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Habeas Corpus in Three Dimensions

Dimension II: Habeas Corpus as a Legal Remedy

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I am solely responsible for the contents of this piece, including certain deviations from the forms prescribed by THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) which have been made at my insistence in the interests of clarity and to facilitate document retrieval by future researchers. For clarification purposes I have also sometimes regularized the capitalization and punctuation in quotations from early sources.

By way of disclosure, I have served as a member of the legal teams pursuing writs of habeas corpus in several of the cases from the current century cited in this article. By way of acknowledgement, I have benefitted greatly from the insights of my co-counsel.

I am most grateful for the collegial support of John Phillip Reid and William E. Nelson of New York University Law School and the thoughtful responses of the participants in the Golieb Research Colloquium in Legal History, where an early version of this article was presented.

Much of the research underlying this article was conducted in the New Hampshire State Archives in Concord during a year-long leave generously funded by Hofstra Law School. The time would have been far less productive (and enjoyable) without the absolutely extraordinary assistance I received from Frank C. Mevers, then the State Archivist, Brian Nelson Burford, then the State Records Manager (now the State Archivist), and John Penney, Armand Dubois, Peter Falzone, William G. Gardner, Benoit Shoja, Pam Hardy, Georgia-Rose Angwin, and Stephen Thomas of the Archives staff. Milli S. Knudsen, a New Hampshire independent scholar who was volunteering at the Archives while I was there, and volunteer Karol Yalcin were responsible for finding a number of the documents that I have relied upon. My work on the New Hampshire materials has also been enriched by the insights of Mary Susan Leahy, Esq., Robert B. Stein, Esq., Eugene Van Loan, Esq., and Richard M. Lambert. Jamie Kingman Rice of the Maine Historical Society provided valuable additional assistance.

Copies of the documents from the New Hampshire State Archives that undergird my descriptions of the cases are available from the reference desk of the Hofstra Law School Library. Some of these records, including ones cited to Provincial Case Files and the Judgment Books of the Superior Court, have also previously been microfilmed by the Genealogical Society of Utah.

The tireless efforts of Hofstra law librarians Patricia Ann Kasting, David Dames and Ann R. Gilmartin and of my assistants Joyce A. Cox and Ryan M. Duck are everywhere reflected in these pages.

I have previewed portions of this installment of the overall project in *Habeas Corpus Past and Present*, 59 FED. LAW. 40 (2012) [hereinafter Freedman, *Past and Present*] and *Liberating Habeas Corpus*, 39 REVS. AM. HIST. 395 (2011) [hereinafter Freedman, *Liberating*].

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Project Overview

This is the second of three planned articles in a project whose overall title is “Habeas Corpus in Three Dimensions.” The first installment discussed the importance of habeas corpus as a common law writ.² This piece considers the significance of the fact that American habeas corpus until the first decades of the nineteenth century was embedded in a system of multiple constraints on government power.³ The third installment will trace the role of

2 See Eric M. Freedman, *Habeas Corpus in Three Dimensions Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591 (2011).

3 See generally Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2555 (1998) (viewing “the Constitution as presupposing the continuation of an Anglo-American tradition in which the forms of action – both ‘private remedies’ like suits for trespass and more distinctive remedies like the prerogative writs – evolved in service of a general aspiration that . . . courts were generally available to redress governmental illegality”).

habeas corpus in the system of checks and balances that developed here subsequently.

I. Habeas Corpus and the Web of Legal Remedies

The argument that follows is simple. Understanding habeas corpus during the colonial and early national periods requires understanding that it was just one strand in a web of public and private legal remedies restraining abuses of government power.

