of appeals that the failure of Congress to provide a damage remedy in this situation is not the result of inattention to the problem involved. For Congress has created a federal cause of action against officials who deprive individuals of Constitutional rights while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." It may be presumed from the enactment of this statute that if Congress wished to create a comparable action against officials acting under color of federal law it would have done so by direct legis-


lation. For this reason, Mr. Justice Black feels a strong inference can be drawn that Congress does not wish to permit such suits against federal officials.

Mr. Justice Black also expressed a fear that providing a damage remedy against federal officials might deter them from the proper performance of their duties.\(^6\) This is indeed a legitimate concern. In response to this, however, it may be noted that damage actions already are permitted against state officials.\(^6\) It has been suggested that a fear of less efficient performance is unwarranted\(^6\) for, by carefully delineating the scope of official immunity, effective police work will not be hampered.

Mr. Justice Black also dissented from the majority opinion on the ground of judicial efficiency. Because of the “growing number of frivolous lawsuits”\(^6\) and the unprecedented volume of cases already before the Court, there are other needs more pressing than that presented by \textit{Bivens}. The resources of lawyers and judges should be devoted to other causes “rather than to civil damage actions against officers who generally strive to perform within constitutional bounds.”\(^6\)

Mr. Justice Blackmun shares this concern, expressed in his dissenting opinion as a fear of an “avalanche of new federal cases.”\(^6\) It has been noted,\(^6\) however, that if the federal cause of action were not available and the petitioner brought suit in a state court, the action would be removed to a federal court. Thus, the question would only be one of substantive law and not a question of forum. It therefore appears that an objection on the basis of an increase in the number of cases litigated in the federal courts is an unfounded one.

An analysis of the dissenting opinions in \textit{Bivens} reveals the fact that the objections of the three justices are rather peripheral to the holding of the majority. The Chief Justice is primarily concerned with the Exclusionary Rule, while Justices Black and Blackmun direct much of their attention to the overcrowding of the docket resulting from the creation of a new federal cause of action.

\textbf{THE IMMUNITY QUESTION}

After deciding that the fourth amendment authorizes a private suit

\(^{59.}\) 403 U.S. at 429.  
\(^{62.}\) 403 U.S. at 428.  
\(^{63.}\) Id. at 429.  
\(^{64.}\) Id. at 430.  
\(^{65.}\) 403 U.S. at 391 n.4.
for damages caused by an unreasonable search and seizure, the question then arises as to whether federal agents acting in their official capacity, but in violation of their lawful and constitutional authority, are immune from suit under the doctrine of sovereign immunity. The Supreme Court did not consider this question because it had not been decided by the court of appeals. Nevertheless, an inquiry into some of the basic principles which are applied in this area is of interest in determining the ultimate outcome of a suit against federal officers for a violation of fourth amendment rights.

The issue of immunity from suit rests upon what the court determines to be the scope of authority of the government official involved:

As to judicial, legislative and executive officers, the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful conduct is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. Thus, if it is decided that the conduct in question was performed within the scope of his authority, the officer is immune from suit. If it is found, however, that the act falls outside that scope, the cloak of immunity is lost.

It therefore becomes necessary to define what is meant by the "scope of authority" and to see how courts have interpreted this concept. It will then perhaps be possible to apply this analysis to the situation in Bivens.

Recent cases have interpreted the concept of the scope of authority rather broadly. The reason for this broad definition has been explained by Judge Learned Hand. It is his contention that although an official who acts maliciously should not escape liability for injuries he may cause, it is impossible to ascertain the validity of a claim until the official has been tried. To expose officers to the constant threat of suit and the burden of proving good faith, Judge Hand maintains, would discourage diligent law enforcement. In order to prevent this result, it is necessary to expand the area in which the official may act with impunity. It is apparent that the danger of deterring officials from the proper performance of their duties by subjecting them to the threat of suit has been thought to outweigh the interest in compensating the individual for injuries due to wrongful acts of government offi-

cials. The Supreme Court adopted this viewpoint in Barr v. Mateo, by express approval of Judge Hand's analysis of the situation. The Court concluded that action taken within the outer perimeter of the officer's line of duty is sufficient to invoke the privilege of immunity. Thus, the majority of courts that have litigated the question have held that law enforcement officials are immune from civil suits based on allegedly malicious acts. There are few cases which express the contrary viewpoint, and those which do so are not very convincing. It should be noted, however, that according to Judge Hand's analysis, each case should be decided on its facts, for in each there must be a balancing of evils. Thus the gravity of the behavior involved is a factor to consider. In addition, a distinction must be made between the different types of government officers. For it appears from cases which have decided the issue that immunity is more readily conferred on those closely identified with judicial departments of the government.

From an analysis of cases in this area, it becomes evident that the requirement that the act be within the scope of authority is not a very meaningful one. For the distinction as drawn by the courts is rather ill-defined, never delineating what is outside this "scope." The description of this concept by the court in Norton v. McShane illustrates this point:

The requirements [sic] that the act be within the outer perimeter of the line of duty is no doubt another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision and not be manifestly or palpably beyond his authority. There is considerable difficulty in determining what acts have "more or less" connection with an officer's "general" duties. And it has been held that acts which were allegedly "willful, malicious, and unlawful" still rendered the officers immune from suit. Thus what can be meant by "manifestly or palpably beyond authority"? These qualifications obviously leave considerable room for debate.

