Remedies for Constitutional Torts: "Special Factors Counselling Hesitation"[1]

On November 26, 1965, federal agents, acting without probable cause, arrested Webster Bivens and searched his home and his person.[2] Mr. Bivens was without a remedy in federal courts until July 21, 1971, when the United States Supreme Court decided the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[3] holding that a violation of the fourth amendment prohibition of unreasonable searches and seizures[4] by a federal officer[5] gives rise to a tort action cognizable in federal courts. *Bivens* has been used frequently as a precedent in the ensuing years by plaintiffs seeking redress against federal officers for violations of many other constitutional provisions. An analysis of *Bivens* and its progeny reveals that certain constitutional provisions are now protected by a right to sue for tort damages in federal courts. The analysis also demonstrates that this right to sue for tort damages becomes unavailable when the courts are confronted with countervailing considerations which the Court in *Bivens* termed "special

[1]Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[2]*Id.* at 389 & n.1.

[3]403 U.S. 388 (1971). For more extensive discussions of the case, see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Note, *The Constitution as Positive Law*, 5 LOYOLA U. L.A.L. REV. 126 (1972); Note, *The Truly Constitutional Tort*, 33 U. PITT. L. REV. 271 (1971).

[4]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[5]The Court used the phrase "under color of his authority." 403 U.S. at 389. The Court thus adhered to the traditional concept that an agent of the government who acts unconstitutionally cannot be within the scope of his authority, since the government cannot authorize unconstitutional acts. *See, e.g.*, Pennoyer v. McConnaughy, 140 U.S. 1, 9-18 (1891); *In re* Ayres, 123 U.S. 443, 500-02 (1887). *See generally Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 837 (1957).

In Bell v. Hood, 327 U.S. 678 (1946), which presented a fact situation similar to *Bivens*, the issue of tort damages was not before the Court. On remand, the traditional concept was allowed to defeat recovery. The district court reasoned that only governmental activity gives rise to a constitutional violation; and, since federal officers violating the Constitution are beyond the scope of their authority, their acts are not the acts of the government and therefore cannot be unconstitutional. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). For a good analysis of the tortuous reasoning in this opinion, see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts*, 117 U. PA. L. REV. 1 (1968).

factors counselling hesitation."[6] It is these factors which this Note will attempt to identify and analyze.

I. Threshold Considerations

A. *Traditional Methods of Protecting Constitutional Interests*

Dean Prosser described a tort in evolutionary terms by his statement that "a wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages, although other remedies may also be available."[7] It is therefore possible to look upon *Bivens* as the final stage in the evolution of a new constitutional tort. Before *Bivens,* the federal courts had long recognized that activities violating the Constitution are wrongs,[8] but the courts had rarely recognized that the resulting harms could be compensated by money damages.[9] Money damages were awarded by state courts when the constitutional violations also resulted in common law torts,[10] but the state tort actions are intended to protect individuals from physical invasions of their persons or property, rather than invasions of their constitutional rights, and are therefore not wholly adequate to protect constitutional rights.[11] Congress created the first constitutional torts through enactment of a series of civil rights acts following ratification of the fourteenth amendment.[12] The Civil Rights Acts, however, apply only to violations of the Constitution by state officials;[13] when the same violations are com-

[6]403 U.S. at 396.

[7]W. Prosser, Handbook of the Law of Torts § 1, at 4 (4th ed. 1970) [hereinafter cited as Prosser].

[8]*See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

[9]Historically, judicial remedies against federal officers in the federal courts were equitable in nature. *See, e.g.*, Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936); United States v. Lee, 106 U.S. 196 (1882); Kelly v. Metropolitan County Bd. of Educ., 372 F. Supp. 528 (M.D. Tenn. 1973). However, where Congress had authorized money damages as compensation for fourth amendment violations, money damages were awarded. *See* West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884).

[10]Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). These suits were customarily removed to federal courts under 28 U.S.C. § 1442 (1970), which permits removal of civil suits against federal officers from state to federal courts. 403 U.S. at 391 & n.4.

[11]*See* notes 37-40 & accompanying text *infra*. *See generally* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

[12]42 U.S.C. §§ 1981-94 (1970).

[13]

> 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

mitted by federal officials, the Acts provide no remedies.[14]

B. The Constitution as an Independent Basis of Liability

A tort requires a plaintiff to have a legally protected right which, when invaded by the defendant, is compensable by money damages.[15] Common law courts at an early date established precedents for the use of statutes as a source of the plaintiff's right,[16] and the federal courts have on numerous occasions followed the common law tradition[17] by recognizing as torts activities which violate rights created by federal legislation.[18] However, on only two occasions before *Bivens* had the Court recognized as torts activities which violated rights defined in the Constitution.[19] Because of the

---

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970) (emphasis added).

[14]Roots v. Calahan, 475 F.2d 751 (5th Cir. 1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971).

[15]PROSSER § 1, at 4. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973).

[16]PROSSER § 36.

[17]*See* Katz, *supra* note 5, at 12-31.

[18]*Id.* at 31-33. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[19]Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900). Both cases were concerned with damages as a remedy for the denial of the right to vote in a congressional election. These cases had been considered in *Bivens* by the lower court as possible precedents for allowing a tort remedy for violations of the Constitution, but the Second Circuit Court of Appeals rejected the possibility because at the times when the suits were brought 42 U.S.C. § 1983 supplied a cause of action for the acts of the defendants. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 724 (2d Cir. 1969). However, this interpretation was untenable since the Supreme Court in *Wiley* explicitly refuted the contention that the court had no jurisdiction to allow a tort remedy under the general federal question grant of jurisdiction, 28 U.S.C. § 1331 (1970). 179 U.S. at 61-62. The Court in *Swafford* expressly overruled the lower court's dismissal of that suit on the basis of a lack of a federal question, using *Wiley* as a precedent. 185 U.S. at 491-92.

Justice Marshall, dissenting in a case subsequent to *Bivens*, indicated that in his view the impairment of the right to vote may be regarded as state action under section 1983 or alternatively as federal action since Congress has the ultimate authority over presidential elections, and that in the latter case constitutional violation of voting rights might be subject to an "implied remedy for a federal deprivation of constitutional rights." O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting).

One commentator has suggested that *Wiley* and *Swafford* may have been brought under the general federal question grant of jurisdiction rather than under section 1983 because the plaintiffs may have been unsure that the latter statute would apply in view of the Court's previous decisions in Carter v.

rarity of modern precedents for the use of the Constitution as the source of a plaintiff's right, the Court's use of the Constitution in *Bivens* was unusual. However, the use of the Constitution as the source of a plaintiff's right was only a minute departure from the traditional and more usual use of federal legislation as the source of a plaintiff's right.[20] The Court in *Bivens*, and other federal courts subsequently relying on *Bivens*, recognize constitutional torts in the same way and apply the same criteria that the federal courts have used for decades in recognizing torts from federal legislation.[21]

II. Criteria for Recognition of a Tort

A precondition to the recognition of a tort is a court with both jurisdiction and the power to fashion a remedy of money damages.[22] The Supreme Court held in *Bell v. Hood*,[23] a case with a fact situation remarkably similar to that of *Bivens*, that civil actions arising out of constitutional violations by federal officials is a proper subject for jurisdiction of federal courts under the general federal question grant of jurisdiction.[24] However, in *Bell* the question of fashioning a remedy was not before the Court; and on remand, the District Court for the Southern District of California declined to allow a tort remedy, although not on the basis of a lack of power

---

Greenhow, 114 U.S. 317 (1884), and Minor v. Happerset, 88 U.S. (21 Wall.) 162 (1874). Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1125 n.74 (1969). *But see* Dellinger, *supra* note 3, at 1544 n.70.

