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An End-run Around the Takings Clause? The Law and Economics of Bivens Actions for Property Rights Violations

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NOTES

AN END-RUN AROUND THE TAKINGS CLAUSE? THE LAW AND ECONOMICS OF *BIVENS* ACTIONS FOR PROPERTY RIGHTS VIOLATIONS

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INTRODUCTION

Frank Robbins owned a ranch and guest lodge in beautiful northwest Wyoming.[1] Robbins did not have a typical American neighbor, as his ranch neighbored land owned by the State of Wyoming, the federal Bureau of Land Management (BLM), and private ranchers.[2] When the BLM discovered that Robbins's ranch was unencumbered,[3] it demanded an easement from him. Robbins tried to negotiate payment for the easement, but the BLM flatly refused, declaring that "the Federal Government does not negotiate."[4] And negotiate it did not.

The BLM instead warned Robbins that "there would be war, a long war and [the BLM] would outlast him and outspend him."[5] BLM bureaucrats promised to "bury Frank Robbins."[6] And they were right—for over the next seven years, the BLM engaged in a systematic campaign of harassment and intimidation against Robbins.[7] BLM agents trespassed on Robbins's land[8] and broke into his lodge.[9] They tried to provoke violence between Robbins and another neighbor.[10] In addition to denying Robbins's access rights to federal land, the BLM revoked his special use permits, which

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1. Wilkie v. Robbins, 127 S. Ct. 2588, 2589 (2007).

2. *Id.* The Federal Government is a common landowner in the area—it owns almost all of the land in Wyoming, and most of the land in the Mountain West. *See* United States Department of Agriculture: Natural Resources Conservation Service, *Percent of Land in Federal Ownership, 1997*, http://www.nrcs.usda.gov/technical/NRI/maps/meta/m5554.html (last visited Mar. 3, 2009).

3. Before Robbins bought his ranch, George Nelson, the previous owner, granted the BLM an easement over his road in exchange for the right to maintain a road across BLM property. *Robbins*, 127 S. Ct. at 2593. But the BLM made a "careless error" when it forgot to record the easement onto the deed. *Id.* at 2608 (Ginsburg, J., dissenting). When Robbins bought the ranch, therefore, the deed was unencumbered by the BLM easement. His right to exclude, the quintessential stick in the bundle of property rights, remained legally intact. *Id.* at 2593 (majority opinion).

4. *Id.*

5. *Id.* at 2610 (Ginsburg, J., dissenting).

6. Robbins v. Wilkie, 433 F.3d 755, 760 (10th Cir. 2006), *rev'd*, 127 S. Ct. 2588 (2007).

7. *Robbins*, 127 S. Ct. at 2608 (Ginsburg, J., dissenting).

8. *Id.* at 2611.

9. *Id.* at 2596 (majority opinion).

10. *Id.* at 2594.

were the primary source of his ranch's revenue.[11] Agents conducted surveillance on Robbins's guests, at times videotaping women using the restroom.[12] As time progressed, so too did the BLM's tactics, morphing beyond small-scale torts and economic intimidation. BLM bureaucrats tried to persuade other federal agencies to harass Robbins.[13] When that avenue failed, the BLM bureaucrats filed false criminal charges against Robbins.[14] A jury, disgusted by the way the BLM "railroaded" Robbins, acquitted him in less than thirty minutes.[15] The pattern of harassment went on and on, but Robbins never gave away his easement.

Robbins sued BLM supervisor Charles Wilkie, seeking money damages.[16] Conceding that no actual taking of property occurred, Robbins argued that the federal officials should pay damages for trying to extract, through a pattern of retaliatory intimidation, his property without just compensation.[17] According to the Supreme Court, however, the central issue did not concern property rights, remedies, or improper retaliation for the assertion of constitutional rights. It was a matter of *jurisdiction*—namely, whether Robbins could seek money damages against federal agents under the Fifth Amendment in the absence of congressional authorization.[18] In *Wilkie v. Robbins*, the Court refused to find a damages remedy under the doctrine of *Bivens v. Six Unknown Federal Narcotics Agents*.[19] *Bivens* allows, under certain circumstances, the victim of

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11. *Id.*
12. *Id.* at 2615 n.7 (Ginsburg, J., dissenting).
13. *Id.* at 2596 (majority opinion).
14. *Id.* at 2595.
15. *Id.*
16. *Id.* at 2596.
17. *Id.* at 2608 (Ginsburg, J., dissenting).
18. *Id.* at 2597 (majority opinion).
19. *Id.* at 2604-05 (noting that a remedy for "when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions"). In *Bivens*, the Supreme Court held that Bivens—a victim of an erroneous and humiliating search by federal narcotics agents—could seek damages under the Fourth Amendment even if Congress provided no damages remedy for the unconstitutional federal action. *Bivens*, 403 U.S. 388 (1971). In this Note, *Bivens* actions refer to judicially crafted damages suits against federal agents for putative constitutional violations. "Constitutional torts" refer to damages suits against state and federal employees for constitutional violations. Examples are *Bivens* actions and liability under 42 U.S.C. § 1983 for unconstitutional conduct by a state official.

unconstitutional harm to pursue money damages against a federal official, even when Congress has not authorized a damages remedy.[20]

Robbins illustrates the range of economic incentives in play when federal officials bargain land-use provisions with private landowners. This Note is not a doctrinal criticism of *Robbins*.[21] *Robbins*, instead, is used as a timely example of how federal agents can make an end-run around the Takings Clause and extract property rights through nuisance-like behavior. This Note explores whether an economic analysis justifies a *Bivens* action in these cases. Although it concludes that a *Bivens* remedy increases optimal deterrence of unconstitutional federal land-use policies, this Note finds that a *Bivens* action, on its own, cannot achieve optimal deterrence.

Part I discusses the standard for measuring economic efficiency. Constitutional torts and takings doctrine both search for the efficient result. Despite this superficial similarity, the two have completely different efficiency paradigms. Constitutional torts are geared toward the optimal deterrence of unconstitutional conduct. Judicial interpretation of the Takings Clause, on the other hand, focuses on the optimal allocation of social resources. What is economically "efficient" in a Takings Clause case is quite different from the "efficient" outcome in a constitutional torts case. In a case like *Robbins*, in which the two underlying policies may coincide, an explicit decision must be made between optimal deterrence and wealth-maximization. Part I concludes that optimal deterrence should be the measure of efficiency.

Part II catalogues the costs and benefits of *Bivens*. Parts II.A and II.B conclude that a *Bivens* action is likely more efficient if a landowner cannot pursue other monetary remedies. In fact, *Bivens* authorizes money damages based in part on whether the victim has access to adequate alternative relief.[22] This makes economic sense. If a victim cannot access alternative remedies, federal agents would

20. *See generally infra* Part I.A.

21. For doctrinal criticisms of the Court's holding, see *Robbins*, 127 S. Ct. at 2608-18 (Ginsburg, J., dissenting in part); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006-2007 CATO SUP. CT. REV. 23, 23-77.

22. *See infra* notes 96-98 and accompanying text.

have little incentive to curb their unconstitutional behavior. Underdeterrence would occur. If adequate alternative remedies already exist, then a *Bivens* action would be redundant, perhaps subjecting federal agents to more liability than necessary. Overdeterrence would occur. Part II.C considers the related doctrine of qualified immunity. Because qualified immunity already combats the costs related to overdeterrence, an economic analysis of *Bivens* need not dwell on the costs associated with swamping federal officials with constitutional tort liability. At the same time, qualified immunity imposes significant costs. These costs should lead courts to find more *Bivens* actions valid.

As Part III explains, a *Bivens* action has an increased deterrent effect if the landowner and federal agents are playing an "iterated" game. When a federal official violates a particular victim's constitutional rights in a discrete, one-shot deal, a constitutional tort action may not deter the official from harming the victim again, even if it deters the official from harming everybody else. In cases like *Robbins*, however, the same federal agents repeatedly interact with the same landowner. Because the parties are the same, the game is said to be "iterated." The deterrence effect of a *Bivens* action may be stronger in preventing the same federal agents from harming the same landowner in an iterated game.

Part IV situates *Bivens* claims for federal violations of property rights against nuisance common law. Takings literature does not successfully address the harassment in *Robbins*. As Part IV shows, such harassment is more doctrinally and economically akin to common law nuisance, which focuses on optimizing deterrence and maximizing societal value.

Combining the insights of game theory, nuisance, constitutional torts, and takings, Part V demonstrates that a *Bivens* action for intentional federal nuisance-like behavior would have a salutary deterrent effect. *Bivens* is the appropriate mechanism to deter end-runs around the Takings Clause. Part V concludes by proposing a *Bivens* action that would protect landowners from federal harassment while preventing an explosion of litigation against the federal government. The proposed cause of action is sensitive to the absence of remedial alternatives under tort and takings law. It also accounts

for the fact that such harassment, like nuisance, is an iterated game.

I. WHAT IS THE "EFFICIENT" RESULT?

Before undertaking an economic analysis, it is important to specify the normative standard of comparison. According to the classic law and economics model set forth by Judge Richard Posner, efficiency "denote[s] that allocation of resources in which value is maximized."[23] The value of a good or service is subjective—it is whatever a person is willing to pay,[24] and economists make no judgment whether the preference is good or bad. When most economists proclaim a transaction "efficient," they usually refer to Kaldor-Hicks efficiency, under which the winners could hypothetically compensate the losers such that the result would be Pareto superior, and thus, nobody is worse off.[25] However much other policies—like corrective justice—matter above and beyond economic efficiency,[26] they are not the focus of this Note. The economic analysis here, rather, is positive instead of normative. As a positive inquiry, this Note "accepts the given goal, makes certain assumptions, and then identifies which legal rule would be most efficient within this framework."[27]

Before concluding that a *Bivens* remedy maximizes the relevant values, one must ask what the relevant values are. The relevant values depend on the legal doctrines in play, the personal preferences and incentives that drive the relevant actors, and the effects of the actors' behavior. In evaluating the efficiency of money dam-

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23. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 11 (6th ed. 2003).

24. *Id.* at 10.

25. *Id.* at 12. There is another standard for efficiency called "Pareto superiority." A transaction is "Pareto superior" if and only if it makes at least one person better off and nobody worse off. *Id.* But this standard is less useful because Pareto superiority assumes that there are no externalities—that is, it does not consider that people who are not parties to the transaction could become losers. *Id.*

26. *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995); *see also* Alexander B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009) (discussing the ways in which torts serve both private and public law goals).

27. Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 501 (1990).

ages, this Note tackles the intersection of takings doctrine and constitutional torts. The first issue, then, is whether the efficient outcome should be dictated by (1) the constitutional torts approach or (2) the takings approach. To simplify, in the constitutional torts approach, courts and scholars try to prevent governmental misconduct just enough to promote legitimate governmental policies.[28] Takings doctrine and scholarship, by contrast, focus on spreading loss, maximizing social wealth, and preserving the physical and economic value of the property.[29] Although not mutually exclusive, these normative goals can conflict. An economic analysis, thus, must make an explicit choice between the two.[30] The remainder of this Section does just that.

