ROUTINE EMERGENCIES: JUDICIAL REVIEW, LIABILITY RULES, AND THE HABEAS CORPUS ACT OF 1863

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A national security emergency justifying the elimination of full judicial review and remedies for executive action is often analyzed as an exceptional, distinctive challenge to the rule of law. However, the possibility of irreparable harm frequently supports bypassing judicial procedures in more pedestrian peacetime law, such as an exigent-circumstances exception to the Fourth Amendment's warrant requirement or a preliminary injunction to avoid irreparable harm before a trial on the merits. While the scale may be different in national security crises, the problem is the same: how to maintain the rule of law when the traditional procedures and remedial doctrines of a reviewing institution may be ill-suited for avoiding irreparable harm in the time required for judicial review.

This Note uses the immunity provisions of the Habeas Corpus Act of 1863—in which Congress explicitly eliminated legal remedies during the greatest national crisis of American history—to illuminate the broader principles behind the availability of judicial remedies in exigent circumstances. In "routine" exigencies, such as a request for a preliminary injunction or exceptions to the warrant requirement, a shortcut around full procedure for the determination of rights and duties is permitted subject to the availability of judicial review after the intervention, and, often, compensation. The immunity provisions of the Habeas Corpus Act of 1863 cut off both of these remedial functions. Such immunities defeat the compensation purpose of remedies unnecessarily; as remedies in "routine" emergency interventions demonstrate, the compensation and judicial review functions need not always result in deterrence of executive action in a crisis. Immunity provisions such as those in the Act also hinder the development of the law and increase uncertainty for future actors and their possible future victims, even outside emergency situations. This Note argues that the best approach to judicial review in national security crises is not to eliminate remedies entirely, as the Habeas Corpus Act attempted to do, but to "code-switch" from a regime of property rules to a regime of liability rules in order to preserve victim compensation and the rule of law.

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INTRODUCTION

In the midst of the Civil War, Congress faced widespread efforts to undermine the Union war effort with state court litigation against Union soldiers and officials.[1] In a time before modern qualified immunity doctrine, government officials during the Civil War were subject to suit for injuries against private citizens in trespass, false imprisonment, and other traditional torts, with their official position serving only as an affirmative defense.[2] While recalcitrant state judges—many Confederate sympathizers—did not have the power of the purse or the sword in their arsenal, they tried to wield the force of law to frustrate the Union efforts by entertaining cases against Union officials.[3]

In response to such litigation, Congress enacted the Habeas Corpus Act of 1863 ("Habeas Corpus Act" or "the Act"), which both suspended the writ of habeas corpus and immunized from private civil suits and criminal liability anyone acting pursuant to the President's authority to wage the war.[4]

While legislatively eliminating judicial remedies—both the Great Writ and traditional civil and criminal actions—was defended as a

[1] *See infra* notes 61–63 and accompanying text (discussing the problems created by litigation against Union soldiers and political leadership).

[2] *See* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 188–89 (1926) (describing English statutes of indemnity passed around the turn of the nineteenth century protecting government actors from litigation similar to that faced by federal officers during the Civil War); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 23–25 (1989) (discussing the development in the mid-twentieth century of qualified immunity as a preliminary test of jurisdiction rather than an affirmative defense).

[3] For example, Secretary of State William H. Steward was sued for damages in New York state court for his order of the arrest and imprisonment of a former senator and alleged Confederate sympathizer, George W. Jones, who was held for four weeks without trial before being released. RANDALL, *supra* note 2, at 189; *Arrest of Senator Jones.; He Is Sent to for Lafayette*, N.Y. TIMES, (Dec. 21, 1861), http://www.nytimes.com/1861/12/21/news/arrest-of-senator-jones-he-is-sent-to-for-lafayette.html.

[4] Act of Mar. 3, 1863, ch. 81, §§ 1, 4, 12 Stat. 755, 755–56 (amended 1866 & 1867).

vital response to a national emergency,[5] such a sweeping elimination of judicial review is neither necessary nor wise. Members of Congress who supported the immunization of Union officials expressed concern that judicial remedies would deter executive actors and the military from carrying out their lawful duties and successfully prosecuting the war.[6] Similar arguments are often made against judicial review of executive action in exigent or wartime circumstances today.[7]

Concerns about overdeterrence may be valid regarding private actors in an emergency situation.[8] However, providing damages for legal violations by the government does not have the same deterrent effect because the costs of these remedies are, for the most part, not internalized by the actors themselves. As shown in both theory and practice, the cost of compensatory damages against government actors is spread among taxpayers.[9] Moreover, judicial review can assist government actors in the long run by clarifying the law governing their behavior.[10] Therefore, the best approach to judicial remedies in national security crises is not to eliminate remedies entirely, as the Habeas Corpus Act attempted to do, but to "code-switch"[11] from a regime of property rules to a regime of liability rules[12] in order to preserve victim compensation and judicial review.

This Note examines the immunity provisions of the Habeas Corpus Act of 1863 in light of the fundamental problem of how best to preserve effective judicial remedies in the context of exigent circumstances. By examining an intentional, explicit elimination of all judicial remedies in the greatest national crisis of American history, this Note uses the Habeas Corpus Act to illuminate the broader principles behind the availability of compensation and judicial review in exigent circumstances. In "routine" exigencies, such as a request for a preliminary injunction, a short-cut around full procedure for the determination of rights and duties is permitted subject to the availability of

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[5] *See infra* notes 67–68 and accompanying text (describing the need for measures to prevent distracting litigation during the war effort).

[6] *See infra* Part II (providing background and context for the immunity provisions).

[7] *See infra* Part III.B (discussing and responding to such objections to judicial review in exigent circumstances).

[8] *Infra* note 98 and accompanying text.

[9] *Infra* note 99 and accompanying text.

[10] *Infra* notes 85–86 and accompanying text.

[11] *Cf.* ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 36 (1999) (coining the term "code-switching" to describe shifting one's behavioral norms between different moral and social environments).

