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The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics

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The Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents* plays an important role in two different narratives.[1] In one narrative, *Bivens* speaks to the Court's power to open the federal courts to actions brought to secure the enforcement of constitutional rights. In this narrative, the Court intervened on behalf of an individual for whom damages represented the only available remedy. Invoking its paramount authority to implement the Constitution, the Court sought to justify a role that overlaps to some degree with the legislative process.[2] In another (increasingly vocal) narrative, *Bivens* exemplifies the sort of judicial activism practiced during the heyday of the Warren Court.[3] This counter-narrative describes the Court's legislative pretensions as fundamentally inconsistent with the judicial function and as fostering the growth of frivolous litigation. With growing suspicion of judge-made rights of action, some members of the Court have portrayed the *Bivens* action as outdated and ripe for reconsideration.

This chapter begins with a sketch of the Court's framework of judge-made remedies for constitutional violations, circa 1970. With that framework of remedies in mind, readers can better understand the stakes in *Bivens* and the role the *Bivens* action plays for those seeking to bring the government to account. Next, the chapter thickens our factual understanding of the *Bivens* litigation by drawing on interviews with three of the leading participants. These interviews reveal the complexity that lurks beneath the surface of any great case and the range of motivations that may have prompted the various actors to play their respective roles.[4] Finally, the chapter suggests a new answer to lingering doubts about the legitimacy of the *Bivens* doctrine.

The *Bivens* Litigation and Constitutional Remedies

A. The Remedial Framework

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

[2] Justice Harlan acknowledged that the judicial task of determining whether to recognize a damages remedy for specific constitutional violations bore some resemblance to the legislative process. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

[3] See Correctional Services Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (describing the *Bivens* remedy as a "relic of the heady" days during which the Court exercised common law powers to recognize implied rights of action).

[4] In preparing this chapter, I interviewed three individuals: Stephen A. Grant, Bivens' lawyer on appeal (on February 21, 2008); Joseph T. Klempner, one of the agents of the Federal Bureau of Narcotics who participated in the arrest and search of Bivens' apartment (on March 13, 2008); and Webster Bivens himself (on July 23, 2008). I explained to each of the three interviewees that I was preparing to write about the case and expected to use material from the interview for that purpose. I appreciate the willingness of Messrs. Bivens, Grant and Klempner to share their recollections. On occasion, I have tried to confirm their recollections through other sources. Perhaps inevitably, as with all oral history, recollections and perceptions differ, both as to events and motivations.

The Supreme Court that granted review of the *Bivens* case in 1970 was very much a court in transition. The era of Earl Warren, the Chief Justice from 1953-1968, had just ended. To replace Warren, President Richard Nixon tapped Warren Burger, a conservative jurist who would align himself with Nixon's own critique of the criminal procedure revolution of the 1960s. Nixon also appointed Harry Blackmun, then a friend of Burger's, to fill the seat vacated when Justice Abe Fortas resigned under a cloud. Burger and Blackmun were the first in a series of Republican justices who would join the Court in the 1970s and 1980s. In comparison to their predecessors, these new justices supported somewhat greater deference to state courts and to the conduct of law enforcement officers.

Two interrelated initiatives of the Warren Court dealt with race and the fairness of the state criminal justice system. In *Brown v. Board of Education*, the Court held that the Fourteenth Amendment barred racial segregation in the public schools.[5] Less well-known, the Court's decision in *Brown v. Allen* expanded the power of the lower federal courts (via the writ of habeas corpus) to hear claims that the *state* courts had committed a constitutional error in course of state criminal proceedings. The habeas petitioners in *Brown* were African-American males who had been convicted of serious crimes in North Carolina state courts. Coming down in 1953, one year before the school case, *Brown v. Allen* deputized the lower federal courts to oversee the constitutionality of state criminal justice.[6] (Although the constitutional errors of state courts had long been subject to direct review in the Supreme Court, the Court could no longer effectively perform that role with a discretionary appellate docket.)

With *Brown v. Allen* in place, every expansion in the scope of constitutional criminal procedural protections could be enforced through lower federal court oversight of state criminal justice. And such expansions came quickly during the 1960s. In the course of a decade, the Warren Court held that indigents were entitled to appointed counsel (*Gideon v. Wainwright*[7]), that criminal defendants were entitled to be told of their right to counsel before being subjected to custodial interrogation (*Miranda v. Arizona*[8]), and that evidence obtained in violation of the Constitution was to be excluded from trial (*Mapp v. Ohio*[9]).

This web of rights and remedies, derived from the Constitution but all in some sense judge-made, focused on the rights of criminal defendants and did little to protect innocent targets of police misconduct. Such innocents faced no criminal charges and had no opportunity to seek the suppression of evidence obtained through police misconduct. The Warren Court addressed the problem in *Monroe v. Pape*.[10] There, members of the

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[5] See Brown v. Board of Education, 347 U.S. 483 (1954). A series of well-known decisions followed, effectively ending Jim Crow in the American South and eventually bringing controversial issues of busing and affirmative action to Northern states as well.

[6] See Brown v. Allen, 344 U.S. 443 (1953).

[7] Gideon v. Wainwright, 372 U.S. 335 (1963).

[8] Miranda v. Arizona, 384 U.S. 436 (1966). Cf. Yale Kamisar, On the Fortieth Anniversary of Miranda, 5 Ohio St. J. of Crim. L. 163, 175 (2007) (suggesting Southern justice may have been a factor in Miranda).

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

[10] Monroe v. Pape, 365 U.S. 167 (1961).

Chicago police department – led by the controversial Frank Pape -- conducted a warrantless raid on the home of James Monroe as part of a murder investigation. During the course of the raid, family members were made to stand naked while officers searched their home, and the plaintiff was arrested and booked on open charges. Eventually, Monroe was released and no murder charges were pursued against him. (The woman who had lied to police about Monroe's involvement was eventually convicted of the crime.) Monroe filed suit against Pape and others, seeking damages in federal court for a violation of his constitutional rights. [11]

In a decision that resembles *Brown v. Allen* and anticipates *Bivens* by ten years, the Court ruled in *Monroe* that section 1983 provides a federal right of action for individuals who allege a violation of constitutional rights under color of state law. Much of the Court's opinion was devoted to parsing the history of Reconstruction-era civil rights legislation. The majority concluded that Congress had provided individuals with a federal right of action, one that was available even where the state courts were open and would in theory provide a tort remedy for the conduct in question. Justice Frankfurter dissented, arguing that state court remedies were adequate and that the federal remedy should arise only where the state or local government's policies, customs, or practices violated the Constitution. Like *Brown v. Allen*, *Monroe* broadens federal jurisdiction by establishing a federal right of action to remedy state constitutional violations, reflecting both a measure of distrust in the state courts and an acceptance of the institutional reality that the Court cannot effectively oversee state courts on direct review.

