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tice Powell ignored that no search warrant had issued at any time—a fact that could have served as a more persuasive basis for distinction. This failure to comment may indicate that the absence of a search warrant is not important to a majority of the Court and leads to one of two conclusions: Either the Court is encouraging warrantless searches in the absence of the traditional exceptions to the warrant requirement,[39] or it recognizes that if search warrants are required, the police will simply fabricate them. Nevertheless, the requirement of a warrant seems the most significant way to restrict *Calandra*. A second limitation would be to grant standing to suppress evidence to all those defendants whom the police reasonably expected to be implicated by the illegal search.[40] This would remove the incentive to violate *O*'s rights and would encourage police compliance with fourth amendment guarantees, since evidence gathered in a legal search could still be used. In light of the majority's exclusionary rule analysis, however, adoption of this restriction does not appear likely.

Of course, the result in *United States v. Calandra* does not compel the police to knowingly violate the fourth amendment, nor does it invite them to do so. But the overbroad conclusion arguably encourages such activity. It may be that the Court felt that the only practical application of *Calandra* is in the investigation of organized crime. The potential for abuse, however, transcends the facts in *Calandra* and threatens the right of privacy of all citizens. It is to be hoped, therefore, that the Court will take the earliest opportunity to place workable limitations on the *Calandra* doctrine.

Robert S. Adams

CONSTITUTIONAL LAW—FEDERAL COURTS—JUDICIALLY CREATED REMEDIES—DAMAGES FOR VIOLATION OF FIRST AMENDMENT—The United States District Court for the District of Hawaii has held that damages are recoverable in a federal action under the Constitution

39. The fourth amendment does not require a search warrant in all cases. It requires only that searches be reasonable. Thus, the Court has authorized warrantless searches where the object of the search is highly mobile, Carroll v. United States, 267 U.S. 132 (1925) (automobile); where the officers are conducting a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); or are in hot pursuit of a suspect, Warden v. Hayden, 387 U.S. 294 (1967).

40. *See* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

against United States military personnel for violation of first amendment rights.

Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973).

Willis Butler and his co-plaintiffs came to Hickam Air Force Base on August 30, 1972 along with other members of the public who had come to witness the arrival of President Richard M. Nixon for a conference with Japanese Premier Tanaka. Butler and those accompanying him planned to demonstrate peacefully their opposition to the President's Vietnam war policies and to his campaign for reelection. The plaintiffs arrived at the base in three cars. The occupants of the first two cars (plaintiffs—cars *A* and *B*)[1] were admitted to the base but denied access to the area where the President was to be greeted. They were detained for one and one-half hours, fingerprinted, photographed, and issued form letters barring them from the base. The third car was stopped at the gate and the occupants (plaintiffs—car *C*)[2] were denied admittance altogether.

Plaintiffs brought suit in the United States District Court for the District of Hawaii,[3] alleging seven causes of action;[4] the first two[5] are within the scope of discussion of this note. The first cause of action, brought under the United States Constitution by plaintiffs—cars *A* and *B*, against the individual military personnel allegedly responsible for their detention and exclusion, sought money damages for violation of plaintiffs' first,[6] fourth[7] and fifth amendment[8] constitutional rights. The second cause of action, brought by plaintiffs—car *C*, asked money damages for violation of their first and fifth amendment rights. Defendants moved for dis-

1. Butler v. United States, 365 F. Supp. 1035, 1038 nn.1 & 2 (D. Hawaii 1973).
2. *Id.* n.3.
3. Jurisdiction was based on 28 U.S.C. § 1331(a) (1970).
   The district courts shall have original jurisdiction of all civil actions 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.
4. 365 F. Supp. at 1038.
5. *Id.* at 1039.
6. U.S. CONST. amend. I, states: "Congress shall make no law . . . abridging the freedom of speech . . . . "
7. U.S. CONST. amend. IV, reads in pertinent part: "The right of the people to be secure in their persons . . . papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "
8. U.S. CONST. amend. V, provides: "[N]or shall any person . . . be deprived of . . . liberty . . . without due process of law . . . . "

missal and, alternatively, for summary judgment.[9] Relying principally upon *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[10] and to a lesser degree upon *United States ex rel. Moore v. Koelzer*,[11] the court reasoned that the *Bivens* principle should be extended to reach violations such as those alleged in the first and second causes of action and denied defendants' motions for dismissal and summary judgment.