A. Approach One: The Constitutional Torts Approach

When a government official unconstitutionally harms a citizen, a court may order the government to compensate the victim. But not always. This result is surprising because remedies matter. Remedies determine the scope, power, and, arguably, the existence of rights.[31] Remedies for constitutional wrongs arise in three ways. The first arises from the Constitution itself. The Fifth Amendment, for instance, explicitly provides its own remedy—just compensation —when the government "takes" a property right.[32] The second is

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28. *See infra* Part I.A.

29. *See infra* Part I.B.

30. *See, e.g.*, A. Mitchell Polinksy & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 413 (1993) (favoring deterrence as the standard to analyze fee allocation schemes as remedies for frivolous suits).

31. *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 414-22 (2003) (discussing how constitutional tort remedies shape constitutional rights).

32. U.S. CONST. amend. V. The Takings Clause is "self-executing" in the sense that a plaintiff may bring an actionable suit even if the state has not statutorily waived its sovereign immunity. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987) ("The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." (internal citations and quotation

statutory. Recognizing that state officials may abuse the federal constitutional rights of their citizens, Congress authorized money damages under 42 U.S.C. § 1983. Congress never did offer the same blanket protection against federal officials, however.[33] In light of congressional inaction, the Supreme Court recognized that it could create constitutional remedies. The doctrine of *Bivens* allows a victim to pursue money damages when federal officials violate some,[34] but not all,[35] constitutional rights. The classical *Bivens* rule states that a court will allow the plaintiff to seek damages against a federal official for unconstitutional behavior unless there are "special factors counseling hesitation in the absence of affirmative action by Congress."[36]

One might reformulate *Bivens*, then, to authorize compensation when (1) administrative or statutorily prescribed compensation is unavailable[37] and (2) there are no unique policies militating against money damages. After *Bivens*, the Supreme Court capaciously defined the "special factors counseling hesitation," thereby narrowing the opportunity for monetary compensation, and often causing

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marks omitted)).

33. Congress has, however, waived its sovereign immunity in limited situations by opening the federal government to damages suits. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006); Tucker Act, 28 U.S.C. § 1491 (2006). *See generally* Gregory Sisk, *The Continuing Drift of Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 535 (2008) (discussing the FTCA); *id.* at 565 (discussing the Tucker Act).

34. *See* Carlson v. Green, 446 U.S. 14 (1980) (allowing *Bivens* compensation for cruel and unusual treatment in a federal prison); Davis v. Passman, 442 U.S. 228 (1979) (allowing *Bivens* when a federal agent fires his subordinate in violation of Due Process).

35. *See* FDIC v. Meyer, 510 U.S. 471 (1994) (foreclosing *Bivens* actions against federal agencies); Schweiker v. Chilicky, 487 U.S. 412 (1988) (denying *Bivens* relief for improper denial of Social Security benefits, in violation of Due Process); United States v. Stanley, 483 U.S. 669, 681 (1987) (disallowing *Bivens* actions by military personnel for injury "incident to service"); Chappell v. Wallace, 462 U.S. 296 (1983) (denying enlisted military employees a *Bivens* action for the unconstitutional behavior of their underlings); Bush v. Lucas, 462 U.S. 367 (1983) (denying a First Amendment *Bivens* claim when a federal agent demotes his employee for making statements critical of the federal agency).

36. *Bivens*, 403 U.S. at 396. As Professor Tribe contends, however, the Supreme Court may have reversed the *Bivens* rule-exception structure such that a damages remedy is now the exception. *See* Tribe, *supra* note 21, at 63-72. Whatever the validity of that interpretation, this Note refers to money damages as the rule because the *Bivens* Court expressed damages as the rule.

37. *See, e.g.*, *Schweiker*, 487 U.S. 412; *Lucas*, 462 U.S. 367.

the Court to arrive at results inconsistent with the original *Bivens* rule.[38]

The response to *Bivens* centers on familiar issues.[39] The most robust debate surrounding constitutional torts concerns their deterrent effect.[40] One must differentiate specific deterrence from

38. *See, e.g.*, *Stanley*, 483 U.S. at 669. Civilian Army officials experimented on James B. Stanley by secretly dosing him with LSD, thereby destroying his cognition, physical and psychological health, and even his marriage. The FTCA barred Stanley from monetary relief. Nonetheless, the Court denied Stanley *Bivens* relief because the FTCA's denial of damages evidenced a "special factor counselling hesitation." *Id.* at 683-84. ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley, or any particular serviceman, an 'adequate' federal remedy for his injuries. The special factor that counsels hesitation is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."). In other words, because Congress chose not to afford a damages remedy, the Court concluded that a *Bivens* remedy was inappropriate, despite the fact that *Bivens* exists precisely to combat congressional inaction. *See also* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008) (denying a *Bivens* cause of action to a Canadian citizen that the United States government detained and transported to Syria, where he was tortured, on the grounds that matters of national security and international comity constitute special factors).

39. For instance, appealing to the oft-quoted dictum from *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."), proponents of *Bivens* argue that courts should find damages remedies for all constitutional violations, regardless of congressional authorization. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995). Opponents respond that courts engage in illegitimate policymaking when they find implied damages remedies. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 250 (1979) (Burger, J., dissenting). Because Congress has the power to enact causes of action and remedies, the argument goes, courts violate the separation of powers when they allow plaintiffs to seek damages. *Id.* at 250-51.

40. Daryl Levinson has challenged the orthodox view that *Bivens* and § 1983 actions deter. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). Unlike private firms, he argues, the federal government responds to political—not monetary—costs. *Id.* at 346. The government is not as sensitive to monetary costs because its institutional goal is not to maximize wealth. *Id.* at 350. Thus, Levinson argues, because *Bivens* actions do not give the federal government the proper incentives to behave, their deterrent effects are overrated. *Id.* at 420. *But see* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 842 (2007) ("Thus, Professor Levinson is wrong to believe that governmental liability has only indeterminate effects. Whatever its defects from the standpoint of corrective justice, governmental tort liability has an instrumental justification; it creates an incentive on the part of officeholders to allocate resources to loss prevention. There should be a clear political incentive to invest in loss prevention at least when the cost of avoiding an injury is small, the likelihood of injury is great, and the impact on the government's budget is likely to be large."). Interestingly, however, monetary incentives may have motivated the BLM agents in *Robbins*. *See* Tribe, *supra* note 21, at 60 n.147 ("In the *Robbins* case, the BLM employees obviously had an incentive to avoid looking

general deterrence.[41] Specific deterrence occurs when the *same* parties are deterred from repeating their behavior.[42] This is in contradistinction to general deterrence, which measures whether anybody has fewer incentives to act.[43] The traditional consensus is that, in the very least, *Bivens* has a general deterrent effect. In other words, *Bivens* remedies constrain federal agents from violating constitutional rights.[44] Even the opponents of *Bivens* seem to agree. The longstanding debate, then, was not about the *existence* of a deterrent effect, but rather the *desirability* of it.[45]

Social scientists express deterrence in terms of "expected utility."[46] Given the probability that certain events will occur, expected utility determines whether it is rational for certain actors to behave a certain way. For instance, when a federal official violates a constitutional right, the issue is whether the costs internalized by the official outweighs the likely benefits he will receive. The costs could include, but are not limited to, the political fallout within a governmental agency, the time and effort to act, or judicial sanc-

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sloppy and wasteful due to their own negligence in losing the original easement, and may also have harbored an inchoate hope that they would be rewarded financially, through monetary bonuses or raises, for their efforts against Robbins, especially if those efforts proved successful.").

41. *See generally* Isaac Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis, in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68-134 (Gary S. Becker & William M. Landes eds., 1974); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968).

42. WAYNE R. LAFAVE, MODERN CRIMINAL LAW 2 (1978).

43. *Id.*

44. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."). *See generally* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001).

45. *See* Rosenthal, *supra* note 40, at 824 ("Initially, the assumption that governmental tort liability works in the same manner as the common-law liability of private tortfeasors went unquestioned."). *But see* Levinson, *supra* note 40, at 355; Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65 (1999) (arguing that *Bivens* has had little deterrent effect because courts act as if the plaintiff were suing the federal government instead of a federal officer in his individual capacity). Pillard's data may underestimate *Bivens*' deterrent effect, however. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 766-80 (2004) (concluding that scholars underestimate the deterrent effect of constitutional tort suits by studying court opinions at the expense of news reports and secret settlements).

46. *See, e.g.*, Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 655 (1990).

tions, such as money damages. Assuming that the federal official is rational, he will violate constitutional rights when and only when the marginal value of deterrence is less than the marginal cost of deterrence—that is, when his expected benefits exceed his expected costs.[47]

Optimal deterrence occurs when the benefits to the official equal the costs.[48] Differently put, "[t]he expression 'optimal deterrence' then interjects the problem of deterring all and only that conduct which is deemed undesirable. 'Under-deterrence' and 'over-deterrence,' of course, signify failures at both ends of that endeavor."[49] Underdeterrence would occur if the unconstitutional harm went undetected, or if its benefits to the federal agent were greater if he committed unconstitutional harms than if he did not.[50]

Optimal deterrence occurs when the penalty is the cost borne by victim multiplied by the probability of apprehension and conviction.[51] Mathematically, optimal deterrence occurs when $f = C/p$; f denotes the fine needed to achieve optimal deterrence, C refers to the cost borne by the victim, and p is the probability of sanction.[52]

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47. *See* Hamish Stewart, *Economic Analysis of Law: Which Way Ahead?*, 53 U. TORONTO L.J. 425, 428 (2003).

48. *Id.*

49. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 55 (2005).

50. Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1448.

51. Richard A. Posner, *Rethinking the Fourth Amendment*, 1982 SUP. CT. REV. 49, 54 n.17. This mathematical formulation is well known in the common law of torts. In *United States v. Carroll Towing Co.*, Judge Learned Hand captured expected utility in his classic BPL formula. 159 F.2d 169 (2d Cir. 1947). The formula for optimal deterrence balanced three variables: the expected burden of non-negligence (B), the likelihood of liability (P), and the amount of liability (L). *See* Stewart, *supra* note 47, at 428. Suboptimal deterrence would occur if the probability or amount of liability was sufficiently small such that $B > PL$. *Id.* Overdeterrence would occur when the expected costs to the federal official exceed the expected benefits—that is, when $B < PL$. *Id.* Optimal deterrence occurs when $B = PL$. *Id.*

52. Posner, *supra* note 51, at 54 n.17.

B. Approach Two: The Takings Clause Approach

Courts and scholars take a very different tack in analyzing the Takings Clause.[53] Land-use regulations and constitutional torts share a superficial similarity: the government acts in a way that tangibly "harms" an individual—say, through the denial or destruction of property rights. Certainly there is a Takings Clause issue implicated by the harassment discussed by this Note. In *Robbins*, for instance, the Tenth Circuit reasoned that the Fifth Amendment preserves a "right to exclude," which, "[if it] means anything, ... must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause."[54] That being the case, however, an economic analysis of takings is very different from an economic analysis of constitutional torts.

Land-use policy is efficient under one of two circumstances.[55] The first solution is to allow unfettered private bargaining, consistent with the Coase Theorem.[56] The second solution is to eliminate private bargaining altogether, making the government the unilateral decision maker.[57]

Scholars have tried to blend the public and private models into a practical solution. These solutions consider multiple factors, such as: moral hazard, adverse selection, the risk of excessive regulation, bilateral monopoly, the social utility of government involvement, the lost value of the private property, government deterrence, and the

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53. U.S. CONST. amend. V ("... [N]or shall private property be taken for public use, without just compensation.").