[12] *See infra* Part I.B (presenting and applying the framework of "property rules" and "liability rules" developed by Judge Guido Calabresi and Douglas Melamed).

judicial review after the intervention, and, often, compensation.[13] The provisions of the Habeas Corpus Act providing immunity for actions taken during national security emergencies cut off both of these remedial functions. Such immunities defeat the compensation purpose of remedies unnecessarily; as remedies in "routine emergency" interventions demonstrate, the compensation and judicial review functions need not always result in deterrence of executive action in a crisis.[14] Immunity provisions such as those in the Act also hinder the development of the law and increase uncertainty for future actors and their possible future victims, even outside emergency situations.[15]

In Part I, I argue that it is misguided to conceive of "emergency" powers in national security crises as a special threat to individual liberty or the rule of law. Instead, it is a manifestation of a routine problem in law: exigency and the error costs of intervention or nonintervention. I explain how decoupling of deterrence and compensation is possible in judicial responses to many of these "routine emergencies." This approach provides relief to victims and legal clarity to the system without deterring executive actors in a way that might itself cause irreparable harm or that would be, in all practicality, unenforceable by courts. In Part II, I apply this framework to the immunity provisions of the Habeas Corpus Act of 1863. By providing not just indemnity but immunity, the Act and its 1866 amendments undermined both the ability to provide compensation to victims and clarify the law—the only practical hope for effective ex ante constraints on the executive in national emergencies. In Part III, I respond to possible objections: first, the civil libertarian objection that courts should have a more robust role in protecting individual rights under a "property" remedial regime, and second, the executive-power-focused objection to judicial competence and the availability of judicial review in national security emergencies. By adopting a liability-rule approach to remedies for rights violations in wartime, courts can achieve the purposes of victim compensation, legal clarity, and spurring democratic deliberation without risking a challenge to the executive decisiveness that courts are often unwilling and unable to deter in times of exigency.

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[13] *See infra* Part I.A (providing examples of judicial review and remedies in such "routine emergencies").

[14] *Id.*

[15] *See infra* Part III.A (discussing uncertainty for litigants and executive actors created by the lack of judicial review for alleged constitutional violations in exigent circumstances).

I
Exigent Circumstances and Judicial Remedies

Legal scholarship examining judicial decision-making during national security crises often treats these cases as a special area of law separate from peacetime jurisprudence.[16] However, the problems of judicial competence and uncertainty in national security crises—and judicial tools to solve these problems—are present in more routine areas of law. In this Part, I explain first that the balance-of-error costs and the possibility of irreparable harm posed by national security exigencies are analogous to those that courts face in "routine" cases of preliminary injunctions and criminal procedure. Second, I explain how this insight shows that the problem of remedies for constitutional violations in national security exigencies may be analyzed similarly to the framework presented for these "routine" exigencies in other areas of law. I conclude that a liability-rules approach—a more practical and liberty-protective solution to exigency than either strict civil libertarianism or complete deference to the political branches or the military—decouples the remedial purposes of legal clarity and compensation from the separate purpose of deterrence.

A. Routine Emergencies

It is a truth universally acknowledged that a national security emergency presents a unique challenge to the rule of law. Even scholars who question the conventional wisdom of crisis jurisprudence maintain a bright, categorical line between wartime and non-wartime judicial decision-making,[17] and even those who take a more libertarian approach to civil liberties implicitly accept that armed conflict lays an analytical meridian across an otherwise contiguous legal landscape.[18] The standard reason is that the political institution whose pri-

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[16] *Infra* notes 17–18 and accompanying text.

[17] *See* Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. Rev. 1 (2005) (presenting an empirical study comparing the Court's decisions in wartime and non-wartime periods). In the account of Epstein et al., a *Milligan* approach to judicial decision-making in national security emergencies is characterized by an insistence on congruity of individual rights and judicial remedies in both wartime and peacetime. *Id.* at 6–7; *see also Ex parte* Milligan, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

[18] *See* Epstein et al., *supra* note 17, at 6–7 (distinguishing the civil-libertarian "*Milligan* thesis" that "the Court acts as a guardian, not a suppressor, of rights during times of war" from the "crisis thesis" that the Court supports "curtailments of rights and liberties in wartimes that they would not support during periods of peace"); *see also, e.g.*, Norman

mary purpose is the interpretation and application of law—the judiciary—is the least competent to make decisions in a national security emergency.[19] The comparative advantage of insulated deliberation and political nonresponsiveness, which makes courts well-suited to neutral and thoughtful application of law, requires deference to the nimble, expert executive when time is short, uncertainty is high, and potential harm is irreparable.[20]

Yet more common exigent circumstances also present similar challenges to courts, which have developed the capacity to manage these routine emergencies while preserving judicial review and fairly standard—if often imperfect—remedies. In criminal procedure, exigencies can excuse executive actors from the more rigorous procedural requirements of the Fourth and Fifth Amendments that they are subject to under normal circumstances. The Fourth Amendment's ex ante warrant requirement for searches and seizures[21] can be waived when an emergency situation creates a need for immediate action (with no time to involve the judiciary) to prevent irreparable harm, such as the destruction of evidence,[22] or imminent commission of a crime.[23] Similar exceptions have developed for forgoing *Miranda*

Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840, 840 (1989) ("Foreign affairs, and its close relation to national security, has been a graveyard for civil liberties for much of our recent history.").

[19] *See, e.g.*, John Yoo, *Enemy Combatants and the Problem of Judicial Competence*, *in* TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES 69, 70 (Peter Berkowitz ed., 2005) (arguing that the Supreme Court's decisions to review the grounds for detaining enemy combatants "will call on the judiciary to make factual and legal judgments in the midst of war, pressing the courts far beyond their normal areas of expertise and risking conflict with the other branches in the management of wartime measures").

[20] Proponents of expansive executive power in wartime have argued that this division of labor is not only good policy but constitutionally mandated. *E.g.*, John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); *cf.* Robert H. Bork, Address, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L. REV. 693, 698 (1990) (criticizing congressional attempts to rein in executive military power with the War Powers Act because "it seeks to involve Congress in something it is institutionally incapable of handling: swift responses with military force").

[21] U.S. CONST. amend. IV ("[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[22] Kentucky v. King, 131 S. Ct. 1849, 1863 (2011) (holding that warrantless entry is permitted to prevent destruction of evidence under the exigent circumstances exception to the warrant requirement, if the police did not create the exigency with an actual or threatened violation of the Fourth Amendment).

[23] *See* Terry v. Ohio, 392 U.S. 1, 20 (1968) ("But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.").

warnings in emergencies[24] and for the use of deadly force by the police to stop a fleeing suspect.[25] In these and other contexts, courts will often decline to enforce constitutional procedural requirements when executive decisions must be made rapidly and in the presence of danger of irreparable harm.

Departure from the "normal" procedural requirements in nonwartime exigencies is also a common occurrence in statutory or common-law civil cases, notably in requests for preliminary injunctions. A request for a preliminary injunction asks a court to restrain a party in a way that may violate the party's rights but that will allegedly prevent irreparable harm—and to do so on a short timeframe, without full judicial process and development of relevant facts to inform the decision. The Supreme Court recently directed courts to balance these concerns by requiring plaintiffs to show (1) a likelihood of success on the merits; (2) the likelihood that the plaintiff will suffer irreparable harm if the preliminary injunction is denied; (3) that the balance of equities favors the injunction (i.e., consideration of irreparable harm to the defendant if the injunction is granted); and (4) whether the injunction would be in the public interest.[26] Essentially, in routine areas of law such as criminal procedure and preliminary injunctions, the immediacy of possible irreparable harm enables a government actor (in this case, courts) to forgo standard procedural requirements applied in a non-emergency.[27]

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[24] *E.g.*, New York v. Quarles, 467 U.S. 649, 656–57 (1984) (holding that a "public safety exception" to the requirement of a *Miranda* warning before custodial interrogation permits the admission of un-*Mirandized* statements when the interrogation was prompted by an "immediate necessity" to prevent "danger to the public safety").