The fifth amendment prohibition against taking of property without just compensation may be viewed as a constitutional mandate for compensatory damages. *See* Jacobs v. United States, 290 U.S. 13 (1933), wherein the Court stated:

> [The right to receive just compensation for the taking of land] rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

Id. at 16. For a more extensive discussion of fifth amendment "taking" cases, see *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 876-81 (1957).

[20] *See* notes 22-28 & accompanying text *infra*.

[21] *See* notes 29-36, 64-67 & accompanying text *infra*.

[22] *See* Dellinger, *supra* note 3, at 1540-43.

[23] 327 U.S. 678 (1946).

[24]

> 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 interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

to fashion such a remedy.[25] The majority in *Bivens* did not discuss the Court's power to fashion a remedy, but chose to rely upon the fact that damages have historically been regarded as a customary remedy for invasions of personal interests and upon precedents established by previous cases in which the Court had awarded damages for violations of federal legislation.[26] However, the Court's decision in *Bivens* should put to rest any doubts regarding the power of the federal courts to fashion tort remedies for violations of the Constitution.

Armed with a grant of jurisdiction and the power to fashion a remedy of money damages, a court may allow a tort remedy in vindication of a legislatively or constitutionally defined right if it deems such action to be a proper exercise of its discretion. The question is then what criteria will be used by a court in determining whether the recognition of a tort is a proper exercise of its discretion. Criteria evolved through the tradition of judicial incorporation of legislatively defined standards of conduct into the common law of torts[27] are: (1) That the conduct which has injured the plaintiff has violated the rights of the plaintiff as defined by the legislation, (2) that judicial recognition of a tort will further the purpose of the legislation, and (3) that there is no evidence of any legislative intent to preclude a tort remedy.[28] When the Constitution is to serve as the basis of tort liability, the courts have thus far proceeded to use the same criteria. The difference is that the right which has been violated is found in the Constitution rather than in legislation, and the intent to preclude a tort remedy may be found in either the Constitution or in federal legislation.[29]

---

[25]Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). The court dismissed for failure to state a claim upon which relief could be granted. *See* note 5 *supra*.

[26]403 U.S. at 395-96. Justice Harlan, in his concurring opinion, discussed the Court's power to recognize a tort from the Constitution. 403 U.S. at 402-06. Two members of the Court were of the opinion that the Court's recognition of a tort from the Constitution was an encroachment upon the legislative powers of Congress and thus an unconstitutional exercise of judicial power. 403 U.S. at 422 (Burger, C.J., dissenting); 403 U.S. at 428 (Black, J., dissenting).

[27]PROSSER § 36.

[28]*Id.* *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Turnstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Burke v. Campania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[29]The Court in *Bivens* stated, "For we have here no . . . congressional declaration that persons injured . . . may not recover money damages from the agents." 403 U.S. at 397. *Cf.* Dellinger, *supra* note 3, at 1547-48; Katz, *supra* note 5, at 43-44.

1. The Plaintiff's Right and the Defendant's Activities.—There are many cases defining rights conferred by the Constitution and many others defining activities which violate those rights. These cases have served as precedents in *Bivens* and its progeny for the recognition of constitutional torts.[30] The courts have therefore rarely found it necessary to delve anew into analyses of the Constitution in order to ascertain whether the Constitution has granted legally protected rights to the plaintiff or whether the acts of the defendant have violated those rights. However, a few cases have involved situations so unusual that the courts have had to decide whether the plaintiffs' alleged rights have been constitutionally defined and, if so, whether the activities of the defendants had violated those rights. In both *Gardels v. Murphy*[31] and *Smothers v. Columbia Broadcasting Systems, Inc.*,[32] the plaintiffs claimed first amendment violations by defendants who were not federal officials and sought to establish constitutional torts on a theory of "federal action" analogous to the state action theory used in constitutional tort suits brought under the Civil Rights Act.[33] In each case, the court necessarily had to determine whether the defendants were using a federal power and thus were violating the Constitution.

2. Furthering the Intent of the Constitution.—Before *Bivens* the Supreme Court had not been called upon to determine whether a tort remedy would further the purposes of a constitutional provision, although the Court had previously created the far more powerful remedy of the exclusionary rule[34] in furtherance of the Constitution. The Court in *Bivens* merely relied upon the accepted custom of awarding damages for the invasions of personal rights[35] and apparently proceeded upon the assumption that damages would further the intent of the Constitution.

The Court did, however, advance three persuasive bases to justify its departure from the traditional method of protection of constitutional rights through state common law torts. These were: (1) A recognition that one acting in the name of the federal

---

[30]*See, e.g.*, Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973); Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972).

[31]377 F. Supp. 1389 (N.D. Ill. 1974).

[32]351 F. Supp. 622 (C.D. Cal. 1972).

[33]42 U.S.C. § 1983 (1970).

[34]The exclusionary rule prevents the use in a criminal trial of evidence gained in violation of the constitutional rights of the accused. It originated in Weeks v. United States, 232 U.S. 383 (1914), and was extended to state courts in Mapp v. Ohio, 367 U.S. 643 (1961).

[35]403 U.S. at 395.

government has the potential ability to bring about substantially greater harm than the ordinary citizen;[36] (2) a recognition that the fourth amendment protects interests different from those protected by state common law torts;[37] and (3) a recognition that state laws which coincidentally protect fourth amendment rights may operate inconsistently or even in a manner hostile to those rights.[38] These rationales support the hypothesis that the federal interest in enforcing constitutional rights is compelling enough to require the protection of those rights under federal laws administered in federal courts, rather than relegating those rights to the vagaries of state laws.[39]

The Supreme Court in *Bivens* rejected the Government's argument that a tort remedy for violation of the Constitution should be allowed only where the remedy is "indispensible for vindicating constitutional rights."[40] The Court looked upon money damages as an appropriate remedy for one whose rights had been violated, without requiring that the remedy be calculated to serve as a deterrent against future constitutional violations.[41] However, the situation in *Bivens* was one which tended to obliterate the distinction between a remedy which is merely "appropriate" and one which is "indispensible." Bivens had been arrested and searched without probable cause.[42] An injunction against further actions of the defendants would not have been helpful, since no future invasions of the plaintiff's interests were threatened.[43] The exclusionary rule would have been of no use, since the plaintiff was not charged with a crime.[44] In Justice Harlan's words, "For people in Bivens' shoes, it is damages or nothing."[45] One might conclude that in such circumstances a tort remedy would have been indispensible, rather than merely appropriate. Two subsequent cases in lower federal courts sufficiently differ from *Bivens* to serve as good illustrations of the distinctions between appropriate and indispensible remedies.

