10-25-2017

Making Habeas Work: A Legal History

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1
Knowing Habeas Corpus When You See It

For Suspension Clause purposes, we should define "habeas corpus" as a proceeding in which an independent court conducts an inquiry and determines whether a jailer is entitled to hold a prisoner.[1] All students exploring the field should keep their eyes firmly fixed on that landmark and resist being distracted by legalisms.

Some legalisms, to be discussed in the next chapter, relate to the name given to the lawsuit challenging the imprisonment (i.e., whether the action is called one for habeas corpus). The current topic, though, is legalisms that lead to a misunderstanding even of those actions that do bear the habeas corpus label.

"Perhaps the best known 'rule' concerning habeas corpus was that against controverting the return."[2] In other words, if the jailer responded to the writ ordering production of the prisoner with a document stating some reason that would if true constitute a valid basis for the detention, the court could not inquire into the truth of the reason. This "rule" obscures far more than it illuminates.

In fact, common law judges "routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention."[3] Employing a variety of procedural devices, they simply nullified the "rule." For instance, after receiving an application for habeas corpus supported by extensive affidavits, the judges might not issue the writ (thereby triggering a return) but rather issue an order requiring the jailer to show cause why the writ should not issue (thereby triggering an

answer to the order to show cause that would be fully litigated).[4] Or, once the jailer had produced the prisoner in court but before formal filing of the return, the judges might take formal or informal testimony from anyone (including the prisoner and counsel) with knowledge of the circumstances.[5]

By the time of the early national period the lower federal courts commonly conducted evidentiary hearings in habeas cases to examine the substantive legality of detentions.[6] This took place most frequently in the context of challenges to military enlistments, where the return to the writ would invariably be that the alleged soldier had regularly enlisted, and the court would conduct an evidentiary hearing to determine whether, for example, he had been drunk or underage at the time.[7]

To take a typical instance, on December 31, 1827, George Peters submitted a habeas corpus petition to the United States District Court for West Tennessee setting forth that he was being held by Captain Robert Sands, who claimed "that your petitioner has been enlisted in the US Army for five years."[8] But, "your petitioner most positively avers that if he has enlisted it was done at a time when he was wholly incapable of transacting business or understanding it by reason of intoxication."

The court issued the writ as requested, and, having the parties before it, listened to full evidentiary presentations by both sides. Whereupon, it concluded, "that at the time the said Peters enlisted, he was not in a state of mind which would make his contracts binding—but the undersigned is satisfied at the same time that the conduct of Captain Sands was entirely honorable and correct as it appeared in evidence that a stranger would be unable to detect the alienation of the said Peters' mind altho' it might exist at the time of conversation." Accordingly, the court ordered "that the said Peters be discharged from the Service of the United States, and

that his enlistment be taken for nothing."[9]

Of course, at the end of any inquiry judges might conclude that a custody was justified. In that case, the outcome would be an order denying the writ of habeas corpus. But to say, as writers sometimes do, that the petitioner had been held not to be entitled to habeas corpus is at best ambiguous and at worst misleading.[10] By obtaining judicial review of the facts and law underlying the detention, the petitioner had actually obtained "habeas corpus without the writ."[11] Anyone who reads decided cases without understanding this is likely to misunderstand their import.

The failure to learn these lessons of history was one of the elements that led the US Court of Appeals for the Fourth Circuit to perform so poorly when in 2003 it considered a habeas corpus challenge by Yaser Hamdi, an American citizen, to his detention as an alleged enemy combatant. In dismissing Hamdi's petition, the court, likely misreading a number of older English cases in the way just described, adopted a rule very similar to the long-discredited "rule against controverting the return." The Court of Appeals wrote that the government was entitled to prevail once it presented an affidavit containing factual assertions that "would, if accurate, provide a legally valid basis for Hamdi's detention."[12]

Recognizing that the effect of such a rule would be to deprive Hamdi of precisely the independent judicial examination into the justification for his imprisonment that is the historical essence of habeas corpus, the Supreme Court reversed. The court wrote, "It would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge."[13] Faced with the prospect of having to justify Hamdi's detention before a judge, the government instead hastily released him.[14]

Conducting an independent investigation into whether a custodian may continue to confine someone and issuing a binding order of release if the custodian has not shown a factual and legal basis for doing so is a core function of an independent judiciary. That, in substance, is what "habeas corpus" means,[15] as it has for some five hundred years.[16] The most meaningful way to view the past, present, and future of the writ is within that framework.

2
Habeas Corpus With and Without the Writ

Some Illustrative Cases

To show what is lost by confining research into habeas corpus solely to cases bearing that name, this chapter presents a series of cases successfully challenging illegal detentions. Those in section A are labeled "habeas corpus" and those in section B are not. But the cases in section A differ from those in section B only formally, not functionally. The cases in each group not only display factual isomorphism but, as chapter 3 will describe, display common characteristics in judicial approach.

A. Formal Habeas Cases

i. An Unappreciated Constable

In 1714, Charles Banfild was an appointed constable for the town of Portsmouth, New Hampshire. One of his duties was to collect taxes from the townspeople and remit them to the Selectmen. But things did not go well.[17]

As Banfild explained to the New Hampshire Superior Court in mid-August of that year, he used his best endeavors to collect but the "people would not pay." And as fast as he hauled the delinquents before the local Justices of the Peace ("J.P.'s") for non-payment, just so fast did the J.P.'s discharge them. This process was interrupted only by his own imprisonment for non-payment of the taxes to the Selectmen, which he had been unable to end by posting bond so that he might return to his collection efforts.

Banfild complained that his imprisonment was not only most unjust but also manifestly illegal because:

1. his incarceration was contrary to the provincial statute under which he had been appointed,[18] inasmuch as he had sufficient assets to pay the taxes in dispute; and
2. the Selectmen who had first appointed him and then procured his imprisonment were without authority because they had been invalidly chosen;[19] and
3. it could "in no way be justifiable" for him to be imprisoned for not remitting to the Selectmen taxes from those townspeople whose obligations had been discharged by the J.P.'s.

Banfild accordingly sought from the Superior Court "an order . . . agreeable to & in the nature of an habeas Corpus . . . to bring your petitioner (in Custody) before your honors that so he may have a proper hearing of his Complaint & may have such remedy as to your honors shall seem Just & Agreeable to Law."

When the court considered the matter on August 11, 1714, it ordered Banfild to be brought before it.[20] Perhaps considering Banfild a security risk, the sheriff initially refused to obey this order. The irritated court followed up by telling him to bring into court the next day not only Banfild "in safe custody," but also the J.P.'s who had committed him to prison and the Selectmen complained of. This was done and the parties worked out an arrangement for Banfild's prompt release. Banfild and a guarantor would enter into a penal bond under which they agreed to pay twice the amount due unless within five weeks Banfild paid to the Selectmen the taxes they claimed, less the amounts owed by taxpayers whose obligations the J.P.'s had forgiven.[21]

ii. J.P. Chase Feels Insulted; Benjamin Whittemore is Imprisoned

On May 31, 1771, Benjamin Whittemore of Nottingham West, New Hampshire was called before J.P. Ezekial Chase to acknowledge his signature on a land deed. Instead of complying, Whittemore violently ripped his signature off the page and fled.[22] On June 2, the irate J.P. issued an order for Whittemore's imprisonment, which resulted in his being jailed on June 5.[23] On June 7, Whittemore filed a petition for a writ of habeas corpus with New Hampshire Superior Court Chief Justice Atkinson that alleged that he was being "unjustly held and detained without any lawful cause for such detainer set forth by the said Ezekial Chase, Esq. in his order of commitment." The justice signed an order granting the writ on June 8; on June 9, Whittemore came before him, posted bail, and was released. When the full court convened at the beginning of September, a paperwork glitch emerged requiring the issuance of another writ of habeas corpus; this took place within a day.[24] In mid-September, the underlying proceedings against Whittemore were quashed without objection.