The regime of private damage suits under section 1983 established in *Monroe* would eventually provide the foundation for an expansion of civil rights litigation in the federal courts.[12] Since *Monroe* came down, the Court has held that state governments and their statewide administrative agencies are not persons within the meaning of section 1983 and bear no liability for the constitutional torts of their officers.[13] On the other hand, the Court has subjected local governments to liability.[14] The Court's preference for official and local government liability reflects the tradition of federal judicial solicitude for notions of sovereign immunity – a tradition that continues to complicate individual efforts to enforce federal rights against state governmental entities.[15]

One more feature of the remedial scheme for state action deserves mention. The Court had held in *Ex parte Young* that individuals could bring suit to enjoin state officials from violating the then-current substantive due process norms in the Fourteenth Amendment.[16] Subsequent decisions extended the principle to state and local

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[11] This account draws on Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir* in Civil Rights Stories (Risa Goluboff & Myriam Gilles, eds. 2007).

[12] For a discussion of the growth of section 1983 litigation, and the Court's response, see Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1079-92 (5th ed. 2003) [hereinafter H&W].

[13] See Will v. Michigan Dept of State Police, 491 U.S. 58 (1989)

[14] See Monell v. Department of Social Services, 436 U.S. 658 (1978).

[15] For the story of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and the doctrine of state sovereign immunity, see chapter __.

[16] See Ex parte Young, 209 U.S. 123 (1908) (discussed in chapter __).

government action and to violations of other constitutional provisions. Indeed, the action in *Brown v. Board of Education*, seeking to enjoin local school boards from maintaining segregated schools, rested squarely on an *Ex parte Young* theory.[17] In a case like *Monroe v. Pape*, by contrast, injunctive relief is not a practical option.

At the time of *Bivens*, the remedial scheme for constitutional violations under color of *federal* authority resembled to some extent that for violations under color of state law. Like state governments, the federal government itself could claim sovereign immunity from any suit based on the misconduct of its law enforcement officers.[18] As a consequence, there was no obvious way to pursue a claim for damages against the federal government or its agencies.

As with claims against state actors, the law of federal government accountability relied extensively on suits against the officers themselves.[19] Federal officers, like state officers, were subject to suits seeking injunctive relief from threatened or continuing violations of constitutional rights.[20] Writs of habeas corpus, moreover, would issue to test the legality of detention under color of federal authority. The exclusionary rule had long since been applied to bar the admission of evidence obtained by federal officers in violation of the Fourth Amendment.[21] *Miranda* rules governing custodial interrogation applied to both state and federal law enforcement officers.

One puzzle remained at the time of the *Bivens* litigation. In a situation like *Monroe v. Pape*, the law did not clearly specify what sort of remedy an individual could obtain against an officer acting under color of *federal* law. Section 1983 applied only to actions under color of state law; it made no provision for suits against federal officers. During the antebellum period, individuals were free to file common law suits for trespass against federal officers in the state courts. Congress had long since provided for the removal of such actions to federal court and removal had become a routine practice. Despite this removal practice, the right of action and measure of damages were thought to

[17] See Bolling v. Sharpe, 347 U.S. 497 (1954) (allowing victims of segregated public schools in the District of Columbia to seek injunctive relief against the federal government).
[18] See generally Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521 (2003); James E. Pfander, Sovereign Immunity and the Right to Petition, 91 Nw. U. L. Rev. 899 (1997). Two statutes waiving federal sovereign immunity did not apply. The Tucker Act provided for suits to remedy government breaches of contract and takings of property, but it excluded tort-based liability. See 28 U.S.C. 1491 (providing for suits against the United States for a variety of claims "not sounding in tort"). The Federal Tort Claims Act provided for tort-based liability but focused primarily on negligence actions. See 28 U.S.C. 1346(b).
[19] See James E. Pfander, Principles of Federal Jurisdiction 172-74 (2006).
[20] See Larson v. Foreign & Dom. Commerce Corp., 337 U.S. 682, 700-03 (1949) (limiting injunctive relief for certain property claims where alternative relief in damages was available, but acknowledging the availability of injunctive relief against federal official action that exceeded authority or violated the Constitution).
[21] See Weeks v. United States, 232 383 (1914).

depend on state common law. So long as state law was seen as controlling the claim for relief, the plaintiff could not sue federal officers in federal court as an initial matter.[22]

Yet there was reason to doubt that the right to sue a federal officer was properly characterized as a creature of state law. In *Bell v. Hood*,[23] the Court had ruled that the federal district court could exercise jurisdiction over a suit against a federal officer, seeking damages for a violation of the Fourth Amendment. While the Court did not expressly rule on the question whether the Fourth Amendment gave rise to an implied federal right of action, it treated the complaint's allegations to that effect as stating a federal question substantial enough to ground the court's jurisdiction. The *Bivens* litigation, commenced some twenty years later, was to provide the Court with a chance to revisit the implied right of action issue.

B. The Bivens Litigation

The *Bivens* case began on November 26, 1965, the day after Thanksgiving, when agents of the Federal Bureau of Narcotics (later re-named the Drug Enforcement Agency) knocked on the door of the apartment of Webster Bivens, arrested him on narcotics charges, and searched the premises. As Bivens' handwritten and sparely worded complaint would later recite, the agents lacked a warrant either for the search of the apartment or for the arrest. As the complaint further recites, the agents used "unreasonable" force in effecting the arrest. Bivens alleged that they manacled him in the presence of his wife and children and threatened to "arrest . . . his entire family." When he was subsequently interrogated and booked at the agency's office, the officers at the station allegedly searched his person and conducted a "visual search of his private parts." The events were said to have caused Bivens "great humiliation, embarrassment, and mental suffering" and to have entitled him to damages of "$15,000 from each of the defendants" and other appropriate relief.

1. Proceedings in the District Court

Bivens filed suit *pro se* in the federal district court for the Eastern District of New York on July 7, 1967 -- some nineteen months after the search took place. In framing his claim, Bivens sought damages for a constitutional tort even though his complaint does not invoke the Fourth Amendment in terms. Thus, he alleged that the agents, "acting under the color and authority" of the United States, "violate[d] plaintiff's constitutional rights." His jurisdictional allegations included a reference to 42 U.S.C. § 1983, and to 28 U.S.C. § 1343(3) and (4), provisions that authorize suit to challenge action taken under color of *state* authority. (These recitals were, as the district court later held, irrelevant to the district court's jurisdiction over the claims Bivens brought, which named *federal* officers.[24]) In addition, Bivens invoked 28 U.S.C. § 1331, the general grant of federal

[22] See Louisville & N. R. Co. v. Mottley, 211 U.S. 149 (1908) (concluding that federal jurisdiction for claims arising under federal law requires that the federal issue appear on the face of the well-pleaded complaint).
[23] 327 U.S. 678 (1946).
[24] See Bivens v. Six Unknown Named Agents, F. Supp. (E.D.N.Y. 1967).

question jurisdiction. At the time, section 1331 required that the amount in controversy exceed $10,000.[25] Bivens may have had this jurisdictional threshold in mind when he claimed damages of $15,000 and may have invoked the alternative (if inapplicable) provisions of section 1343 as jurisdictional insurance in case the court regarded the ad damnum in his complaint as overblown.