To illustrate, I begin in Part II by telling the story of Captain Isaac Hodsdon of the United States Army, who was accused of wrongfully imprisoning several men in Stewartstown, New Hampshire during the War of 1812. Their first resort was to obtain a writ of habeas corpus from a state court. Hodsdon's return to the writ, that he would not produce the men because one petitioner was a prisoner of war and so beyond the reach of civil authority and that the other was detained on federal charges and so not amenable to a state writ, was – quite appropriately – found contemptuous. He was prosecuted for criminal contempt both by the state and by the private parties concerned, and also held liable in damages in a false imprisonment action. In the midst of all this, the New Hampshire legislature (to whom Hodsdon apparently gave a misleading account of the events) passed a bill to enable him to mount a defense on the merits despite a missed deadline, and ultimately the United States Congress (to which his counsel had been elected in the meantime) indemnified him.

Part III seeks to unravel the many threads of Hodsdon's cat's cradle of a story – one which may have seemed to him simply a tangle of irritations but one in which we can perceive an overall pattern of mutually reinforcing components forming a structure to restrain government power. After a discussion of the power and limits of habeas corpus, this Part presents a number of illustrative cases arising under different legal headings to canvass the range of remedies that litigants could invoke to confine public officials to the lawful exercise of their authority. One important feature these remedies shared was a heavy reliance on the jury to sort out degrees of culpability (e.g., non-liability for actions taken in good faith, *respondeat superior* liability).⁴ Just as with regard to habeas corpus

4 See G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J. L. & PUB. POL'Y 643, 655–57 (2012).

itself,⁵ legislative enactments had only a peripheral role.⁶

Part IV concludes this article and previews the third part of the overall project.

The novel idea of separation of powers as checks and balances only took root gradually in the new nation. After the overthrow of royal authority, the legislature alone claimed the mantle of the

- 5 See A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 26–27 (1902); Freedman, *supra* note 2, at 610 n.93 (citing sources).

Notwithstanding some noisy controversy as to whether or not the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, extended to any particular colony at any particular time, see generally D[ANIEL] DULANY [the elder], THE RIGHT OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF THE ENGLISH LAWS 12–13, 18–26 (1722); WILLIAM KILTY, A REPORT OF ALL SUCH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 176–78 (1811); JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 475 n.29 (1950); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 645 n.206 (2008); Donald E. Wilkes, Jr., *From Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733–1865*, 45 GA. L. REV. 1015, 1029 nn.47–48 (2011), the point was of little practical significance in light of the judges' ample common law habeas powers, see Wilkes, *supra*, at 1023–27; Dallin Oaks, *Habeas Corpus in the States – 1776–1865*, 32 U. CHI. L. REV. 243, 255 (1965), which they used vigorously to perform “their most innovative work.” PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE* 242 (2010).

I have yet to see a colonial case turning on the distinction between the statutory and common law writ, cf. JOHN PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND: OR, THE LATE GOVERNMENT THERE, VINDICATED (1690), reprinted in THE ANDROS TRACTS 21, 46 (W.H. Whitmore ed., 1868) (responding to charge that administration of Sir Edmund Andros had arbitrarily imprisoned opponent by arguing both that Act did not extend to colonies and that prisoner in any event not entitled to release), and suspect that few if any will be unearthed in the future. See generally JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664–1776, at 504–06 (1944) (noting colonial New York confusion between statutory and common law writ); Eric M. Freedman, *Just Because John Marshall Said it Doesn't Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 579 n.10 (2000) (collecting sources on fluidity of distinction).

- 6 See *infra* text accompanying notes 170–76; see also Carolyn Steedman, *At Every Bloody Level: A Magistrate, a Framework-Knitter, and the Law*, 30 L. & HIST. REV. 387, 408 (2012) (reporting that notebooks of an English magistrate recording forty years of business “used the word ‘statute’ on only two occasions”); cf. *infra* note 171 (noting exception to statement in text).