iii. An Alleged Slave

In New Hampshire, as elsewhere, suits by alleged slaves claiming freedom were common,[25] and there as elsewhere the suits could be brought in many legal forms. One possibility was to petition for a writ of habeas corpus.[26] That is what Peter Johnson of Portsmouth, New Hampshire did in the summer of 1748 in claiming that he had been wrongfully "imprisoned for refusing to serve as a slave."[27] The Superior Court ordered that the alleged owner appear, and when he did, the issue of Johnson's status was put to a jury.[28] On its finding Johnson to be free, the court ordered that "he be enlarged and the Sheriff set him at Liberty."[29]

iv. An Impoverished Service Member

Members of the armed forces in the early 1800s who were imprisoned in violation of a federal

statute exempting active duty military personnel from arrest for debt would routinely seek and gain release through writs of habeas corpus.[30] Thus, for example, in May 1814, George Daze presented to US District Court for the Eastern District of Pennsylvania a petition setting forth that he was "an enlisted seaman in the service of the United States," currently "in confinement in the debtors apartment of the City and County of Philadelphia" by virtue of an execution (a copy of which was attached to the petition) issued on a state court judgment for debt; that "by the provisions of an Act of Congress approved the 11th of July 1798," he was "exempted from all personal arrests for any debt or contract"; and praying for "a Habeas Corpus directed to the keeper of the debtors apartment that he may be discharged according to Law."

The court responded by requiring the keeper of the debtors' apartment to produce Daze "forthwith." The keeper's written return confirmed that Daze had correctly set forth the cause of his detention, and the court signed an order the same day, May 27, 1814, releasing him: "Discharged. The Act of Congress forbids arrests of persons lawfully engaged in *naval* Service."

B. Functional Habeas Cases

i. Certiorari: J.P. March Feels Insulted; Peter Pearse Is Imprisoned

One winter's day in 1769, 17 months before Benjamin Whittemore ripped the deed from the hands of J.P. Chase, Peter Pearse had an encounter on a Portsmouth, New Hampshire street with Clement March, a J.P. whom he had just seen inside the courthouse. Pearse asked March "what reason he had to call him a chattering fellow in the Court," and "added that the said March was a Blockhead as much as any in a Barber's Shop and called him a Rogue afterwards."[31] March responded by having Pearse presented for contempt to his own inferior court, which denied requests for counsel and jury trial, summarily convicted Pearse of contempt, and ordered him

imprisoned until such time as he could provide sureties for good behavior. His incarceration lasted approximately 8 hours.[32] Within that time he filed with Chief Justice Theodore Atkinson of the Superior Court a petition for a writ of certiorari; it was granted and Pearse was released on bail the same day, December 23, 1769. The contempt proceedings were eventually quashed without objection.

ii. Personal Replevin: Another Alleged Slave

Late in 1750, an alleged slave named Phebe Nung of Dover, New Hampshire, gained her freedom through a different legal procedure than the one Peter Johnson had invoked two years earlier.[33] She brought an action of personal replevin against her alleged owners, Vincent and Lois Tarr, to test who had the superior right to possession of herself, the subject of the action.[34] The sheriff promptly seized her *pendente lite*—that is, he took an appearance bond from Nung—and the case was tried to a jury.[35] It found in her favor and the same result was reached on appeal, resulting in a ruling that she was "a free woman and that she enjoy her freedom."[36]

iii. Bare Demands

a. Another Impoverished Service Member

On February 25, 1745, Captain Jonathan Tuften Mason of the British Army presented a petition to the New Hampshire Superior Court alleging that a soldier under his command, one Andrew Downer, was being detained in prison for a debt of less than 10 pounds, in violation of an Act of Parliament,[37] and requesting no more than that "Your Worships would put the Act of Parliament in force by releasing and setting the said Andrew Downer at liberty, that his Majesty's Service may not suffer thereby."[38] The court responded the next day with an order that a writ of supersedeas "forthwith be issued" to the presiding judge in the debt action, "prohibitting any further prosecution of said Downer,"[39] and directing Downer's release.

b. An Abused Apprentice

In the fall of 1749, the widow Elizabeth Bird of Portsmouth, New Hampshire complained to the Superior Court that her son John Bird, age 14, was apprenticed to a ropemaker named Richard Winter, but that the latter (who was in prison) had for a long period neglected John—failing "to provide suitable and sufficient meat drink lodging and clothing" and not permitting him to attend public worship. She prayed simply for "the advisement of this Court on the Premises and that your complainant may have some relief in the Premises."[40]

The court responded by issuing a writ of habeas corpus to have Winter brought before it, which was done the same day.[41] Having reviewed the indenture he produced, and there being "nothing made to appear that the said servant had ever been provided for as in said indenture mentioned and the particular facts complained of appearing to be true"—not to mention that Winter had not even taught John to read—the court concluded that Winter was not entitled to retain John's custody, which was returned to his mother.

c. A Headless Baby

One particularly dramatic example of a petitioner obtaining release after filing a non-specific demand was the "Case of the Headless Baby" in Massachusetts in 1662–63.[42] A free black woman by the name of Zipporah was suspected of killing her illegitimate child, but because the father was probably the scapegrace nephew of a powerful local aristocrat (rather than another black servant who was being officially blamed), the authorities were in no position to prosecute, and she languished in jail for months. Eventually, she wrote to the court, noting that she (unlike her putative paramour) was being held without bond notwithstanding they were both equally guilty of fornication and "humbly beseech[ing] this honored Court, to call her before you, and to deal with her, as to yor wisedomes and mercy shall see meet, that she may not lye where she is to

perrish[.]”

This document may or may not have been a petition for a writ of habeas corpus technically,[43] but it certainly was one functionally. Responding to her demand to be charged or released, an indictment charging Zipporah with infanticide was presented for consideration to a grand jury; when it refused to indict her, she was freed.

3
The Benefits of a Functional View: The Past Educating the Present

As chapter 1 showed, the critical privilege protected by the Suspension Clause of the Constitution is a speedy and meaningful judicial examination of the justification for an imprisonment.

Indeed, the Suspension Clause jurisprudence of the Supreme Court has been commendably pragmatic in asking whether the system at hand provides an adequate and effective mechanism for independent judicial review of a detention.[44] In answering that question, the court relies heavily on the raw material unearthed by legal historians and presented in legal briefs. Section A of this chapter suggests that those briefs would be enriched, to the enhancement of the court's rulings, if they were written from a functional perspective.

The task of giving content to the Supreme Court's pronouncements rests on the lower courts, which can approach it in various ways. Section B of this chapter describes the pragmatic approach their common law predecessors took.

Section C applies the lessons of this history to a modern litigation arising from the imprisonment of alleged terrorists at Guantanamo Bay.

A. Educating the Supreme Court

If Supreme Court briefs in Suspension Clause cases were written from a functional perspective, they could cite many more cases than they commonly do because they would not limit themselves to cases bearing the "habeas corpus" denomination.