[25] *See* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that the use of deadly force against a fleeing suspect "whatever the circumstances" is "constitutionally unreasonable," but that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force").

[26] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008) ("We agree with the Navy that the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."). The Seventh Circuit continues to apply a slightly different test that it employed prior to *Winter*—a sliding-scale approach where the court balances the overall magnitude of the expected "irreparable harm" to the plaintiff and defendant, the outcome of which is itself the determination of whether the injunction is in the public interest. *See* Schultz v. Frisby, 807 F.2d 1339, 1342 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (1987). Regardless of formulation, the different tests for preliminary injunctions illustrate the same principles of bypassing procedural protections because of exigency and the possibility of irreparable harm.

[27] Another example of a "routine" area of law where constitutional rights are permissibly inhibited by an ex ante government intervention—as long as there is judicial review—is prior restraints under the First Amendment. The Supreme Court has repeatedly explained that prior restraints are highly disfavored. *See, e.g.*, Neb. Press Ass'n v. Stuart,

The commonality among these "exceptions" to facially categorical legal requirements is that the urgency of the circumstances and the irreparability of the possible harm from nonintervention by a government actor make ex ante procedural protections impractical. However, these "exceptions" to the procedural requirements are only acceptable because judicial review and remedies for violations are available ex post. In the criminal procedure context, invocation of an exigent circumstances exception to the warrant requirement or to *Miranda* warnings will generally be reviewed for reasonableness by a court during any subsequent criminal proceeding.[28] Similarly, preliminary injunctions are merely stopgap measures to avoid irreparable harm while the court takes the time to make a final determination on the merits, without which the tool of preliminary injunctions would illegitimately eliminate procedural protections for defendants. Without effective judicial review to evaluate the reasonableness and legality of the exception's invocation, the procedural protection would be essentially eliminated rather than tailored to co-exist with the demands of exigency and irreparable harm.

Another commonality among these "exceptions" is the availability of a remedy for the party wrongfully harmed by erroneous intervention during the exigency. If bypassing the warrant requirement to conduct a search or if failure to provide a *Miranda* warning prior to custodial interrogation is not justified by the alleged exigency, the wronged party has the remedy of excluding the evidence[29] and

427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). Yet the Court has approved prior restraints in several narrow contexts when there is a rigorous guarantee of judicial review of the restraint and a sufficient state interest in the ex ante intervention to prevent speech or publication that is not based on the content or viewpoint of the expression. *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316 (2002) (upholding an ex ante permitting regime for large gatherings in public parks); Snepp v. United States, 444 U.S. 507, 515–16 (1980) (protecting the Central Intelligence Agency's preclearance requirement for publication by employees with a supercompensatory disgorgement remedy); Freedman v. Maryland, 380 U.S. 51, 59 (1965) (striking down a preclearance process for movie distribution but explaining that such a prior restraint could be constitutional if it could, inter alia, "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license"). Therefore, even in an area of highly protected constitutional rights where exigent ex ante intervention is highly disfavored, such intervention can be permissible with sufficient judicial review ex post, showing the importance of preserving such ex post remedies.

[28] *See* Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (requiring judicial determination of probable cause because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations").

[29] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the exclusionary rule remedy for Fourth Amendment violations against the states and stating that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"); Miranda v. Arizona, 384 U.S. 436, 477 (1966)

may be able to pursue a civil suit for damages.[30] Similarly, the Federal Rules of Civil Procedure require plaintiffs to post an injunction bond to protect the defendant against pecuniary losses suffered from a wrongful grant of the preliminary injunction, ensuring compensation for violation of the defendant's rights during government intervention in seemingly exigent circumstances.[31] Therefore, in other more routine exigencies, courts accommodate the need for rapid decision-making on limited information and without basic procedural protections but do not entirely eliminate the protections of judicial review and the availability of compensatory remedies.[32]

While doctrinally—and politically—distinct from evaluations of exigency and judicial intervention in such "routine" cases, exceptions to legal procedural protections in national security exigencies can be analyzed in light of the same basic considerations. As even the Court in *Ex parte Milligan*, a strongly civil libertarian decision, explained, "[i]n the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large."[33] The same reasoning stands behind the routine exigencies of criminal and civil procedure, where intervention is necessary but doing so "according to law may not be possible." This is not to say that war is identical to other exigent circumstances for all legal or constitutional purposes. Clearly, the Constitution provides for specific war-related authority for Congress and the President,[34] and international laws of

(applying the exclusionary rule to statements made in custodial interrogation without effective warnings).

30 42 U.S.C. § 1983 (2012) (providing a civil cause of action to remedy constitutional violations committed under color of law or government authority).

31 *See* FED. R. CIV. P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.").

32 Admittedly, there are many situations in which these exceptions are invoked (or would be if the police were pressed) but no judicial review immediately follows because the search, seizure, or interrogation does not result in an arrest, and civil defendants have no remedy against a plaintiff or court for the harm caused by an erroneously granted preliminary injunction if the injunction bond is waived. Yet many victims may still have a remedy under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (allowing a civil cause of action for constitutional violations by federal agents even without an authorizing statute).

33 71 U.S. (4 Wall.) 2, 125 (1866); *see also* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 391–92 (2004) (comparing national security exigencies to exigencies in criminal procedure doctrine).

34 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1, 11–15 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . . ; To make Rules for the Government

war, treaties, and military law have distinct doctrines and applications in the context of armed conflict.[35] The social and political aspects of national security exigency are also distinctive in many ways.[36] Rather, within the specific scope of judicial review and judicially prescribed remedies, the institutional competence factors that make exigency difficult terrain for judges in the national security context are similar to those that courts confront in other exigent circumstances: factual uncertainty, a narrow timeframe for intervention, and the threat of irreparable harm on both sides of the decision. As discussed in the next Section, the distinction between judicial behavior in wartime and peacetime should lie not in the *availability* of judicial review but the *form* of remedy when that review occurs.

B. Liability Rules and Exigency in the Cathedral

The preceding Section illustrates that courts and legislatures, through judicial doctrines and statutes such as 42 U.S.C. § 1983, routinely preserve the availability of judicial review and ex post remedies even when allowing government interventions in exigencies that would otherwise violate fundamental legal rights, including constitutional rights. The question remains how this framework should apply in national security emergencies, and what kind of judicial remedy should be available for victims of such exigent interventions.

In an influential 1972 article, Judge Guido Calabresi and Douglas Melamed developed a taxonomy of remedies and a framework to decide when courts should prefer one remedial approach to another.[37]

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and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."); U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

[35] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 ("[I]f such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the [attacked] Party . . . by taking . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (governing treatment of prisoners of war during armed conflict).