After acknowledging that the facts alleged in the first cause of action brought plaintiffs' fourth amendment claim within the principles of *Bivens*, the court cited *Moore* for the proposition that the *Bivens* rationale extended to damages for fifth amendment violations. The court then abandoned specific discussion of the fourth and fifth amendment causes of action and took up the problems presented by the first amendment claim.

The court stated initially that the "irresistible logic" of *Bivens* led to the conclusion that damages are recoverable for first amendment violations. Beginning with this positive statement, the court proceeded to counter potential arguments that would seem to refute this irresistible logic.

The court asserted that first amendment rights were not less important than fourth or fifth amendment rights,[12] and declared that the first amendment rights have been historically interrelated with fourth and fifth amendment rights from their earliest origins.[13] The

9. 365 F. Supp. at 1038.

10. 403 U.S. 388 (1971) [hereinafter referred to as *Bivens*]. The Court there held that damages were recoverable in an action brought under the United States Constitution against federal officers for violation of plaintiff's fourth amendment rights.

11. 457 F.2d 892 (3d Cir. 1972). The *Moore* court held that damages were recoverable in an action brought under the United States Constitution against federal officers for violations of plaintiff's fifth amendment rights.

12. 365 F. Supp. at 1039. This is unquestionably true in view of such cases as Saia v. New York, 334 U.S. 558 (1948), and Marsh v. Alabama, 326 U.S. 501 (1946), which elevated the first amendment to what must be considered a judicial pedestal, even among constitutional rights.

13. 365 F. Supp. at 1039, *citing* Stanford v. Texas, 379 U.S. 476 (1965), which quoted approvingly from the dissenting opinion of Mr. Justice Douglas in Frank v. Maryland, 359 U.S. 360, 376 (1959), in support of the perceived relationship.

> "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of Entick v. Carrington [19 Howell's State Trials 1029 (C. P. 1765)] . . . . These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'"

379 U.S. at 484-85. Entick v. Carrington, referred to in the foregoing quotation as the common foundation for the first, fourth and fifth amendments, has indeed been frequently so

court then noted that first amendment rights are among personal liberties protected by the fifth amendment due process clause against federal intervention.[14]

It was admitted by the court that an obvious difference between the *Bivens* situation and that presented in the instant case was that Bivens had had the option of suing in trespass in the state courts, whereas no parallel state tort actions existed in the area of first amendment rights.[15] Thus, it was at least arguable that *Bivens* had merely recognized the practical convenience of permitting an original federal action where a state action was available, but would usually result in removal to federal court. This reading of *Bivens* was, however, flatly rejected in view of the express statement by the *Bivens* Court that the fourth amendment limits the conduct of federal officers whether or not the state would penalize identical conduct on the part of a private citizen.[16]

Having discovered no reason not to apply *Bivens*, the court offered two affirmative arguments for extending the principle advanced in that case. The court pointed out that under 42 U.S.C. § 1983[17] damages are recoverable for the deprivation of first amendment rights under color of state law.[18] The court found no special difficulties in the application of similar principles to damage actions

considered; *see, e.g.*, Marcus v. Search Warrants of Property, 367 U.S. 717, 728-29 (1961). Entick was the editor and publisher of a newspaper believed to be seditious. Three messengers of the King ransacked his home, confiscating his private papers, and were subsequently sued for trespass. Their defense of justification was rejected.