The justification for this approach is simple. The question of why common law litigants seeking release from imprisonment invoked one writ rather than another is (a) simply antiquarian because the writ system vanished generations ago; (b) essentially unanswerable because of the informality of colonial legal recordkeeping and legal practice;[45] and (c) at the end of the day, the wrong question to be asking for present purposes. As the examples in chapter 2 illustrated, when suitors communicated to judges claims of wrongful imprisonment and demanded a judicial inquiry, judges consistently responded in a way that cut through any technical obstructions. This was most certainly a situation in which "no one cared whether wrong writs were used."[46]

To be sure, as many judges, practitioners, and scholars have elucidated with great effort,[47] there were indeed differences, ones that varied with time and place,[48] among and between the prerogative writs such as habeas corpus,[49] prohibition,[50] and certiorari.[51] Thus, to revisit some examples from chapter 2, it may well be that because Whittemore had been summarily committed by a magistrate and Pearse convicted of contempt by an inferior court, habeas corpus to bring up the body was thought procedurally appropriate in the first instance and certiorari to bring up the record in the second.[52] Similarly, Nung's use of the writ of personal replevin might reflect a view of that writ as being better suited than the writ of habeas corpus to deal with a situation in which neither party was in prison and private actors were imposing the restraint.[53]

But when placing legal cases into categories, the critical question is for what purpose the categorization is being undertaken.[54] The distinctions among common law writs are of marginal relevance at best to an inquirer whose purpose is obtaining greater insight into the Suspension Clause. A person with that goal should arrange the cases by what the courts did rather than what they said, and should define "habeas corpus" as simply a collective name for what judges did

when they "had been convinced by a story that they should examine more closely the circumstances of a person's imprisonment."[55]

B. Educating the Lower Courts

Once moved to review an imprisonment, the common law courts considered it their duty to see that justice was done,[56] and implemented their view through a predictable series of responses that reflected the environment in which they were working. The environment has since changed, but the judges on today's lower courts would have much to learn from those courts' approach to their task.

i. The Jurisprudential Environment of Common Law Courts

Irrespective of whether they were dealing with habeas corpus, the professional world in which courts operated prior to the middle decades of the nineteenth century was sharply unlike ours.[57] The pervasive tendency of judges trying to reach just outcomes was to focus on facts, not law. In particular, two features of the environment discouraged the disposition of cases on legal grounds.

The first was practical: legal authority was hard to come by. Printed law reports were rare at best,[58] and during the early national period legislatures sometimes specifically forbade the publication and citation of judicial opinions.[59] Moreover, court systems frequently did not include superior appellate courts with law-pronouncing powers.[60] Indeed, during the colonial period and beyond, New Hampshire and Massachusetts appeals were normally decided by a second or sometimes a third jury, and a similar practice was followed in post-Independence Pennsylvania.[61] Thus, the common law was for purely practical reasons inherently fact-centric to a degree that we—particularly those of us educated professionally from casebooks consisting largely of appellate court decisions chosen to teach legal doctrines—can only with difficulty

appreciate.[62]

Second, law determination was difficult intellectually as well as practically. All professional actors understood that the substantive contents of the common law had an objective existence.[63] When they did engage in legal reasoning the judges saw their task as finding that law in cooperation with counsel,[64] not making it.[65] This often involved the serious expenditure of effort.[66] One reason was that statutes, even if accessible, were by no means determinative of the law. They might be part of it, but they did not define or exhaust it. Rather, judges would give them appropriate consideration as evidence of what the law was.[67] As the estimable scholarship of Professor Paul Halliday has confirmed, the marginal role of statutory law applied fully in the field of habeas corpus. Legislative intervention was rare and almost always unnecessary or counterproductive.[68] In any event, finding the correct legal answer required independent judicial consideration of a good deal of data, which included, but was by no means limited to, the pronouncements of legislators, previous judges, scholars, and others.[69]

ii. The Common Law Courts' Responses to Prisoners

a. Speed Matters: Facts Beat Law and Settlements Beat Adjudications

In cases involving potentially unlawful imprisonments the judicial orientation toward focusing on facts rather than law was particularly strong.[70] Because, for the logistical and intellectual reasons just described, the facts were commonly easier to find than the law, taking this approach was likely to yield a faster result.[71]

Consider how the court responded to the habeas corpus petition of Charles Banfild, the hapless tax collector described in chapter 2 (A) (i). As informative as what it did do—speedily calling all interested parties into the courtroom and coming to a pragmatic resolution to secure

Banfild's prompt liberation[72]—is what it did not do. It made no ruling on any of the three perfectly reasonable legal arguments he had presented. Its impulse was to deal with facts, not law. This was the typical approach of a common law court, as the cases in the next few paragraphs illustrate.

On Saturday January 24, 1761, Mrs. Deborah D'Vebre, who had been confined to a private madhouse by her husband, sought habeas corpus in London.[73] The court responded with an order that a medical expert, her nearest relation, and her attorney "be admitted and have free access" to her at all reasonable times "in order to consult with, advise and assist the said Deborah D'Vebre." On Monday, January 26, the court convened to take the affidavit and live testimony of the medical expert, who reported that he had seen no indications of mental disorder. After hearing this, Lord Mansfield said, "Take a writ of habeas corpus: and if this should appear to be the case, we ought to go further." So the keeper of the madhouse brought in Mrs. D'Vebre herself, but "no return was indorsed upon the writ."[74] In interchange with the bench she "appeared to be absolutely free from the least appearance of insanity," and—since she did not wish to return to the madhouse but the court thought that she could not safely be trusted to the custody of her husband—she was released overnight in custody of her attorney. "It afterwards ended in a compromise, and an agreement to separate."

Because fact-finding was faster than law-finding, habeas courts in England dealing with impressment cases often "made findings of fact to *avoid* reaching particularly difficult questions of law," as Professor Jonathan L. Hafetz has documented.[75]

A settlement might be even faster. Thus, when in 1779 habeas was sought on behalf of two boys impressed into military service who sought release on the grounds that they were apprentices, Lord Mansfield could likely have issued the writ as a legal matter,[76] but his actual

response was that “a shorter way to work” would be for him to issue a warrant to have the boys brought into court to sort the matter out between the claimants to their services.[77] Indeed, many habeas challenges to military impressments never got to court at all because the authorities began internal investigations on receipt of the writ and discharged petitioners who appeared to have been illegally conscripted.[78]

And the most famous English slave case of the eighteenth century, *Somerset v. Stewart*,[79] only reached its celebrated judgment in favor of liberty because the parties insisted on rejecting Lord Mansfield’s repeated efforts to broker a settlement.[80]

b. In Dealing with Law, Merits and Focus Matter

Notwithstanding the strong judicial preference to take a fact-specific approach, legal issues might obtrude in two different ways.

First, a procedural technicality might pose a potential delay to reaching the merits. In that case the courts would knock aside the barrier, as happened in the case of the deed-ripper Whittemore whom we saw in chapter 2 (A) (ii).[81] As Professor Stephen I. Vladeck puts it, the writ would “transcend jurisdictions, championing substance (whether the jailer had a legal basis for confining the prisoner) over jurisdictionally-varied procedural forms.”[82] This might happen in a variety of ways, including that a nominal rule ceased being enforced in practice or that an actual rule was bent more or less sharply in a particular instance.[83] Indeed, I have not seen any case before 1867 in which an incarcerated petitioner was denied relief on the basis of having made a procedural misstep.

Second, in some instances a ruling on the merits might ineluctably require determination of a legal question. In that case the judges worked actively to see that the core legal issue was stated as narrowly as possible and resolved quickly.[84] For example, as Professor James Oldham

reports, when Lord Mansfield had before him a habeas corpus case in which the dispositive question would be whether the conceded fact of petitioner's employment as a liveryman on the Thames exempted him from impressment, the judge assisted counsel in formulating accordingly the issue to be litigated.[85] He proceeded the same way in *Somerset*.[86]

Similarly, in an English case of 1629 reported by Professor Paul Halliday, Margaret Symonds disrupted a church service by laughing at the preacher in alleged violation of a statute and was imprisoned (although promptly granted bail *pendente lite*).[87] "All agreed that Margaret had laughed in church. But her case remained surrounded by factual, and thus legal, doubts. What made Margaret laugh? Was the sermon so bad that she could not help herself? Or was laughter a sign of her contempt for what she considered dubious doctrine? The return to the writ did not say." As the justices of King's Bench approached the case, "There was no mention of precedents, no analogizing to ostensibly similar cases." Instead, the justices construed the statute to apply only to situations in which the disruption was intended to express opposition to the doctrine being taught. Since the return to the writ was silent on that critical legal issue, it failed to show sufficient cause for the detention and "they sent Margaret home."