[36] *See generally, e.g.*, FRAMING TERRORISM: THE NEWS MEDIA, THE GOVERNMENT, AND THE PUBLIC (Pippa Norris et al. eds., 2003) (discussing media and political reaction to the national security exigency of 9/11 and its impact on public opinion and social psychology surrounding national security events).

[37] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

While an in-depth discussion of this "Cathedral framework" is outside the scope of this paper, their central insight that courts should have flexibility in choosing between property rules (sanctions that promote deterrence and that prevent "efficient theft," or "take-and-pay," from rights-holders) and liability rules (sanctions that enable judicially determined compensation in lieu of a prohibition on violating the right in question)[38] relates directly to how courts can approach remedies in exigent circumstances, even in the national security context. In brief, a property rule remedy grants an entitlement that cannot be taken by another party at the price of compensatory damages; the allocation of a property entitlement is often protected by criminal sanctions and supercompensatory remedies such as injunctions or punitive damages.[39] In contrast, liability rules allow one party to violate another's entitlement at the price of paying compensatory damages set by a judicial process.[40]

A petition for the writ of habeas corpus is generally considered a request not for compensation, but a determination that the petitioner has a right to be released—essentially, a specific performance or property rule remedy for an illegal detention.[41] Yet, as Calabresi and Melamed illustrate, there are other possible remedial responses to such a petition when a court finds that the entitlement should be allocated to the petitioner (i.e., a determination that the detention is illegal). First, the court could find the detention illegal but, instead of

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[38] *See id.* at 1105–10 (discussing the difference between property and liability rules). The article makes the critical point that transaction costs in private negotiation between the parties to price and reallocate entitlements should drive a court's analysis of whether to apply a property rule (when transaction costs are low such that private negotiation would create more efficiency than judicial allocation) or a liability rule (when transaction costs are high such that a judicial determination of compensation would create more efficiency than the bilateral monopoly of an injunction or sanction). *See id.* at 1117–21 ("The moment we assume, however, that transactions are not cheap, the situation changes dramatically."); *see generally* R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 6 (1960) (arguing that in the absence of transaction costs, the possibility of private negotiation and compensation renders the initial allocation of legal entitlements irrelevant to the final allocation, which will always be transferred to the highest-value use). For the purposes of this Note, I assume that such negotiations are unlikely to occur between the government and rights holders in national security emergencies, and I focus on other aspects of liability rules, including their lower deterrent effect as compared to property rules or inalienability rules. *See* Calabresi & Melamed, *supra* note 37, at 1111–15 (discussing inalienability rules and the need for them when liability rules do not provide proper incentives to deter certain activities with external costs).

[39] Calabresi & Melamed, *supra* note 37, at 1125–26 ("[W]e impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules.").

[40] *Id.* at 1119–21.

[41] *See* Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 657–60 (1984) (describing the historical development of the writ as a means to challenge the basis of detention and to liberate prisoners).

ordering release, could require the petitioner to pursue a liability rule remedy of suing for damages.[42] This approach mirrors Calabresi and Melamed's second category, where a party's entitlement is essentially for sale at the price of compensatory damages.[43] Eugene Kontorovich proposes such a liability rule approach to mass detentions during national security exigencies, arguing that liability rules can provide better deterrence than property rules for detainees.[44] I do not argue that liability rules can provide such deterrence—in fact, as discussed in Part III, the deterrence value of remedies can effectively prevent their availability entirely. Yet liability rules can at least provide compensation to victims even if they cannot fully prevent irreparable harm.[45]

Second, the court could find executive conduct to have violated rights of the plaintiff/petitioner, but allow that conduct to continue while requiring the government to pay compensation for the violation. This approach follows the framework of Calabresi and Melamed's fourth category, where a court allocates the entitlement to the intervening party but requires that party to compensate the other party for harms suffered as a result of that allocation.[46] The standard illustration of this rare but illuminating remedy is "coming-to-a-nuisance" cases like *Spur Industries v. Del E. Webb Dev. Co.*, where a residential development encroached on a previously established—and quite smelly—feedlot.[47] In *Spur*, the court granted an injunction in favor of the residential developer but required the developer to compensate the feedlot owner fully for the expenses of relocation undertaken to comply with that injunction.[48] In the exigency context, an executive's actions are permitted to continue not because they are legal (just as the developer in *Spur* was not blameless) but because the externalities of defending the victim's rights with a property rule are far too costly.[49] Thus, the court (or in the case of the Habeas Corpus Act of

[42] Another approach would be for the court to sidestep the legality question by dismissing for a lack of standing, ripeness, or another requirement for justiciability, without precluding the ability of the petitioner or similarly situated victims to sue for damages in the future.

[43] Calabresi & Melamed, *supra* note 37, at 1116.

[44] Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 755–56 (2004).

[45] *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871–72, 875 (N.Y. 1970) (finding that the pollution was a nuisance but because of the high social costs of an injunction, only requiring the polluter to pay damages at an ongoing rate).

[46] Calabresi & Melamed, *supra* note 37, at 1116.

[47] 494 P.2d 700 (1972).

[48] *Id.* at 707–08.

[49] *See id.* at 186 ("Webb . . . is entitled to the relief prayed, not because Webb is blameless, but because of the damage to the people who have been encouraged to

1863), Congress need not completely abandon the availability of judicial review or of a remedy for victims. Instead, the court can recognize that legal rights exist and have been violated, but essentially permit the violations to continue on the condition that the government indemnify the victim(s) for harms suffered as a result.

What the Cathedral framework and cases like *Spur* demonstrate is that flexibility in remedial rules can preserve both judicial review and the availability of compensation to harmed parties. This insight is especially important when a property rule approach to rights would be too costly to administer, whether because of the time pressure of exigency or institutional competence reasons.[50] In circumstances such as national security exigencies—or more routine exigencies like preliminary injunction requests—courts need not treat any rights violation as necessarily resulting in a property rule remedy. Therefore, instead of code-switching between a national security crisis jurisprudence, where rights are mostly unprotected, and a peacetime jurisprudence where the availability of judicial review and judicial remedies is standard, courts could switch between an "exigency" jurisprudence where liability rules dominate and a "normal" jurisprudence where property rules dominate the remedies for violations of individual rights, especially constitutional rights. In this way, non-deterrent remedial purposes of compensation to victims and clarification of the law are preserved in national security exigencies just as they are in "routine" exigencies. The following Part examines the immunity provisions of the Habeas Corpus Act of 1863, which directly implicates the availability of judicial review and remedies for rights violations in times of exigency, in light of this conclusion.