54. Robbins v. Wilkie, 433 F.3d 755, 766 (10th Cir. 2006), *rev'd on other grounds*, 127 S. Ct. 2588 (2007).

55. *See* William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1583-84 (1988).

56. *Id.* at 1583; *see* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that in the absence of transaction costs, so long as there is a bright-line legal rule, private bargaining will always yield the efficient outcome).

57. *See* Fischel, *supra* note 55, at 1583-84. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

transaction costs of administering remedies.[58] Law and economics scholars debate on how to balance these factors.[59]

Economic analyses of takings purport to reach the optimal balance of these variables. One theory considers full compensation to be inefficient because it gives landowners the incentive to overinvest in their property.[60] This theory gives primacy to the so-called moral hazard problem, under which a potential victim is encouraged to be more reckless than she would have otherwise been.[61] Conversely, if a landowner receives no compensation, the government has greater incentives to make inefficient decisions.[62] Another theory suggests that the government pay compensation when it provides public goods, but not when it shifts entitlements from one private party to another.[63] A third theory suggests balancing the "demoralization costs" of not paying compensation against the transaction costs of paying.[64] A fourth theory argues that efficient compensation occurs when the government compensates private land use that conforms to social norms, but not those that are "subnormal"; the idea here is that most citizens will by definition conform to normal land use, and so the transaction costs would be smaller.[65] Professors Blume and Rubinfeld propose that just compensation is akin to government-supplied insurance against regulatory risk; the private market cannot supply this insurance, they contend, because of adverse selection and moral hazard.[66] Under another theory, compensation is justified if and only if (1) the private land use was efficient when the government decided to

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58. *See, e.g.*, Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995).

59. *See id.* (addressing other positions argued by academics attempting to fashion a framework for dividing entitlements).

60. Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71, 71 (1984).

61. *Id.* at 84.

62. William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 INT'L REV. L. & ECON. 115 (1989).

63. Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

64. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

65. Fischel, *supra* note 55, at 1584-85.

66. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984).

regulate it, or (2) the government regulation was inefficiently imposed.[67] According to Professor Richard Epstein, torts against property are takings under the Fifth Amendment.[68]

Many other law and economics theories of takings undoubtedly exist. The point, however, is that prominent theories focus on the best way to maximize social value. Deterring bad faith governmental conduct is one of many factors to examine, but it is surely not the sole focus.

Case-in-point: in defining per se takings, the Court treats optimal deterrence as an irrelevant factor. In most cases, land-use-related harassment is not a per se taking. A per se taking occurs under one of two circumstances. The first is when the government physically occupies land for a permanent period of time, regardless of the social or governmental benefits.[69] Such occupations, by denying the landowner the use of a part of his property, must also trample on the right to exclude, thereby effecting a Fifth Amendment violation.[70] This did not occur in *Robbins*, as BLM agents did not permanently trespass or erect physical structures on the land.[71] The second type of per se taking happens when the government deprives the property of "all economically beneficial or productive use."[72] Here, because BLM bureaucrats deprived Robbins of some—but not all—of his land's value, no per se taking occurred.[73] Deterrence plays little part in determining a per se taking. Instead the Court seems more concerned with demarcating the metaphysical boundaries of physical property, and protecting those boundaries with a bright-line rule.

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67. Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 750 (1994).

68. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-38 (1985). Epstein's view is particularly relevant because the difference between takings and government-imposed torts shares important qualities, while fracturing along other relevant dimensions. *See infra* discussion Part IV.B.

69. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

70. *Id.* at 435-36.

71. *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2602 (2007).

72. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

73. *Compare Robbins*, 127 S. Ct. at 2588, *with* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (finding that a regulation barring the landowner from constructing on his property for thirty-two months is not a permanent deprivation of all economic value).

The Court's regulatory takings jurisprudence also discounts the importance of deterring wrongful governmental conduct. In *Penn Central Transportation Co. v. City of New York*,[74] the Court applied an "ad hoc" analysis to determine if land-use regulations violated the Takings Clause.[75] The Court balanced (1) the economic impact on the owner, (2) the value of the property taken, and (3) the character of the governmental action.[76] The three factors ostensibly focused on the social benefits of regulation weighed against the individualized harm the owner suffered. Notably absent from the Court's analysis, however, was any mention of deterrence. The Court, in fact, gave deterrence short shrift, as, over the years, it was understood *Penn Central* gave rational basis review of regulations.[77] The Court also failed to distinguish between "social benefit" and "private governmental benefit." The Court's failure to distinguish makes little sense: society may not benefit from regulations, but the relevant governmental officials certainly may. At any rate, it is now clear that regulations can survive a regulatory takings challenge even when they do not "substantially advance legitimate state interests."[78]

Although the Court demanded that trial courts balance various factors to determine when the government regulation becomes a taking, trial courts treat the *Penn Central* factors as an "empty ritual,"[79] in fact applying deferential rational basis review in its stead. Given the limited scope and practical impotence of a regulatory takings remedy, it offers no relief when federal officials harass a landowner in trying to extract a property right. Because regulatory takings law does not focus on deterrence, it is not a useful conceptual mechanism to apply here. In other words, regulatory

74. 438 U.S. 104 (1978).

75. *Id.* at 124.

76. *Id.*

77. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1557 (2003).

78. Lingle v. Chevron U.S.A., 544 U.S. 528, 540-41 (2005).

79. *See* Basil H. Mattingly, *Forum over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 699 (2000) (statistically demonstrating that "the property owner is unlikely to prevail under [*Penn Central*]"). Mattingly's empirical analysis revealed that "the 'balancing' test appears to be nothing more than a strong presumption in favor of no compensation, regardless of the impact of the regulation." *Id.*

takings law has no answer when government agents extract private property through harassment.[80]

C. The Superiority of the Constitutional Torts Approach

Optimal deterrence is a superior metric in federal land-use situations. Doctrinally, the type of harm more resembles a tort than a taking. Remedies under the Takings Clause aim to redress a specific harm, and takings jurisprudence does not regulate the harm of harassment inflicted by federal employees. Substantive takings law—regulatory takings, public use, and just compensation doctrines—is currently so weak that it fails to protect the property rights in question. Constitutional torts, by contrast, are harm-neutral, as they can apply to any range of conduct, from police brutality to sexual harassment. The takings approach is inadequate

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80. The preceding discussion assumes that a federal court has jurisdiction to hear the case when a state or municipality takes the property. That assumption, however, is weakening thanks to the Supreme Court's recent decision in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

For a federal takings suit to be ripe, the plaintiff must go through state administrative proceedings. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985); *see also* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 264 (2002). But once the plaintiff goes through the administrative proceedings, state preclusion laws, which the federal court must follow under the full faith and credit statute, bar the federal court from hearing the takings claim. *See* 28 U.S.C. § 1738 (2000) (requiring federal courts to give "full faith and credit" to acts or judicial proceedings of any state). Thus,

> the Court's decisions in *Williamson County* and *San Remo Hotel* suggest that the Section 1983 action is no longer the exclusive province of federal law and jurisdiction. While federal law is still operative in takings cases, it is applied in state, rather than federal, courts. Despite this shift from past practices, the Court has not yet signaled a willingness to shift the doctrine further-such as it has in *Bivens*, where state tort law has begun to supplant federal constitutional law. Nonetheless, this further shift is quite plausible, especially considering the new composition of the Court and existing precedent requiring the adjudication of federal rights occur in state courts. If state courts are considered competent to adjudicate these claims, it may not be long before state law-already considered adequate in *Bivens* suits-is considered adequate for Section 1983 claims as well.

John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 733 (2008); *see also* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 254 (2006). As this Note does not deal with takings by states or municipalities, the "*Williamson* trap" is not explored in further detail. It is mentioned, however, to underscore the disrespect takings suits receive in federal court, which is relevant to the larger theme of this Note.

for several other reasons. First, takings do not properly emphasize the role of deterrence. Second, wealth maximization and loss-spreading is more apposite for state and local—not federal—takings, where local officials have better incentives and knowledge to reach the socially beneficial outcome. When discussing the "efficient" result, then, the Note refers to the outcome that optimally deters.

II. THE COSTS AND BENEFITS OF *BIVENS*

The literature on *Bivens* largely ignores an important distinction. The literature does not take into account the economic effect of the *Bivens* rule and its exceptions. Under its traditional formulation, a court will allow the plaintiff to seek damages against a federal official for unconstitutional behavior unless there are "special factors counselling hesitation in the absence of affirmative action by Congress."[81] All things being equal, a damages remedy is more efficient when the case falls within the *Bivens* rule—that is, in the absence of an alternative congressional or administrative remedy.

A. Why Not Injunctive Relief?

Cataloging the costs and benefits of *Bivens* presupposes that a damages remedy has a superior deterrent effect over injunctive or declaratory relief. But that assumption is not immediately obvious. Its validity depends on the specific factual setting.[82] Phrased differently, relative to money damages, the issue is whether an injunction creates better incentives for federal agents. This Section offers several general observations on why a damages remedy is a better tool to optimize deterrence.[83]

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

82. *See generally* Calabresi & Melamed, *supra* note 57 (famously discussing the inevitable and important economic choice between "liability rules," which require damage remedies, and "property rules," which require injunctive remedies); *see also* Park, *supra* note 31, at 450-51 (arguing that the effectiveness of structural injunctions at regulating government officials' discretion to indirect unconstitutional harm depends on the factual and legal setting).

83. The debate between monetary and injunctive relief recurs in the context of nuisance common law. *See infra* Part III.B.

In constitutional torts, damages typically compensate victims for the value they have lost.[84] Injunctions instead deny defendants the value they have gained.[85] For an injunctive remedy to deter more than damages, one of three conditions must occur.[86] First, injunctions would be superior deterrents if the value of the federal agent's benefits exceed the value lost by the victim.[87] Second, injunctions would serve a better deterrent effect if they created better detection rates than damages.[88] Injunctive remedies would create better detection rates if they incentivized plaintiffs to file additional suits and led courts to enjoin unconstitutional behavior more often. Third, injunctions would prove a better deterrent than damages if the potential gain to the government was very large, even if the probability of its occurrence was very small.[89] In this situation, the aggregate gains would exceed the aggregate losses, even if it were unlikely to occur in any individual instance.

All three scenarios are unlikely.[90] Just like police officers, federal agents create more loss than gain. That is, when federal agents violate property rights, the harm they inflict on the victim likely exceeds the benefits they receive. Take *Robbins* as an example. True, federal agents were trying to exact an easement from the citizen,[91] which was presumably worth less than the value of the property. There was no evidence, however, that the government would have put the easement to socially valuable use. So, the loss to Robbins made the government's benefits of the easement pale by comparison. Moreover, the personal utility of the easement to the BLM agents probably did not match the Robbins's subjective valuation of the property. Landowners tend to value their property at rates higher than market value.[92]

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84. *See* Standen, *supra* note 50, at 1450.

85. *Id.* at 1451.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Wilkie v. Robbins, 127 S. Ct. 2588, 2593 (2007).