14. *See, e.g.*, United States v. Korner, 56 F. Supp. 242, 246-47 (S.D. Cal. 1944). The *Butler* court noted the analogous incorporation of first amendment rights into the fourteenth amendment, resulting from the finding that first amendment freedoms were personal liberties protected by the fourteenth amendment due process clause. 365 F. Supp. at 1040.

15. 365 F. Supp. at 1040.

16. 403 U.S. at 392.

17. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1970), provides:

> 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.

18. 365 F. Supp. at 1040 n.12, *citing* Perry v. Sindermann, 408 U.S. 593 (1972); Winters v. Miller, 446 F.2d 65 (2d Cir. 1971); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970); Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970); Fulton v. Emerson Elec. Co., 420 F.2d 527 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962); Davis v. Board of Trustees, 270 F. Supp. 528 (E.D. Ark. 1967), *aff'd*, 396 F.2d 730 (8th Cir. 1968).

It is unclear from the opinion whether this line of cases was cited as an argument for

against federal officers under the first and fifth amendments.[19] Moreover, it noted that unnecessary difficulties were presented by the application of different standards.[20]

Noting the lack of any practicable alternative remedy, the court found the damages remedy to be particularly well suited to relief for first amendment violations such as those alleged.[21] Questions of good faith and official immunity defenses were reserved for a full evidentiary hearing.[22]

As the foregoing synopsis indicates, the keystone of the court's rationale was its reading of *Bivens*, augmented to some degree by *Moore* and by some independent analysis of the compatibility of the damage remedy with first amendment rights. The *Butler* court offered little in the way of explanation for its interpretation of *Bivens*; yet, the court's appraisal of this leading case seems accurate.

Prior to *Bivens*, the problems relating to judicially created remedies for violation of constitutional rights had been thoughtfully explored by only a few legal commentators,[23] and by even fewer judges.[24] Decisions granted relief,[25] seemingly without awareness of

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extending *Bivens* or as an indication of the standards which should apply to the new cause of action if the *Bivens* principle is expanded to include first amendment violations. The placement of the § 1983 discussion with the arguments justifying the new cause of action supports the former of the two possible readings.

19. 365 F. Supp. at 1040.

20. *Id.*, *citing* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973), *in contrast to* Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971).

21. "Where the occasion for exercising First Amendment rights has passed, a private damage action affords the only practicable means of redressing the kind of wrong alleged." 365 F. Supp. at 1040.

The court also quoted from the thorough concurrence of Mr. Justice Harlan in *Bivens*:

> [I]t would be at least 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.

Id. at 1041, *quoting* 403 U.S. at 403-04.

22. 365 F. Supp. at 1045.

23. Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); 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]; 83 HARV. L. REV. 684 (1970); 48 TEXAS L. REV. 219 (1969).

24. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

the issues that later tantalized legal scholars.[26] Others denied the desired remedy, either without independent analysis[27] or on grounds not relating to the constitutionality or propriety of judge-made constitutional remedies.[28] The availability of injunctive relief was long taken for granted.[29] Recent attempts at analysis[30] have suggested that the power to grant injunctive relief may rest upon the absence of equity jurisdiction early in the history of some state courts. It may also be implied directly from the Constitution or as a necessary corollary of the power of judicial review established in *Marbury v. Madison*.[31]

The first case prior to *Bivens* that drew general attention to the possibility of awarding damages for deprivation of constitutional rights was *Bell v. Hood*.[32] In *Bell*, the Supreme Court held that the federal courts had jurisdiction under 28 U.S.C. § 1331 over a claim for damages asserted against federal officers who had violated plaintiff's fourth amendment rights. Decision on the merits was left to the lower court, which ultimately denied the damage claim.[33] The

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Mapp and *Weeks* dealt with the unique exclusionary remedy, which has given rise to some criticism and to some arguments in its favor which are distinct from those relating to the damage remedy.

25. Jacobs v. United States, 290 U.S. 13 (1933) (taking property without just compensation remedied by granting just compensation); Swafford v. Templeton, 185 U.S. 487 (1902) (granting damages for denial of right to vote approved).