C. Applying the Lessons in National Security Cases

A skeptical reader might point out that the wrongful imprisonment cases of serious concern today do not arise in the context of disrespectful congregants or insolvent tax collectors. Modern courts are likely to find themselves confronted with claims by the government that the incarceration of a particular individual is vital to public safety in connection with the worldwide struggle against terrorism. Don't we face novel national security problems, so that responses derived from the common law are simply impractical? My answer is no. The approach just described was practical and desirable in national security cases then and is now.

i. Then

There is nothing new about national security crises. The Glorious Revolution—a celebrated landmark in constraining royal power by law—was born in the midst of one.[88] In December 1688, the Catholic James II of England, having lost all political support, fled the Kingdom to be succeeded by William and Mary. But James (who had also been King of Ireland and Scotland, where he retained many supporters) mounted a re-invasion, landing in Ireland in March 1689. His Scottish allies staged a military uprising that achieved early success and continued to pose a threat for many months. The prospect that forces supporting him would launch an invasion of England from France appeared increasingly plausible. Although James was defeated at the battle of Boyne in Ireland in July 1690 and fled for what proved to be the last time, open warfare persisted into the fall of 1691.

Meanwhile, "there were plenty of Jacobites in England who could not foreswear their allegiance to the man they considered their divinely anointed king. Rebellion seemed imminent, especially when so many were arrested for printing seditious libels, for conspiring against the king and queen or for being priests—or worse, Jesuits."[89] When the judges of King's Bench (appointed largely by William and hence unlikely to have any sympathy for his rival) examined the cases of 147 such arrestees on writs of habeas corpus in 1689–90, they found that 20 percent of the prisoners posed a danger known to the law and should therefore be remanded for trial on criminal charges. But in the remaining 80 percent of the cases, a closer look at the seemingly suspicious circumstances—such as an ill-timed trip to France or Ireland—showed that "many men and women had been jailed on the thinnest evidence or caught in indiscriminate trawls for suspects." Having reviewed "the alleged facts behind each imprisonment against the relevant law," the court ordered the release of those prisoners for whose detentions the government could not provide solid justification.[90]

ii. Now

In June 2004, the Supreme Court ruled that prisoners at the US naval base at Guantanamo Bay, Cuba were entitled to bring writs of habeas corpus to contest their captivity.[91] Nonetheless, Judge Richard J. Leon of the US District Court for the District of Columbia ruled in January 2005 that as a matter of law they were not.[92] After lengthy delays caused by two intervening Acts of Congress, the US Supreme Court in 2008 reiterated that they were.[93] Late that year Judge Leon actually sat down to scrutinize the factual underpinnings of the cases against Lakhdar Boumediene and the five other men accused with him.[94] As to five of the men, he found wholly unsupported the government's allegation that they planned to travel to Afghanistan to engage in hostilities against US forces and ordered their release,[95] which indeed took place.[96] As to the final petitioner in this group, the District of Columbia Circuit reversed Judge Leon's ruling that he had been properly detained and ordered another look at the case in light of growing doubts about the government's factual and legal basis for it.[97]

When Judge Leon did in 2008 what he might have done in 2004, and focused on the facts rather than the law in the interests of restoring to freedom people who had been wrongly deprived of it, he was exemplifying the common law traditions of habeas corpus,[98] and serving enduring national interests.[99]

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1 Independent judicial inquiry into the validity of the imprisonment has for centuries been the core of habeas corpus. See Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," 94 *Virginia Law Review* 575, 600 (2008) (describing this as the "single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century"); 6 John H. Baker, *The Oxford*

History of the Laws of England, 1443–1558, at 91–94 (Oxford: Oxford University Press, 2003) (outlining fifteenth- and sixteenth-century habeas precedents establishing authority of judges to examine causes of imprisonment and commenting that "the courts had found an effective means of curbing arbitrary power . . . which deprived a subject of his liberty"). See also Stephen I. Vladeck, "The New Habeas Revisionism," 124 *Harvard Law Review* 941, 988–90 (2011) (suggesting Founders' key concern was not substantive standards governing detentions but their application by "an impartial magistrate"). Thus, *Boumediene* found a Suspension Clause violation in the inability of the prisoners to have their imprisonments judicially examined, while explicitly declining to address "the content of the law that governs petitioners' detention." *Boumediene*, 553 U.S. at 798.

2 Halliday, *Habeas Corpus*, at 108.

3 Brief for Legal Historians as Amici Curiae Supporting Petitioners 29, *Boumediene*, 2007 Westlaw 2441583, at 29. (I was one of the amici who submitted this brief.) See Jonathan Hafetz, *Habeas Corpus After 9/11*: *Confronting America's New Global Detention System* 83, 279 nn. 25–27 (New York: New York University Press, 2011) (citing cases).

4 See Kevin Costello, "Habeas Corpus and Military and Naval Impressment, 1756–1816," 29 *Journal of Legal History* 215, 216–18 (2008) (describing many such cases). See also Brief for Legal Historians, at 22–26 (describing cases using other devices for same purpose); Marc D. Falkoff, "Back to Basics: Habeas Corpus Procedures and Long-term Executive Detention," 86 *Denver University Law Review* 961, 967–85 (2009) (providing extended historical survey).

5 See Donald E. Wilkes, Jr., "Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625," 54 *American Journal of Legal History*, 200, 238–39, 249

(2014) (describing habeas cases in both Houses of Parliament considering documents, members' statements, or witness testimony after return to writ had been read). One example is the case of Deborah D'Vebre described in the text accompanying notes 30–31 to chapter 3.

6 The material in this and the next two paragraphs of text is taken from Freedman, *Habeas Corpus*, at 27–28.

7 See, e.g., *Beglee v. Anderson*, M–1214, roll 1 (C.C. D. Tenn., Aug. 5, 1812); *Smith v. Armstead*, M-931, roll 1 (C.C. D. Md., June 16, 1814); *United States v. Towson*, ibid. (C.C. D. Md., May 27, 1812). In both the two latter cases there is additional documentation beyond that on the microfilm in the records of the National Archives and Records Administration housed in Philadelphia. See also *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 682, 685 (E.D. Pa. 1855) (No. 16,725) (finding after hearing that return to writ, which denied custody over claimed slaves, was "evasive, if not false"); *Ex Parte Bennett*, 3 F. Cas. 204 (C.C. D. D.C. 1825) (No. 1,311) (examining anew at habeas corpus hearing witnesses who had appeared before committing magistrate); *United States v. Irvine*, M-1184, roll 1 (C.C. D. Ga., May 8, 1815) (discharging petitioner because, despite having been given opportunity, detaining officer had failed to provide proof to support statement in his affidavit that the enlistment had obtained the parental consent required by Act of March 16, 1802, ch. 9, § 11, 1 Stat. 135).

8 *Matter of Peters*, M-1215 (D. W. Tenn., Dec. 31, 1827). All the quotations through the end of the next paragraph of text are taken from the same source.

9 Additional examples of habeas corpus petitions brought by individuals in the custody of the military are discussed in chapters 4 and 5.

10 See Dimension 1, at 595–96 (discussing Philip Hamburger, "Beyond Protection," 109

Columbia Law Review 1823, 1888–90, 1985 (2009)).

11 Halliday, *Habeas Corpus*, at 113.

12 *Hamdi v. Rumsfeld*, 316 F.3d 450, 472 (4th Cir. 2003). The opinion was also deeply flawed in other respects. See Eric M. Freedman, "Hamdi and the Case of the Five Knights," *Legal Times*, February 3, 2003. These included its failure to learn from a good deal of history supporting close judicial review in the specific context of challenges to national security detentions. See text accompanying notes 46–47 to chapter 3; text accompanying notes 36–38 to chapter 13.

13 *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004). I was a member of the prisoner's legal team in this case.

14 See Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), 156.

15 See *Boumediene*, 553 U.S. at 787 (holding that for Suspension Clause purposes a "habeas corpus" proceeding is one in which a "judicial officer [has] adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release"). See text accompanying notes 19–21 to chapter 15; text accompanying notes 8–9 to the Concluding Thoughts.