Following the initiation of the litigation, the United States Attorney identified the agents who participated in the search of Bivens' apartment, and process was duly served upon them. (Apparently, only five agents were so identified and served, rather than the six specified in the complaint.[26]) Much later, when the case was pending before the Supreme Court, the government offered this post-filing identification of the agents in an attempt to account for the caption of the case. The government's brief on appeal to the Supreme Court sought to explain the apparent contradiction by suggesting that the agents were "unknown" at the time of filing but were later identified and served with process, and thus "named."[27] But the subsequent identification does not explain why the original *pro se* complaint referred to "Unknown Named" agents who were not named in the original complaint. A more plausible explanation is that, from the plaintiff's perspective, the agents simply had "unknown names."[28]

The government offered to provide a legal defense for the identified agents through an assistant United States attorney. But one of the agents, Joseph Klempner, understood the government to have taken the position that it would not indemnify the agents for any award of damages.[29] In any case, Klempner (who was trained and later practiced as a lawyer) recalls having thought that the threat of ultimate liability was quite remote. He viewed the claims either as defensible (handcuffs were standard procedure) or as overblown and was puzzled by the government's attitude on indemnity, particularly in light of the fact that an assistant United States attorney in New York had signed off on the plan to arrest Bivens at his home and to conduct a search incident to arrest.

The government moved to dismiss the action on September 18, 1967. As for the section 1983 claims, they were said to be unavailable against federal agents. As for the claim under section 1331, the government argued that the federal agents enjoyed an

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[25] Congress eliminated the jurisdictional threshold for federal-question claims against the United States, its agencies, and officials in 1976 and removed the threshold for all federal question claims in 1980. See Charles Alan Wright & Mary Kay Kane, *The Law of Federal Courts* 196-97 (6th ed. 2002).

[26] The five agents identified and served with process were: Joseph T. Klempner, Alan M. Kofman, Dennis F. Lozon, Timothy G. Sheehan, and Chetland Wysor. (Klempner advises that, contrary to the way it appears in the appendix, Wysor's first name was spelled "Chantland".) For their identification and service with process, see Appendix, Bivens v. Six Unknown Named Agents of the Federal Narcotic Bureau, at iv. Klempner recalled that perhaps as many as eight or ten FBN officers were involved with the search of the Bivens apartment. One agent, Dennis Lozon, was later convicted in Maryland of conspiracy to distribute and to possess with intent to distribute cocaine. See United States v. Meacham, 799 F.2d 751 (4th Cir. 1986) (affirming Lozon's conviction), cert. denied, 479 U.S. 1086 (1987). One, Timothy Sheehan, was later ordained as a priest. Klempner himself later became a lawyer and published novelist.

[27] See Brief of the Respondent (Government) in Bivens at 1 n.1.

[28] David Shapiro suggested this solution to the puzzle and Webster Bivens confirmed it.

[29] Perhaps the government had simply reserved its rights to withhold indemnity depending on the ultimate resolution. For the current indemnity policy, see note 105.

absolute immunity from suit as federal officials acting within the scope of their authority. See Affidavit of Ralph A. Bontempo, Assistant U.S. Attorney. (Note that the rationale of this immunity defense appears at odds with the government's refusal to hold the agents harmless for any award against them.) The district court initially granted the government's motion on this immunity rationale. See Memorandum and Order, dated October 9, 1967 at 1 (citing *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964)).

The implied right of action question entered the case when Bivens filed a notice, dated October 17, 1967, seeking leave to appeal *in forma pauperis*. The district court responded to that notice by conducting additional research. In a subsequent opinion, dated November 24, 1967, the court found no implied right of action. The district court's opinion referred to *Bell v. Hood*, in which the Supreme Court had reserved judgment on the implied right of action issue.[30] The district court also noted that, following a remand in *Bell*, the lower court had found that no such right of action existed. Relying on that conclusion, the district court in *Bivens* found that "no federal question is presented by the complaint." That finding was apparently meant to support a conclusion that the district court lacked jurisdiction under section 1331 (as indeed the heading of that section of the court's opinion indicated). Yet the district court disposed of the case by noting that it adhered to "its prior ruling, dismissing the complaint on the merits." Finally, the district court denied Bivens leave to pursue an appeal.

2. Proceedings in the Second Circuit

Some time passed before the Second Circuit took up the *Bivens* case. On July 12, 1968, Judge Henry Friendly (and fellow Circuit Judges Feinberg and Smith) signed an order that both granted leave to appeal (reversing the district court's contrary conclusion) and appointed Stephen Grant as counsel to represent Bivens on appeal. The selection of Mr. Grant was Judge Friendly's doing. Grant graduated from Columbia Law School in 1965, where he had served as the editor-in-chief of the *Law Review*, and clerked for Judge Friendly during the following year. While clerking, Grant had assisted with a case that posed an implied right-of-action question. In the case, *Colonial Realty Co. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966), Friendly refused to recognize an implied federal right of action, but did not foreclose the possibility of doing so in an appropriate case. Friendly recalled Grant's work on the issue and asked Grant to help with the *Bivens* litigation. At the time, Grant had taken a job with the New York firm, Sullivan and Cromwell, and was working in the corporate (not the litigation) department. Grant accepted the representation on a *pro bono* basis.

Bivens did not succeed at the Second Circuit. In an opinion by Chief Judge Lumbard (Judge Friendly did not hear the case), the panel concluded that no implied right of action existed. It thus affirmed on the merits, and specifically rejected the alternative conclusion that the district court lacked jurisdiction under section 1331. As the court explained, it made sense to leave the recognition of the right of action to Congress, which had occasionally stepped in to fill perceived gaps in the remedial scheme. Courts were

[30] 327 U.S. 678 (1945).

not in the best position to convert the shield of the Constitution into a "sword directed against individual officers."[31]

The Second Circuit handed down its opinion in April 1969, and there matters rested for a time. Acting with Judge Friendly's encouragement, Grant filed a petition for Supreme Court review on May 12, 1969. After taking no action for over a year, the Court granted the petition on June 22, 1970.[32] Briefs were filed in the fall and the oral argument took place in January 1971.

3. Proceedings in the Supreme Court

As counsel for the petitioner, Grant was first up at the argument.[33] As he had in his brief, Grant contended that the Fourth Amendment was framed on the assumption that its prohibition against unreasonable searches was to be enforced in an action for damages. Moreover, Grant contended that the right of action in question should be considered a creature of federal common law, not simply a matter of state law. Such an approach would ensure, according to Grant, that the right in question was not subject to what he termed "the vicissitudes of state law."[34] Although he did not spell out these vicissitudes in detail, Grant noted that the quantum of damages (compensatory and punitive) might vary from state to state. Later, Grant observed that this state-to-state variability was a corollary of the decision in *Erie R. Co. v. Tompkins*,[35] which deprived the federal courts of the control over the nuances of common law rights of action against government officers. Only by federalizing the right of action could the Justices ensure that the constitutional rights embedded in the Fourth Amendment would apply uniformly throughout the country.[36]

Grant also made the telling argument that an injunction would be available to enforce the Fourth Amendment in federal court.[37] The injunction argument proved persuasive to Justice Harlan, who noted in his concurring opinion that the right of action already existed and that a decision in favor of Bivens would simply add the remedy of damages.[38] Harlan also noted at the outset of his opinion that he had initially favored the government's view of the case, but had changed his mind on further reflection. The availability of an injunction may have played a prominent role in his change of heart; in any case, the Court understood the significance of the argument and pressed the

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[31] Bivens, 409 F.2d 718, 724 (2d Cir. 1969). The shield-sword metaphor has become a staple in scholarly discussions of the *Bivens* action. It made an early appearance in 1954, see Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 521-22 (1954), and re-appeared in the post-*Bivens* literature. See Dellinger, supra note 14.