II
Immunity Provisions of the Habeas Corpus Act of 1863

The Habeas Corpus Act of 1863 and its 1866 amendments[51] have frequently been cited in legal scholarship as an example of Congress enabling the wartime excesses of a powerful executive.[52] The constitu-

purchase homes in Sun City. . . . [But] Webb is . . . [not] then free of any liability to Spur if Webb has . . . been the cause of the damage Spur has sustained.").

[50] *See supra* notes 19–20 and accompanying text (discussing objections to the judiciary intervening in national security exigencies).

[51] Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (amended 1866 & 1867).

[52] For examples of scholarship focusing on the Act's suspension of habeas corpus, see Clinton L. Rossiter, Constitutional Dictatorship (Princeton Univ. Press 1948); Bruce Ackerman, Essay, *The Emergency Constitution*, 113 Yale L.J. 1029 (2004); David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131 (2006); Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of Rebellion*, 3 Pol. Sci. Q. 454 (1888);

tional and policy objections to the Act are and were numerous: that it unconstitutionally extended federal question jurisdiction, that it unconstitutionally interfered with private rights of contract, that it violated values of federalism by interference with state police power, and that it enabled Congress to authorize constitutional violations by the executive branch in a manner that exceeds the President's war powers.[53] However, in this Part, I focus specifically on the Act's effects on private remedies in Section 4 of the Act and its attempted immunization of Union agents from civil and criminal liability.[54] First, I provide historical background and context for the immunity provisions. Second, I discuss these provisions in the context of remedial purposes other than the deterrence and constraints on the executive that concerned the Act's proponents—compensation and clarification of the law. I conclude that given the importance and viability of maintaining judicial review and the possibility of compensation discussed in Part I, the breadth of these immunities was an example of dangerous and unnecessary overreach.

Much of the legal scholarship discussing the Act focuses on Congress's ratification of President Lincoln's suspension of habeas corpus.[55] Yet hand-in-hand with the suspension provisions, Congress provided immunity for thousands of legal and constitutional violations that occurred, or were likely to occur, during the suspension.[56] Section 4 of the Act provided an affirmative defense to civil lawsuits and criminal prosecutions for "any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or impris-

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Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006).

53 *See* Griffin v. Wilcox, 21 Ind. 370, 386 (1863) ("But in all parts of the country, where the Courts are open, and the civil power is not expelled by force, the Constitution and laws rule, the President is but President, and no citizen, not connected with the army, can be punished by the military power of the *United States*, nor is he amenable to military orders."); RANDALL, *supra* note 2, at 199–207 (1926) (detailing these objections).

54 Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (amended 1866 & 1867).

55 Briefly, in the spring of 1861, President Lincoln issued several orders suspending the writ of habeas corpus in various locations along the east coast of the United States in response to supply-line sabotage and other attacks on Union interests. ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR 92–96 (2013). Famously, when Justice Roger Taney concluded that only Congress could constitutionally suspend the writ and granted a habeas petition in *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861) (No. 9487), President Lincoln simply ignored Justice Taney's judicial order. *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 10–14 (1991) ("The president offered no impulsive response to the criticism . . . . Lincoln had quickly overcome any initial hesitation to use presidential power to suspend the writ.").

56 Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (amended 1866 & 1867).

onment made, done, or committed, or acts omitted to be done" pursuant to "any order of the president, or under his authority, made at any time during the existence of the present rebellion."[57] Additionally, Section 7 of the Act created a two-year statute of limitations for such suits, and Section 5 authorized removal of such cases from state to federal court and created penalties for nonenforcement of the Act's provisions.[58] The Act's provisions followed the pattern of the British Parliament immunizing executive actors for detentions made during a period of suspension of the writ,[59] but their broad scope and implications particular to the American constitutional system have generated intense criticism and controversy.[60]

These provisions were prompted by the immense volume of litigation against Union soldiers and officials in state courts.[61] Most of these targeted Union soldiers and low-level officials; however, some targeted members of President Lincoln's cabinet and were of particular concern to the Radical Republicans.[62] Proponents of the Act saw these lawsuits as "instruments for the prosecution of Union officials in the interest of outraged secessionists," not truly justifiable suits to vindicate individual rights.[63] However, because the Act provided a defense only for conduct pursuant to "any order of the President, or pursuant to his authority,"[64] even after the Act's enactment many state courts continued to allow suits on the basis that the conduct in question was not pursuant to a specific order of the President.[65] Therefore, in 1866 Congress amended the Act to extend the defense to defendants whose conduct was "by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States" in command in that jurisdiction.[66]

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57 *Id.*

58 *Id.* at §§ 5, 7, 12 Stat. at 756–58.

59 *See* Morrison, *supra* note 52, at 1541 ("Parliament passed numerous laws temporarily suspending habeas corpus. But the suspension acts themselves did not affect any detention's legality. Instead, when Parliament wanted to insulate responsible officials from subsequent liability for their actions, it passed what were known as 'indemnity acts,' which granted not just indemnity but immunity.").

60 *See supra* note 52 (providing examples of critical scholarship).

61 RANDALL, *supra* note 2, at 187–90.

62 *Id.* at 188–89.

63 *Id.* at 194.

64 Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (amended 1866 & 1867).

65 *See* RANDALL, *supra* note 2, at 196–98 ("Under the original law, as interpreted by the State courts, an order of the President himself had to be produced in court in order to make available the benefits of the act as a defense. This was a serious limitation, for many of the acts complained of had been committed on the authority of department commanders, provost marshals, and other subordinate officials.").

66 *Id.* at 198 (quoting Act of May 11, 1866, ch. 80, sec. 1, §§ 4–6 14 Stat. 46 (1866)).

Applying the framework of liability rules discussed in Part I, immunity provisions of the Act were an unnecessary and dangerous overreach by Congress, even in light of the exigency of the period. Protections such as ex post judicial review, and injunction bonds, and other forms of compensation for erroneous intervention (or non-intervention) discussed in Part I are similarly relevant in the context of a national security exigency such as that facing the Union in 1863. State courts were undeniably attempting to interfere with the Union effort by hearing civil and criminal actions against Union agents, and "the need of protection for Federal officers was real."[67] Additionally, as the Supreme Court explained in discussing the Act's immunity provisions in *Mitchell v. Clark*, "many acts had probably been done by these officers, in defense of the life of the nation, for which no authority of law could be found, though the purpose was good and the act a necessity."[68] However, preventing state court rebellion was a challenge of federal authority over state institutions playing out in the courts just as it was in other fora. It was not a challenge that required legislative elimination of rights and remedies.