92. In takings cases, market value usually refers to the value imputed during a forced exchange. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 5-6 (1949). But, of course, as Posner notes, market value is in fact the price at which two or more parties voluntarily transact. POSNER, *supra* note 23, at 55. Therefore, when the government forces

B. The Economics of the Exceptions to Bivens

Bivens and its lineage distinguish between scenarios in which (1) the plaintiff has access to an alternative and adequate remedial scheme, and (2) the plaintiff will leave empty handed in the absence of a *Bivens* remedy.[93] For instance, in *Bush v. Lucas*,[94] NASA demoted one of its employees for criticizing the agency.[95] The employee filed a *Bivens* suit under the First Amendment, but ultimately lost because he had access to an alternative administrative remedy.[96] This doctrinal distinction has critical implications for optimal deterrence. All else being equal,[97] the Court's reasoning makes economic sense in theory. When there is an alternative remedial scheme, the Court is economically justified in denying a *Bivens* action, because (1) the relative transaction costs of implementing a new remedy would be high, and (2) the relative benefits to the plaintiff would be low.[98]

The most common cost associated with *Bivens* is its chilling effect on legitimate governmental activity. Analogizing to the purpose of the Eleventh Amendment, some complain that constitutional torts would paralyze the government's ability to perform its routine duties.[99] But that is not the only potential cost. If a state law remedy already existed, some argue, a *Bivens* remedy might crowd out state protection of individual rights,[100] which would impose its own set of

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a transfer of property after the preliminary opportunity to bargain, the landowner must have valued the property more than what the government offered. *Id.*

93. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971).

94. 462 U.S. 367 (1983).

95. *Id.* at 369-70.

96. *Id.* at 374-90.

97. As it turns out, all things were not equal in *Bush*, because that case represents an iterated game, which would be a factor suggesting enforcement of a *Bivens* action. *See infra* Part III.

98. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICAL WRONGS 79-80 (1983).

99. *See, e.g., id.* at 59-81. *But cf.* Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577 (2009) (arguing that the original drafters of the Eleventh Amendment were more concerned with preserving state sovereignty than the effective provision of services or protection of their treasury).

100. *See* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 8 (1980) ("One of the explanations used to support the Supreme Court's retrenchment on section 1983 claims has

costs. According to John Jefferies, *Bivens* actions could impose a different nontrivial cost.[101] A *Bivens* action increases the costs of enforcing a constitutional right; thus, courts are more likely to limit the scope of the right in order to limit its costs.[102] In other words, a *Bivens* action could potentially jeopardize the positive expansion of a constitutional right.[103] Jefferies qualifies that this effect is merely a negative on the cost-benefit ledger, not a dispositive argument against *Bivens* as a whole.[104]

Another negative on the *Bivens* ledger is transaction costs. The transaction costs of a new *Bivens* action would be high for several reasons. Most obviously, the amount of litigation would increase, although it is prospectively difficult to estimate how much.[105] This is because a judge would have to draw lines between compensable and noncompensable constitutional rights.[106] Taking *Robbins* as an example, if the Supreme Court found a *Bivens* action, the limiting principle is not immediately obvious.[107] It could limit the action to

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even been the redundancy of section 1983 actions and state tort law.").

101. John C. Jefferies, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999).

102. *Id.*

103. *Id.* at 91.

104. *Id.* at 113-14. Jefferies's argument does not have much force against this Note's thesis, however, because the property right in question is already very limited, and the Court has not indicated a willingness to expand it. *See infra* notes 134-41 and accompanying text.

105. The Court articulated this fear in *Robbins*. Wilkie v. Robbins, 127 S. Ct. 2588, 2604 (2007) ("Exercising any governmental authority affecting the value or enjoyment of property interests would fall within the *Bivens* regime, and across this enormous swath of potential litigation would hover the difficulty of devising a 'too much' standard that could guide an employee's conduct and a judicial factfinder's conclusion."). *But see* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 524 (1982) ("[T]he sheer volume of section 1983 cases poses no serious threat to the federal court system. Section 1983 cases neither place unbearable burdens on the courts nor direct massive resources to relatively minor claims.").

106. *Cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (a regulatory Taking in which the Court worried about the costs associated with line-drawing). But in that case, as with other regulatory takings cases, the regulator was the state or municipality, which has police power. The municipality's police power may have cautioned the Court away from finding a compensable property right. The federal government, on the other hand, does not have a plenary police power. United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution ... withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.").

107. This is because, as James Park notes, the nature of the remedy depends on, and sometimes defines, the scope of the constitutional right. *See* Park, *supra* note 31, at 419-22.

the intentional destruction of property rights.[108] Or it could limit the action to government retaliation for asserting any property right, like the right to alienate.[109] It could also strictly limit the action only to government retaliation for asserting the right to exclude.[110] In the latter case, it is not clear why the right to exclude should enjoy any more protection than other quintessential "sticks in the bundle," such as the right to alienate.[111] Similarly, it is uncertain why the Court should narrowly define a *Bivens* action to a very specific factual situation.[112] A court could avoid the harshness of bright lines by using a balancing test, but that would add even more uncertainty, raising the likelihood of potentially frivolous litigation.[113] In any case, whatever line the court draws, aggrieved plaintiffs will sue, asking to clarify and expand the new damages doctrine.[114] This is a burden on judicial economy.

Although the transaction costs of a new *Bivens* action could be great, the social benefits might be meager in comparison. Assume, for instance, the plaintiff has access to compensation through another federally provided substitute—say, the FTCA or Tucker Act. In this event, the plaintiff's expected utility would be non-negative if the expected remediation from the compensatory substitute equaled or exceeded the expected compensation from a *Bivens* action. Or, if the compensatory substitute would not yield as much compensation as a *Bivens* action, the difference may not be great enough to matter, considering the administrative costs of a new *Bivens* action.[115] *Bivens*-type damages would be efficient only

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108. *See Robbins*, 127 S. Ct. at 2604 (2007).

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* Bandes, *supra* note 39, at 328-32.

113. *See* Pillard, *supra* note 45, at 66 (arguing that the Court's current framework prevents clarity and coherence when deciding constitutional tort litigation); *cf.* Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 989-93 (1996) (noting that strict liability tends to be more efficient than negligence when the transaction costs of negligence trials are higher).

114. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

115. *See, e.g.*, Pillard, *supra* note 45, at 66 (describing how almost all of the *Bivens* actions between 1971 and 1985 have not yielded relief for the plaintiff ("When analyzed by traditional measures of a claim's 'success'—whether damages were obtained through settlement or court order—*Bivens* litigation is fruitless and wasteful, because it does not provide the remedies

when the plaintiff's expected verdict would outweigh litigation costs and the alternative remedy.

On the other hand, if a court denies *Bivens* relief when the victim has no other avenue for money damages, the reasoning above is more suspect. To be sure, the public does not have to shoulder the administrative costs of increased litigation. But the costs are high for the victim. Stripped of any meaningful check on its power, the federal government and its officials have no incentive to lower either its activity level or care level of constitutional violations.[116] The absence of a *Bivens* action could lead to (1) a greater number of constitutional violations, or (2) more severe constitutional violations. Without *Bivens*, federal employees might not have an incentive to refrain from committing unconstitutional harms.

However plausible this theory, it assumes that a court can accurately determine the adequacy of another compensation scheme. This assumption might undercut the inherent limits in the *Bivens* doctrine, for courts arguably lack the expertise and legitimacy to determine if a congressional remedy is "good enough."[117] Assume, for instance, that Congress or an administrative agency created a remedial program that severely undercompensated victims injured by a federal actor. Under *Bivens* and its progeny, a court will likely not entertain a *Bivens* action because the victim was afforded an alternative remedial scheme. In such a case, federal officials might have more incentives to cost-effectively violate constitutional rights because their expected liability would be lower.[118] Moreover, public choice theory suggests that congressional or administrative remediation could be inadequate, because Congress has little self-

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contemplated by the decision, and it burdens litigants and the judicial system.")).

116. Activity level refers to the amount of action a person takes. STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 41 (2004). If Joe shoots skeet twice a week, whereas Frank shoots three times a week, Frank's activity level is higher than Joe's. Care level refers to the amount of prudence taken when engaging in an activity. *Id.* If Frank shoots in a secluded area, whereas Joe shoots in a highly populated area, Frank's care level is higher than Joe's.

117. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 429 (1988). *But see* Bandes, *supra* note 39, at 320-22 (arguing that the relative competencies of the judiciary and legislature are "beside the point").

118. This borrows from the notion of efficient breach in contracts, under which a rational actor would (and should) breach a contract when the cost of liability would be less than the expected damages. *See generally*, Richard Craswell, *Efficiency, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988).

interest to open its constituency—federal employees—to liability while limiting their discretion.[119] And even if Congress did open the federal employees to liability, it would likely not protect those with little political influence, because the political benefits of doing so would be relatively small.[120] Rather, rent seeking and interest group pressure might sway the federal government towards inefficient land-use regulation.[121] In short, a court operates with a margin of error when it decides whether *Bivens* or its exceptions control.

Thus, when Congress does not specify a remedial scheme to address a constitutional violation, and when courts give plaintiffs a clear, sweeping *Bivens* action to a constitutional right, (1) the transaction costs of uncertainty may be reduced, and (2) the government may reduce its activity level of unconstitutional behavior.

C. The Effect of Qualified Immunity

One cannot analyze the costs and benefits of *Bivens* in a vacuum. As it turns out, the supposed costs of *Bivens* litigation are overrated because qualified immunity already minimizes them. The benefits of *Bivens* litigation, on the other hand, may be underrated because qualified immunity inflicts pernicious costs that *Bivens* litigation may correct.[122]

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119. *See* Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 20 n.105 (2001) (characterizing Congress's inaction as a "sign" of its disinterest in pursuing an administrative remedy). *But see* Federal Torts Claim Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2000) (waiving the sovereign immunity of the federal government under certain conditions).

120. *Cf.* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089-90 (1993) (arguing that public choice explains why legislatures fail to protect the rights of the accused).

121. *See* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 137 (1992).

122. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972) (holding, on remand, from *Bivens*, 403 U.S. 388 (1971), "[t]hat it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted"). *See generally* Gary S. Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983).

In determining whether qualified immunity shields a federal agent's conduct from *Bivens* liability, a court conducts a two-step inquiry. First, it determines whether a *Bivens* action exists.[123] Next, if a *Bivens* action exists, the court asks whether qualified immunity nonetheless bars the plaintiff's suit.[124] A state actor is not entitled to qualified immunity if (1) the plaintiff's allegations, assuming they are true, establish a constitutional violation, (2) the constitutional right at issue was clearly established at the time of the putative violation,[125] and (3) a reasonable officer, situated similarly to defendant, would have understood the challenged act or omission to contravene the discerned constitutional right.[126] This burden is very difficult to overcome.[127]

Qualified immunity, as one commentator suggests, is a heuristic that siphons out unconstitutional behavior with *some* redeeming social utility.[128] Qualified immunity makes no attempt to eliminate *all* unconstitutional behavior that is, on the net, socially detrimental. Rather, by presuming that the governmental employee is immune from liability, qualified immunity only penalizes behavior that is clearly "over-the-line" on the grounds that the "optimal level of 'over-the-line' unconstitutional activity is zero."[129] The transaction

123. Butz v. Economou, 438 U.S. 478, 503 (1978).

124. *Id.* at 503-04; Neb. Beef v. Greening, 398 F.3d 1080, 1083 (8th Cir. 2005) ("Although the lack of a *Bivens* remedy would not entitle the defendants to qualified immunity, the issue is 'analytically antecedent to, and in a sense also pendent to, the qualified immunity issue.'") (quoting Drake v. Scott, 812 F.2d 395, 399 (8th Cir. 1987), *aff'd on reh'g*, 823 F.2d 239 (8th Cir. 1987)).