[32] Turnover in the Court's membership that may have contributed to the delay.

[33] See Transcript of Oral Argument at 1, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics [hereinafter Transcript] (copy on file with author).

[34] Id. at 7.

[35] 304 U.S. 64 (1938).

[36] Transcript at 11-12.

[37] Id. at 9.

[38] See Bivens, 403 U.S. at 400 (Harlan, J., concurring) (noting the presumed availability of injunctive relief as fatal to the government's argument that suit depends on the passage by Congress of legislation creating a federal right of action).

government attorney on the point. Thus, when Jerome Feit rose to argue the case for the government, one of the Justices asked Feit if there was "a cause of action for injunctive relief, as Mr. Grant suggested."[39]

Feit's difficulty in responding to this question was emblematic of his troubles throughout the argument. He admitted that such an action might exist.[40] That, in turn, prompted one Justice to ask, "If there is already a cause of action for injunctive relief for a violation of the Fourth Amendment, why does the Government suggest that we would be creating a cause of action?"[41] Feit struggled with the question: he suggested that doubts about the ability of state courts to enjoin federal officers created a necessity for a federal injunctive remedy that was lacking in the case of damages, where the state courts were clearly competent. In other words, Feit argued that the existence of an alternative state law damages remedy removed any need to fashion a federal damages remedy.

But Feit was hard pressed to explain and defend a role for state law on his view of the case. When called upon to define what was left to state law, Feit mentioned the "measure of damages" including the availability of punitive and compensatory damages.[42] Feit noted in particular that the law of New York had been somewhat liberal in permitting the recovery of damages for emotional distress in cases involving official misconduct.[43] But this line of argument may have only helped to confirm Grant's contention that the existing model of official federal accountability was too dependent on the vicissitudes of state law.

Feit also tried a somewhat more promising line of argument, raising the specter that a remedy fashioned to enforce the Constitution might prove impervious to congressional adjustment.[44] The argument clearly provoked the Court, which had lived through many of the same sorts of arguments in connection with its decision to extend the exclusionary rule from federal to state proceedings. But it was Grant to whom the Court turned for answers. During rebuttal, Grant denied that he was seeking the redefinition of the Fourth Amendment, or that his position would "freeze" remedies in a mode that could only be "broken by a constitutional amendment."[45] Rather, the petitioner sought only the enforcement of the Fourth Amendment as a "matter of federal common law free from local rules."[46] According to Grant, such common law could "be changed by legislative action." For example, Congress might choose to substitute the federal government as a defendant in the place of the federal officer. In addition, Congress might choose to

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[39] Transcript at 23.
[40] Id.
[41] Transcript at 23.
[42] Id.
[43] Id. at 27-28, 31.
[44] Thus, if the Court were to recognize a cause of action governed by federal law, it would create a "constitutional tort." Id. at 29. For coining the term "constitutional tort," scholars credit my colleague Marshall Shapo, *Constitutional Torts: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277 (1965). The Supreme Court did not borrow the term until 1978.
[45] Id. at 39.
[46] Id. In this respect, Grant's argument anticipated Henry Monaghan's later treatment of constitutional common law.

provide indemnity for its officers. Grant proposed to end the argument with a call for a judicial re-affirmation of the citizens' right to seek redress "in clear and resounding terms."[47]

But one member of the Court pressed him on the issue of congressional control. Suppose, one Justice asked, "we were to hold that there is a cause of action and Congress has a bill saying there should not be a cause of action."[48] What then? Grant provided a sophisticated answer: he submitted that the law would violate the Fourth Amendment, but he added that Congress would retain flexibility to reshape or redefine the scope of the remedy. Well then, suppose Congress were to say "the Federal Court shall have no jurisdiction to hear suits against Federal officers?"[49] Again, Grant provided a sophisticated answer, noting that the action could proceed in state court as a matter of federal law, subject to review in the Supreme Court. This led in turn to the question whether Congress could repeal the exclusionary rule.[50]

Grant's answer to this question posed an issue that must have been lurking in the back of everyone's mind: what impact would the recognition of a right of action for damages for violation of the Fourth Amendment have on the continued recognition of the suppression remedy under the exclusionary rule? Grant responded that the inadequacy of alternative remedies had clearly been a factor in the decision to adopt the exclusionary rule and extend it to state court proceedings.[51] So, as one Justice noted, if you were to prevail here, it might "lead the Court to be invited to reconsider at least the full force of the exclusionary rule."[52] Echoing a view that had seemed obvious since he first became involved in the litigation, Grant replied: "It certainly might."[53]

4. The Court's Opinions

Justice Brennan wrote the opinion for the Court. Adopting a matter-of-fact tone, Brennan apparently sought to downplay the significance of the recognition of a federal right of action. He first considered and rejected the government's contention that state law provided the vehicle with which individuals were to vindicate rights under the Fourth Amendment.[54] State law could not control the question of what limits the Fourth Amendment placed on federal action, and the Fourth Amendment was not limited to operating as a reply to the defense of official justification. Indeed, as Brennan pointed out in the second part of his opinion, the interests protected by state law actions for

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[47] Id.
[48] Id. at 41.
[49] Id. at 42.
[50] Id. at 43. In 1968, Congress had adopted 18 U.S.C. § 3501, purporting to overrule the Court's decision in Miranda v. Arizona. The Court ultimately invalidated the statute. See Dickerson v. United States, 530 U.S. 428 (2000).
[51] Id.
[52] Id. at 43-44.
[53] Id. at 44. Depending on one's perspective, subsequent history may or may not bear out Grant's assertion that recognition of a damages remedy might influence the evolution of the exclusionary rule. While it has refrained from abandoning the exclusionary rule, the Court itself has gone some distance in recognizing good faith and other exceptions that dampen the rule's impact on the criminal process.
[54] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S 388, (1971).

trespass or invasion of privacy do not necessarily match up well with the interests protected by the Fourth Amendment.[55] Thus, state law empowers the homeowner to deny entry to a private intruder but that strategy may not work when a federal officer demands access to the premises.

In the third section of the opinion, Brennan acknowledged that there may be "special factors counseling hesitation" in the recognition of implied rights of action under the Constitution.[56] But, in contrast to the way in which subsequent decisions have understood the counsel of hesitation,[57] the sorts of factors he identified do not appear to pose much of a barrier to an expansion of *Bivens* liability. Thus, Brennan noted that federal fiscal concerns might counsel hesitation, citing and distinguishing a case in which the Court had refused to recognize an implied right of action on behalf of the federal government to recover losses due to the injury to a key employee.[58] Brennan acknowledged, picking up on the ideas discussed in oral argument, that Congress might reject the *Bivens* remedy; but to do so, Brennan suggested, would require an explicit congressional declaration against official liability and the creation of "another remedy, equally effective in the view of Congress."[59] Brennan also suggested that the Court might proceed more cautiously when the plaintiff alleged not a constitutional violation but a claim that the officer exceeded his statutory authority. Finally, Brennan rejected the government's submission that a showing of necessity was required to sustain the action. Rather, the issue was "merely" whether the plaintiff can show injury consequent upon the violation of his Fourth Amendment rights.