26. Katz, *supra* note 23. A partial listing of the many issues debated would include: the Constitution as a political document v. the Constitution as law; the state tort action as the proper vehicle for redress v. the federal cause of action; the Congress as the only institution qualified to grant a damage remedy v. the capacity of the judiciary to do so.

27. Johnston v. Earle, 245 F.2d 793, 796-97 (9th Cir. 1957); Garfield v. Palmieri, 193 F. Supp. 582, 586 (E.D.N.Y. 1960), *aff'd per curiam*, 290 F.2d 821 (2d Cir.), *cert. denied*, 368 U.S. 827 (1961). Both relied upon Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

28. *See* Wheeldin v. Wheeler, 373 U.S. 647 (1963) (no constitutional violation demonstrated); Wiley v. Sinkler, 179 U.S. 58 (1900) (allegations insufficient to support granting damages for denial of the right to vote); Holt v. Indiana, 176 U.S. 68 (1900) (amount in controversy requirement not met); United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965) (emphasis on applicability of civil rights statute rather than on the Constitution); Koch v. Zuieback, 194 F. Supp. 651 (S.D. Cal. 1961), *aff'd*, 316 F.2d 1 (9th Cir. 1963) (damages for conscription denied because conscription found not violative of the Constitution).

29. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908) (granting an injunction based upon constitutional violation).

30. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969).

31. 5 U.S. (1 Cranch) 60 (1803).

32. 327 U.S. 678 (1946).

33. 71 F. Supp. 813 (S.D. Cal. 1947).

district court reasoned as follows: The fourth amendment is directed at federal action only. Since the federal government had not consented to suit, the action necessarily proceeded on the premise that the officers had exceeded their authority and thus lost official immunity. The suit, therefore, was in fact directed at the officers as individuals, to whom the commands of the fourth amendment were inapplicable.[34] This remarkable reasoning, as one notable commentator pointed out, relies on the erroneous assumption that the concept of color of federal authority does not exist.[35]

More than a decade and a half elapsed before the question of damages for fourth amendment violations again reached the Supreme Court. In *Wheeldin v. Wheeler*,[36] the Court avoided the question by its finding that no fourth amendment violation had occurred.[37] Scholarly debate persisted,[38] but, prior to *Bivens*, no court took occasion to rethink the issue.[39]

In the interim before *Bivens*, the related processes of implying remedies[40] and creating remedies[41] based upon federal statutes did, however, receive extensive judicial attention. In these areas, initiative by the judiciary was accepted practice, and rules were developed to guide the process. The power of the federal courts in this area had been broadly stated and was thought to be limited only by boundaries rather clearly imposed by the written law being implemented.[42] Generally speaking, remedies would be created where "necessary" or "appropriate" to effectuate the legislative policy.[43]

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34. *Id.* at 817. The doctrine is well established that a federal officer is stripped of official immunity by virtue of his unlawful act; *see, e.g.*, Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

35. Katz, *supra* note 23, at 4. This appraisal was shared by the court of appeals in *Bivens*, 409 F.2d at 721.

36. 373 U.S. 647 (1963).

37. *Id.* at 650.

38. *See, e.g.*, note 23 *supra*.

39. Cases cited notes 27, 28 *supra*. All rejected the remedy.

40. *See, e.g.*, Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

41. *See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

42. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 472 (1942) (Jackson, J., concurring):

> Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.

Id.

43. *See, e.g.*, United States v. Standard Oil Co., 332 U.S. 301, 307 (1947).

The court of appeals decision in *Bivens* was the first thorough judicial reconsideration of damages for constitutional violations to emerge.[44] Like all the other post-*Bell* decisions to that date,[45] *Bivens* rejected the independent fourth amendment damages claim. It did so, however, by expressly declining to follow the rationale of the district court in *Bell*.[46] Instead, it proceeded to carefully analyze the existing law and policy in the area.