16 See Halliday, *Habeas Corpus*, at 7.

Chapter 2. Habeas Corpus With and Without the Writ

17 The account given in this and the following two paragraphs of text is drawn from Provincial

Case File No. 17944, New Hampshire State Archives. That file contains three petitions: one dated August 10, 1714, one undated which I believe to be from August 11, 1714, and one dated August 12, 1714.

18 An Act to Compell Constables to Doe Their Duties in Collecting Rates, passed March 9, 1692–93, in 1 *Laws of New Hampshire: Province Period 1679–1702*, at 555 (Manchester, NH: John B. Clarke Co., 1904).

19 The underlying dispute between rival slates of officeholders was resolved over the summer by the provincial House of Representatives. See *Journal of the House of Representatives*, July 24, 1714, in 19 *Provincial Papers of New Hampshire* 55 (Manchester, NH: John B. Clarke, Public Printer, 1891).

20 The details in this paragraph are to be found in Superior Court Docket Book, 1699–1738, at 86–87, New Hampshire State Archives.

21 Our knowledge of this arrangement comes from Provincial Case File No. 20399, New Hampshire State Archives, which records the initiation in April 1715 of a lawsuit on the bond after Banfild allegedly failed to satisfy his obligations under the settlement.

22 This behavior is easily explained; Whittemore had also given a deed to the same land to another party, resulting in an extended dispute over title, as recorded in Provincial Case File No. 29935, New Hampshire State Archives. It was that part of the tale, rather than Whittemore's brief contretemps with Chase, which involved the greater number of players and expenditure of judicial resources. For an account, see Dimension 1, at 599 n.38. There was also a subsequent indictment of Whittemore for assaulting Chase and carrying away the deed, to which he pleaded not guilty. See Hillsborough County Case File, No. 8133, New Hampshire State Archives. I have been unable to find any further records of this proceeding.

23 Chase's mittimus and the jailer's endorsed receipt are in Provincial Case File No. 30379, New Hampshire State Archives. The same file is the source for the statements in the remainder of this paragraph.

24 For a fuller account, see Dimension 1, at 599 n. 42.

25 See Robert B. Dishman, "Breaking the Bonds: The Role of New Hampshire's Courts in Freeing Those Wrongfully Enslaved, 1640s–1740s," 59 *Historical New Hampshire* 79, 81 (2005).

26 For English examples, see 2 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), 1225–35 and Halliday, *Habeas Corpus*, at 174–75, 211–12. For post-Independence examples, see Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Washington, DC: Library of Congress, 1985), 25, 121, 258, and Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," 94 *Virginia Law Review* 575, 588–93 (2008). Another example is *Respublica v. Negroes Sam and John* (1788) in the file Habeas Corpus 1788–1790, Pennsylvania State Archives.

27 The proceedings can be found in Provincial Case File No. 22344, New Hampshire State Archives. Johnson was in prison at the time because his alleged master, George Massey, had complained to a local Justice of the Peace that he "refuseth to labour and is stubborn and rebellious" and had requested "that the said Peter may be detained in Prison until he shall become submissive and dutiful," whereupon the J.P. had issued an order directing the sheriff to confine Johnson "until he the said Peter shall behave himself."

28 This fact shows that what began as a habeas action had, legally speaking, morphed into

something else, perhaps an action for false imprisonment or one for personal replevin. There is a fuller discussion in Dimension 1, at 600 n.47.

29 Judgment Book of Superior Court, Vol. A, at 341–42 (Aug. 1744–[June 1750]), New Hampshire State Archives. The order thus released Johnson both from the physical custody of the sheriff and from the legal custody of the alleged owner. As further discussed in note 6 to chapter 3, habeas corpus has long been used as a mechanism for challenges not just to wrongful physical detentions by public or private parties, see *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973), but also to legal restraints on liberty, whether imposed by public actors (e.g., parole boards) or private ones (e.g., alleged masters of apprentices). See *Hensley v. Municipal Court*, 411 U.S. 345, 350–51 (1973).

30 The account that follows is taken from Freedman, *Habeas Corpus*, at 42–43. The federal statute in question is Act of July 11, 1798, ch. 72, § 5, 1 Stat. 595 (exempting enlisted servicemen from personal arrest for debt or contract). For a similar New Hampshire case, see In re *Mills*, Strafford County Ct., Dec. 18, 1819, Strafford County Court Records, Folder 11, New Hampshire State Archives (petitioner discharged on habeas corpus after successfully invoking federal statute in state court).

31 My account is based on Provincial Case File No. 25352, New Hampshire State Archives, and Judgment Book of Superior Court, Vol. F, 1767–70, at 459–62, New Hampshire State Archives.

32 This detail comes from Provincial Case File No. 16916, New Hampshire State Archives, which contains documentation on Pearse's subsequent civil damages action against March. That lawsuit is described in the text accompanying notes 18–20 to chapter 6.

A similar set of events took place in the case of William Licht. After being summarily

incarcerated by a J.P. (and then released on bail) in 1770 on the complaint of two townspeople of Chester, New Hampshire for harboring a potentially indigent stranger, he brought successful certiorari proceedings. See Provincial Case File No. 26274, New Hampshire State Archives; Judgment Book of Superior Court, Vol. G, Feb. 1771–Sept. 1773, at 83. As described in the text accompanying notes 21–23 to chapter 6, the following year Licht successfully sued both the J.P. and the complainants for damages.

33 The proceedings in her action are recorded in Provincial Case File No. 22138, New Hampshire State Archives. There is an account of the case in Dishman, "Breaking the Bonds," at 84–86, in which the plaintiff's name is rendered as "Nong" and the defendants' as "Torr."

34 Such an action was based on the writ *de homine replegiando*, commonly known as the writ of personal replevin. See 9 William Holdsworth, *A History of English Law* (London: Methuen & Co., 3d ed., 1944), 105 (describing writ as "in substance, the process of replevin, applied to the purpose of rescuing a person from imprisonment. Just as chattels unlawfully distrained could be recovered by their owner by the action of replevin, so a person unlawfully detained could recover his liberty by this writ"). The general scholarly belief is that proceedings under this writ were antiquated and cumbersome in England by the mid-eighteenth century, and had largely been superseded by habeas corpus until personal replevin was resurrected by the northern states to deal with slavery issues. See Dimension 1, at 603 n. 57 (citing scholars). Nung's case suggests that further study of the colonial situation would be warranted.

35 The availability of a jury trial was one of the key advantages of proceeding by personal replevin instead of habeas corpus. See Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780–1861* (Baltimore: Johns Hopkins University Press, 2001),

11–12. See also "Trial by Jury, in Questions of Personal Freedom," 17 *American Jurist and Law Magazine* 94 (1837) (criticizing Massachusetts statute providing that alleged slaves should bring habeas corpus and abolishing personal replevin but failing to provide for jury trial); An Act to Restore the Trial by Jury, on Questions of Personal Freedom, Mass. Rev. Stat., Ch. 221, § 17 (1837) (repealing statute abolishing personal replevin).

36 Judgment Book of Superior Court, Vol. B, Sept. 1750–Mar. 1754, at 87–88, New Hampshire State Archives. In addition to common law actions such as those described in the text, a number of states had statutes specifically providing for suits by alleged slaves claiming their freedom. These statutes varied with respect to such matters as the availability of jury trials and the extent to which they replaced rather than supplemented the habeas corpus remedy. See Kely M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017), 36–38; Lea Vandervelde, *Redemption Songs: Suing for Freedom Before Dred Scott* (Oxford: Oxford University Press, 2014), 8, 18–21, 49.

37 Almost surely this was an invocation of the Mutiny Act, 1716, 3 Geo. I, c. 2 (Gr. Brit.), which provided that if an arrest were made contrary to the Act, the soldier or his superior officer could file a complaint demanding an inquiry into the matter and a judicial warrant discharging him. The Act was, of course, a direct ancestor of the federal statute that freed George Daze from the debtors' jail in Philadelphia as described earlier in this chapter.