Justice Harlan concurred in the result. Harlan first observed that the creation of a right of action was no novelty; after all, the federal courts had recognized private suits to enforce statutory rights and their discretion to do so might well extend to rights grounded in the Constitution. Moreover, the federal courts were clearly capable of entertaining suits to restrain federal officers from violating constitutional norms. This fact persuaded Harlan that the right of action already existed and the issue was whether to make available a remedy in damages. For Harlan, the absence of alternative remedies was decisive; for a person in Bivens' shoes, it was "damages or nothing."

Chief Justice Burger dissented. Burger opposed the exclusionary rule and what he viewed as the judicial expansion of the Fourth Amendment.[60] From that perspective, Burger might well have embraced the *Bivens* action as a less disruptive alternative to

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[55] Bivens, 403, U.S. at .
[56] Id. at .
[57] Cf. Wilkie v. Robbins, __ U.S. __ (2007) (treating concern with the docket implications of a right of action and the desire to preserve congressional primacy as factors counseling hesitation);Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001) (emphasizing the availability of a state tort remedy as one justification for refusing to recognize a *Bivens* remedy against a private firm that had contracted to run a federal prison).
[58] Bivens, 403 U.S. at 396 (citing United States v.Standard Oil Co. 332 U.S. 301 (1947)).
[59] Id. at 396.
[60] On the same day *Bivens* came down, Burger dissented in an exclusionary rule case. See Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (Burger, C.J., dissenting) (objecting to the "monstrous" price exacted by the Court's exclusionary rule jurisprudence).

exclusion. Indeed, Burger noted that the *Bivens* complaint, alleging the absence of cause for an arrest and associated search that did not lead to criminal process, identified police conduct that the exclusionary rule could not remedy.[61] But Burger nonetheless declined to embrace the *Bivens* action, calling instead for Congress to take the lead in developing a system of government accountability for federal official misconduct.[62]

Somewhat surprisingly, Justice Black also dissented.[63] Justice Black took the position that the creation of rights of action was for Congress, not for the federal courts. At least in tone, Black's opinion in *Bivens* departed from the views he had expressed twenty-five years earlier in *Bell v. Hood*.[64] There, Black concluded that constitutional tort claims against officers of the FBI were sufficiently substantial to warrant the exercise of federal question jurisdiction. Black's 1946 opinion had suggested a willingness to consider an implied right of action; he encouraged the federal courts to be "alert to adjust their remedies so as to grant the necessary relief."[65] Brennan drew on this language in his majority opinion in *Bivens*. But sounding a theme that critics of the decision echo today, Black expressed doubt that the need for a judicial remedy outweighed the costs of devoting judicial energy to claims brought to challenge the work of well-meaning government officials.[66]

5. Remand and Settlement

Following its ruling on the right of action, the Court remanded the proceeding to the Second Circuit for resolution of the immunity issue. The government argued for something verging on absolute immunity and pointed to lower court decisions that had rejected common law trespass claims against federal police officials. With that broad position, the Second Circuit did not agree.[67] The Second Circuit, however, concluded that the officials were subject to personal liability if they committed Fourth Amendment violations. They could nonetheless invoke a defense of privilege by showing good faith and a reasonable belief in the validity of their actions.[68] As the Second Circuit explained, this defense included both subjective (good faith) and objective (reasonable) components.[69]

After ruling for Bivens on immunity, the Second Circuit remanded to the district court for further proceedings, perhaps including a trial. At about the same time, in 1972, Bivens met with his attorney for the first time. Recollections differ as to whether the case

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[61] See note 15 supra.
[62] Bivens, 403 U.S. at 422.
[63] See Bivens, 403 U.S. at (Black, J., dissenting); cf. Dellinger, supra note , at 1541 (registering surprise at Black's dissent).
[64] Bell v. Hood, 327 U.S. 678 (1946).
[65] Id. at 684.
[66] Bivens, 403 U.S. at (Black, J., dissenting).
[67] See Bivens, 456 F.2d 1339, 1347 (2d Cir. 1972).
[68] Id. at 1348.
[69] The Supreme Court has since abrogated the subjective element of the inquiry, calling instead for a focus on whether the official violated clearly established constitutional norms. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). [chapter?].

settled for $500 or $1000, but each of the five defendants contributed one-fifth of the sum.[70] Joseph Klempner recalls having been reluctant to contribute. He reportedly did so out of concern for the situation of his co-defendants, some of whom no longer lived in New York and were so eager to avoid trial there that they had offered to pay Klempner's share.

Competing Narratives and the Problem of Innocence

Building on comments by Justice Harlan ("for people in Bivens' shoes, it's damages or nothing"[71]), many scholars have assumed that Bivens was (like Monroe) an innocent man, wrongly targeted by law enforcement officials.[72] The narrative of innocence gains strength from two factors: the agents found no drugs when they searched Bivens' apartment and the federal magistrate (or commissioner, as such officials were known in those days) dismissed certain of the charges against Bivens.[73] For purposes of seeking relief from a Fourth Amendment violation, therefore, it was certainly true that Bivens was not in a position to vindicate his Fourth Amendment rights by seeking suppression of evidence in connection with dismissed charges.[74]

The narrative of innocence that has grown up around the *Bivens* case influences scholarship in two ways. First, innocent victims of unannounced but wrongful police intrusions would have no remedy, other than a claim for damages. Second, some constitutional scholars argue that the *Bivens* remedy should take the place of the exclusionary rule, in part on the ground that constitutional tort litigation would primarily operate in favor of the innocent (Monroe, for example) and would be less costly than an exclusionary regime that operates for the benefit of the guilty.[75] In such a tort-based regime, the guilty, if denied suppression as the remedy for a constitutional violation, could still sue for an award of damages but judges and juries might award only nominal

[70] Bivens recalls that the case settled for $1000, with each of the five defendants contributing personal checks in the amount of $200 each. Bivens photocopied the checks before cashing them and kept them with his personal effects at a house in Pennsylvania that was later destroyed in a fire. Klempner, by contrast, puts the settlement figure at $500, or $100 each.

[71] See Bivens, 403 U.S. at 410 (Harlan, J., concurring). See also Bivens, 403 U.S. at 415, 418, 422 (Burger, C.J., dissenting) (remarking upon the paradoxical fact that a regime that relies upon the suppression of evidence as its primary remedy for Fourth Amendment violations does not afford any relief to innocent victims of official wrongdoing).

[72] See, e.g., Akhil Reed Amar, *Criminal Justice*, 34 Pepperdine L. Rev. 521, 532 (2007) (describing Bivens as an innocent man, degraded by police officers); Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1136 (1996) (describing the Bivenses of the world as innocent citizens hassled by the government).