It seems that officers should be responsible at least in some circumstances for their illegal actions. For as Judge Gewin points out in his dissenting opinion in Norton, government officers can best engender

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70. See Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926); Norton v. McShane, 323 F.2d 855 (5th Cir. 1964).
71. 332 F.2d at 858-59.
the respect to which they are entitled by respecting the rights of others. If officers willfully and maliciously violate constitutional rights, they are not likely to command respect.

In a situation where an officer flagrantly deprives an individual of his fourth amendment rights, the officer should be held responsible for his actions. For as Judge Gewin observed, it is paradoxical to say that a malicious violation of the United States Constitution is "committed by law" to the control of an officer. Patently unlawful and malicious conduct can never be within an official's scope of authority. No man is given license to violate the Constitution and no man should be cloaked with immunity for such conduct.

There can be no possible justification for conferring immunity upon an officer who willfully and knowingly deprives an individual of his constitutional rights. This viewpoint is supported by the opinion of the Ninth Circuit in *Hughes v. Johnson* where the court stated that immunity does not extend to a search without a warrant and unsupported by arrest. This view should govern in the case of an illegal search, whether or not it is incidental to an arrest, if the search is found to be in violation of an individual's constitutional rights.

Thus, although Judge Hand's rationale for conferring immunity on government officers and thus not deterring them in the performance of their duties is a convincing one, there is an opposite viewpoint which is perhaps even more convincing. As Mr. Justice Brennan states in his dissenting opinion in *Barr v. Mateo*:

It is stretching the argument pretty far to say mere inquiry into malice would have worse consequences than the possibility of actual malice. . . . [T]he courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business. Such a burden is hardly one peculiar to public officers; citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice.

Thus it certainly would seem that those employed to enforce the law should be subject to it themselves, at least in the case where their violation is malicious, willful or so flagrant as to negate the possibility of good faith.

73. *Id.* at 864-65.
74. *Id.* at 866.
75. 305 F.2d 67, 70 (1962).
76. 360 U.S. at 588-89.
Although the Court in *Bivens* did not address itself to the question of immunity, there is dictum in the concurring opinion of Mr. Justice Harlan on the issue:

But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the nation's government stand ready to afford a remedy in these circumstances.\(^{77}\)

Thus although it is recognized that the interests of effective law enforcement necessitate a protective zone of behavior, this zone is not an unlimited one. Therefore it should be recognized that officers who willfully violate an individual's constitutional rights would be amenable to the laws which they endeavor to enforce. The individual, too, has a right to privacy and a zone surrounding this right which should not be invaded—certainly not in the name of the law.

**CONCLUSION**

"The case has significance far beyond its facts and holding."\(^{78}\) Thus, Chief Justice Burger feels that an analysis of the Court's decision in *Bivens* makes manifest the far-reaching implications of a judicially created damage remedy for violation of the rights guaranteed by the fourth amendment. It can therefore be inferred that the extent of the holding in *Bivens* goes beyond this particular fact situation.

It is difficult, however, to accurately assess the implications of the result in *Bivens* at this time since certain very important questions have not been answered. Firstly, the immunity issue must be resolved. It would seem incongruous, however, for the Court to have granted certiorari and created a new cause of action while at the same time rendering it somewhat moot by an overly broad construction of immunity. Apparently the Court at least felt that there is some limitation to the concept of the "scope of authority." In addition, rules of immunity for state officers under the Civil Rights Act\(^ {79}\) have been formulated which suggest that in the absence of good faith and probable cause, an officer may be held liable for unlawful conduct.\(^ {80}\) Thus

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77. 403 U.S. at 411.
78. *Id.* at 412.
it appears that the doctrine of official immunity does indeed have some boundaries.

Secondly, it is necessary to more clearly define the measure of damages in the action created by the *Bivens* Court and to differentiate this from a state trespass action. In the latter situation, recovery may be limited to injury to property. This new cause of action, to be meaningful, must provide for additional compensation, the limits of which must be delineated.

It should also be noted that the concept of regarding the fourth amendment as more than a mere "shield" opens the door to the possibility of viewing other amendments in a similar fashion. Thus, it may be found, for example, that a damage remedy can be predicated on the first amendment, 


* On remand, the Second Circuit has recently held that the officers in *Bivens* were not entitled to immunity, even though their actions were held to be within the scope of their duty. Because the actions were ministerial, and not founded upon a good faith reasonable belief in their legality, the court refused to confer immunity upon the officers. *Bivens* v. Six Unknown Named Agents of Federal Bureau of Narcotics, 40 U.S.L.W. 2608 (2nd Cir. March 8, 1972).

While, as aforementioned, certain important issues remain unresolved, the very fact that the Supreme Court did, at this time, exercise its discretionary power to imply such a damage remedy at all, and one capable of analogous application to other amendments, is itself momentous. If, in addition, the immunity question is decided for the petitioner, *Bivens* will have a dramatic effect on a federal official's accountability for his actions.

**ANN ROSEN**