38 The document is in Provincial Case File No. 21242, New Hampshire State Archives.

39 Superior Court Minutes, 1699–1750, Superior Court Docket Box 1, Folder 1744–45, New Hampshire State Archives. This concensed phraseology was no doubt intended to (1) stay the action below (supersedeas) and thereby liberate Downer, and (2) terminate that action

permanently (prohibition).

40 This account is drawn from Provincial Case File No. 23254 and Judgment Book of Superior Court, Vol. A, at 463– 64, New Hampshire State Archives.

41 This writ directed the sheriff to bring Winter from prison to court so that he might answer the charges and be dealt with "as to law and justice appertain." In other words, the purpose of the habeas writ in this context was not to bring Winter into court so that he could test his imprisonment but rather to secure his physical presence so that he could respond to Bird's challenge to his custody over John. See note 6 to chapter 3.

42 There is a complete description of the case, reproducing the relevant documents, in Melinde Lutz Sanborn, "The Case of the Headless Baby: Did Interracial Sex in the Massachusetts Bay Colony Lead to Infanticide and the Earliest Habeas Corpus Petition in America?," 38 *Hofstra Law Review* 255 (2009). I have relied on this source for my documentation. A more recent account of the case appears in M. Michelle Jarrett Morris, *Under Household Government: Sex and Family in Puritan Massachusetts* (Cambridge, MA: Harvard University Press, 2013), 191–208.

43 See William E. Nelson, "Categorizing Zipporah's Petition," 38 *Hofstra Law Review* 279, 282 (2009).

Chapter 3. The Benefits of a Functional View: The Past Educating the Present

44 See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 779–93 (2008).

45 See 1 William E. Nelson, *The Common Law in Colonial America: The Chesapeake and New England, 1607–1660* (Oxford: Oxford University Press, 2008), 37, 71, 92; 2 William E.

Nelson, *The Common Law in Colonial America: The Middle Colonies and the Carolinas, 1660–1730* (Oxford: Oxford University Press, 2013), 26, 28, 41–42, 87–89, 128–30, 138; 3 William E. Nelson, *The Common Law in Colonial America: The Chesapeake and New England, 1660–1750* (Oxford: Oxford University Press, 2016), 120–21; A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill: University of North Carolina Press, 1981), 57–60; William E. Nelson, "Legal Turmoil in a Factious Colony: New York, 1664–1776," 38 *Hofstra Law Review* 69, 150–51 (2009); William E. Nelson, "Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 166–1775," 88 *North Carolina Law Review* 2133, 2176 and n. 340 (2010).

46 1 Nelson, *The Common Law*, at 71.

47 Examples include the two volumes of Chester J. Antieau, *The Practice of Extraordinary Remedies: Habeas Corpus and the Other Common Law Writs* (New York: Oceana Publications, 1987); Horace G. Wood, *A Treatise on the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari and Quo Warranto* (2d ed., 1891); the two volumes of James L. High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition* (2d ed., 1884); and the influential discussion in 3 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768), ch. 8, at 129–38. For a terse overview of the various prerogative writs as instruments of appellate review, see John H. Baker, *An Introduction to English Legal History* (London: Butterworths Tolley, 4th ed., 2006), 143–50; see also 2 Nelson, *The Common Law*, at 54.

Among the modern contexts in which this material is relevant is in the construction of the All Writs Act, 28 U.S.C. § 1651, a direct descendant of a provision of the Judiciary Act of

1789. See *United States v. Hayman*, 342 U.S. 205, 221–22 (1952).

48 Thus, for example, in New Hampshire around 1699 "appeals" replaced review by habeas corpus or certiorari. See Elwin L. Page, *Judicial Beginnings in New Hampshire 1640–1700* (Concord: New Hampshire Historical Society, 1959), 42. But that had changed by 1769. See Dimension 1, at 605 n.74 (citing cases where appeals unavailable and certiorari succeeded). Indeed, Peter Pearse's successful certiorari petition described in chapter 2 (B) (i) noted that he had sought leave to appeal from the inferior court but had been denied.

49 See Ex Parte *Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment"). Like the other common law writs, habeas corpus was divided into various formal categories. See Ex Parte *Bollman*, 8 U.S. (4 Cranch) 75, 97–100 (1807) (explicating categories). But in actual practice these distinctions were frequently not observed. From the late seventeenth century onward, King's Bench in England combined the existing forms of the writ in creative ways to deal with issues raised by private restraints in such contexts as slavery, apprenticeship, and domestic relations, with the goal of reaching outcomes, preferably negotiated ones, that addressed the problems underlying the detentions. See Halliday, *Habeas Corpus*, at 101, 116–21. As the cases of the alleged slave Peter Johnson and the apprentice John Bird described in chapter 2 (A) (iii) and (B) (iii) (b) illustrate, colonial courts followed the same practice. So did early national ones. See Dimension 1, at 606 n.76; Dimension 2, at 23 n.80.

Thus, habeas corpus is among those constitutional areas in which there is solid historical basis for considering an anticipation of future evolution to be part of original intent. See Eric

M. Freedman, "On Protecting Accountability," 27 *Hofstra Law Review* 677, 687, and n.17 (1999); L. Kinvin Wroth, "The Constitution and the Common Law: The Original Intent About the Original Intent," 22 *Suffolk University Law Review* 553, 560–63 (1988); Eric M. Freedman, Note, {AU: Opening quotation mark OK to add here? = Yes} "The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?," 88 *Yale Law Journal* 142, 162–64, 165 (1978). See also Bernadette Meyler, "Towards a Common Law Originalism," 59 *Stanford Law Review* 551 (2006) ("common law originalism attempts to square fidelity to the Founding era with fidelity to its common law jurisprudence—a jurisprudence that retained continuity yet emphasized flexibility").

50 The three-volume work, Charles M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law* (New York: Oceana Publications, 1994), which focuses on England from the later sixteenth century to the middle of the seventeenth, describes the sometimes-obscure overlap between prohibition and habeas corpus, in volume 1 at vii, xxv–vi and volume 2 at 315–16, 341–74, 401–30. The mutually supportive roles of prohibition and habeas corpus in securing liberty in Massachusetts in the middle of the eighteenth century are discussed in John Philip Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park: Pennsylvania State University Press, 1977), 68–70. For a North Carolina example from 1728 see Nelson, "Politicizing the Courts," at 2156–59 (after obtaining prohibition from common law court against admiralty proceedings, litigant secures release from imprisonment in connection with latter by habeas corpus).

Whether or not they sought habeas corpus, litigants frequently sought prohibition against

admiralty proceedings in favor of ones at common law so that their liabilities would be determined by a jury, a development that assumed considerable legal and political significance in the decades surrounding the Revolution, as described in Dimension 1, at 606 n.77 and Dimension 3, at 271 n.97.

51 See *Rector v. Price*, 1 Mo. 198, 200–01 (1822) (holding that court would use certiorari, like habeas corpus, to remedy fundamental failures of justice); Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008), 384–91 (describing 1778 litigation in North Carolina using certiorari to test status of a large group of alleged slaves); note 12 to chapter 11 (certiorari used around 1547 to release English prisoner who had been pardoned). In many cases, certiorari and habeas corpus were employed in tandem. See Dimension 1, at 607 n. 81; Lee Kovarsky, "A Constitutional Theory of Habeas Power," 98 *Virginia Law Review 7*53, 800–802 (2013).

52 This distinction is explicated in Dimension 1, at 607 n.81. In any event, Pearse may have been perfectly happy to proceed by certiorari because that route put before the decision-maker the entire file containing the narration of his travails rather than just a jailer's return that might well have annexed only the order committing Pearse for contempt.