[73] See Bivens v. Six Unknown Named Agents, 409 F.2d 718, 719 (2d Cir. 1969). An early and influential account of the litigation concluded that, if the allegations of the complaint were true, "both the arrest and the search were illegal under the Fourth Amendment." Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1534 (1972).

[74] The exclusionary rule had long been applied to exclude unlawfully obtained evidence from federal criminal prosecutions, see Weeks v. United States, 232 U.S. 383 (1914), and was extended to state criminal proceedings in 1961. See Mapp v. Ohio, 367 U.S. 643 (1961). But the rule would have no role to play if, as Dellinger noted, "no charges were ever filed against [Bivens]." Dellinger, supra note 14, at 1534,

[75] See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 795-99 (1994); Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 St. John's L. Rev. 1097, 1131 (1998).

damages or otherwise limit the size of any award. Scholars have defended such a proposed regime on the ground that suppression undermines society's interest in convicting the guilty and may provide a remedy that does not fit the nature of the constitutional violation at issue.[76] As we have seen, counsel to Bivens and the Justices before whom he appeared understood that the Court's creation of a damages remedy might influence the development of the suppression remedy. Judge Friendly's role in persuading Grant to represent Bivens may have reflected Friendly's own preference for a tort-based alternative to the Fourth Amendment suppression remedy.[77]

But a variety of factors complicate the narrative of innocence. First, my interviews with participants in the litigation suggest that Bivens was not, himself, an entirely innocent victim of police misconduct. Rather, as the next section describes, Bivens was involved in drug trafficking at the time of the arrest and search of his apartment. Moreover, the state of the law at the time of the search would have provided a relatively sound, if not entirely airtight, legal justification for the conduct of the agents in arresting Bivens and searching his apartment without a warrant. Finally, one can argue that a remedial system designed to secure a measure of government accountability should focus not on the *status* of the victim (guilty or innocent, rich or poor) but on the *behavior* of the government official. On this view, the importance of a claim for damages results less from the need to compensate the innocent than from the need to deter misconduct on the part of government officials. Guilt or innocence may be something of a distraction, especially if it tends to raise doubts about the right of the guilty to lawful treatment at the hands of government officials.

A. Bivens and the Problematics of Innocence

Bivens' complaint alleged that federal agents violated his constitutional rights by conducting a warrantless search of his apartment. While the allegations never went to the jury, government agents believed that their actions complied with the law. According to an account provided by Joseph Klempner, who, as noted, was one of the agents later identified as a defendant in the action, two different working groups of federal agents had bought drugs from Bivens in separate undercover operations. One of the "buys" occurred in Manhattan (under the aegis of the Southern District of New York) and one in Brooklyn (within the Eastern District). The Manhattan buy suggested to the officers involved that Bivens occupied a mid-level position in the chain of distribution; the one ounce packet of heroin that Bivens sold had a street value in the mid-1960s of roughly $500 and represented a wholesale, rather than a retail, transaction. Once the two groups of agents learned that they had both made buys from the same suspect, they considered a range of cooperative strategies. One possibility was to orchestrate a third, and larger buy, and arrest Bivens at that time. Another possibility was to arrest Bivens at his home on charges relating to the earlier buys.

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[76] See Amar, supra note 127.

[77] For his critique of remedies that failed to take account of guilt or innocence, see Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) (arguing that an evaluation of likely guilt or innocence should inform the willingness of federal courts to grant habeas relief to state prisoners).

In evaluating alternatives, the agents consulted with William "Tendy" Tendesky, the assistant United States attorney for the Southern District in charge of drug investigations. Tendesky advised that it was entirely permissible for the officers to arrest Bivens at his home and conduct a search incident to that arrest. At the time, the state of New York authorized police officers to enter a suspect's home to make a routine felony arrest on probable cause, without any showing of exigent circumstances or any requirement that the officers first obtain a warrant.[78] In addition, New York law allowed the introduction of evidence seized in searches incident to such arrests.[79] Although the Supreme Court eventually ruled that the Fourth Amendment barred the non-exigent warrantless entry into a suspect's home, that decision did not come until 1980.[80] Following the agents' drug buys from Bivens, the government could thus make a plausible, if not entirely airtight,[81] case for the legality of the arrest and the attendant search of his apartment. The decision to search the apartment may have reflected the agents' desire to secure the cooperation of Bivens in implicating those at the top of his distribution chain.[82]

In my interview, Bivens confirmed certain elements of the agents' account, although he offered a strikingly different portrait of the events inside the apartment. Born in Harlem in August 1928, Webster Bivens was almost 80 years old when I spoke with him in July 2008. At the time of his arrest during the 1960s, evidence in the public record tends to confirm that Bivens had been involved in drug trafficking. Based on conduct in New York City during the summer of 1963, Bivens was convicted of two

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[78] See New York v. Loria, 179 N.E.2d 478, 482 (N.Y. 1961) (explaining that entry to effect an arrest without a warrant is valid if there is probable cause to make the arrest); New York v. Malinsky, 209 N.E.2d 694, 698 (N.Y. 1965) (explaining that an arrest without a warrant is lawful if the arresting officers have a "reasonable cause for believing that a crime has been committed and that the person arrested is the party responsible"). At the time of Bivens' arrest, New York federal courts would have looked to New York state law to determine an arrest's lawfulness. See e.g., Ker v. California, 374 U.S. 23, 37 (1963) (recognizing the long-established rule "that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution"). William Tendy has been elsewhere identified as William "Tendy" Tendesky. See Douglas Valentine, The Strength of the Wolf: The Secret History of America's War on Drugs 179 (2004).

[79] See New York v. Loria, 179 N.E.2d 478, 481-82 (N.Y. 1961) (holding, in the wake of Mapp v. Ohio, 367 U.S. 643 (1961), that evidence obtained from a search and seizure conducted incident to a lawful arrest was legal and admissible); see also New York v. Gatti, 212 N.E.2d 882, 883-84 (N.Y. 1965) (affirming the validity of searches and seizures conducted pursuant to lawful arrests; decided two days prior to the arrest of Bivens). Contemporary federal law also permitted the search for, and seizure of, items in the place where a person was lawfully arrested under certain circumstances. See United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965). This right to search the place where a lawful arrest was made extended to people arrested while committing a crime. See Agnello v. United States, 269 U.S. 20, 30 (1925).

[80] See Payton v. New York, 445 U.S. 573 (1980).

[81] One of the buys had occurred some weeks earlier and its relative staleness may have reduced its value in establishing a basis for the arrest. In addition, well-informed lower courts may have anticipated the Court's eventual decision in Payton v. New York, which was to bar warrant-less entry into a home in the absence of exigent circumstances.