Sparrow v. Goodman[46] was a class action against Secret Service agents in charge of security for President Nixon. Members of the class were individuals entitled to be present at public meetings

[36] *Id.* at 392.

[37] *Id.* at 392-94.

[38] *Id.* at 394.

[39] *Cf.* Hill, *The Law-Making Power of Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1025, 1028-29 (1967).

[40] 403 U.S. at 397.

[41] *Id.* at 407-08 (Harlan, J., concurring).

[42] *Id.* at 389 & n.1.

[43] *Id.* at 410 (Harlan, J., concurring).

[44] *Id.*

[45] *Id.*

[46] 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom.* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

at which the President was expected to be present and who were excluded from the audience because of the defendants' arbitrary decisions based upon the plaintiffs' manner of dress, hair styles, and leaflets and placards. The court found that the defendants had violated the plaintiffs' rights under the first, fourth, and fifth amendments, and that damages were an appropriate remedy for those violations. The court also enjoined the Secret Service from future arbitrary exclusions of citizens from public meetings attended by the President. The court recognized that the injunction would probably not prove useful to those members of the plaintiff class immediately before the court since the President would probably not make another public appearance in the same locality in the near future, but the court also recognized that the injunction would benefit members of the class in other cities at which the President would speak.

VonderAhe v. Howland[47] was an action by a dentist against Internal Revenue Service agents who had seized the plaintiff's financial and patient treatment records under an overly broad search warrant. The plaintiff sought suppression of the records in any subsequent criminal proceedings, return of the records, and damages for loss of income allegedly suffered as the result of the seizure of the patient treatment records. The Ninth Circuit Court of Appeals, remanding the case to the district court with directions to suppress the evidence and return the records, stated: "Insofar as the complaint seeks damages because of the Agents' acts, the serious pecuniary loss caused thereby would appear to bring this case within the *Bivens* doctrine."[48]

In both *Sparrow* and *VonderAhe*, the injunctions illustrate remedies which may be classified as "indispensible" since they are calculated to deter further invasions of constitutional rights by federal officers. The tort damages illustrate remedies which may be classified as "appropriate" since they compensate the plaintiffs for damages suffered as a result of the violations but are not particularly calculated to prevent future constitutional torts.

The Court's opinion in *Bivens* was written narrowly in terms of the fourth amendment right to be free of unreasonable searches and seizures, and subsequent majority opinions of the Court continue to refer to *Bivens* in the same context.[49] However, a fair reading of the opinion leads to the conclusion that the rationale of *Bivens* will readily support the recognition of tort actions for violations of other constitutionally protected rights. This conclusion

[47]508 F.2d 364 (9th Cir. 1974).

[48]*Id.* at 372.

[49]United States v. Calendra, 414 U.S. 338, 354 n.10 (1974); District of Columbia v. Carter, 409 U.S. 418, 432-33 (1973).

is supported by statements found in post-*Bivens* dissenting and concurring opinions of members of the Court[50] and by the decisions of lower federal courts using *Bivens* as a precedent for allowing tort actions in vindication of rights conferred by the first,[51] fifth,[52] sixth,[53] eighth,[54] ninth,[55] tenth,[56] and fourteenth[57] amendments.

The Court's concept, elucidated in *Bivens*, that state common law torts are inadequate to protect constitutional rights is particularly applicable in situations involving constitutional provisions other than the fourth amendment. In the ordinary case of search and seizure, there is a restraint or a taking of the plaintiff's person or physical property which creates at least a potential for recovery under common law torts. This, however, may not be true in other situations. The first amendment rights of freedom of

---

[50]City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan & Marshall, JJ., concurring) (alleged due process violation by a municipality); O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting) (alleged violation of the right to vote in a political party's convention for choice of candidate for President of the United States).

[51]Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973); Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972) (by implication). *Contra*, Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974); Smothers v. Columbia Broadcasting Sys., Inc., 351 F. Supp. 622 (C.D. Cal. 1972).

[52]Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971); Jackson v. Wise, 385 F. Supp. 1159 (D. Utah 1974) (by implication); United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974); Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973); Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973); Scheunemann v. United States, 358 F. Supp. 875 (N.D. Ill. 1973); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973) (dictum); Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972). *Contra*, Archuleta v. Calloway, 385 F. Supp. 384 (D. Colo. 1974); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972); Smothers v. Columbia Broadcasting Sys., Inc., 351 F. Supp. 622 (C.D. Cal. 1972).

[53]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974).

[54]Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973) (dictum).

[55]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974); Howard v. Warden, 348 F. Supp. 1024 (E.D. Va. 1972).

[56]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974).

[57]Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Manos v. City of Green Bay, 372 F. Supp. 40 (E.D. Wis. 1974) (by implication). *Contra*, Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974).

speech, assembly, and petition for redress of grievances[58] offer particularly good examples of rights which may be violated without physical acts upon the plaintiff's person or property. First amendment rights may be infringed when citizens merely obey the commands of federal officials to be silent or to depart from a place of assembly.[59] First amendment rights also may be infringed when citizens peacefully acquiesce to a federal official's refusal to allow the citizens to join a public gathering because they are carrying leaflets or placards.[60] The rights are lost in these situations because citizens have lost their opportunities to exercise their first amendment rights;[61] yet, because there has been no physical restraint or injury to the citizens or to their property, no state common law torts will allow them compensation.[62] If there is no constitutional tort, the injured citizens will have no remedy; if there is no remedy, there is no way to further the purpose of the Constitution.[63]

3. The Absence of Negative Intent.—Once the courts have satisfied themselves that a constitutional tort has occurred and that a tort remedy would further the purposes of the Constitution, they must then determine whether there is any evidence of an intent to preclude a tort remedy. This intent may be found in the Constitution[64] or in statutes.[65] The presence of negative intent will preclude the recognition of a tort[66] and may therefore be the most

---

[58]

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[59]Sparrow v. Goodman, 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom.* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

[60]*Id.*

[61]Butler v. United States, 365 F. Supp. 1035, 1040 (D. Hawaii, 1973).

[62]*Id.* at 1044.

[63]Chief Justice Burger, dissenting in *Bivens*, conceded the necessity of a remedy for constitutional violations. He said:

> I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. . . . This is illustrated by the paradox that an unlawful act against a totally innocent person . . . has been left without an effective remedy, and hence the Court finds it necessary now . . . to construct a remedy of its own.

403 U.S. at 415-16 (Burger, C.J., dissenting).

[64]*See* notes 150-172 & accompanying text *infra.*

[65]403 U.S. at 397.

[66]The presence of negative intent may be found when the statute creates a complex regulatory scheme which, in the opinion of the court, would be destroyed by allowing tort remedies. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458-61 (1973).

important of the "special factors counselling hesitation" in the recognition of a tort based on the infringement of a constitutional right. In the absence of any evidence of an intent to preclude a tort remedy, the traditional approach of the courts is that "[a] disregard of the command is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of common law . . . . This is but an application of the maxim, *Ubi jus ibi remedium.*"[67]

Courts at times apply a more stringent requirement of evidence of an affirmative legislative intent to allow a tort remedy for violation of a statute.[68] The application of the more stringent requirement is probably a court's response to the presence of special factors counselling hesitation in the case at bar rather than an automatic application of a rule of law.[69] The recent case of *Breitwieser v. KMS Industries, Inc.*[70] may serve as an illustration of this point.