The Act—and similar blanket immunities, whether imposed by legislation, judicial decision, or in a de facto manner through judicial abdication—unnecessarily eliminated the possibility of compensation for deserving victims. These concerns are not novel; they were raised by opponents at the time. An opposing statement by Representative Pendleton signed by thirty-seven members of Congress condemned the indemnity provisions for providing a blanket immunity that failed, inter alia, to provide any remedy for victims of egregious constitutional harms: "It proposes to condone all offenses, to protect all offenders, and to take away all redress for injuries, however great, or with whatever circumstances of aggravation or bad motive inflicted."[69] If the defendant's conduct were truly in the public interest, the dissenters argued, the victims should at least have access to compensation from the government for the violation of their rights: "If these acts had been done in all cases from the purest motives, with an eye single to the public good . . . it might be proper to protect [the offenders] from pecuniary loss, by the payment, from the public Treasury, of the damages assessed against them."[70] Immunity was not the only option available to Congress; the legislature could have, as the Pendleton statement proposed, provided some kind of liability rule to preserve the possibility of compensation, especially for egre-

[67] *Id.* at 189.
[68] 110 U.S. 633, 640 (1884).
[69] CONG. GLOBE, 37th Cong., 3d Sess. 165–66 (1862).
[70] *Id.* at 165. .

gious harms. Additionally, the statement emphasized the importance of access to courts and judicial review for the rule of law:

> Congress has hitherto uniformly maintained, and, as far as was necessary, has perfected by its legislation [constitutional] guarantees of personal liberty, and the courts have enforced them by the assessment of damages for their infraction. This bill proposes to deprive the courts of the power to afford such protection. It will . . . release the people from the duty of appealing to such peaceful and legal means of redress, and will provoke more summary and less constitutional measures.[71]

Certainly, these Representatives were opponents of the Lincoln administration generally and their opposition to the Act must be understood in that context.[72] But this statement evidences that the members of Congress considered the possibility of decoupling compensation and judicial review from deterrence of executive action when acting "with an eye single to the public good."[73] As Senator Cowan argued in opposition to the Act, "[i]t is not for [ ] Congress . . . to declare by one sweeping act that nothing done in the suppression of the rebellion under authority and by virtue of orders shall give to [the] injured an action for damages."[74] Therefore, the immunity provisions illustrate the dangers of overreaction to a national emergency exigency, resulting in complete elimination of remedies and judicial review rather than utilizing the viable option of "code-switching" to liability rules.

III
Objections and Responses

Establishing liability rules for the protection of individual rights during national security exigencies would likely be met with criticism from opposite ends of the philosophical spectrum: Civil libertarians may perceive ex post judicial review with decoupled compensation as immorally putting a price on fundamental rights, while proponents of emergency powers may recoil from armchair-quarterbacking judges making culpability determinations about executive decisions made during a national emergency. As discussed above, similar arguments were made on both sides of the issue during the debates over the Habeas Corpus Act of 1863.[75] In this Part, I respond to both sides, showing that applying liability rules strikes a practical balance

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71 *Id.*

72 *See id.*

73 *Id.*

74 Cong. Globe, 39th Cong., 1st Sess. 2020–21 (1866).

75 *See supra* notes 61–73 and accompanying text (describing the debates over the Act).

between the two approaches to individual rights in national security exigencies.

A. The Civil Libertarian Objection: Unacceptable Pricing of Constitutional Rights

Applying liability rules to remedy rights violations in national emergencies, especially constitutional violations, is anathema to basic assumptions about the nature of these rights.[76] It violates the oft-celebrated (but oft-violated) rhetoric of cases like *Milligan* trumpeting the judiciary's role in preserving individual rights in the face of over-reach by the political branches.[77] A property rule protects the liberty of the individual, ensuring release and a bar against continued rights violations should the court rule in favor of the petitioner or plaintiff. By contrast, a liability rules regime allows continued deprivation of liberty or other constitutional rights in exchange for compensation—effectively, putting a price on individual rights and liberties.[78] Yet if a rigid property-rule framework discourages courts from deciding cases in favor of victims—or deciding the legal question at issue at all—then that rhetoric comes at the steep price of compensation for victims and clarity in the law. Ironically, the result is functionally similar to the effect of the immunity provisions of the Habeas Corpus Act: no remedy at all.

First, it has become clear that a property-rule or inalienability approach to individual rights in national security exigencies has largely failed to protect those rights effectively, at least for the particular individuals who seek to protect those rights during the emergency period.[79] At most, courts—and the Supreme Court, in particular—avoid evaluating the legality of specific executive actions and instead

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[76] *See* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338–39 (1986) ("*Ex post* compensation can sometimes be adequate both to legitimate forced transfer and to secure or protect a legal right. It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"); Kontorovich, *supra* note 44, at 758 ("The freedoms set out in the first eight amendments of the Constitution are generally regarded as rights that *must* be protected by property rules.").

[77] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

[78] Calabresi & Melamed, *supra* note 37, at 1105–10.

[79] *See, e.g.*, Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003) ("[C]ourts during World War I condoned severe restrictions on freedom of expression, under the Espionage and Sedition Acts. More than 2,200 people were prosecuted, and more than a thousand were convicted. The Supreme Court itself sustained convictions under the Espionage Act . . . . In *Abrams v. United States*, it expressly upheld the constitutionality of the Sedition Act of 1918. Only after a few years had passed, and the urgency of the war had subsided, did the Court resume its solicitude for civil liberties." (internal citations omitted)).

will make an institutional-process-focused determination of whether or not the political branches are aligned in support of that action.[80] Thus, when courts are faced with the choice between a property-rule-protected right and the exigencies of a national security emergency, they generally defer to the executive or duck the issue.[81] Courts may be particularly risk-averse not only because of perceived social costs of, for example, setting prisoners from Guantanamo free, but because of the political costs to the courts of being defied by the executive. Because courts depend on perceived legitimacy rather than the purse or sword,[82] it may be political self-interest as much as institutional competence or concern for social cost that drives the desire to avoid finding a rights violation that might require them to apply a property-rule remedy, such as release from military detention under writ of habeas corpus.

This may explain why it is rare for courts to find constitutional violations even in the context of liability rules (though, as I have argued, a liability rule is still better than a property rule in these circumstances). As Daryl Levinson has shown, when courts face costly and politically difficult property-rule regimes governing the protection of constitutional rights, in the long run they will shrink the scope of the right itself rather than apply such a demanding remedy.[83] As Mark Neely recounts, even the celebrated *Milligan* decision was largely irrelevant because "[t]he court did not directly challenge the suspension of the writ of habeas corpus or the resulting military arrests of civilians."[84] Alternatively, as recent criminal procedures cases have

[80] Perhaps the most influential formulation of this institutional-process approach is Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (determining the level of judicial scrutiny of executive action in wartime according to whether Congress has authorized the action).

[81] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 202 (1998) ("The traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the . . . maxim . . . : In time of war the laws are silent."); *cf.* Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 202 (2010) ("[T]he interventionist decisions posit the same binary choice as the categorical-deference model: overreaching or abdication. Categorical deference and intervention thus undermine hopes for equilibrium between presentist and hindsight biases.").