[82] His lawyer on appeal, Stephen Grant, also had come to understand that federal agents had evidence of wrongdoing and were using the search to obtain additional evidence that would identify other links in the chain of supply.

substantive counts of drug trafficking and one count of conspiracy to engage in drug trafficking.[83] In a separate incident, the government successfully pursued forfeiture proceedings against Bivens' car after observing a drug transaction and finding him in possession of heroin.[84] Bivens was eventually imprisoned on a federal narcotics conviction at the federal penitentiary in Atlanta, Georgia in the mid-1960s[85] and was there when he filed his *in forma pauperis* civil action against the "unknown named" agents on July 7, 1967.[86]

Precisely what happened in Bivens' apartment that morning remains a mystery.[87] Bivens's complaint alleged that he was handcuffed in front of his family, that his family was threatened with arrest, and that he suffered embarrassment. He also alleged that, during the booking process, he was strip searched at the station house. Klempner has confirmed these allegations to some extent. He recalls that family members were present during the search and recalls that Bivens was handcuffed, something that was standard operating procedure at the time. Klempner did not rule out, moreover, the possibility that Bivens had been strip searched at the station, although Klempner denied that a strip search had occurred at the apartment. Klempner recalls that Bivens requested and received permission to change his clothes at his apartment before being taken down to the station, a recollection roughly consistent with Bivens' own memory that he was wearing only shorts and a t-shirt.

Recollections also differ on the tenor of the encounter. On the whole, Klempner does not recall the search as unusual, difficult, or unpleasant; he recalls that Bivens was cordial throughout and that the agents were accommodating in return. Bivens does not agree with Klempner's account. At one point, an agent had threatened to require his wife

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[83] See United States v. Aiken, 373 F.2d 294, 296 & n.1 (2d Cir. 1967) (describing Bivens' involvement with a narcotics distribution organization run by Messrs. Aiken and Davis; noting that Bivens was convicted on three counts but also noting that Bivens had appealed from his convictions).

[84] See United States v. 1964 Ford Thunderbird, 445 F.2d 1064, 1066-67 (3d Cir. 1971). Bivens believes that one of the federal agents planted the drugs that were later "discovered" in the car. He reports that he never sold drugs from his car; he believes the agents pursued him after their primary target slipped away. See Letter from Webster Bivens to James E. Pfander, March 9, 2009 (copy on file with author).

[85] See Bye v. United States, 53 F.R.D. 354 (S.D.N.Y. 1971) (describing Bivens as an inmate at the Atlanta federal penitentiary and noting that Bivens had testified in support of a challenge to a fellow inmate's guilty plea). Bivens reportedly prepared the petition that led to Bye's successful challenge to the voluntariness of his guilty plea.

[86] Bivens Appendix at 5, 9, 13, 17, 21 (summoning agents to serve a response to the complaint on "Webster Bivens, # 90053-A, U.S Penitentiary, Atlanta, Georgia").

[87] At the time of the search, Bivens said he was living with his wife and two small children. After celebrating Thanksgiving dinner with his family the previous day, Bivens had entertained a new guest at his home who produced a one-ounce bag of relatively pure cocaine. Bivens and the guest "sniffed" some of the cocaine, staying up until the wee hours of the morning. The guest left the house about 3:00 am, and insisted on leaving the remainder of the cocaine with Bivens. Bivens now believes that the guest did so at the behest of federal agents; the guest left only a few hours before the agents arrived. Bivens also recalls that the agents asked specifically about the location of the "cocaine," suggesting that they had reason to suspect that Bivens was in possession of that particular drug. Bivens believes that certain of the agents were later dismissed from the FBN on corruption charges and may have been hoping to find money or drugs or both. See Letter from Webster Bivens, supra note 84.

to open her nightgown and submit to a visual search of her person. The threatened strip search of his wife clearly angered Bivens as did the thoroughness and relative destructiveness of the search of the premises. Bivens reported that the agents removed the grates from the heating ducts, and even poked around in the crawl space above the top floor. Bivens also noted that his brother, Bernard, arrived in a car during the search and was arrested. Perhaps a search of one's home will always feel invasive and destructive to the target, even if the agents conducting such a search come to regard it as a matter of routine.

In the end, the fact that the police believed that they had reasonable cause to arrest Bivens and search the apartment may not alter one's evaluation of the Court's decision. Agents who have legal justification for conducting a search incident to arrest, as the FBN agents did in the *Bivens* case, must still conform their actions to law. Lawful initial entry thus does not place subsequent events beyond review, just as the right to use force does not justify excessive force. In any case, the Court decided the *Bivens* case on the pleadings. In emphasizing the importance of damages as a remedy for people in Bivens' shoes, Justice Harlan was adverting to the well-pleaded shoes that Bivens wore in his 1967 complaint, rather than to the literal shoes he wore in the apartment in November 1965. In any case, it was surely clear to the Court that, following its decision to federalize constitutional torts for *local* police officers, something needed to be done to unify and clarify the remedy for the wrongful conduct of *federal* law enforcement officers.[88]

Some elements of the Bivens story fit well with a counter-narrative that views the case as encouraging prison litigation of questionable merit. Bivens was incarcerated at the time he brought suit and had developed some expertise as a jail-house lawyer. [89] Emphasizing the modest terms of the settlement, one district court later characterized the litigation as one in which the mountains had labored and delivered a mouse.[90] These elements of what one might call the back story of *Bivens* may explain Justice Black's concern with litigation that serves more to harass than to remedy injustice. They also provide context for the dissenters' claim that Congress may be in a better position, as an institutional matter, to evaluate the pros and cons of recognizing such a remedy. Yet the settlement may have provided Mr. Bivens with a sense of vindication that went well beyond the monetary terms at issue.[91]

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[88] For a discussion of Monroe v. Pape, 365 U.S. 167 (1961), see pages __ supra.

[89] Bivens learned to practice jailhouse law from Marty Yamin, who pled guilty to second degree murder and with whom Bivens served time in New York during the 1950s. He reports that he prepared federal 2255 petitions on behalf of fellow Atlanta prisoners in *Martone v. United States*, 435 F.2d 609 (1st Cir. 1970) (invalidating certain evidentiary presumptions and vacating a conviction for possession of cocaine) and in *Casella v. United States*, 449 F.2d 277 (3d Cir. 1971) (affirming in part district court decision to vacate conviction). Some time later, the federal authorities reportedly transferred Bivens from the federal prison in Atlanta to one in Danbury, CT, perhaps as a backhanded compliment to his lawyering skills.

[90] Hernandez v. Lattimore, 454 F. Supp. 763, 767 n.2 (S.D.N.Y. 1978) (recounting the terms of the $500 settlement).

[91] Shortly after his release from prison in the early 1970s, Mr. Bivens reports that he was prosecuted for joining a drug conspiracy. Bivens believes that the prosecution, which reportedly resulted in his acquittal, may have been brought in retaliation for his successful pursuit of civil remedies.