Breitwieser was, in essence, a state wrongful death action, but the plaintiff sought to obtain a tort remedy in federal court on the theory that the death of his son had occurred while the son was employed by the defendant in violation of the Fair Labor Standards Act.[71] The Act prohibits the employment of minors in the operation of heavy equipment, and the decedent had been a minor whose death occurred while he was operating a fork-lift truck. The decedent was also covered by the Georgia Workmen's Compensation Act, which gave the plaintiff an automatic right to recovery but explicitly excluded recovery under the state wrongful death laws.[72] Allowing recovery under federal legislation would therefore have been in derogation of a strong state policy explicitly expressed in the state Workmen's Compensation Act. The existence of the state legislation and the absence of any federal legislation specifically allowing a tort action may well have been deemed to have been special factors counselling hesitation, therefore re-

---

[67]Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916).

[68]*See, e.g.*, Breitwieser v. KMS Indus., Inc., 467 F.2d 1391, 1394 (5th Cir. 1972); Chavez v. Freshpict Foods, Inc., 465 F.2d 890, 894 (10th Cir.), *cert. dismissed*, 409 U.S. 1042 (1972). *See generally* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes*, 43 FORDHAM L. REV. 441 (1974).

[69]The origin of the requirement may have been a statement in Wheeldin v. Wheeler, 373 U.S. 647, 650 (1965). *See* Comment, *A Civil Cause of Action May Be Implied Under the Federal Corrupt Practices Act*, 6 RUTGERS CAMDEN L.J. 453 (1974).

[70]467 F.2d 1391 (5th Cir. 1972).

[71]29 U.S.C. § 212 (1970).

[72]GA. CODE ANN. § 114-103 (1973).

quiring the application of the more stringent requirement of an affirmative legislative intent to allow a tort remedy for violation of a statute.

In a situation such as *Breitwieser,* the more stringent requirement is reasonable and not inconsistent with the ordinary requirement of the mere absence of an intent to preclude a tort remedy. In recognizing a tort, the courts apply their remedial powers to further the intent of the Constitution or federal legislation. The application of the usual standard leaves the courts free to further that intent through a variety of remedial mechanisms available to the courts. The use of a more stringent standard when faced with special factors counselling hesitation leaves the remedial powers of the courts intact; the courts may thus allow a tort remedy if the requirement of affirmative intent is satisfied, or the courts may allow other remedies if the requirement is not satisfied.[73]

The Court in *Bivens* did not discuss the possibility of an intent to preclude a tort remedy for vindication of constitutionally protected interests.[74] Justice Harlan, in his concurring opinion, did point out that the history of the Bill of Rights appears to indicate that the constitutional authors assumed that state common law remedies would be sufficient to protect the Bill of Rights guarantees.[75] However, it does not follow that the authors did not intend to allow an independent constitutional tort remedy should one become necessary. The post-*Bivens* cases discussing the evidence of negative intent have all done so in the context of the vicarious liability of state-created governmental entities,[76] and the discussions have not dealt with evidence of negative intent found in the Bill of Rights. In these cases, evidence of negative intent has been found either in other constitutional provisions or in legislation; and when negative intent has been found, recovery has been denied.[77]

---

[73]*See, e.g.*, United Farmworkers Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974).

[74]Justice Black found evidence of legislative intent to preclude a tort remedy.

> Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials.

403 U.S. at 429 (Black, J., dissenting).

[75]*Id.* at 400-01 n.3.

[76]*See* notes 95-131 & accompanying text *infra.*

[77]*See* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974); Payne v. Mertens, 343 F. Supp. 1355 (N.D. Cal. 1972).

III. Special Factors Counselling Hesitation

A. Comity: The Effect of State Laws

If a court finds that the elements of a constitutional tort are present and that there is no evidence of intent to preclude a tort remedy, the court must then search for the presence of any special factors counselling hesitation. Considerations of comity[78] have sometimes counselled hesitation in cases seeking to recognize torts based upon federal legislation. Because of comity, the availability or adequacy of state law remedies[79] have militated against the judicial creation of a federal remedy[80] unless the federal interest in the subject has been so compelling as to demand a federal remedy.[81]

In view of the extensive explanation by the Supreme Court in *Bivens* that the fourth amendment operates independently of any state laws which may coincidentally protect the same interests,[82] one must conclude that comity is no longer very important in constitutional tort actions against federal officers. Significantly, in post-*Bivens* actions against federal officers, the courts have not mentioned state laws unless the court has been asked to exercise pendent jurisdiction over a state law claim.[83] There is simply no need to discuss state law remedies when "[a]s in *Bivens:* A common law or state tort remedy may or may not afford a means of redressing [a] wrong, but in any case, will not be

---

[78] Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others. . . . Comity persuades, but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided.

Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

[79] *Compare* Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973), *with* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[80] *See generally* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes*, 43 Fordham L. Rev. 441 (1974); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 292-94 (1963).

[81] *Cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (federal interest in regulating sale of securities); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal interest in commercial paper issued by the Federal Government); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) (federal interest in regulating interstate communications); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (federal interest in protecting citizens from discriminatory practices by interstate carriers). *See generally* Hill, *supra* note 39.

[82] 403 U.S. at 392-95.

[83] *Cf.* Butler v. United States, 365 F. Supp. 1035 (D. Hawaii, 1973).

tailored specifically to cases of lawlessness pursuant to federal authority . . . ."[84]

Considerations of comity are still viable, however, in cases involving a state-created governmental entity as a defendant. One federal court has specifically stated that it would not allow a constitutional tort remedy against such a defendant because of "considerations of comity and federalism."[85] Others, conversely, have used comity as a means of allowing recovery.[86] These courts have incorporated state laws waiving immunity of state-created governmental entities into the federal law of constitutional torts. If the state in which the court sits has waived immunity to tort suits, tort damages are allowed;[87] if not, the damages are not allowed.[88]

The fact that federal jurisdiction over constitutional tort suits has been predicated upon 28 U.S.C. § 1331,[89] the general federal question grant of jurisdiction, was discussed previously.[90] Federal courts may apply the laws of the state in which they sit to suits predicated upon section 1331 if they "see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect . . . ."[91] These special reasons are, of course, very frequently reasons of comity, and have in the past been disregarded when the courts have deemed the subject matter of a case to be of compelling federal interest requiring uniform federal laws.[92] Surely *Bivens* can be interpreted to indicate a compelling

---

[84]States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974).

[85]Perzanowski v. Salvio, 369 F. Supp. 223, 230 (D. Conn. 1974).

[86]*See* Skehan v. Board of Trustees, 501 F.2d 31, 42-43 (3d Cir. 1974). *Cf.* Manos v. City of Green Bay, 372 F. Supp. 40 (E.D. Wis. 1974) (by implication).