53 See 9 William Holdsworth, *A History of English Law* (London: Methuen & Co., 3d ed., 1944), 106–07.

54 Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109–111 (1945) (cautioning that distinction between substance and procedure under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), must be "applied with an eye alert to essentials" of the particular problem at hand, regardless of terms' use in other contexts, because a "policy so important . . . must be kept free from entanglements with analytical or terminological niceties"). Thus, to take an example

described in Freedman, *Habeas Corpus* at 34, 169 n.30, in 1824 a federal judge in Georgia concluded that an alleged debtor was being wrongfully confined and should be released. See *Bullock v. United States* (C.C. D. Ga., April 28, 1824). The judge thereupon sent the jailer not a writ of habeas corpus but rather an injunction against further incarceration of the prisoner. It is hard to see what difference the distinction might make for any purpose of present relevance.

55 Halliday, *Habeas Corpus*, at 92.

56 Ibid., at 77–83 (observing that the various prerogative writs were united by a sweeping conception that it was the role of the judges to ensure that the King's justice was being done to the prisoner). Because of this central focus on justice rather than law in any situation where the two might be in conflict, as well as its flexible and pragmatic orientation with regard to remedies described later in this chapter, the writ of habeas corpus has been recognized since the seventeenth century as governed by equitable principles. See ibid., at 87–93,102; *Holland v. Florida*, 560 U.S. 631, 646 (2010); Erica Hashimoto, "Reclaiming the Equitable Heritage of Habeas," 108 *Northwestern University Law Review* 139, 143–45 (2013); Brief of Eleven Legal Historians as Amici Curiae in Support of Petitioner, *Holland*, 2009 WL 5945956. (I was one of the amici who submitted this brief.)

57 See Freedman, *Habeas Corpus*, at 37.

58 There is an extensive collection of sources in Dimension 1, at 609 n.89. Moreover, the mere fact that a report appeared in print did not make it reliable. Varying reporters and publishers had differing standards of accuracy and differing editorial policies. See Tim Hitchcock and William J. Turkel, "The *Old Bailey Proceedings, 1674–1913*: Text Mining for Evidence of Court Behavior," 34 *Law and History Review* 929, 933–34 (2016) (listing reasons why

reports bear an "inconsistent and ambiguous relationship" to what actually happened in court).

59 See text accompanying note 17 to chapter 12 (explaining context); Dimension 3, at 271–72 and nn.96–100 (providing documentation).

60 See Mary Sarah Bilder, "The Origin of the Appeal in America," 48 *Hastings Law Journal* 913, 925, 927 (1997) (explaining non-hierarchical structure of English common law courts in sixteenth and seventeenth centuries); David Rossman, "'Were There No Appeal': The History of Review in American Criminal Courts," 81 *Journal of Criminal Law & Criminology* 518, 529–30 (1990) (describing how same judges heard trials and appeals).

This is the background against which, as the Supreme Court has often reiterated, at common law res judicata did not apply to a denial of habeas corpus relief. Rather, "a renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." *Schlup v. Delo*, 513 U.S. 298, 317 (1995) (citing *McCleskey v. Zant*, 499 U.S. 467, 479 (1991), and repeating its quotation from William Smithers Church, *A Treatise on the Writ of Habeas Corpus* § 386, at 570 (2d ed. 1893)). I was an author of an amicus brief in *Schlup*.

61 See Dimension 1, at 610 and nn.91–92.

62 Cf. Oliver Wendell Holmes, Jr., "Codes and the Arrangement of the Law," 5 *American Law Review* 1, 1 (1870) ("It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . It is only after a series of determinations on the same subject-matter that it becomes necessary to 'reconcile the cases,' as it is called, that is, by a true induction to state the principle which has until then been obscurely felt.")

63 See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 34–35, 156 ("Virtually all lawyers agreed that judges did not make the common law; they merely administered the common law that already existed in nature"); G. Edward White, "Recovering the World of the Marshall Court," 33 *John Marshall Law Review* 781, 791–93 (2000).

64 See William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York: New York University Press, 2007), 10 (describing English system prior to 1750 as one "where a close-knit and expert bench and bar collaborated to reach a decision").

65 See 2 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), 1230 (quoting Lord Mansfield to this effect).

66 For example, when in the spring of 1744 the judges of the New Hampshire Superior Court were divided on appeal in a legally tangled case arising out of a bitter religious dispute, they adjourned so that counsel could "State the case and apply for advisement to the neighbouring lawyers on the Case." When that consultation failed to occur, the judges considered, but apparently could not decide, whether to allow a further adjournment on the basis that there was a Superior Court session to be held at York "in June next when they might have opportunity of conversing with some of the Principal Lawyers of the neighborhood who would attend the session." The documentation appears in the New Hampshire State Archives: Judgment Book of Superior Court, Vol. A, Aug. 1744–[June 1750], at 69–71; Provincial Case File No. 025518; and in Superior Court Minutes, 1699–1750, Superior Court Docket Box 1, Folder 1744–45 (Entry no. 24 for Feb. 5, 1744). A description of the case, *Leavett v.*

Sinkler, appears in 3 Nelson, *The Common Law*, at 113–14.

67 In fact, until well into the nineteenth century, when the pressures described in chapter 12 (B) began to be felt, substantive statutes were of relatively minor importance to judicial decision-making. See Ellen Holmes Pearson, "American Legal Scholars and the Republicanization of the Common Law," in *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: Johns Hopkins University Press, Eliga H. Gould & Peter S. Onuf eds., 2005), 93, 97; Carolyn Steedman, "At Every Bloody Level: A Magistrate, a Framework-Knitter, and the Law," 30 *Law and History Review* 387, 408 (2012). For supportive evidence from New Hampshire see chapter 6, at note 27 and text accompanying notes 41–43.

68 See Halliday, *Habeas Corpus*, at 55–58, 239–43, 215–56; Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," 94 *Virginia Law Review* 575, 631–32 (2008); A. H. Carpenter, "Habeas Corpus in the Colonies," 8 *American Historical Review* 18, 26–27 (1902); Dimension 2, at 4 n.5. See also 1 Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (New Providence, NJ: LexisNexis, 7th ed., 2015) § 2.2 at 14–17 (describing views of Supreme Court on relationship between judge-made and statutory law of habeas corpus).

69 See Freedman, *Habeas Corpus*, at 37. There is a further discussion of the sources of the common law in the text accompanying notes 11–12 to chapter 14, and in Dimension 3, at 294 n.211.

70 For a powerful argument that modern legal actors forgot this lesson in the context of the Guantanamo Bay habeas litigations, see Sabin Willett, "Clericalism and the Guantanamo Litigation," 1 *Northeastern University Law Journal* 51, 52, 56–58 (2009).

71 Cf. Note, "Review of Orders in Habeas Corpus Proceedings," 25 *Harvard Law Review* 460

(1912) (observing critically that, notwithstanding frequent presence of important legal issues, most states deny "review by appellate courts of adjudications in *habeas corpus* proceedings" and commenting that the only substantial justification for this "rests upon the doctrine underlying the writ of *habeas corpus*, namely the need of a speedy adjudication").

72 As indicated in note 6, habeas courts valued negotiated outcomes of this sort. See Halliday, *Habeas Corpus*, at 60 (noting that often "discharge occurred only after a settlement had been negotiated, at the court's behest, among the parties involved in the original controversy").

For an early seventeenth century habeas corpus case settled through mediation, see Donald E. Wilkes, Jr., "Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625," 54 *American Journal of Legal History*, 200, 245 (2014).

73 *Rex v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761). The case is reported on a single page, and the support for each sentence in this paragraph of text is to be found on that page.

74 For the procedural significance of this, see text accompanying notes 2–5 to chapter 1.

75 See Jonathan L. Hafetz, Note, "The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts," 107 *Yale Law Journal* 2509, 2536 n.209 (1998), citing *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (reviewing the facts in the sailor's affidavit to avoid ruling on the legality of Admiralty's general press warrant); *Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (accepting the petitioner's affidavit stating that he was a ship-carpenter and thus entitled to a previously established exemption to avoid ruling on the legality of another exemption based on the petitioner's status as a freeholder).

76 See Kevin Costello, "Habeas Corpus and Military and Naval Impressment, 1756–1816," 29 *Journal of Legal History* 215, 34–39 (2008).