Bivens and the Future of Constitutional Litigation

Echoing Justice Black, some members of the Court have expressed skepticism about the *Bivens* right of action. In the early years, to be sure, the Court took a fairly matter-of-fact approach to the expansion of *Bivens* litigation.[92] Thus, the Court has extended *Bivens* beyond its Fourth Amendment context to encompass suits for violations of the Equal Protection component of the Due Process Clause,[93] the Eighth Amendment,[94] and the free speech component of the First Amendment.[95] But more recently, the Court has refused to permit *Bivens* suits in a variety of settings, including suits brought by government employees to secure relief for workplace retaliation in violation of the First Amendment,[96] suits brought for due process violations in connection with the processing of applications for social security benefits,[97] and suits by service members for racial discrimination by superior officers in the Armed Forces.[98]

The Court's unsteady course raises questions about what a litigant must show to pursue a *Bivens* claim. One can hardly read the Court's rejection of race discrimination claims in the military context as foreclosing all equal protection claims; after all, the Court had previously allowed equal protection claims to proceed.[99] Similarly, the rejection of First Amendment retaliation claims in the civil service context does not necessarily bar all such retaliation claims in view of the Court's acceptance of such claims in other settings.[100] It appears, in short, that the Court has been assessing the availability of the *Bivens* remedy on a retail, rather than wholesale, basis. Its decisions take account of the existing remedial options available to the plaintiff and to the question whether special factors counsel hesitation in the recognition of a new tort remedy.[101]

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[92] See Davis v. Passman, 442 U.S. 228 (1979) (individual may bring suit for damages against member of Congress for discharging her on the basis of sex in violation of the equal protection component of the Fifth Amendment's due process clause); Carlson v. Green, 446 U.S. 14 (1980) (parents may sue prison guards for cruel and unusual punishment on behalf of their son, who died after having allegedly been denied medical treatment at a federal prison).

[93] See Davis v. Passman, 442 U.S. 228 (1979) (permitting individual to sue former member of Congress for discrimination on the basis of sex).

[94] See Carlson v. Greene, 446 U.S. 14 (1980) (allowing a *Bivens* action to remedy cruel and unusual punishment in a federal prison).

[95] See Hartman v. Moore, 547 U.S. 250 (2006) (recognizing the viability of a *Bivens* action to remedy government retaliation aimed at punishing individuals for the exercise of their First Amendment right to speak out).

[96] See Bush v. Lucas, 462 U.S. 367 (1983) (concluding that remedies available through the civil service were adequate substitutes for a *Bivens* action).

[97] See Schweiker v. Chilicky, 487 U.S. 412 (1988) (concluding that the social security laws provided an adequate remedial scheme).

[98] See Chappell v. Wallace, 462 U.S. 296 (1983) (refusing to permit enlisted men to sue their superior officers for racial discrimination and citing the system of military discipline as a factor counseling hesitation). See also United States v. Stanley, 483 U.S. 669 (1987) (refusing to permit an action for damages against military officials who conducted unconsented drug experiments on enlisted personnel).

[99] Compare Chappell v. Wallace, 462 U.S. 296 (1983) with Davis v. Passman, 442 U.S. 228 (1979)

[100] Compare Bush v. Lucas, 462 U.S. 367 (1983) with Hartman v. Moore, 547 U.S. 250 (2006).

[101] In a useful overview of the cases, one leading casebook distinguishes between those in which the Court refused to extend *Bivens* in light of the adequacy of alternative remedies and those in which the Court identified factors other than remedial alternatives to narrow *Bivens*. See H&W, supra note 13, at 817-19.

The Court formalized this approach in *Wilkie v. Robbins*, its most recent attempt to synthesize its *Bivens* jurisprudence.[102] The case arose from allegations by Robbins that officials of the Bureau of Land Management conducted a campaign of harassment aimed at securing a right of way over his land. Robbins portrayed the campaign as one designed to retaliate against him for the exercise of his right under the Fifth Amendment to insist on compensation for a government taking of his property. In rejecting this claim, the Court examined the adequacy of alternative remedies and any special factors counseling hesitation. In the end, the Court expressed concern that the recognition of a tort of government retaliation would open the federal courts to much litigation by citizens who confront hard bargaining by government officials. The cases would, moreover, present a delicate line-drawing problem as courts and juries struggled to say when the government had gone too far in pursuit of its interest.

One can fairly ask, in the wake of the *Wilkie* decision, what remains of the *Bivens* principle. Bivens was surely entitled to bring a state common law trespass action against the responsible officers, a factor that the *Bivens* Court dismissed but the *Wilkie* Court deemed relevant to its analysis of the existence of available alternative remedies.[103] Moreover, the special *Wilkie* factors (concern with increased litigation and with preserving congressional primacy) were certainly present in the *Bivens* case itself, and informed the views of the dissenting justices. Subsequent decisions, in short, have fundamentally transformed *Bivens* from the presumptively available right of action for constitutional violations into an essentially discretionary remedy, available only where the remedial scheme otherwise falls short. Oddly, then, the existence of a damages remedy appears to turn on the sort of equitable considerations that once informed decisions to grant injunctive relief. Perhaps Jerome Feit was something of a prophet after all, in urging on the government's behalf at oral argument in *Bivens* that the Court should refrain from recognizing a damages remedy except in cases of "necessity."

One can also ask if the Court has taken adequate account of subsequent legislative developments that help to shore up the legitimacy of the *Bivens* right of action. In two separate amendments to the Federal Tort Claims Act, one in 1974 and one in 1988, Congress took steps to ratify and preserve the *Bivens* action. Indeed, the 1988 legislation specifically preserves the availability of suits against federal government officials for "violations of the Constitution."[104] One can argue, very much in contrast to the Court's more recent emphasis on giving effect to factors counseling hesitation, that the 1988 legislation provides statutory support for the recognition of a routinely available *Bivens* action.[105]

Conclusion

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[102] See Wilkie v. Robbins, __ U.S. __, 127 S. Ct. 2588 (2007).
[103] Wilkie, __U.S. at __ (describing tort remedy for trespass as unquestionably available to Robbins and citing Correctional Services Corp. v. Malesko, 534 U.S. 61, 72-73 (2001) to establish the relevance of such remedies in defining the scope of *Bivens* liability).
[104] 28 U.S.C. 2679(b)(2).
[105] See James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 Geo. L.J. __ (forthcoming 2009).

Contrary to many accounts of the *Bivens* litigation, there may have been cause to arrest the defendant and legal justification for a search of the apartment. But these findings neither undermine the legitimacy of the *Bivens* decision nor lend decisive support to the critics' view of *Bivens* as a source of frivolous litigation. For one thing, lawful entry into the apartment does not justify everything that may have taken place thereafter. For another, the *Bivens* case was resolved on the basis of the pleadings, thus limiting the relevance of what really happened on that day to the legal question before the Court. Today, victims of government wrongdoing may still confront situations in which it's damages or nothing.

Revised estimates of underlying facts lead to a second conclusion: that students of government accountability might do well to focus less on the innocence of the particular victim and more on how well the system of remedies secures official compliance with the law. Professors Fallon and Meltzer have argued that our system of government accountability law should not guarantee individuals an effective remedy in every case but should focus on assuring that the government remains generally within the bounds of the law.[106] By shifting the focus away from individual remedies to systemic deterrence of government wrongdoing, Fallon and Meltzer may have provided a solution to the puzzle over the place of innocence in the debate over remedies for constitutional torts. Fear of liability may cause officers to reassess risky strategies. Alternatively, officers may seek advice from legal counsel before pursuing a particular course of action, much the way the officers of the Federal Bureau of Narcotics reportedly consulted with a lawyer before conducting their search of Bivens's apartment. Even in a world where plaintiffs succeed infrequently, government officers may find that the possibility of future litigation informs their evaluation of how best to proceed.

[106] See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991).