[87]*See* cases cited note 86 *supra.*

[88]*Id.*

[89]28 U.S.C. § 1331 (1970). Federal officers cannot be sued for constitutional torts under the Civil Rights Act, 42 U.S.C. § 1983 (1970), because they are not acting under color of state law, as required by that Act. *See* note 13 & accompanying text *supra. See, e.g.*, District of Columbia v. Carter, 409 U.S. 418 (1973); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 n.1 (1971); Roots v. Callahan, 475 F.2d 751 (5th Cir. 1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

Counties and municipalities cannot be sued under section 1983 because they are not persons within the meaning of that section. *See* notes 126-131 & accompanying text *infra.* These defendants may be sued for constitutional torts under the diversity grant of jurisdiction, 28 U.S.C. § 1332 (1970), if they are amenable to suit according to the law of their own state. Moor v. County of Alameda, 411 U.S. 693, 717-22 (1973).

[90]*See* notes 23-24 & accompanying text *supra.*

[91]D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471 (1942).

[92]*See, e.g.*, cases cited note 81 *supra. See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 60 (2d ed. 1970); Hill, *supra* note 39.

federal interest in enforcing federal constitutional rights. The courts would then be justified in disregarding state laws which would impact either positively or negatively upon the federal rights.[93]

The federal courts' recognition of the state laws of immunity for state-created governmental entities simply cannot be interpreted as an indication of a lack of a compelling federal interest in the enforcement of federal constitutional rights. When one considers the application to the states of the more powerful remedy of the exclusionary rule,[94] the fallacy of such an interpretation is obvious. The continued application of state laws in suits against state-created governmental entities must therefore indicate the presence of special factors counselling hesitation, which are found in federal laws.

B. The Effect of Federal Laws

Before *Bivens,* lower federal courts accepted jurisdiction over state-created governmental entities under section 1331,[95] but it was commonly believed that the only relief which federal courts could grant against these defendants for violation of the Constitution was injunctive[96] because violation of the Constitution was not considered a tort.[97] Neither the language[98] nor the history[99] of section 1331 supports the conclusion that the federal courts lack jurisdiction over constitutional tort suits against state-created governmental entities under that statute. However, in *Perzanowski v. Salvio,*[100] the pre-*Bivens* case law of section 1331 was construed to limit the discretion of the court to allow a constitutional tort suit against a city.

The Supreme Court has not had occasion to consider whether tort damages may be awarded in cases in which a state-created

---

[93]Sullivan v. Murphy, 478 F.2d 938, 972 (D.C. Cir. 1973).

[94]Mapp v. Ohio, 367 U.S. 643 (1961).

[95]*See, e.g.,* Bennett v. Gravelle, 323 F. Supp. 203 (D. Md.), *aff'd,* 451 F.2d 1011 (4th Cir. 1971), *petition for cert. dismissed,* 407 U.S. 917 (1972); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

[96]*See* cases cited note 95 *supra.*

[97]This rationale was based on the decision in Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). See note 5 *supra.*

[98]

> 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 interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

[99]*See* notes 132-140 & accompanying text *infra.*

[100]369 F. Supp. 223 (D. Conn. 1974).

governmental entity is a defendant.[101] In *Illinois v. City of Milwaukee*,[102] the Court held the city and local sewage commission to be proper defendants in a tort action based upon federal legislation in which jurisdiction was based upon section 1331, and in *City of Kenosha v. Bruno*,[103] the Court implicitly recognized that a municipality was amenable to a constitutional tort suit where jurisdiction was based upon section 1331.[104] Both of these cases, however, presented only a question of equitable relief; compensatory damages were not at issue. State-created lesser governmental entities therefore may be proper defendants in constitutional tort suits under section 1331; however, in view of the absence of a definitive statement by the Court that tort remedies can be allowed against these defendants, the pre-*Bivens* case law of section 1331 may continue to be deemed a special factor counselling hesitation.

Some federal courts have also denied constitutional tort remedies against state-created governmental entities because of the courts' interpretations of the eleventh amendment.[105] The eleventh amendment[106] gives the states the right to complete immunity from suit in federal court by their own citizens[107] or the citizens of another state. This immunity may be waived by a state, either through consent or through voluntary participation in an activity not within the sphere of the state's governmental functions.[108] However, the Court established at an early date that this immunity to suit does not generally extend to governmental entities created by the states.[109] The immunity will apply if such entities are merely the

---

[101] *Cf.* United Farmworkers Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974).

[102] 406 U.S. 91 (1972).

[103] 412 U.S. 507 (1973).

[104] The Court remanded the case to the district court for a consideration of jurisdiction under section 1331. 412 U.S. at 515. Justices Brennan and Marshall, concurring in the opinion, stated, "If appellees can prove their allegations that at least $10,000 is in controversy, then § 1331 jurisdiction is available . . . ." *Id.* at 516 (Brennan, J., concurring).

[105] Perzanowski v. Salvio, 369 F. Supp. 223, 230-31 (D. Conn. 1974); Washington v. Brantley, 352 F. Supp. 559, 564-65 (M.D. Fla. 1972).

[106]

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

[107] Hans v. Louisiana, 134 U.S. 1 (1890); *In re* Ayres, 123 U.S. 443 (1887).

[108] *Compare* Parden v. Terminal Ry., 377 U.S. 184 (1964), *and* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), *with* Edelman v. Jordan, 415 U.S. 651 (1974).

[109] Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911); Chicot County v. Sherwood, 148 U.S. 529 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868).

arms or alter egos of the states[110] and a judgment against the entity will result in the payment of compensatory damages from state funds.[111]

The history of the eleventh amendment reveals that it was intended to maintain the sovereign immunity of the states in a manner consistent with the federal system[112] and to protect the states' financial resources.[113] The recent decision in *Edelman v. Jordan*[114] reveals that the Court continues to adhere to these principles. In *Edelman,* officials of the Illinois Department of Public Aid were sued under 42 U.S.C. § 1983[115] for enforcing a state regulation which conflicted with a federal social security regulation. The plaintiffs alleged deprivation of property without due process, in violation of the fourteenth amendment.[116] The property involved was the right to welfare benefits to which the plaintiffs were entitled under federal legislation.[117] The plaintiffs were therefore asserting federal rights based upon both federal legislation and the Constitution. The Court allowed injunctive relief, but refused an award of back payments, which the Court termed "a form of compensatory damages,"[118] because the funds would have been paid from state resources. The Court distinguished past cases which had allowed tort remedies for violation of rights created by federal legislation from *Edelman* on the basis of the eleventh amendment.[119] The Court further held that suits against state officials under section 1983 are limited by the eleventh amendment[120] and noted that a state's abolition of its immunity to suit in its own courts is not a determination that the state has relinquished its eleventh amendment immunity to suit in federal courts.[121]

Following *Edelman,* the Third Circuit Court of Appeals had occasion to consider the eleventh amendment immunity of a state-

---

[110]State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929).

[111]Edelman v. Jordan, 415 U.S. 651, 668 (1974).

[112]Mathis, *The Eleventh Amendment: Adoption and Interpretation,* 2 GA. L. REV. 207, 215-30 (1968).

[113]*Id.*

[114]415 U.S. 651 (1974).