This analysis began with *Entick v. Carrington*,[47] the commonly acknowledged genesis of the fourth amendment, and other early English decisions[48] which vindicated violations of fourth amendment-type rights through common law trespass actions. The court reasoned that it was this type of action, initiated in state court, that the drafters of the amendment contemplated as the means of its enforcement through private actions. In such actions the fourth amendment would serve to negate the defense of federal justification on the part of any federal official. The court rejected the notion that the drafters necessarily intended to establish a new federal cause of action to vindicate violation of the rights created by the amendment.[49] In support of this viewpoint, it noted that general jurisdiction over cases based upon the presence of a federal question did not even exist at the time the amendment was drafted.[50]

Acknowledging that general federal question jurisdiction now existed, and that the federal courts had on rare occasions formulated remedies for violation of federal statutes which failed to specify a method to vindicate the statutory policy, the court admitted that the same power would appear to exist with regard to the Constitution.[51] Three situations were cited in which the power to devise constitutional remedies seemingly had been recognized.[52] Generally,

44. 409 F.2d 718 (2d Cir. 1969).

45. Cases cited notes 27, 28 *supra*.

46. 409 F.2d at 720.

47. 19 Howell's State Trials 1029 (C.P. 1765).

48. Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

49. 409 F.2d at 721.

50. *Id.*

51. *Id.* at 722.

52. *Id.* at 724. The first was the injunction for threatened or continuing constitutional violations. The court suggested that this remedy had developed in part from the lack of equity jurisdiction in many states, and in part as a necessary concomitant of the power of judicial review established by Marbury v. Madison, 5 U.S. (1 Cranch) 60 (1803). Neither of these bases existed in the *Bivens* situation.

however, the court was convinced that without some statutory basis[53] for granting the remedy, the judiciary should not embark upon the formulation of a damage remedy that was not absolutely essential.[54]

With this foundation, the *Bivens* case reached the Supreme Court, which held that violation of the fourth amendment by federal officers gave rise to a cause of action for damages.[55] In the Court's view, restricting plaintiff to the common law action of trespass and relegating the utility of the fourth amendment to a rebuttal of the defense of federal justification were inconsistent with the nature of the fourth amendment prohibition. The amendment reached conduct that would not necessarily be violative of state law if engaged in by a private citizen.[56] Normally, an individual who demanded entry into another's house on the strength of his own authority would not be liable in trespass if the owner admitted him.[57] Yet, such an unauthorized demand and entry by a federal official would be clearly violative of the amendment. The state law, however, could not take into account the different status of the federal official, for to do so would be, in effect, to limit the exercise of federal authority.[58] Thus, some fourth amendment violations would have remedies while others, just as reprehensible in terms of constitutional guarantee, would be completely without redress. The Court found the double limitation inherent in state causes of action to be an unavoidable stumbling block in the rationale of the court of appeals,[59] and the inevitable foundation for a federal cause of action.

Having established that plaintiff had stated a valid cause of action, the Court declared that damages were the ordinary remedy for

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The second situation was exemplified by Jacobs v. United States, 290 U.S. 13 (1933), in which the Supreme Court read the fifth amendment right to just compensation as self-executing. The remedy implication was in that way unique to that amendment.

The third situation was the rule excluding evidence obtained in violation of the fourth amendment, developed in Weeks v. United States, 232 U.S. 383 (1914). The Court found that the remedy created was essential, since without it the right would remain only a "form of words".

53. The court suggested that a possible statutory remedy, under what is now 42 U.S.C. § 1983 (1970), explained the decisions in Swafford v. Templeton, 185 U.S. 487 (1902), and Wiley v. Sinkler, 179 U.S. 58 (1900), discussed at notes 25, 28 *supra*.

54. 409 F.2d at 726.

55. 403 U.S. 388 (1971).

56. *Id.* at 392.

57. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18, at 101 (4th ed. 1971).

58. 403 U.S. at 395.

59. 409 F.2d 718 (2d Cir. 1969).

a violation of personal interests in liberty.[60] In support of this the Court cited several cases concerning damages for deprivation of voting rights.[61] The court found no further "special factors counselling hesitation"[62] and disagreed with the proposition that damages should be available only if essential to the enforcement of the amendment.

Mr. Justice Harlan wrote a separate concurrence, reasoning from the premise that the interest claimed by the plaintiff was federally protected.[63] There was no question, in his opinion, that a federal remedy was proper. The true problem was whether the Constitution itself limited the creation of such remedies to Congress. Analyzing and analogizing developments in the area of judicial remedies for violation of federal regulatory statutes, Harlan concluded that a judicially created damage remedy was proper in this instance.[64]

What emerges from the *Bivens* opinions is a rationale that proceeds as follows: The Bill of Rights creates certain unique individual interests in liberty that are federally protected and that require federal remedies. Personal interests in liberty are normally vindicated by a recovery of damages, a remedy that the federal courts have demonstrated their capability to fashion. This rationale applies as readily to the first amendment case[65] as to the fourth amendment case. *Bivens* clearly recognized that the federal judiciary has the power to create remedies for constitutional wrongs that would otherwise go without adequate redress, just as the judiciary has this power in regard to federal statutes not specifying a remedy. What is unclear from the majority opinion is the standard to be applied in determining whether the judiciary should exercise this power in a given instance.[66]

The very stringent test advocated by the court of appeals, *i.e.*, that the remedy must be absolutely essential to prevent the right

60. 403 U.S. at 395.

61. Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900).

62. 403 U.S. at 396.

63. *Id.* at 400.

64. *Id.* at 405.

65. *See, e.g.*, Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973).

66. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

> Given the existence of judicial power to formulate compensatory remedies directly from the Constitution, there still remains the central and difficult question of articulating standards to govern the Court's discretion in exercising that power. In *Bivens*,

from becoming "a mere form of words,"[67] was rejected.[68] The Supreme Court indicated that this test was inappropriate where Congress had not expressly prohibited the damage remedy and that emphasis would be better shifted to the individual whose personal rights had been violated.[69] Harlan, concurring, likewise emphasized the situation of the individual and the efficacy of the remedies available to him,[70] and advocated granting the relief sought if "necessary" or "appropriate" to the vindication of the personal interest asserted.[71] Adopting the "necessary" or "appropriate" test of Justice Harlan, or merely looking to the range of remedies available to the plaintiff whose first amendment interests have been invaded, as suggested by the majority opinion, it becomes clear that the response of the *Butler* court is justified by *Bivens*. As was noted by the court in *Butler*, refusal to create a remedy would leave plaintiff with a right in a vacuum. No alternative form of redress was available.[72]

Whether other factors, such as the existence of a parallel traditional cause of action, should be considered in granting relief was not specifically discussed by the majority. As the *Butler* court suggested, however, this may have been an unspoken premise underlying the assertion that an award of damages was an ordinary remedy for the type of wrong inflicted in *Bivens*.[73] Harlan's concurrence suggested, by implication at least, that the existence of a parallel tort might serve to guide the judiciary in constructing a remedy, but there is no suggestion that this should be a prerequisite to remedy creation.[74] As the *Butler* court perceived, the majority's clear impli-

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the Court proceeded as if that question answered itself, and, although its decision provides the federal courts with a potentially powerful tool, there is very little instruction on how or when it is to be used.

Id. at 1543.

67. 409 F.2d 718, 724 (1969).

68. 403 U.S. at 397.

69. 403 U.S. at 397. The court quoted Marbury v. Madison, 5 U.S. (1 Cranch) 60, 69 (1803), "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."

70. 403 U.S. at 409-10.

71. *Id.* at 407.