People, while the executive and judicial branches had to struggle to assert the legitimacy of their exercises of power.⁷ Even though the judges had long held the role of keeping government officials within lawful bounds,⁸ judicial independence got off to quite a rocky start in the new nation⁹ both because the judges were so closely identified with the Crown and because the common law they administered had no plainly visible democratic source.¹⁰

That thinking had changed by the middle of the nineteenth

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- 7 See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 323–24 (2008); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE CONSTITUTION* 33 (1990); Tarr, *supra* note 4, at 645 (“In most states, only legislators were directly elected by the people and this fact, combined with their short term of office, encouraged the belief that the legislature embodied the people, whereas other branches did not.”); see also Johann N. Neem, *Who are “The People”? Locating Popular Authority in Postrevolutionary America*, 39 *REVS. AM. HIST.* 267 (2011) (reviewing current historiography of contested claims to represent “the People”); see generally Roman J. Hoyos, *Who are “the People”?* (July 20, 2015) (unpublished research paper, Southwestern Law School) (on file at <http://ssrn.com/abstract=2633349>) (exploring meaning of term).
- 8 See HALLIDAY, *supra* note 5, at 7, 135–36; *infra* text accompanying notes 293–95.
- 9 The issue of judicial independence soon became entangled with that of judicial review, see SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787*, at 333–36 (2011); see also [Francis Bowen], *The Independence of the Judiciary*, 57 *N. AMER. REV.* 400, 421 (1843); see generally Larry D. Kramer, *The Supreme Court, 2000 Term—Foreward: We The Court*, 115 *HARV. L. REV.* 5, 25–26 (2003) (describing English background).
- 10 See BRENDAN MCCONVILLE, *THE KING’S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA, 1688–1776*, at 8 (2006); KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* 76–77, 99 (2011); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 *WASH. & LEE L. REV.* 787, 789–90 (1999) (observing that at Independence judges were considered dangerous, being regarded “essentially as appendages or extensions of royal authority”).

century¹¹ and brought us to the point where we rest today.¹²

For the President or the Congress to act without oversight is to exceed the authority granted by the People. For the Judiciary to review the actions of those branches is to exercise authority granted by the People¹³ and does not require the permission of the other branches.¹⁴ In utilizing the writ of habeas corpus to implement this understanding, the judiciary not only honors the original purpose of

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- 11 See Ellen Holmes Pearson, *Revising Custom, Embracing Choice: Early American Legal Scholars and the Republicanization of the Common Law*, in *EMPIRE AND NATION: THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD* 93 (Eliga H. Gould & Peter S. Onuf eds., 2005) (describing theories propounded by post-Independence jurists to accomplish this); William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 355 (2004) (describing how Marshall and other Federalists reconciled democracy and common law). The process has been aptly described by Professor Jessica K. Lowe as “transitioning from the colonial to the republican, from the inherited to the created,” Jessica K. Lowe, *Guarding Republican Liberty: St. George Tucker and Judging in Federal Virginia*, in *SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY* 111, 113 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (discussing Virginia in 1791). These developments will be discussed more fully in the third installment of this project.
 - 12 The next paragraph of text is taken from Freedman, *Past and Present*, *supra* note 1, at 41.
 - 13 See THE FEDERALIST, NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that because judges are empowered by the people judicial review does not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.”); see also GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 450–52 (2009) (discussing this argument); James L. Underwood, *Judicial Review in a Legislative State: The South Carolina Experience*, 37 S.C. L. REV. 335, 342–43 (1986) (describing how South Carolina rejected claim that judicial review is “an alien elitist practice engrafted on popular government” and accepted idea that “when a court strikes down legislation or an executive act as unconstitutional, it does not . . . stymie the will of the people, but actually effectuates it”). As the third installment of this project will describe, a critical element of the establishment of the legitimacy of checks and balances was a “redefinition of the ‘separation of powers’ by which judges gained . . . equivalent status with legislators and executives as representatives or agents of the sovereign people,” Charles F. Hobson, *The Origins of Judicial Review: A Historian’s Explanation*, 56 WASH. & LEE L. REV. 811, 812 (1999). See *infra* Part IV.
 - 14 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (“[I]t 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.”).

the writ – making sure that those to whom power has been granted (by the monarch then and by the People now) use it lawfully – but also strengthens the checks and balances that this country has built since Independence to serve the same purpose.¹⁵