125. A clearly established right exists if "[t]he contours of the right [are] ... sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

126. Pagan v. Calderon, 448 F.3d 16, 31 (1st Cir. 2006).

127. *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 262, 267-76 (2006) (chronicling how the Supreme Court has moved from treating qualified immunity analysis as a quasi-factual inquiry to a purely legal one, "to make it as much like absolute immunity as possible without formally abandoning the idea that civil rights claimants can still enforce the Constitution").

128. Gilles, *supra* note 44, at 849-50 ("In applying the doctrine of qualified immunity, courts are essentially engaged in the project of drawing a line that separates (i) police conduct which, although possibly violative of constitutional rights, is either socially useful, not terribly egregious, or both; from (ii) police misconduct which very clearly violates constitutional rights and which, as least implicitly, courts recognize as being devoid of social utility.").

129. *Id.* at 853 ("[T]he basic idea is this: we seek to identify police conduct that may be socially useful and, even if that conduct is (non-egregiously) unconstitutional, we accord it immunity from suit. At the same time, we identify conduct that we are not worried about

costs in the line-drawing are supposedly minimal, as courts can easily detect constitutional violations resembling intentional torts.[130] Any further liability, the argument goes, would increase net social costs.[131]

Though ostensibly designed to reign in the costs of civil litigation, qualified immunity is not without costs of its own.[132] Qualified immunity, for instance, may freeze constitutional development. Courts calcify the expansion of individual rights by only penalizing conduct that was "clearly established" as unconstitutional at the time of the supposed harm.[133] Efficiency evaporates when courts cannot respond to the lessons taught by experience:

> The economic model then is one of a command economy, not a market one. In a market economy, people's responses to prices form only one part of a cybernetic system in which the necessary concomitant is the response of prices to people's demands. In the current microeconomic incentive model, the pricing structure is frozen. By shielding the investigation of possibly unconstitutional behavior, qualified immunity prevents adjustment of the pricing structure. Unlike other tort liability regimes, where industry standards and professional norms evolve and affect

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overdeterring—conduct that is lacking in social utility, or shocking and egregious—and we label it 'over-the-line' and expose it to liability.").

130. *Id.* at 857 ("The avoidance of over-the-line actions does not entail substantial compliance costs, as ... intentional torts or crimes ... can be avoided with minimal effort or precaution-taking .... By exposing to liability only conduct that is objectively reasonable in light of the unclear nature of the relevant constitutional law, the qualified immunity doctrine avoids the compliance costs that inevitably come into play where ... socially valuable activity runs up against uncertain standards of constitutional liability." (internal citations and quotation marks omitted)).

131. Gilles, *supra* note 44, at 856 ("The compensated costs of constitutional violations will generally not exceed the social benefits ... except in a relatively minor category of cases that he likens to 'intentional torts or crimes.'").

132. *See generally* Diana Hassel, *Living a Lie: The Costs of Qualified Immunity*, 64 MO. L. REV. 123, 148-56 (1999).

133. Jonathan M. Freiman, *The Problem with Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 80-83 (1997); *cf.* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgment of State Courts*, 50 WM. & MARY L. REV. 211, 215, 228 (2008) (describing how the development of substantive criminal procedure is frozen by 28 U.S.C. § 2254(d), which prohibits federal courts from granting habeas relief unless the underlying state court conviction evidenced "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (quoting 28 U.S.C. § 2254(d)(1) (2000))).

> prices, qualified immunity freezes the prices of constitutional torts at an abnormally low level.[134]

The common law tort regime, by contrast, reaches the optimal rule through decentralized, forward-looking adjudication; under this regime, the legal rules change in response to what experience declares efficient.

The cost of constitutional calcification[135] will only exacerbate in light of *Pearson v. Callahan*,[136] the Court's latest qualified immunity decision. For eight years, under the mandate of *Saucier v. Katz*,[137] federal courts decided qualified immunity questions using a two-step sequence. First, the lower court would decide if a constitutional violation occurred.[138] If it found a violation, only then would it determine whether the constitutional right was clearly established.[139] The *Saucier* two-step was designed to further the development of constitutional common law.[140]

Saucier was a response to a number of costs pervasive in the qualified immunity rule. The "clearly established" requirement freezes the expansion of constitutional rights and chills decentralized decisionmaking.[141] When lower courts throw out a *Bivens* or § 1983 suit *merely* because the putative right was not "clearly established," they fail to refine constitutional common law, because "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional."[142] Refining constitutional common law is a critical function of constitutional tort suits, however.[143] Without refined standards, future litigants and lower courts will lack guidance and litigation will increase. Recognizing

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134. Freiman, *supra* note 133, at 73.

135. *See also* Jefferies, *supra* note 101, at 91 (discussing how *Bivens* may impose calcification costs by making courts more reluctant to find constitutional violations and award money damages).

136. 129 S. Ct. 808 (2009).

137. 533 U.S. 194 (2001).

138. *Id.* at 201.

139. *Id.*

140. *Id.*

141. *See supra* notes 134-35 and accompanying text.

142. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

143. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

this problem,[144] *Saucier* mandated the two-step sequence.[145] But *Pearson* overruled *Saucier*'s "order of the battle," and gave federal courts carte blanche to dismiss *Bivens* and § 1983 suits before reaching the constitutional question.[146] In short, *Pearson* increased the costs of constitutional calcification that accompany the qualified immunity standard.

The development of constitutional law, of course, imposes costs too. Lower courts expend time and resources when they demarcate the contours of constitutional rights. This expenditure becomes a waste—"an essentially academic exercise"[147]—when a lower court could dismiss because the right was not clearly established as a threshold matter.[148] The benefits of development may be limited where the decision is highly fact-specific[149] or based on an ambiguous interpretation of state law.[150] Less intuitively, constitutional development may lead to bad constitutional law. In the pleading stage, courts may not adequately make legal decisions where the factual basis has not developed.[151] And during the *Saucier* experiment, while lower courts developed more constitutional law, they also sided more often with the government.[152] Plaintiffs got past the qualified immunity stage less often after *Saucier* than they did before.[153] To the extent that the government was already undeterred from violating rights, *Saucier* made things worse.

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144. *Saucier*, 533 U.S. at 201 ("This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.").

145. *Id.*

146. The Court did admit, however, that the *Saucier* two-step doctrine was preferable in certain situations. *Pearson*, 129 S. Ct. at 818.

147. *Id.*

148. *Id.*; Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) ("Sometimes the [*Saucier*] rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources.").

149. *Pearson*, 129 S. Ct. at 819.

150. *Id.*

151. *Id.* at 818-20.

152. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. (forthcoming 2009) (manuscript at 18), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282683.

153. *Id.*

Lost in the debate between *Saucier* and *Pearson*, however, was what role optimal deterrence would play in qualified immunity jurisprudence. Optimal deterrence would appear to be an important consideration. After all, constitutional development is less valuable if it does not develop in the right direction. The strain on judicial economy is a ubiquitous fear, but the fear cannot exist in a vacuum. Worries about litigation costs are unwarranted if more litigation reaches the efficient result. As it has in other contexts, the *Pearson* Court failed to consider the deterrent effect that constitutional tort litigation has on government employees. *Pearson* illustrates once again that deterring unconstitutional conduct is a secondary value in the Court's qualified immunity jurisprudence.

By contrast, the Court chronically worries about the potential costs of constitutional tort litigation. The qualified immunity defense arose in the 1970s and 1980s as a response to the perceived excesses of § 1983 and *Bivens* claims.[154] Meanwhile the Court also started cutting back on *Bivens*' scope. These two contemporaneous doctrinal shifts developed without reference to each other. Both aimed to ferret out claims that would have a chilling effect on legitimate governmental conduct.[155] Limiting *Bivens*, while expanding qualified immunity, then, served redundant functions. If a plaintiff establishes a *Bivens* action, the court is essentially convinced that overdeterrence would not occur. The plaintiff, however, may still lose on qualified immunity grounds, precisely because the imposition of liability would lead to overdeterrence. Through their expansive and overlapping rationales, *Bivens* and qualified immunity combined to encourage *illegitimate* behavior by federal employees.

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154. Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower Level Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 483 (1994).

155. *Compare* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty-at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."), *with* Wilkie v. Robbins, 127 S. Ct. 2588, 2604 (2007) ("Exercising any governmental authority affecting the value or enjoyment of property interests would fall within the *Bivens* regime, and across this enormous swath of potential litigation would hover the difficulty of devising a 'too much' standard that could guide an employee's conduct and a judicial factfinder's conclusion.").

Paradoxically, at the same time, qualified immunity has features that could lead to overdeterrence of *legitimate* governmental conduct. Although qualified immunity seeks to prevent "over-the-line" conduct, the line itself is fuzzy.[156] In ascertaining where the line is, government actors, naturally risk-averse, may overcomply and forego socially beneficial activity.[157] This bizarre outcome means that qualified immunity not only imposes a significant cost, but a cost contrary to qualified immunity's original purpose.

It is impossible to assess the costs and benefits of *Bivens* without considering the costs and benefits of qualified immunity. Although the two doctrines are logically distinct, they operate in tandem. By neglecting the two in context, courts fail in their duty to "[weigh] reasons for and against [subjecting federal employees to potential liability], as common law judges have always done."[158] And because qualified immunity already weeds out claims that would chill legitimate governmental conduct, an economic analysis of *Bivens* need not be as concerned with the costs of suboptimal overdeterrence.

III. *BIVENS* IN ITERATED AND NON-ITERATED GAMES

The literature about *Bivens* ignores that a federal employee interacts with a citizen in one of two ways. The first case is a one-shot transaction: the employee violates a citizen's constitutional rights at one discrete moment and never again.[159] In the second case, a high likelihood exists that the *same* employee recurrently violates the constitutional rights of the *same* victim. Economists call the first situation a non-iterated game and the second an iterated game.[160] For the purposes of measuring specific deterrence, the distinction matters quite a bit. The deterrent effect of a *Bivens* action is much greater in an iterated game.

156. Mandery, *supra* note 154, at 500-05.

157. *Id.*

158. *Robbins*, 127 S. Ct. at 2591.

159. *Cf.* Park, *supra* note 31, at 440 ("The rights established in constitutional tort actions are generally applied in discrete transactions between individual plaintiffs and individual government officials.").

160. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27-69 (1984).