72. 365 F. Supp. at 1040. Although it is conceivable that a false imprisonment claim would succeed, such a recovery would not, of course, serve to vindicate the peculiar injury to first amendment rights that plaintiffs alleged. The opportunity for injunctive relief, moreover, had passed.

73. 403 U.S. at 395.

74. *Id.* at 408-09.

cation was that the federal remedy was all the more desirable because no state-created interest was truly equivalent.[75] Moreover, the citation of voting rights cases,[76] as examples of the proposition that damages were the ordinary remedy for violation of personal interests in liberty, clearly indicates that the existence of some parallel tort did not govern the propriety of the damage remedy.[77]

The question of what the *Bivens* Court referred to as "special factors counselling hesitation" remains. The factors enumerated by the *Bivens* Court were as follows: questions of federal fiscal policy,[78] cases of mere excess of an otherwise valid authority delegated by Congress,[79] and cases where Congress had affirmatively prohibited remedies other than those which it had sanctioned.[80] None of these factors were present in *Bivens*, nor did they confront the *Butler* court. Apart from these factors, might the lack of a parallel traditional tort, even though not an absolute bar to remedy creation, constitute still another "special factor counselling hesitation"?

Although an affirmative answer to this question does not in itself imply that the remedy should not be given, the answer in this case must certainly be affirmative. Policy problems, given scant attention by the *Bivens* majority, loom somewhat larger where no similar cause of action has existed at common law. Such problems include those associated with the development of subsidiary law, *e.g.*, the measure of damages; those associated with increased volume of litigation; and those resulting from the burdening of federal officers with a liability that may serve to deter proper vigor in the performance of official duties.[81]

It was perhaps in contemplation of problems of this sort that the court in *Butler* cited cases granting damages under § 1983 for violation of first amendment rights under color of state law.[82] This line of cases does indeed furnish a kind of parallel, which may serve as a guide to the federal judiciary in the formulation of ancillary law. More importantly, it furnishes an affirmative incentive to extend a

75. *Id.* at 392.
76. Cases cited note 61 *supra*.
77. *See also* Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring).
78. 403 U.S. at 396.
79. *Id.* at 397.
80. *Id.*
81. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1543 (1972).
82. 365 F. Supp. at 1040.

similar liability to federal officers, an incentive which counterbalances to some degree the perceived difficulties. To allow federal officers greater freedom than state officers to violate personal liberties is an incongruity that is offensive to our concept of justice within the federal system.[83]

An unfortunate shortcoming of the line of § 1983 cases cited is that although damages are certainly being awarded for first amendment violations, the practice has never been well analyzed by the courts, and the cases do not furnish a particularly informative precedent.[84] Where parallel traditional torts exist, as in *Bivens*, the federal courts generally have centuries of precedent on which to draw. Ancillary law has developed some degree of detail in order to meet the problems pinpointed by so many years' experience with the particular cause of action. If shortcomings and anomalies exist in the tort law they are generally well recognized. This type of protracted development and change has not yet occurred with the § 1983 cause of action for violation of free expression. Practical and philosophical problems under this cause of action may certainly be envisioned but are still, for the most part, in the realm of potentialities. Some may never materialize and others, lurking unforeseen, may yet arise. One thing that may be said for the line of first amendment § 1983 cases is that they certainly have not unleashed an unmanageable wave of litigation, for they have been relatively infrequent thus far.

The ultimate answer probably lies, as Harlan suggested, with the cases where the courts have fashioned remedies for federal regulatory statutes.[85] New and unparalleled causes of action have regularly been recognized in order to fully effectuate statutory policy. To do

83. 48 TEXAS L. REV. 219 (1969).

> The fact that congressional oversight has left a hiatus in the law hardly seems a satisfactory explanation for judicial restraint. It seems totally incongruous that a federal officer may presently violate the federal rights of a citizen with impunity while a state officer may be held liable for the very same actions under the civil rights acts.

Id. at 224.