[82] *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570 (2003) ("[C]ourts must worry that if they rule against the government on a matter of national security, they may face a potential test of their credibility and legitimacy.").

[83] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 891 (1999) ("We should not be surprised, therefore, if appellate courts find fewer Batson violations than they would if the consequences were less drastic. According to research by Pamela Karlan, this is precisely the case." (internal citations omitted)).

[84] MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 161 (1991).

shown, courts will find ways to refuse to provide remedies at all if the remedy, in fact or in theory, may overly deter executive actors in exigent circumstances.[85] This pattern leaves victims of emergency measures both with their rights violated and without any form of compensation. It also inhibits the participation of the judiciary in clarifying rights—perhaps leaving executive actors such as the Office of Legal Counsel ("OLC") as the de facto final authority on the scope of individual rights during exercises of executive power in national emergencies.[86] A lack of judicial clarity and binding legal authority about the scope of individual rights and available remedies also makes it more difficult for future victims to establish their claims, and provides little guidance for good-faith executive actors outside of memos from OLC or similar advisory offices in state or local government.

Second, the civil libertarian, property-rule approach threatens the existing availability of remedies against executive actors even under qualified immunity. As the Supreme Court explained in *Pearson v. Callahan*, "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[87] A court determines whether a right is clearly established by looking to relevant decisions in the Supreme Court and lower federal courts, and assesses whether in light of such decisions an actor could "reasonably believe[ ] that his or her conduct complies with the law."[88] Given this doctrinal framework for qualified immunity, if the results of property-remedies make courts, especially the Supreme Court, hesitant to either decide in favor of plaintiffs or to even analyze the alleged violation, that will undermine civil libertarian goals in at least three ways. First, victims will have far fewer favorable precedents upon which they can rely in the motion-to-dismiss stage (and without a real possibility of compensation, few may be incentivized to bear the cost of litigation). Second, uncertainty about what constitutes a violation expands the scope of conduct that a "reasonable" officer could believe is legal under the

[85] *See* Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (applying the exclusionary rule to officer conduct "only when [unconstitutional police practices] are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system" (internal quotation marks omitted)); United States v. Leon, 468 U.S. 897 (1984) (creating a "good faith" exception to the exclusionary rule).

[86] The OLC is an office within the Department of Justice that provides legal advice to the President and that in recent decades has taken on a major role in the development and application of constitutional law in the national security context. *See generally* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

[87] 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[88] *Id.* at 244.

Pearson standard for determining when a government actor enjoys qualified immunity. And third, fewer decisions about the scope of a right may indicate that the law is less "clearly established" even when courts have addressed the issue.

Finally, even though a pricing regime often fails to prevent irreparable harm to individuals ex ante, especially when the risky actors do not have motive or opportunity to negotiate with potential victims, this framework may bolster the protections of the system as a whole in the long run. As David Cole has argued, even if courts frequently fail to protect civil rights and liberties in the short run during national security crises, they still have the capacity to protect those rights in the "next" emergency by prompting democratic deliberation about how to value and protect such rights.[89] Property-rights rules that disincentivize judicial engagement with these issues—just like legislatively enacted immunities such as those in the Habeas Corpus Act of 1863—short-circuit this judicial function. Moreover, the availability of judicial review is particularly important because as a matter of political incentives, the political branches are frequently less competent to determine the scope of constitutional rights[90] or are not to be trusted in particular regarding the rights of minorities or disfavored constituencies.[91] While courts may be too timid or institutionally incapable of enforcing rights with property rules during national emergencies,[92] abdicating the entire field of remedies—and thereby effectively defining the scope of many rights—permits the OLC (and its equivalents) to become the only relevant legal authority and to make constitutional law on these issues because the courts will not.

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[89] Cole, *supra* note 82, at 2566 ("[B]ecause courts, unlike the political branches or the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes, judicial decisions offer an opportunity to set the terms of the *next* crisis, even if they often come too late to be of much assistance in the immediate term. Thus, the Court has over time developed a highly protective test for speech advocating illegal activity, subjected all racial discrimination since *Korematsu* to exacting scrutiny, and prohibited guilt by association." (internal citations omitted)).

[90] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (justifying judicial review because, inter alia, unelected judges are removed from the political pressures of majoritarian politics). *See also* Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is. [Under the Fourteenth Amendment] [i]t has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." (internal citations omitted)).

[91] *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[92] *Supra* notes 17–19 and accompanying text.

In sum, courts have demonstrated the capacity to code-switch between exigency and non-exigency in their approach to remedial frameworks, in both national security and routine exigencies.[93] A liability-rule regime may not provide the symbolic value of moral absolutism regarding civil liberties—and symbolic value is not to be dismissed lightly. Yet it provides compensation to the affected victims and clarity for the future, giving stronger protection to civil liberties in the long run than a rigid, unshifting, *Milligan*-like property-rules regime.

B. The Unitary Executive Objection: Unacceptable Judicial Interference with Executive Authority and Effectiveness During Crises

Proponents of executive power in national emergencies may make at least two objections to the availability of judicial review and compensation to victims of executive action. First, they may object that any liability, even simply compensatory damages, will deter the executive when decisive action is needed most. Second, they may object that during exigencies such as the suspension of habeas corpus, any action taken by the executive cannot, by definition, be a legal violation while the writ is suspended.

The objection to any liability for actions taken in a time of exigency is usually grounded in the common understanding that liability rules, including in suits against government actors, can be effective tools for deterrence of wrongful (or socially inefficient) behavior.[94] If

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[93] *See* Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1013 (2007) ("[T]he quest for a coherent jurisprudential framework is futile because the Constitution's text and history do not clearly reveal any single proper way to reconcile judicial review with war powers. This uncertainty has led the Court to eschew black-letter rules in favor of a flexible approach that reflects political and practical considerations."); *supra* Part I.A (discussing judicial application of alternative legal rules in exigent circumstances across different areas of law).

[94] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283 (1988) ("If deterrence of government misconduct is important, one way to promote it is through the traditional tort damages remedy. . . . Tort suits may deter not only because of the threat of liability for damages, but also because of the desire to avoid adverse publicity, the costs and burdens of litigation, or the simple sting of a determination of liability." (internal citations omitted)). *See generally* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (arguing for an efficiency-focused understanding of how to allocate liability in torts cases based on the cost of safety precautions and which party was in the best position to adopt the precaution most efficiently). *But see* Meltzer, *supra*, at 283 (explaining that tort scholars have also argued that deterrence is often difficult to achieve because of unclear signals and incentives for risky actors).

the government internalizes the costs of violating the rights of its citizens, then it will only do so when those costs are outweighed by the social benefits.[95] The Supreme Court has therefore repeatedly expressed the concern that lawsuits could "distrac[t] . . . officials from their governmental duties,"[96] and has justified judicially created immunities

> as protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority, by contributing to principled and fearless decision-making, and by responding to the concern that threatened liability would . . . dampen the ardour of all but the most resolute, or the most irresponsible, public officials.[97]

However, the danger that a liability rule that requires compensation, rather than injunctive or other supercompensatory relief, would result in any significant deterrence is typically overstated, for at least two reasons. First, unlike private actors, the federal government responds primarily to political rather than pecuniary incentives.[98] The government treasury is essentially a pass-through entity for payments from taxpayers to taxpayers. While compensation for rights violations may be concentrated on the victim, the cost of that compensation is spread among taxpayers in such a way that it is highly unlikely to be politically salient.[99] Therefore, without a focusing event like a major news story or well-organized issue campaign, it is unlikely that compensating victims under a liability rule will trigger the kind of negative political reaction that drives government decision-making.