A. A Game-theoretic Analysis of Federal Land-use Disputes

This Section models the optimal deterrence of federal harassment as a game. The game consists of two players: the federal agent and the landowner.[161] Each player has two strategies: cooperate or defect. A government official "cooperates" by refraining from violating constitutional rights. In the property rights context, cooperation means interacting with the plaintiff through lawful means.[162] The official could, for instance, bargain with the landowner, buy the land, take the land through eminent domain, lawfully regulate the land, or leave the landowner alone. A government official "defects" by violating constitutional rights, or in this specific case, harassing the plaintiff. Here, harassment means a pattern of *intentional* and illegal conduct in an effort to extract a property interest. The landowner "cooperates" by acquiescing to the federal official's demands by alienating the property interest. The landowner "defects" by refusing to do so. A landowner's defection could result in other actions: he could negotiate with the federal agent, alienate the property to a private party, commence a lawsuit, seek administrative relief, or engage in private self-help measures. The game, then, yields four different sets of payoffs based on the combination of the plaintiff's and defendant's strategies. The game assumes that all parties are rational[163] and that there is perfect information.[164] For the federal agent, public choice theory dictates his rational choice.[165] The landowner seeks to maximize his interpersonal utility.

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161. This assumption, of course, simplifies the fact that multiple federal agents could act in concert, and does not account for the fact that the government could act in its corporate capacity. Similarly, the target entity might be a firm or a group of landowners instead of one individual. None of the simplifications should affect the incentives and payoffs in the game.

162. To avoid a circular definition, "unlawful" conduct does not necessarily refer to action that would give rise to a *Bivens* action. Rather, it refers to a pattern of harassment—some of which might be lawful, some of which might not—to extract the property right, in which the federal employees are motivated by bad faith.

163. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 11, 27-28 (1994).

164. *Id.* at 312.

165. *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1440-43 (2006).

B. Government as a One-time Transactional Actor

Does a *Bivens* action deter a federal official who likely violates the victim's constitutional right only once? In *Bivens*, federal narcotics agents raided Webster Bivens's home without a warrant, manacled him in front of his wife and children, threatened to arrest his entire family, and strip searched him at the courthouse.[166] Bivens was never actually tried or convicted.[167] There was no evidence that the federal narcotics agents knew or had a reason to personally know Bivens.[168] The agents raided Bivens's home due to faulty information, not due to any feature about him.[169] Thus, there was little reason to suspect that the federal agents would unconstitutionally raid Bivens's home again and humiliate him.[170]

Similarly, in *Davis v. Passman*,[171] Congressman Otto Passman fired a female employee on the basis of her gender.[172] Passman wanted his deputy administrative understudy to be a man because he did not believe women could handle the pressures of the job.[173] Even with a damages remedy, as the Supreme Court found, it is seriously unlikely that Passman would ever again be in the position to discriminate against Shirley Davis on the basis of her gender.[174]

Thus, if a federal official would likely violate a given individual's constitutional right only once, there is not much room for added specific deterrence. The potential benefit of added specific deterrence is low because the *particular* federal actor is unlikely to

166. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

167. *Id.*

168. *See id.*

169. *See id.* at 720-21.

170. *But see* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 60-61 (1989) (discussing situations in which law enforcement officials retaliate against citizens for filing suit).

171. 442 U.S. 228 (1979).

172. *Id.*

173. *Id.* at 230.

174. *Id.* at 245. It is worth emphasizing that specific deterrence does not account for cases in which the federal agent violates the constitutional rights of other similarly situated people. For instance, specific deterrence does not measure whether Congressman Passman would sexually harass other women in his office, or whether the federal narcotics agents would raid other homes. Those cases fall under the ambit of general deterrence.

recommit the constitutional tort against the *particular* victim, even in the absence of a *Bivens* action.

C. Government as a Repeat Transactional Actor

In an iterated game, the landowner and federal agent interact multiple times. This changes the incentives of cooperating or defecting because each game creates reputational effects that would alter the parties' behavior after each iteration.[175] It makes sense that *Bivens* would have a higher specific deterrent effect in iterated games. The purpose of *Bivens*, after all, "is to deter *the officer*."[176]

Bivens actions would deter the same federal agents from behaving the same way against the same victim. In the West, for instance, federal agencies like the BLM deal with landowners like Robbins on a regular basis.[177] Moreover, a negotiation, which classically consists of repeated offers and counteroffers, is an iterated game under which the incentives change from game to game. This is unlike the facts of *Bivens*, under which the victim presumably would never again interact with the narcotics officers.[178]

Take *Robbins* as an example. Because the BLM had regular contact with Robbins,[179] a successful suit would more likely deter the BLM for several reasons. A lawsuit signals information to the parties.[180] In particular, a successful verdict signals to the victim that the government is at fault, and that a victim has a right.[181] The outcome would signify that the BLM can successfully negotiate only if landowners are willing to do so.[182] A successful verdict would make a landowner less willing to do business with the official or agency, and thereby raise the political and monetary costs of negotiating and carrying out its land use objectives.[183]

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175. *See generally* BAIRD, *supra* note 163, at 159-87.

176. FDIC v. Meyer, 510 U.S. 471, 485 (1994).

177. *See* Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 721-806 (2005).

178. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

179. Wilkie v. Robbins, 127 S. Ct. 2588, 2593-94 (2007).

180. *See* Gilles, *supra* note 44, at 859.

181. *Id.*; *see also* Park, *supra* note 31.

182. *See* Park, *supra* note 31.

183. *See* Gilles, *supra* note 44, at 860.

Second, a verdict for Robbins would certainly deter the BLM from harassing him thereafter. The verdict would send the BLM a signal that (1) a court looks unfavorably on its actions and (2) Robbins has the incentive to legally defend his property right if the BLM threatens it. The BLM can continue to harass Robbins, and perhaps acquire an easement if he capitulates.[184] But the probability of Robbins's acquiescence is low, because Robbins now knows that a court is likely once again to impose a damages judgment against the BLM. Aside from the reduced likelihood that Robbins surrenders, the BLM does not gain any expected utility from harassing Robbins. The costs of a damages judgment would include administrative expenses, presumably passed on to the taxpayers. Another potential cost would occur if the unconstitutional government behavior were socially beneficial but then stopped.

Or take the case of *Bush v. Lucas*[185] as another example. Because the employee was not terminated, he would have to interact repeatedly with the government official.[186] In the absence of a remedial scheme that provided damages, the employer would be suboptimally deterred from abridging the employee's freedom of speech.

D. A Fourth Amendment Example

In the context of a Fourth Amendment search, the police-citizen interaction exemplifies an iterated game. The officer's decision to search depends on the citizen's decision to grant consent, and vice versa.[187] The police officer "cooperates" by searching when the suspect grants consent, or when the police officer believes he is following the law. The officer "defects" by searching without consent or probable cause.[188] This game assumes that the only remedy is the exclusion of illegally obtained evidence at trial; the citizen is not allowed to sue the officer in his personal capacity for money damages.

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184. *See* Tribe, *supra* note 21, at 60-62.
185. 462 U.S. 367 (1983).
186. *Id.* at 370.
187. Standen, *supra* note 50, at 1463.
188. *Id.*

The suspect "cooperates" by granting consent when he believes the police officer is legally entitled to enter. The citizen "defects" by not granting consent. This game is iterated because decisions of each party depend on the decision of the other. Assume now that the only remedy for unconstitutional police behavior is the suppression of illegally obtained evidence—that is, the citizen does not have access to a damages remedy. The respective expected utilities appear in Figure 1.

Figure 1: No *Bivens* Damages in an Illegal Search and Seizure Iterated Game[189]

	Player Two—Federal Agent (FA)		
Player One—Citizen (C)		Cooperate	Defect
	Cooperate (C, FA)	(0,0)	(-15, -70)
	Defect (C, FA)	(-70, -15)	(-50, -50)

In the first square, the police officer rightfully asks for consent and the citizen provides it; neither side incurs any harm. Moving to the top-right square, the police officer conducts a search without the citizen's consent, even if the citizen would have provided it. The officer's harm is relatively great because his search is likely unconstitutional; however, because the penalty is exclusion of the evidence instead of personal liability, the officer's harm is not absolutely high, as he does not internalize all of the costs of his unconstitutional conduct.[190] The citizen suffers harm, but the dignitary harm is limited by the citizen's belief that the search was constitutional. The bottom-left square occurs when the officer lawfully searches but the citizen withholds consent. In this case, the officer suffers harm to the limited extent that his search will be declared unconstitutional. The citizen will suffer a greater harm, however, stemming from the indignity of having the police conduct an unwanted search on the premises. If both players defect, shown in the bottom-right square, the harm to both parties will be substantial; the officer faces a high risk that his search will be declared invalid, and the citizen still suffers dignitary harms.

189. *Id.* at 1464 fig.1.
190. *Id.* at 1467 & n.116.

This situation presents a Prisoner's Dilemma because each party has the incentive to defect, ending up in the lower-right square, even when the best point for both parties is the top-left square.[191] The citizen's optimal strategy is to withhold consent, whereas the officer has the incentive to enter without consent or probable cause. Their respective strategies yield a higher ratio of unconstitutional behavior.

Damages may provide a solution to the Prisoner's Dilemma by giving the government official and landowner the incentive to cooperate. In such a case, damages bridge the informational asymmetry—each party knows the likely consequences of cooperating or defecting, and tailors his actions accordingly. Damages provide the federal agent with information about the expected value of engaging in harassing behavior. It gives the landowner knowledge about the rationality of a damages suit, given the costs of litigation and the amount of harassment.

IV. ANALOGIZING NUISANCE TO HARASSMENT RELATED TO LAND USE

Nuisance common law already provides monetary remedies for interference with private property rights. A *Bivens* remedy protecting property rights appears to overlap with those protections. This double coverage prompts two questions. First, if a *Bivens* action provides a redundant remedy, why should it exist?[192] Second, if *Bivens* is not redundant, why use *Bivens* instead of extending preexisting takings or nuisance doctrine?

To the first question, *Bivens* production would not duplicate remedies under the common law nuisance. To the second question, *Bivens* protection should exist alongside nuisance because, although they share many critical similarities, they also share doctrinal tensions.

191. *Id.* at 1466; *see also* BAIRD, *supra* note 163, at 312.

192. The Court contemplated this scenario in *Bivens* itself. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971).

A. Advantages of the Nuisance Analogy

Conduct like that in *Robbins* is best conceived as a nuisance for efficiency purposes. Doctrinally, this approach is defensible, as constitutional torts "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action."[193] Because damages are usually the most efficient remedy for a tortfeasor's nuisance, it follows that a *Bivens* action is likely more efficient than an injunction.

Under common law, a defendant is liable for private nuisance if he intentionally and unreasonably interferes with another's use and enjoyment of his land.[194] The remedies for nuisance include injunction, purchased injunction, or money damages.[195] Nuisance cases paradigmatically refer to socially beneficial activity with negative externalities.[196] There is some modest authority holding that government-imposed nuisances can become a taking.[197] And nothing in its definition precludes nuisance from encompassing the type of harassment that Robbins suffered.[198]

Nuisance, unlike an "accident" tort such as negligence, is not a discrete singular event. Instead, it is usually continuous.[199] Nuisances typically occur when transactional costs are high, usually when the class of harmed plaintiffs cannot effectively bargain with the defendants.[200] With disputes involving a nuisance, giving either the defendant or plaintiff a property entitlement is ineffi-

193. Monroe v. Pape, 365 U.S. 167, 187 (1961) (finding that police officers acted "under the color" of law, pursuant to 42 U.S.C. § 1983 when, without authorization, they broke into a man's home, made him stand naked in the middle of the home, and ransacked every room in his apartment); Park, *supra* note 31, at 398-99 ("Because of the general similarities between constitutional and common law torts, it is natural to conceive of the function of constitutional tort action in common law terms.").