II. Captain Hodsdon in a Cat's Cradle

The War of 1812 was highly controversial domestically, especially in federalist New England¹⁶ and particularly prior to April 1814 – the period during which the British blockade of the Atlantic Coast exempted ports from Boston northward.¹⁷ One result was widespread smuggling between New England and Canada.¹⁸

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- 15 See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2010) (unanimous) (noting that checks and balances serve to protect both the liberties of the individual and the prerogatives of the three branches); *Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008) (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”). See also Freedman, *Past and Present*, *supra* note 1, at 41 (describing John Quincy Adams’s successful argument to this effect in *The Amistad*, 40 U.S. (15 Pet.) 518 (1841)).
- 16 See TROY BICKHAM, *THE WEIGHT OF VENGEANCE: THE UNITED STATES, THE BRITISH EMPIRE, AND THE WAR OF 1812*, at 171–202 (2012); DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 52–53 (1989); J.C.A. STAGG, *MR. MADISON’S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783–1830*, at 253–69 (1983); ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS & INDIAN ALLIES* 9–10 (2010).
- 17 See WALTER R. BORNEMAN, *1812: THE WAR THAT FORGED A NATION* 174, 216 (2004); HICKEY, *supra* note 16, at 152, 214–15; JOHN M. MCCLINTOCK, *HISTORY OF NEW HAMPSHIRE* 501–02 (Boston, B.B. Russell 1889); 2 CHANDLER E. POTTER, *MILITARY HISTORY OF NEW HAMPSHIRE 1623–1861*, pt. 2, at 109 (photo. reprint 1972) (Concord, McFarland & Jenks 1869).
- 18 See PETER ANDREAS, *SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA* 82–88 (2013); JOSHUA M. SMITH, *BORDERLAND SMUGGLING: PATRIOTS, LOYALISTS, AND ILLICIT TRADE IN THE NORTHEAST, 1783–1820*, at 10, 66–94 (2006); STAGG, *supra* note 16, at 364, 380, 470–71; Edward Francis Cloutier, *New England Opposition to the War of 1812*, at 48–65 (June 1957) (unpublished M.A. thesis, University of New Hampshire) (on file with University of New Hampshire library). Smith’s account contrasts the views of this phenomenon as it appeared from the perspective of the capitals of both governments with those from the perspective of the inhabitants — who lived in a rough and poorly surveyed country where personal relationships had much more influence on events than the formal structures of nation-states. See, e.g., SMITH, *supra*, at 6–67, 82–84.

On December 29, 1813, General Thomas H. Cushing of the United States Army wrote from his headquarters in Boston to Captain Isaac Hodsdon:¹⁹

Sir,

So soon as your company shall have been completed . . . you will march . . . for Stewartstown, [N.H.] . . . The object to be attained by an establishment at Stewartstown . . . is effectually to prevent any intercourse with the enemy . . . It is believed that by interesting the citizens, friendly to the General Government, to watch and report to you, the movements of the inhabitants on both sides of the line, and by sending out small parties by day and by night to the principal roads leading to the enemys country, from Connecticut River to the settlements along the northern boundary of New Hampshire, an effectual stop may be put to all unlawful intercourse in that quarter . . . The act, laying an Embargo²⁰ will justify you in stopping every person or thing which you may find in motion for the enemys country and you will not fail to make every exertion for carrying it into full and complete effect.²¹

19 Hodsdon had an extended public career, primarily in the military in Maine. A condensed biographical sketch appears in *HISTORY OF PENOBSCOT COUNTY MAINE* 840, 840–42 (Cleveland, Williams, Chase & Co. 1882).