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[95] This is a common explanation for the "just compensation" requirement of the Fifth Amendment for constitutional takings. U.S. CONST. amend. V; *see, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992) (arguing that the just compensation requirement "prevents the government from overusing the takings power").

[96] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[97] Richardson v. McKnight, 521 U.S. 399, 408 (1997) (internal quotation marks and citations omitted); *see also* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (explaining that a justification for qualified immunity is "the danger that the threat of such liability would deter [an executive officer's] willingness to execute his office with the decisiveness and the judgment required by the public good"), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[98] *See generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government responds to political incentives rather than directly to pecuniary losses).

[99] *Cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (explaining that concentrated special interests are more effective at achieving their desired political outcomes than diffuse but widely held interests).

Second, even executive actors who are sued in their personal capacities are typically insured against liability by their government agency, especially when these actors are law enforcement officers. A recent study of police indemnification practices showed that officers are virtually always indemnified by their states and municipalities (and therefore, the taxpayers) against personal liability for civil rights violations.[100] Given the lack of a deterrence function in practice, the advantage of a liability rule is that it effectively provides a "decoupling" of the undesirable (at least, from many courts' perspectives) deterrence function from the separate remedial functions of compensation and increasing clarity in the law.[101] By preserving judicial review and applying liability rules, judges and legislatures need not sacrifice these worthwhile remedial values in order to avoid overdeterrence of executive actors in exigent circumstances.

A second objection from proponents of executive power in national emergencies is more doctrinal: When the President has legitimately invoked Commander-in-Chief powers under the Constitution, or when the writ of habeas corpus has been suspended, actions taken by the executive cannot be illegal even if they would violate individual rights in peacetime.[102] Yet the very fact that Congress enacted immunity provisions in the Act is evidence that executive actions under the auspices of war powers or during the suspension of habeas corpus are not necessarily legally authorized. Certainly, a significant motivation for Congress was to rein in state courts with explicit instructions to cut off litigation regardless of Congress's views of the legality of the conduct that was the subject of these suits and prosecutions. But as Trevor Morrison has argued, suspension of habeas corpus or the existence of a national security exigency is not a blanket legalization of executive action.[103] Senator Trumbull, a strident proponent of the Act, recog-

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[100] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 884 (2014) (presenting a survey of state and local police indemnification practices across the United States).

[101] *Cf.* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999) (proposing a remedial model in takings law where the deterrence function of identifying a taking is decoupled from the compensation function of "just compensation" in appropriate cases).

[102] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 578 n.6 (2004) (Scalia, J., dissenting) (implying that suspension of the writ of habeas corpus could "justify indefinite imprisonment without trial"); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006) (arguing that suspension can result in legal authorization of otherwise unconstitutional conduct).

[103] *See* Morrison, *supra* note 52, at 1541–42 ("The overarching lesson from the historical evidence is that suspension, post-detention liability, and legality are all distinct questions. Suspending the writ does not affect the availability of post-detention remedies for unlawful detention, nor does it change a detention's legality.").

nized as such in his defense of the indemnity provisions on the Senate floor:

> When a man is arrested in ordinary times, he may apply for a writ of *habeas corpus*; and if he can show that his arrest is illegal and improper, he will be discharged; but he does not recover damages in that proceeding. He may then institute his suit for damages; and that is a different matter entirely. So, if the writ of *habeas corpus* was suspended by act of Congress with the concurrence of the President, both acting together, there would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests.[104]

Moreover, President Lincoln's famous justification for suspending habeas corpus recognizes not that national security exigency has made any executive action legal, but that these actions may be necessary even if laws are broken as a result: "To state the question more directly, [a]re all the laws, *but one*, to go unexecuted, and the Government itself go to pieces lest that one be violated?"[105] Therefore, a liability-rules approach to remedies during national security exigencies does not over-deter executive actors, as those actors do not internalize the cost of compensation. It is also an appropriate judicial approach even when the writ of habeas corpus has been suspended, as history demonstrates that suspension is merely the removal of a specific remedy, not a blanket authorization for otherwise illegal conduct.

Conclusion

A national security emergency justifying the elimination of full judicial review and remedies for executive action is often analyzed as an exceptional, distinctive challenge to the rule of law. However, the possibility of irreparable harm frequently justifies bypassing judicial procedures in more pedestrian "peacetime" law, such as an exigent-circumstances exception to the judicial warrant process or a preliminary injunction to avoid irreparable harm before a full trial on the merits. While the scale may be different in national security crises, the problem is the same: how to maintain the rule of law when the traditional procedures and remedial doctrines of a reviewing institution may be ill-suited for avoiding irreparable harm in the time required for review.

The immunity provisions of the Habeas Corpus Act of 1863 were a congressional overreaction to a national crisis, eviscerating the remedial purposes of victim compensation and clarity in the law in an

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104 Cong. Globe, 37th Cong., 3d Sess. 534 (1863).

105 President Abraham Lincoln, Message to Cong. in Special Sess. (July 4, 1861).

effort to avoid deterrence. Instead, in similar circumstances courts and legislatures should apply a system of liability rules if it is too costly or too impractical to apply the regime of strict property rules usually associated with civil liberties. Such "code-switching" can enable compensation for victims and ensure judicial review, providing an avenue to a more civil libertarian result during national exigencies than has been possible under property rules for constitutional violations. Enabling judicial review of executive actions in national exigencies not only provides guidance to future good-faith government actors and to future potential victims seeking to identify and vindicate their rights; it also is essential to an effective qualified-immunity doctrine, which itself requires evaluation of whether rights were "clearly established" at the time of the alleged violation. And even when judicial review cannot prevent the harm in question or make victims whole in a particular case, it can spur democratic deliberation and the process of popular constitutionalism.[106] With so much riding on the judicial function of clarifying constitutional rights and obligations, immunity provisions that effectively remove judicial participation and preempt constitutional review of executive action in exigent circumstances should be particularly suspect.

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[106] *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (discussing the role of popular opinion and democratic influence on the Supreme Court in shaping the development of American constitutional law); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that the final arbiter of constitutional meaning should not be the Supreme Court but "the people themselves").