194. RESTATEMENT (SECOND) OF TORTS § 822 (1977).

195. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 46-47 (1987).

196. *Id.* at 48.

197. Richards v. Wash. Terminal Co., 233 U.S. 546, 553 (1914); Thornburg v. Port of Portland, 376 P.2d 100, 110 (Or. 1962).

198. Nuisance, for instance, does not require trespassory harm. *See, e.g.*, Branning v. United States, 654 F.2d 88, 99 (Ct. Cl. 1981).

199. LANDES & POSNER, *supra* note 195, at 42.

200. *Id.* at 43.

cient.[201] In other words, an injunction is inefficient.[202] By contrast, a liability rule under which the defendant has to pay money damages is efficient.[203] A property right (or injunction) is efficient only if the damages to the plaintiff exceed the damages that the defendant would suffer if the nuisance stopped.[204] If the defendant's nuisance creates significant social value, and that value exceeds the amount of harm incurred by the plaintiff, then it is inefficient to have the defendant pay damages.

B. Disadvantages of the Nuisance Analogy

Although nuisance law provides a fitting economic framework, it faces two doctrinal difficulties. The first doctrinal difficulty occurs, as Professor Carlos Ball has recently recognized, when the government commits nuisance, because the line between a taking and nuisance is unclear and arguably incoherent.[205] Professor Ball proposes that government-imposed nuisances merit money damages, subject to intermediate scrutiny.[206] It is unwise, however, to characterize government-imposed nuisances as per se takings for three reasons. First, if such a nuisance were always a per se taking, then some very socially beneficial outcomes would be offset, and perhaps become outweighed by the monetary reward.[207] Second, nuisance and takings law have different ends. Like constitutional tort doctrine, nuisance law attempts to minimize interference with property rights while maximizing economically productive

201. *Id.* at 44.

202. An injunction, however, may be warranted due to the iterated nature of the activity in question. *Id.* at 47 ("In principle an injunction may even be used in an accident case: it would forbid the defendant to repeat the dangerous conduct that led to the accident and thus would obviate the need for further damage actions. The critical difference, however, is that an accident victim rarely has an incentive to get an injunction against the defendant. The probability that the plaintiff will be involved in a second accident with the same injurer is ordinarily remote. The defendant's future conduct is more likely to be a danger to other people. In nuisance cases the future injury (all or at least part of it) is to be the plaintiff, who therefore has an interest in getting an injunction against future harm as well as damages for harm already suffered.").

203. *Id.* at 44.

204. *Id.*

205. Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 821-22 (2006).

206. *Id.* at 850-51.

207. *Id.* at 856.

activity.[208] Takings doctrine, by contrast, attempts to spread the landowner's loss onto the public in order to offset the public's benefit.[209] Third, characterizing government-imposed nuisances as takings would be doctrinally incoherent. According to Professor Ball, the Takings Clause is the "minimum form[] of [property] protection."[210] To treat nuisance as a per se taking would essentially put nuisance below the constitutional floor.[211]

Should the victims of government-imposed nuisances receive as little protection as the victims of regulatory takings? Professor Ball says no, giving three reasons why government-imposed nuisances merit a higher form of scrutiny than the deferential *Penn Central* test. First, the government typically commits nuisance in its enterprise capacity—for example, as the operator of a landfill—in which it resembles a private business more than an impartial mediator.[212] Second, the victims of a nuisance usually want to continue ordinary land use, whereas the victims of a regulatory taking usually want to intensify land use.[213] Finally, plaintiffs in a regulatory takings suit are more likely to engage in harmful land use than the victims of nuisance.[214] The upshot, then, is that regulatory takings jurisprudence does not offer private property owners the protections they deserve when governmental officials engage in a repeated pattern of intentionally harmful conduct.

The second doctrinal difficulty is that landowners likely do not have private rights of action against federal employees for nuisance. Although the Tucker Act waives sovereign immunity with respect to regulatory takings suits,[215] a landowner is barred from seeking just compensation when an executive level employee takes property without congressional authorization.[216] But, as discussed earlier,

208. *Id.* at 857.
209. *Id.*
210. *Id.* at 858.
211. *Id.*
212. *Id.* at 862.
213. *Id.*
214. *Id.* at 863.
215. 28 U.S.C. § 1491(a)(1) (2000) (granting jurisdiction in the United States Court of Federal Claims for any claim against the federal government to recover damages founded on the Constitution).
216. *See, e.g.*, Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 126-27 (1974); United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920); Hooe v. United States, 218 U.S. 322, 335-36 (1910).

cases like *Robbins* resemble the tort of nuisance more than any existing cognizable constitutional cause of action, such as a per se or regulatory taking. Under the Tucker Act, a landowner cannot sue the federal agents in tort.[217] The Federal Tort Claims Act also offers no relief, because it does not authorize constitutional tort suits against federal employees.[218]

These two limitations demonstrate the gap between statutory and constitutional remedies. The statutory remedies do not cover the harassment, whereas the constitutional remedies are impotent to do so, to the extent that constitutional remedies even exist. Although nuisance common law provides a useful framework to analyze bad-faith federal interference with property rights, the landowner would still lack a colorable avenue for compensation—that is, unless a landowner has access to a *Bivens* remedy.

V. SLOWING THE END-RUN AROUND THE TAKINGS CLAUSE

Combining the insights of iterated games, common law nuisance, and Takings jurisprudence, this Section has two purposes. First, it explains why federal employees have a structural incentive to behave the way the BLM agents did in *Robbins*. Second, it shows that a *Bivens* remedy would change the incentives of the game, more effectively deterring such harassment.

A. The End-Run Explained

Assume no *Bivens* relief, consistent with the Court's holding in *Robbins*. Federal agents have three basic options to regulate the use of a particular piece of private land. First, it could voluntarily negotiate with the landowner and purchase or acquire the property, a servitude, or easement. Second, it could regulate the land,[219] and perhaps be subject to a regulatory takings suit. Third, it could explicitly take the property using eminent domain, pay just compensa-

217. 28 U.S.C. § 1491(a)(1) (2000) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim ... not sounding in tort.").

218. FDIC v. Meyer, 510 U.S. 471, 477-78 (1994).

219. *See* Bell & Parchomovsky, *supra* note 165, at 1426-39 (listing the ways in which the government can effectively take property through its regulatory powers, in a way not subject to the constraints of eminent domain).

tion, and use the land as it wishes. Figure 2 shows the game and the payoffs, in extensive normal form, for the federal agent and landowner.[220]

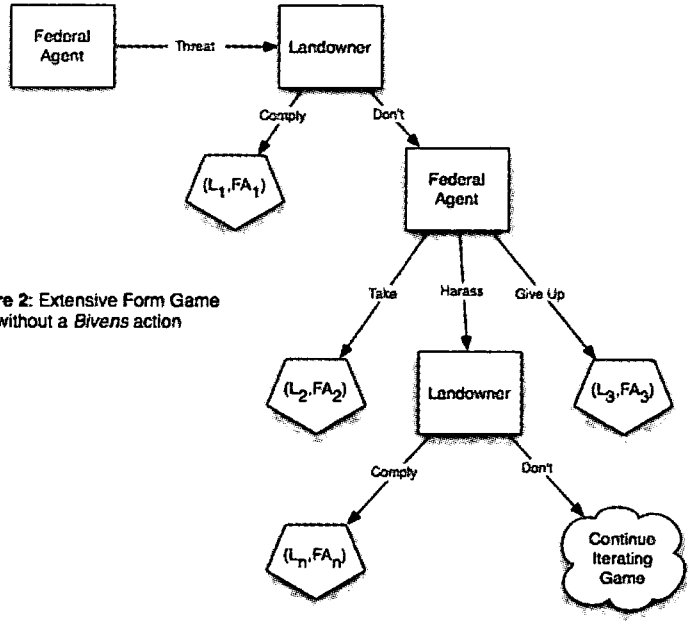

Figure 2: Extensive Form Game without a *Bivens* action

The game begins with a threat: the federal agent demands the property right, "or else." Assume momentarily that the landowner does not comply. Now, the federal agent has three options. Taking the property (FA_2) would impose large monetary costs on the federal agent but give the landowner relatively high compensation (L_2). Giving up would inflict a minor reputational cost on the federal agent, because his future threats may lose credibility (FA_3). The landowner's payoff is the benefit of retaining the property (L_3). Suppose the federal agent harasses the landowner—say, by a common law trespass. If the landowner complied (L_4), his payoff would be negative: he would lose the value of the property right and suffer the cost of the trespass. If the landowner did not comply, the

220. *See* AXELROD, *supra* note 160, at 68-69.

federal agent would have his turn, with the incentive to harass. Thus, after each iteration, the landowner's harm increases by the amount of the harassment. At some point, the cumulative costs of harassment will eventually induce the landowner to forfeit. His negative payoff will be the costs of the property *and* the costs of bearing the harassment. Absent a *Bivens* action, the landowner's optimal payoff is at L_1. In other words, the landowner should forfeit upon a credible threat from a federal agent.

* * *

How does this outcome arise? The federal government simply lacks the incentives to bargain with the landowner. Compare, for instance, the payoffs associated with eminent domain with those associated with voluntary bargaining. The government's expected transaction costs are lower in an eminent domain proceeding. For one, the constitutional limit on the federal government's eminent domain power is very weak. Although the Constitution requires that land only be taken for a "public use," the Supreme Court has held that the government can take private property for private use if it serves a "public purpose"[221]—which now includes a good faith belief that the taking will raise more tax revenues.[222] So the possibility that a court will enjoin the land seizure is low. Bargaining, by contrast, normally imposes high transaction costs.

Eminent domain also yields lower expected actual costs than does negotiation. The Fifth Amendment requires that a taking be accompanied by "just compensation."[223] Just compensation—which the Supreme Court has read to mean "fair market value"[224]—also distorts a voluntary bargain between government and landowner. For instance, a court would not compensate the landowner for the value of a functionally equivalent replacement of the property.[225] Nor does fair market value take into account the intangible, subjective valuations of the property, such as its sentimental value.[226] The landowner probably never gets the subjective value of

221. Berman v. Parker, 348 U.S. 26, 33 (1954).

222. *See* Kelo v. City of New London, 545 U.S. 469, 487-88 (2005).

223. U.S. CONST. amend. V.

224. United States v. Miller, 317 U.S. 369, 373-74 (1943).

225. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979).