77 See 1 Oldham, *Mansfield Manuscripts*, at 77–78.

78 Costello, *Habeas Corpus and Impressment*, at 236–37, 239–41. One example is *Goldswain's Case*, described in note 32.

79 20 Howell's State Trials 1 (1772). The alleged slave was brought into court six days after the habeas application was made and remained free on bail until his ultimate discharge six months later. See ibid. at 1, 23, 80.

80 See ibid., at 79–80; 2 Oldham, *Mansfield Manuscripts* 1228–29 (describing background to *Somerset*). For a sketch of the case from an American perspective, see Paul Finkelman, "The Politics of Slavery and Missouri's First Elected Supreme Court: *Dred Scott v. Emerson*," in *Missouri Law and the American Conscience* (Columbia: University of Missouri Press, Kenneth H. Winn ed., 2016), 63, 67–73.

81 For a collection of twentieth-century Supreme Court statements supporting this approach, see 1 Hertz and Liebman, *Federal Habeas Corpus*, § 2.2, at 21–22. Cf. James Robertson, "Quo Vadis, *Habeas Corpus?*," 55 *Buffalo Law Review* 1063, 1087 (2008) (suggesting that court adopt same approach in dealing with statutory post-conviction habeas cases, as it once did; see, e.g., *Hensley v. Municipal Court*, 411 U.S. 345, 349–51 (1973)).

82 Stephen I. Vladeck, "The New Habeas Revisionism,"124 *Harvard Law Review* 941, 948 (2011). Cf. *Johnston v. Holiday*, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety").

83 For an example of the first situation see the discussion in chapter 1 of the nullification of the "rule" that jailer's return to the writ was conclusive. For an example of the second, see the description in chapter 2 (A) (iii) of the case of the alleged slave Peter Johnson that was commenced by habeas corpus but decided by a jury. Of course, to know what the putatively governing "rule" actually was we need a certain number of data points, which are not yet

available in every instance.

84 See, e.g., Nelson, "Politicizing the Courts," at 2166–67 (describing how 1732 North Carolina imprisonment for contempt because disbarred attorney had appeared in court was terminated by habeas corpus on determination that return failed to show disbarment had been legal). The Daze case described in chapter 2 (A) (iv) is another example of this pattern.

85 See 1 Oldham, *Mansfield Manuscripts*, at 78.

86 See *Somerset*, 20 Howell's State Trials 1, 23, 80, 82 (having heard counsel, court finds return legally insufficient).

87 The account in this paragraph is taken from Halliday, *Habeas Corpus*, at 99–100.

88 See J. R. Jones, *The Revolution of 1688 in England* (London: Weidenfeld and Nicolson, 1972), 5–7, 298–301, 328–31. For a more detailed account of the events summarized in this paragraph, see John Miller, *James II* (New Haven: Yale University Press, 2000), 205–33. For a modern study of the Glorious Revolution from a legal perspective, see Richard S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington, DC: Catholic University of America Press, 2014), a volume reviewed by Grant Tapsell in 132 *English Historical Review* 714 (June 2017).

89 Halliday, *Habeas Corpus*, at 134–35. The remaining quotes in this paragraph of text are drawn from this source. See also Halliday and White, "The Suspension Clause," at 613–27. It is worth recalling that early in the century there had been a plot engineered by a group of Catholic extremists to blow up the opening day of Parliament with 39 barrels of gunpowder. The official response to the Gunpowder Plot resulted in the torture and execution both of the plotters and of many innocent people. See Antonia Fraser, *The Gunpowder Plot: Terror and Faith in 1605* (London: Weidenfeld & Nicholson, 1996); see also James Shapiro, *The Year of*

Lear: Shakespeare in 1606 (New York: Simon & Schuster, 2015); *A v. Secretary of State for the Home Department* (2005) UKHL 71 (appeal taken from Eng.) (speech of Lord Hope of Craighead, ¶103).

90 Some modern comparisons may be instructive. Prior to the end of 2010, during a period when the District Courts were exercising their judgment relatively free of the appellate restraints described in the text accompanying notes 4–9 to the Concluding Thoughts, 56 Guantanamo Bay habeas cases were decided on the merits, of which 37 (66%) were won by the petitioners and 19 (34%) by the government. See "Guantanamo Bay Habeas Decision Scorecard," Center for Constitutional Rights, December 21, 2009, www.ccrjustice.org. For the subsequent statistics see note 8 to the Concluding Thoughts.

When our military, acting through tribunals that applied basic due process norms, reviewed the cases of 1,196 detainees captured during the Persian Gulf War, it found that 310 (26%) of them were legitimately held as prisoners of war, with the remainder (74%) entitled to refugee status. See Department of Defense, "Conduct of the Persian Gulf War: Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991," Appendix L at 577 (April 1992). Because the US military had as a general matter acted pursuant to these norms since before World War II, there had been very little need for alleged prisoners of war to invoke habeas corpus review prior to 2001. See Stephanie Carvin, *Prisoners of America's Wars: From the Early Republic to Guantanamo* (Oxford: Oxford University Press, 2010), 88–100. But they sometimes did. See *In re* Territo, 156 F.2d 142 (9th Cir. 1946). As chapter 5 of this text shows, such proceedings were more common before the Civil War.

91 See *Rasul v. Bush*, 542 U.S. 466 (2004).

92 See *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

93 See *Boumediene v. Bush*, 553 U.S. 723 (2008). The 2004–2008 judicial history is summarized in James E. Pfander, *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* (Oxford: Oxford University Press, 2009), 156–62 and in the text accompanying notes 6–12 of chapter 15.

94 See *Boumediene v. Bush*, 583 F. Supp. 2d 133 (D.D.C. 2008).

95 In reading his ruling from the bench he added a direct (and ultimately successful) plea to the Justice Department lawyers that they not appeal his ruling and thereby further delay the petitioners' long-deserved release. See William Glaberson, "Judge Declares Five Detainees Held Illegally," *New York Times*, November 21, 2008, at 1. He noted that any legal issue the department wanted to preserve would be dealt with on the appeal of the remaining petitioner.

See Del Quentin Wilber, "5 at Guantanamo Ordered Released; Men Not Considered Enemy Combatants," *Washington Post*, November 21, 2008, at 2. The result of that appeal is described in the next sentence of text.

96 See Peter Finn and Julie Tate, "4 from Guantanamo Are Sent to Europe; Detainees, One Part of Supreme Court Case, Going to Three Countries," *Washington Post*, December 1, 2009, at 6.

97 *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010). The subsequent events, eventuating in the prisoner's release, are recounted in *Bensayah v. Obama*, 2014 U.S. Dist. LEXIS 13073 (D.D.C. 2014).

98 For a defense of the common law model of habeas in the context of the struggle against terrorism, see Richard H. Fallon and Daniel J. Meltzer, "Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror," 120 *Harvard Law Review* 2029, 2041–46 (2007).

For a discussion of modern contexts other than habeas corpus which would benefit from the common law style of judging, see Evelyn Keyes, “Hedgehogs and Foxes: The Case for the Common Law Judge,” 67 *Hastings Law Journal* 749 (2016). For a more formal and more general treatment, see Douglas E. Edlin, *Common Law Judging: Subjectivity, Impartiality, and the Making of Law* (Ann Arbor: University of Michigan Press, 2016), 29–36. An empirical study of the behavior of the federal district judges for the period 1932–2012 appears as Neal Devins and David Klein, “The Vanishing Common Law Judge?,” 165 *University of Pennsylvania Law Review* 595 (2017). See also Richard A. Posner, “What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part II,” 19 *Green Bag 2d* 257, 262 (2016) (Federal appellate judge argues that “a judicial focus on outcome rather than process” is appropriate in all cases; “The judge should decide what is the best outcome for a case and then decide whether that outcome is blocked by some authoritative source of law. . . . The outcome is the end, the process merely the means”).

99 There is further discussion of this point in the Concluding Thoughts.