[115]42 U.S.C. § 1983 (1970).

[116]

> No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

[117]42 U.S.C. §§ 1382-85 (1970).

[118]415 U.S. at 668.

[119]*Id.* at 673-74.

[120]*Id.* at 677.

[121]*Id.* at 677 n.19.

created governmental entity in *Skehan v. Board of Trustees*,[122] a constitutional tort suit in which a college professor sought reinstatement and back pay as a remedy for dismissal in violation of the fourteenth amendment. The Third Circuit first established that the state had abolished immunity of state-created governmental entities and that the federal courts have jurisdiction under section 1331 to allow tort remedies against state-created governmental entities.[123] The court then pointed out that since the tort remedy is limited by the eleventh amendment, retrospective relief could be allowed only if the defendant was found on remand to be a separate, subsidiary governmental unit[124] and that the funds for payment of damages would be derived from separate college funds rather than from state funds.

The approach of *Edelman* is probably the most reasonable solution to the problem of the vicarious liability of state-created governmental entities for the constitutional torts of their employees. The *Edelman* solution is consistent with the language, history, and judicial construction of both the eleventh amendment and section 1331. The solution accommodates the federal interest in protecting constitutionally defined rights of both individuals and the states; and the solution recognizes the practicality of the situation, since a state which has waived the immunity of its lesser governmental entities will probably also have provided protection against financial judgments through the medium of insurance. The *Edelman* solution therefore violates neither the law nor its purpose.

The concept that section 1983 and its accompanying grant of jurisdiction, 28 U.S.C. § 1343,[125] limit the jurisdiction of federal courts in actions predicated upon section 1331 is another facet of the courts' concern with the basic principles of the eleventh amendment.[126] This concept has been the rationale for refusing to allow tort remedies against state-created governmental entities in several post-*Bivens* cases.[127] An examination of the concept reveals that it is not the result of any substantive law; rather, the concept is a result of the fact that both sections 1331 and 1983 are bases for constitutional tort suits and that both statutes were passed within a few years of each other.

---

[122]501 F.2d 31 (3d Cir. 1974).

[123]*Id.* at 41, 44.

[124]*Id.* at 42-43.

[125]28 U.S.C. § 1343 (1970).

[126]*See* notes 112-113 & accompanying text *supra*.

[127]Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377-78 (W.D. Pa. 1974); Perzanowski v. Salvio, 369 F. Supp. 223, 230 (D. Conn. 1974); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972), *implicitly overruled in* Dahl v. City of Palo Alto, 372 F. Supp. 647, 649-51 (N.D. Cal. 1974).

Although some state-created governmental entities have been held to be persons within the meaning of section 1983,[128] the Supreme Court has held that municipalities[129] and counties[130] are not. Consequently, federal courts do not have original jurisdiction over these defendants under section 1983's grant of jurisdiction, section 1343. The Court's decisions have rested upon its analyses of the history of sections 1983 and 1343, which have revealed a congressional intent not to allow state-created governmental entities to be held vicariously liable for the constitutional torts of their agents.[131]

In *Lynch v. Household Finance Corp.*,[132] the Court had occasion to consider the relationship between civil rights cases arising under section 1983 and those arising under section 1331. The Court pointed out that while there are similarities because the subject matter of both classes of cases may be the same, the grants of jurisdiction are different because they stem from different congressional enactments.[133] Section 1343 was a part of the Civil Rights Act of 1871,[134] but section 1331 was enacted in 1875 as part of an amendment of the removal grant of jurisdiction.[135] Therefore the focus of congressional attention was in the first instance upon the fourteenth amendment, and in the other upon article III, sections 1 and 2 of the Constitution.[136] The Court's examination of the sketchy legislative history of section 1331[137] revealed no indication

[128]*See* McCormack, *Federalism & Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 34-36 (1974).

[129]City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

[130]Moor v. County of Alameda, 411 U.S. 693 (1973).

[131]City of Kenosha v. Bruno, 412 U.S. 507, 512 (1973); Moor v. County of Alameda, 411 U.S. 693, 704-10 (1973); Monroe v. Pape, 365 U.S. 167, 188-92 (1961).

[132]405 U.S. 538 (1972).

[133]*Id.* at 543-48.

[134]Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The Act was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

[135]Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. The Act was entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

[136]

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U.S. CONST. art. III, §§ 1, 2.

[137]405 U.S. at 548. For the history of the statute, the Court relied partially upon Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942).

of any congressional concern with any class of defendants at the time of enactment;[138] rather, the concern was with subject matter jurisdiction.[139] The Court also found that section 1331 was a part of a trend of expanding national authority over matters formerly left to the states.[140]

Sections 1983 and 1343 were enacted for one purpose, and section 1331 for another, at different times and by different Congresses. It does not follow that one section should limit the other, merely because both may serve as jurisdictional bases for cases involving the same constitutional questions. Although the proximity of the dates of passage of the two laws may be evidence that Congress would have limited section 1331 to conform with sections 1983 and 1343 if the matter had been discussed, the evidence is surely not sufficient to allow a determinative decision.[141] The better view is probably that those courts which hold sections 1983 and 1343 to be special factors counselling hesitation are expressing concern for the limitations on suits against the states imposed by the eleventh amendment.

When federal officers are defendants in constitutional tort suits, there is of course nothing in section 1331, the eleventh amendment, or section 1983 which counsels hesitation. Instead, judicial conviction that federal officers should be governed by the same rules which federal courts have previously applied to state officers has been a persuasive force in forming the scope of constitutional torts.[142] Federal case law requiring states to hold evidentiary hearings to comply with the due process clause of the fourteenth amendment have been influential in defining those activities of federal officers which constitute a violation of the due process clause of the fifth amendment.[143] Similarly, federal laws previously applied to state officers under section 1983 have been influential in defining activities which constitute constitutional

---

[138]405 U.S. at 548.

[139]*Id.*

[140]*Id.*

[141]*See* Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1973).

[142]*See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971).

[143]States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974). This was a constitutional tort suit brought by a ship's charterer against the Secretary of the Treasury, the District Director of the Customs Service, and agents of the Customs Service for violation of the fifth amendment prohibition of the taking of property without due process. The court said,

> [I]t would be incongruous indeed if the federal government were left completely unrestrained under the identical wording of the Fifth Amendment following the seizure of goods by customs officers.

Id. at 1154.

torts,[144] the scope of immunity of the officers,[145] the defenses available to them,[146] and the damages for which they are liable.[147] To a great extent, therefore, the federal case law of constitutional torts applied to state officials may be said to counsel affirmation rather than hesitation.

However, in some constitutional tort suits against federal officials, courts have deemed the tasks of certain defendants so distinguishable from those of state officials as to destroy the analogy with cases involving state officials. The courts have then ignored the precedent of federal case law applied to state officials. One such case was *Galella v. Onassis*,[148] in which Secret Service agents protecting John Kennedy, Jr., were sued for false arrest and malicious prosecution by a free-lance photographer whom the defendants had apprehended for jumping into the path of John Kennedy, Jr., while he was playing in a public park. The court found that the defendants were immune from the suit because their duties required an instant decision, unlike ordinary law enforcement officers who have time for reflection before making an arrest.[149] The circumstances of the case were therefore deemed to be so different from the ordinary constitutional tort situation that federal laws ordinarily applied to state or federal law enforcement agents could not be applied to the defendants.