226. *See* Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?*, 58 S.C. L. REV. 489, 500-08 (2007).

his property even if the government does constitutionally compensate him.[227] The upshot, then, is that the government necessarily pays less in an eminent domain proceeding than it would in a voluntary negotiation.[228]

Conversely, when faced with eminent domain, the landowner would have lower expected payoffs compared to negotiation. Because the takings and compensation schemes are so skewed in favor of the government, the transaction costs for a landowner to challenge a taking would be very high, whereas the expected return would be very low. Additionally, the government faces problems relating to fiscal illusion. Because the government can acquire property at less than the value at which the owner would sell, it does not have to bear the entire cost of the project's worth.[229] The incentive, then, is for the government to engage in projects that would not maximize the value of the land.[230] Finally, because the government has a legal advantage in taking property very easily, it has an insuperable bargaining chip that forces the landowner to sell at a low price.[231]

Now, compare the expected costs and benefits of land-use regulation and eminent domain. The government's expected benefits might be lower. It might not achieve the productivity and efficiency gains from owning the land.[232] Also, the government would face a higher risk of a Takings Clause violation if it withheld or granted privileges, in order to exact concessions from the landowner.[233] At the same time, the expected costs would be lower.[234] The government would not have to pay fair market value for the land. The landowner, not the government, would internalize any costs

227. *Id.* at 499.

228. Decreasing the purchase price, of course, is intended (and perhaps socially optimal) in so-called "hold out" situations. In a hold out situation, because the landowner has a "bilateral monopoly" over the land, and thus has the incentive to raise his asking price ad infinitum. Without eminent domain, the government is prevented from acquiring a piece of property it really needs. *See* POSNER, *supra* note 23, at 55. Hold out problems are not relevant to the issues addressed in this Note.

229. *See* Abraham Bell & Gideon Parchomvsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 881-84 (2007).

230. *Id.* at 883.

231. *See id.* at 887-90.

232. *See id.* at 881-84.

233. *See* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (requiring an "essential nexus" between the exaction and the land use to survive a Fifth Amendment challenge).

234. Bell & Parchomvsky, *supra* note 165, at 1442.

associated with regulation. And finally, the transaction costs of a takings suit would be low, as the government rarely loses a regulatory takings suit.[235]

Federal officials can engage in discrete acts of harassment—some illegal, some not. The landowner may not have a private right of action to sue the government for some of the illegal offenses. For others, such as trespass, the landowner may sue, but the transaction costs—for instance, hiring a lawyer—could outweigh the probable damages. Because ten lawsuits usually cost more than just one, the expected costs for suing for each illegality may dwarf the expected benefits, especially when some of the torts only yield nominal damages.

This discussion assumes that the landowner will receive some compensation for his troubles. After *Robbins*, however, it appears that federal officials can harass a private landowner—sometimes legally, sometimes not—in the hope that the private party capitulates to the government's demands for land or an easement. This, in essence, creates a financial incentive for federal agents to make an end-run around the Takings and Just Compensation Clauses,[236] for "coercion is the adoption of some bargaining strategy that leads to an unacceptable deviation from the original set of entitlements."[237]

235. *See supra* notes 74-80 and accompanying text.

236. *See* Tribe, *supra* note 21, at 60 ("Without the threat of personal liability under *Bivens*, officials working for a federal agency that seeks to acquire a private property interest but either lacks statutory authority to obtain it by eminent domain or has insufficient funds in its budget to purchase it for its fair market value have nothing to lose and much to gain by using the kinds of harassing behavior that the BLM employees used against Robbins.").

237. RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 75 (1991).

B. Righting Unconstitutional Wrongs Without Shackling Federal Agents

Now assume *Bivens* relief is available to the landowner. Figure 3 illustrates the expected payoffs.

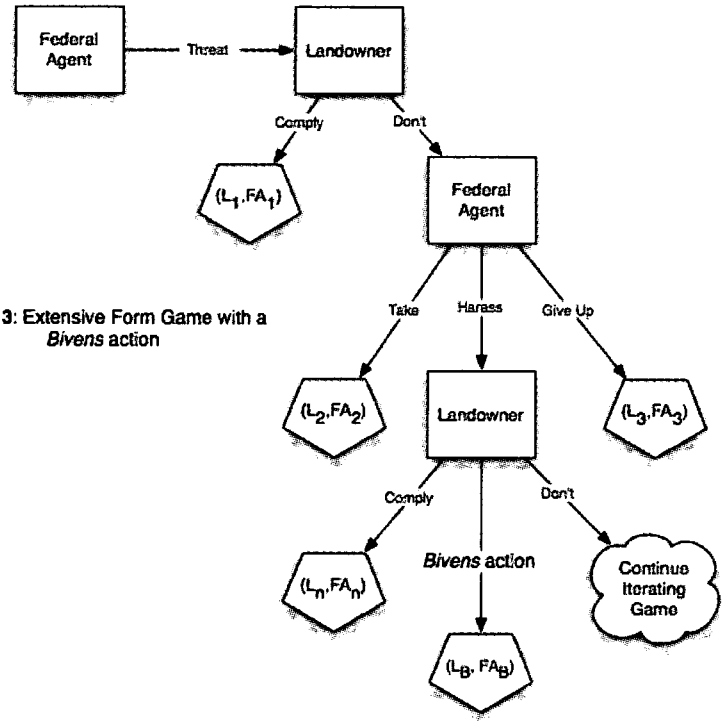

Figure 3: Extensive Form Game with a *Bivens* action

Figure 3 has payoffs identical to Figure 2, with the exception of L_B and FA_B, which represent the expected utilities of a *Bivens* suit. The landowner's payoffs (L_B) will depend on the magnitude of harassment and the likelihood the *Bivens* suit will succeed. It is important to emphasize that a *Bivens* suit does not fix all harassment problems. In some cases, the harm from harassment may not be great enough to justify the costs of suing. In others, due to doctrines like qualified immunity, a *Bivens* suit may not succeed. A *Bivens* verdict may not impose sufficiently high costs (FA_B) to deter

a federal agent. Although *Bivens* is no panacea, it arrests the end-run in limited situations. If the landowner could file a *Bivens* suit for the aggregate harm that has accrued through the government's misconduct, then federal employees may not have the incentive to commit torts—such as trespass—that would normally yield nominal damages while causing a landowner grief. The transaction costs for suing would be lower, because the landowner would not need to sue for each discrete act in the chain of harassing conduct. The administrative costs, however, would be greater if more landowners sued. As Justice Ginsburg's dissent in *Robbins* pointed out, however, if similar suits against state officials under § 1983 are any indication, such suits are not frequent.[238]

The counterargument that *Bivens* actions may restrict the scope of a constitutional right[239] is well taken, but inapplicable in this case. As it stands, the scope of protection offered by the Takings Clause is very limited.[240] For instance, the injunctive component of the Takings Clause, which requires that the governmental purpose be for a "public use," has been reduced to "hortatory fluff."[241] The damages element of the Takings Clause, which requires that the government pay "just compensation," systematically undercompensates property owners. Regulatory takings jurisprudence is also very limited.[242] After all, "[i]n adjudicating constitutional tort actions, courts must often adapt rights to different contexts. Narrower rights are appropriate in some settings while more expansive rights are appropriate in others."[243]

Professor Levinson warns against assuming that damages deter the government in the same way that they do for private entities.[244]

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238. Wilkie v. Robbins, 127 S. Ct. 2588, 2615-16 (2007) (Ginsburg, J., dissenting).

239. *See* Jefferies, *supra* note 101, at 89-90.

240. *Cf.* Park, *supra* note 31, at 450 ("In some cases, the prospect of significant damage liability can influence courts to narrow rights. But without an individual remedy many such rights would not have been established in the first place.").

241. Kelo v. New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting); *see also* Richard A. Epstein, Kelo*: An American Classic (Of Grubby Particulars and Grand Principles)*, 8 GREEN BAG 2d 355, 361 (2005); Timothy Sandefeur, *Mine & Thine Distinct: What* Kelo *Says About Our Path*, 10 CHAP. L. REV. 1, 43 (2006).

242. *See supra* text accompanying notes 74-80.

243. Park, *supra* note 31, at 437.

244. Levinson, *supra* note 40, at 346.

Despite the government's behavior to the contrary,[245] let us assume that Professor Levinson is correct. His theory does not mean, however, that *Bivens* will have no deterrent effect. At most, the effect may be smaller. Assuming, however, that federal agents are undeterred from unconstitutional behavior, *Bivens* still has a role to play if it provides *some* incentives to behave closer to the socially optimal activity level.[246] Even if *Bivens* has no quantifiable deterrent effect, it still has qualitative force.

CONCLUSION

Cases like *Robbins* not only evidence an end-run around the Takings Clause, but also "a death by a thousand cuts,"[247] under which a landowner has no legal recourse for cumulative acts of nuisance. The two problems have significant economic repercussions. A game-theoretic model shows that federal employees have little incentive to respect property rights when statutory, common law, and constitutional remedies are unavailable. Although the Supreme Court purported to "weigh[] reasons for and against the creation of a new cause of action,"[248] it did not rigorously consider the balance of incentives in play when federal agents harass a citizen in order to acquire his property rights.[249] In determining

245. *See* Rosenthal, *supra* note 40, at 841 ("The existence of immunity legislation is itself the strongest evidence for the conclusion that elected officials are highly sensitive to governmental damages liability. If, as predicted by Levinson, elected officials were indifferent to liability, they would not bother to enact immunity legislation.").

246. *See* Gilles, *supra* note 44, at 879-80 ("Professor Levinson's argument stresses that optimal deterrence on the standard law and economics model is not achieved by the imposition of constitutional tort remedies. I agree. We lack the necessary information to 'price' constitutionally infringing conduct by government officials in order to achieve optimal deterrence against future violations. But ... constitutional tort remedies nonetheless service a vital—if not 'optimal'—deterrent function.").

247. Tribe, *supra* note 21, at 23.

248. Wilkie v. Robbins, 127 S. Ct. 2588, 2600 (2007).

249. One commentary described the Court's reasoning in *Robbins* as such:

> The Court, ... adhering to the superficial trend of rejecting *Bivens* claims, disrupted the measured development of the *Bivens* doctrine. In contrast to the detailed analyses of the previous *Bivens* cases, the Court's analytical approach—which it optimistically described as "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done"—lacked sophistication. In fact, the Court conducted this analysis without attempting to explicate, and indeed failing entirely even to mention, its conception of the purposes of *Bivens*. Lacking any doctrinal theory against which

whether to find a *Bivens* action, courts should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."[250]

One such consideration—the lodestar of much of policy analysis—is economic efficiency. In cases involving land-use regulations, government employees frequently interact with the same citizen. *Bivens* relief, for instance, would have a stronger deterrent effect when federal officials are likely to be repeat offenders against the victim. Economic analysis suggests when federal officials try to exact a property right through nuisance-like behavior, a damages remedy may move toward the efficient result. If optimal deterrence is a valuable goal in these cases, as it should be, then courts and legislatures should seriously rethink the availability of damages relief. If not, property rights may suffer yet another death by a thousand cuts.

Arpan A. Sura[*]

> it might consider the facts it encountered, the Court proffered an inapposite, overly simplified, one-to-one comparison between the inadequacy of the redress Robbins had received and the "difficulty in defining a workable cause of action." By focusing on Robbins's interest in being recompensed rather than the necessity of a remedy for protecting constitutional rights, the Court simultaneously blunted the true force of the action and delegitimized any recognition of a damages remedy, thereby permitting it to find that mere "difficulty in defining a workable cause of action" could outweigh a constitutional interest. The Court therefore never even addressed the true merits of the claim.

Comment, *Bivens Damages—Takings Clause Retaliation*, 121 HARV. L. REV. 185, 192-93 (2007) (internal citations omitted).

250. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 407 (Harlan, J., concurring).

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