84. *Cf.* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 305-07 (1965), which discussed first amendment claims under § 1983 as "unique situations," and suggested that "the statute should also be given play to operate in cases involving first amendment rights." *Id.* at 329. The implication from this is that the existing cases did not firmly assert § 1983 protection for these rights. Development in this area has subsequently occurred, but still no comprehensive body of appellate level opinions exists to furnish guidelines for the judiciary on question of public policy and of ancillary law.

85. 403 U.S. at 410-11.

less in furtherance of constitutional rights would by implication express a value judgment on the importance of these rights in comparison to rights created by statute.

Although the primary focus of this note is on the *Butler* court's treatment of the first amendment claim, its handling of the related fifth amendment claim merits mention in light of the principles just developed. In *Moore*,[86] the decision cited by the *Butler* court in support of its decision to sustain the fifth amendment claim, the plaintiff had filed a pro se complaint alleging that defendant agents of the Federal Bureau of Investigation and defendant Assistant United States Attorney had falsified a legal document and procured false testimony in a criminal prosecution of the plaintiff, and that these actions were racially motivated. The court found sufficient allegations of fifth amendment violations to support a damage action, and asserted that *Bivens* recognized a cause of action for damages for violation of constitutionally protected interests and was not limited to fourth amendment violations.[87]

It would appear that *Moore* is not sufficiently authoritative to support the weight that the *Butler* court has asked it to bear. To accept *Moore's* conclusionary statement without independent analysis is to ignore the many questions that have been briefly indicated in the foregoing analysis of the first amendment claim. One obvious question that went completely unasked, both by the *Moore* and *Butler* courts, is whether alternative remedies exist. That a court has power to create a remedy does not necessarily mean that it is wise to do so.

The trend in the federal courts, as exemplified by *Butler*, is toward a greater participation by the judiciary in the vindication of personal rights. This activism received Supreme Court sanction in the *Bivens* case because it was believed that full protection of individual interests in liberty required judicial as well as congressional participation, and that the judiciary had been vested with the power to assume the task.[88] The Supreme Court there asserted further that the judiciary had the necessary acumen to make the policy judg-

86. United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972).

87. *Id.* at 894. The court cited Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), which held that allegations of fourth and fifth amendment violations stated a valid cause of action. That case, like *Moore*, did not offer an analysis in support of its holding, but relied upon *Bivens*.

88. 403 U.S. at 396.

ments inherent in remedy-making.[89] *Butler* is at least the third[90] decision since *Bivens* to expand the concept that was shaped there. The extension appears appropriate in light of the relevant considerations discussed here, and is consistent with *Bivens*.

Yet, the judiciary is not institutionally equipped, as is the legislature, to step into each and every perceived breach, weigh the delicate balancing policies and weave its remedial web. It is true that the courts can analyze policy and that they can and should fashion remedies where remedies are required and justified. However, the judicial power is qualitatively different from the legislative power, and the courts are unquestionably more restricted in terms of time and resources available for remedy-making than is the Congress. The judiciary should shoulder its responsibility for the protection of the individual and vindication of the Constitution willingly, but should never do so without a clear understanding of what is required for the vindication of the constitutional rights involved and of the limitations of its own energies and talents. Evidence of such an understanding is not obvious on a reading of *Butler*, and this, as well as the actual decision rendered by the court, is significant. As the court demonstrated by its own reliance on the *Moore* holding, the effects of any holding, even one lacking a verbalized rationale, can have quite far-reaching effects in this developing area of the law.

Susan K. Wright

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION—VOTING RIGHTS OF EX-FELONS—The United States Supreme Court has held that California's disenfranchisement of convicted felons who have completed their sentences and paroles did not violate the equal protection clause of the fourteenth amendment.

Richardson v. Ramirez, 94 S. Ct. 2655 (1974).

When, in 1972, the individual respondents Ramirez, Lee and Gill attempted to register to vote in their respective counties, their ap-

89. *Id.*

90. It joins United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) and Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971).