Provisions of the Constitution itself also may be special factors counselling hesitation. It has already been suggested that, in the presence of these special factors, the courts will require the evidence of a positive intent to allow a tort remedy, rather than the mere absence of negative intent.[150] Therefore, when provisions of the Constitution are deemed to counsel hesitation, the plaintiff can only prevail when he successfully propounds evidence of an intent to allow a tort remedy. The previous discussion of the eleventh amendment[151] serves to illustrate this point. The eleventh amendment counsels hesitation; but the congressional grant of jurisdic-

[144] *See, e.g.*, Walker v. McCune, 363 F. Supp. 254, 256 (E.D. Va. 1973); Johnson v. Alldredge, 349 F. Supp. 1230, 1231 (M.D. Pa. 1972).

[145] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1346-47 (2d Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1165-66 (3d Cir. 1971); Carter v. Carlson, 447 F.2d 358, 371 (D.C. Cir. 1971) (Nichols, J., concurring), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[146] *See* cases cited note 145 *supra.*

[147] Butler v. United States, 365 F. Supp. 1035, 1040 (1973).

[148] 487 F.2d 986 (2d Cir. 1973). *See also* Reese v. Nixon, 347 F. Supp. 314, 317 (C.D. Cal. 1972).

[149] 487 F.2d at 993. *But cf.* Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973).

[150] *See* notes 68-73 & accompanying text *supra.*

[151] *See* notes 105-124 & accompanying text *supra.*

tion in section 1331 coupled with a waiver of state immunity is evidence of positive intent to allow a tort remedy.

In addition to the eleventh amendment, other provisions of the Constitution may also counsel hesitation. Although it has been demonstrated that the general grant of legislative power to Congress does not counsel hesitation,[152] the specific grants of legislative power probably do.[153] The *Bivens* Court may well have alluded to these specific grants in its brief discussion of *United States v. Standard Oil Co.*[154] and *Wheeldin v. Wheeler.*[155]

In *Standard Oil,* the Government sought damages for injuries inflicted upon a soldier by the defendant's negligence. No federal statute specifically created the right to recovery.[156] The Court noted that Congress had a specific constitutional grant of power to create the right to recover government property[157] but had chosen not to exercise this power.[158] The Court therefore denied the Government's claim, reasoning that the specific grant of legislative power to Congress precluded judicial recognition of a tort.

A comparison of *Wyandotte Transportation Co. v. United States*[159] with *Standard Oil* illustrates that the decision in *Standard Oil* was not merely the result of the Court's determination that the question was one of "federal fiscal policy"[160] over which Congress alone had control.[161] *Wyandotte* also involved a situation in which the Government sought to recover damages. The United States had removed a negligently sunken vessel from an inland waterway and sought to recover the cost of removal from the party at fault under the Rivers and Harbors Act of 1899.[162] The acts of the defendant were unquestionably wrongful as defined by the Act,[163] but the penalties provided by the Act did not specifically

---

[152] *Cf.* cases cited notes 1, 19, & 51-57 *supra.* The general grant of legislative power reads: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

[153] There are many specific grants of legislative power to Congress throughout article I of the Constitution. For example, section 8 of article I is composed of a lengthy list of such powers.

[154] 332 U.S. 301 (1947).

[155] 373 U.S. 647 (1963).

[156] 332 U.S. at 314-16.

[157] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3.

[158] 332 U.S. at 316.

[159] 389 U.S. 191 (1967).

[160] 403 U.S. at 396, *quoting from* United States v. Standard Oil Co., 332 U.S. 301, 311 (1947).

[161] 332 U.S. at 316-17.

[162] 33 U.S.C. §§ 401-16 (1970).

[163] 389 U.S. at 197.

include recovery of the cost of removal of the vessels.[164] The same constitutional grant of specific legislative authority which had defeated recovery in *Standard Oil*[165] could have applied in *Wyandotte*. Yet, because legislation revealed a congressional intent to allow the tort remedy,[166] the Government prevailed.

The Court's reference in *Bivens* to *Wheeldin v. Wheeler*[167] provides another analogy to a constitutional tort situation and points to the specific grant of legislative power allowing Congress to make its own rules of its proceedings.[168] In *Wheeldin*, the Court was asked to allow a tort remedy to a citizen who was injured, albeit not in violation of the Constitution, as a result of the unauthorized issuance of a subpoena by an employee of the House Un-American Activities Committee. The legislation, which provided the committee with subpoena power, had established a general procedure for the issuance of subpoenas;[169] however, for the sake of efficiency, the committee had adopted a more informal procedure which did not conform with the legislation.[170] To have used the legislation as the basis of a tort action in *Wheeldin*, the Court would have found it necessary to hold that the committee's informal procedure was illegal. Since the legislation neither made the general subpoena procedure exclusive nor provided any penalty for nonconformity,[171] there was no evidence of any congressional intent to allow a tort remedy for noncompliance.[172] The Court's refusal to recognize a tort in this situation therefore may be viewed as an indication of judicial restraint in the face of a specific constitutional grant of power to Congress.

The Court in *Bivens* acknowledged that legislation in the form of a congressional prohibition of a tort remedy for violation of the Constitution would be a special factor counselling hesitation.[173] At the time of the *Bivens* affair, there was no legislation which

---

[164] *Id.* at 197-200.

[165] *See* note 157 *supra*.

[166] 389 U.S. at 200.

[167] 373 U.S. 647 (1963).

[168] "Each House may determine the Rules of its Proceedings, [and] punish its Members for disorderly Behavior . . . ." U.S. CONST. art. I, § 5.

[169] Act of August 2, 1946, ch. 753, § 121(b), 60 Stat. 828.

> Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

[170] Wheeldin v. Wheeler, 302 F.2d 36, 37 (9th Cir. 1962), *aff'd*, 373 U.S. 647 (1963).

[171] *Id.*

[172] 373 U.S. at 650.

[173] 403 U.S. at 397.

might have been so construed. The defendants in the case might well have been subject to a criminal penalty under 18 U.S.C. § 2236,[174] which prohibits the illegal search of a private dwelling by a federal law enforcement officer.[175] However, the existence of a criminal penalty has rarely precluded a tort remedy;[176] instead, statutes defining criminal activity have frequently served as bases of substantive law from which a court could recognize a tort.[177] The defendants in *Bivens* were also potentially subject to disciplinary regulations of their employer. However, regulatory legislation, like criminal legislation, has served as the source of torts rather than as a special factor counselling hesitation.[178] The existence of federal legislation condemning the activities of the defendant will not usually be construed as a special factor counselling hesitation.

The Federal Tort Claims Act[179] has now been amended to waive governmental immunity for the torts of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, when the torts are committed by federal law enforcement officers.[180] The Act retains provisions which make a judgment against the United States[181] or an acceptance of an adminis-

---

[174]18 U.S.C. § 2236 (1970). *See* Berch, *Money Damages for Fourth Amendment Violations by Federal Officials*, 1971 LAW & SOC. ORDER 43.

[175]By the summer of 1972, there had been no convictions under this legislation. Comment, *Money Damages for Unconstitutional Searches: Compensation or Deterrence?*, 1972 UTAH L. REV. 276, 278 n.14.

[176]*Compare* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), *with* Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972).

[177]*See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

[178]*See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956). *But see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1973).

[179]28 U.S.C. §§ 1346, 2671-80 (1970).

[180]

> The provisions of this chapter and Section 1346(b) of this title shall not apply to—
>
> . . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law.

28 U.S.C.A. § 2680(h) (Cum. Supp. 1976), *amending* 28 U.S.C. § 2680(h) (1970).

[181]28 U.S.C. § 2676 (1970).

trative settlement by the United States[182] an absolute bar to further actions against the employee whose activities caused the injury. These provisions have never been construed to bar an original action against an employee; they merely bar an action against the employee after compensation by the Government.[183] The Act will therefore probably not be construed as a congressional declaration prohibiting a tort remedy for violation of the Constitution. In view of the legislative history of the amendment,[184] the Act probably will be viewed as an expression of congressional intent that constitutional torts should be remedied by tort actions in the federal courts.

It is important to note that the Act, as amended, is framed in the language of state common law torts[185] and specifically retains intact and unamended the provision which allows suits only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[186] At this date, no reported opinions construe the amended Act. However, in view of the explicit retention of provisions requiring the application of state laws, the courts will almost certainly base recovery under the Act upon state law.[187] If the state laws do not recognize violations of

---

[182]*Id.* § 2672.

[183]*Cf.* Moon v. Price, 213 F.2d 795 (5th Cir. 1954); United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952).

[184]The Act was amended in response to fourth amendment violations by agents of the Federal Bureau of Narcotics during "raids" in Collinsville, Illinois, in April, 1973. These activities had attracted nationwide publicity. S. REP. No. 93-588, 93d Cong., 1st Sess. 3-4 (1973).

[185]The legislative history of the amendment reveals that the language was probably used in an attempt to include both state common law torts and constitutional torts.

> [T]he Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee amendment should not be viewed as limited to constitutional tort situations but would apply in any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

Id. at 4.

[186]28 U.S.C. § 1346(b) (1970).

[187]Section 1346(b) has been literally construed to require the application of state laws in every aspect of claims brought under the Act, except in situations where state laws conflict with specific provisions of the Act itself or in instances of strict liability. *See, e.g.*, Campbell v. United States, 493 F.2d 1000 (9th Cir. 1974); Cenna v. United States, 402 F.2d 168 (3d Cir. 1968); United States v. Becker, 378 F.2d 319 (9th Cir. 1967); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Anthony v. United States, 233 F. Supp. 693 (E.D. Mo. 1964).

the Constitution as independent torts, recovery under the Act will be an ineffective protection of constitutional interests. The same defenses which have served to defeat recovery in past actions against federal officers in the state courts[188] will continue to defeat recovery under the Act.

There is, however, some authority for the proposition that state courts are required to protect federal rights by applying federal law in state courts when existing state laws are inadequate to do so.[189] If this rationale can be applied to the Act, its provisions for the use of state law may be mitigated. The states would be required to recognize violations of the Constitution as independent torts and plaintiffs would then be compensated under the Act.[190]

Even if state laws do eventually recognize violations of the Constitution as independent torts, government liability under the Act probably will not extend to all constitutional torts. Interests protected by the first, fifth, sixth, eighth, ninth, and tenth amendments, which have already been adjudged to be within the scope of constitutional torts,[191] will not fall within the purview of the Act unless they are invaded as a proximate result of the intentional torts now covered by the Act. Even some fourth amendment violations may not be covered by the Act if they are the acts of officials who are not law enforcement officers, since the Act specifically refers only to acts committed by these officers.[192] Post-*Bivens* cases have demonstrated that constitutional tort actions are often brought against federal officials who are not law enforcement officers, such as volunteers working with the Presidential Advance

---

[188]*See generally* Foote, *supra* note 11.

[189]General Oil Co. v. Crain, 209 U.S. 211 (1908). *Cf.* Parker v. Illinois, 333 U.S. 571 (1948); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); Ward v. Board of County Commr's, 253 U.S. 17 (1920). One of the rationales for this theory is based upon the supremacy clause in article VI of the Constitution. Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954). The other rationale is that the equal protection clause found in the fourteenth amendment requires states to make specific violations of the Federal Constitution actionable if concurrently violated state interests are inadequate to protect the federal interests. Katz, *supra* note 5, at 52. *See generally* Note, *State Remedies for Federally-Created Rights*, 47 MINN. L. REV. 815 (1963).

[190]Federal courts may be required to interpret state laws without benefit of precedent from state courts since some state courts have refused to accept jurisdiction over federal questions, and therefore have developed no body of law concerning federal constitutional torts. *Compare* Galbadon v. United Farm Workers Organizing Comm., 35 Cal. App. 3d 757, 111 Cal. Rptr. 203 (1973), *with* Cashen v. Spann, 125 N.J. Super. 386, 311 A.2d 1972 (App. Div. 1973).

[191]*See* cases cited notes 51-57 *supra*.

[192]*See* note 180 *supra*.

Office,[193] Veterans' Administration supervisory officials,[194] and members of the United States Board of Parole.[195] The Act, as it is now written, will be of no help to the plaintiff who has been injured by these officials.

IV. Summary and Conclusion

Constitutional torts now represent a body of federal common law similar to the common law previously developed in federal courts to remedy breaches of federal statutes. Congress has placed its imprimatur on some judicially created constitutional torts through passage of an amendment to the Federal Tort Claims Act. However, the scope of the amended Act is too narrow to include all constitutional torts and potential defendants. The scope of the Act is further limited by the retention of the requirement for the applicability of state law to suits under the Act. Therefore, the federal courts will be required to continue to forge the federal common law of constitutional torts in suits beyond the purview of the Act.

A problem unique to constitutional torts arises when state-created governmental entities are defendants. The problem becomes acute when the tort is a violation of the fourteenth amendment, since only states and their entities are capable of violating that amendment. If these defendants cannot be sued in federal courts for violation of constitutional torts, the federal policy of enforcing the Constitution in federal courts is thwarted; if, on the other hand, the federal courts indiscriminately allow these defendants to be sued in federal courts, there is a danger of violation of the eleventh amendment rights of the states. Thus far, those federal courts which have faced the problem thoughtfully have reached a reasonable solution by allowing tort remedies when the states have waived immunity to tort suits. However, there is a split of authority on the issue, which is yet to be resolved by the Supreme Court. Until the issue is resolved, the right to compensation for violations of rights enjoyed by all citizens of the United States will continue to depend upon the law of the state in which the violation occurred. Some Americans will continue to receive the unequal protection of the laws sought to be avoided by the fourteenth amendment; and, ironically, the unequal protection will usually occur when the fourteenth amendment has been violated.

Kathryn S. Wunsch

---

[193]Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974).

[194]Scheunemann v. United States, 358 F. Supp. 875 (N.D. Ill. 1973).

[195]United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974).