20 See Act of Dec. 17, 1813, 3 Stat. 88 (“laying an embargo on all ships and vessels in the ports and harbours of the United States”). Section 12 of this statute gave the President authority to employ the armed forces against persons “in any manner opposing the execution of this act or, otherwise violating or assisting and abetting violations of the same.” This act was in effect during the period that Captain Hodsdon took the actions leading to his legal entanglements. It was subsequently repealed by an Act of Apr. 14, 1814, 3 Stat. 123. For the ensuing history see Act of Feb. 4, 1815, 3 Stat. 195; ANDREAS, *supra* note 18, at 83 (noting that the 1815 statute, “passed shortly before the conclusion of the war . . . included a further militarization of customs enforcement, as [armed] forces were increasingly tasked with fighting not only British troops but also smugglers”).

21 Letter from T.H. Cushing to Isaac Hodsdon (Dec. 29, 1813). My source is a copy of the letter in the Maine Historical Society, Coll. 8, Box 1/4. The copy was made by a United States Treasury Department official in April 1850, very possibly in connection with a claim being made by Maine against the federal government around that time for a military expedition Hodsdon had

Events from this point forward can be followed both from newspaper pieces in which the participants exchanged sharply-worded volleys and from court papers, sources which tell similar but not identical stories.²²

Captain Hodsdon and a party of troops arrived at Stewartstown on January 10, whereupon, as he wrote to a newspaper several months later, he “posted sentinels at the forks and angles of roads for the purpose of detecting citizens who were in the nefarious practice of smuggling.”²³ Hodsdon continued:²⁴

At the time of my arrival here, I was informed that Austin Bissel of Colebrook, had recently conveyed a horse and sleigh into the province of Lower Canada, and that he declared openly, that he would in defiance of the laws of the United States, pass to and fro from Canada when he pleased . . . I thought it my duty to apprise him of the impropriety of his behaviour and to state to him the consequences which would probably attend a repetition of the same offence. I therefore on the 11th January directed a sergeant and file of men to conduct him to the garrison. On his arrival at the garrison I conversed with him on the subject of his having made these assertions, &

led in 1839 to disputed timberlands near the Canadian border. See HISTORY OF PENOBSCOT COUNTY MAINE, *supra* note 19, at 841; STATE OF MAINE, HISTORICAL SKETCH AND ROSTER OF THE AROOSTOOK WAR (1904) (publishing documents relative to the expedition). I speculate that the original 1813 document was at the Treasury to be copied because it had been submitted in connection with Hodsdon’s indemnification claim in the 1820’s, see *infra* text accompanying notes 60–77.

- 22 A detailed account sympathetic to Hodsdon appears in [GEORGIA DREW MERRILL], HISTORY OF COOS COUNTY, NEW HAMPSHIRE 95–97 (Syracuse, W.A. Ferguson & Co. 1888). See also *The Season of Deception*, N.H. PATRIOT, Mar. 8, 1814, at 3 (rebutting claim of rival newspaper that Hodsdon was guilty of military depotism). The various newspaper accounts cited in connection with Hodsdon’s activities were first published in the New England periodicals to which I have cited them and subsequently re-published widely in newspapers from Maine to Washington, D.C.
- 23 Isaac Hodsdon, Letter to the Editor, *To the Public*, N.H. PATRIOT, Mar. 29, 1814, at 3.
- 24 In considering the veracity of this account one relevant consideration might be that it was composed more than a month after the court proceedings described *infra* text accompanying notes 26–32.

in the presence of his father and Joseph Loomis, Esq . . . and after receiving . . . their joint assurance that . . . Bissel would do nothing inconsistent with the laws of the United States he returned to his home, not having been detained more than one hour at the garrison, and that without any restraint.

On the 10th of Feb having obtained evidence that that Charles Hanson of Canaan, Vt. was aiding and assisting in running property into Lower Canada, I arrested him forthwith and transmitted to the District Attorney the evidence against him, together with his situation.

And having obtained abundant respectable information which proved that Sanders Welch Cooper in the employment of Herman Beach of Canaan [had been] running property across the lines to the enemy's territory for five or six months past . . . I thought it proper to apprehend him before he could pilot the enemy's forces into our territory . . . His offences were immediately reported to Titus Hutchinson, Esq. District Attorney for the District of Vermont; and the said Cooper has been taken into custody by the civil authority on a warrant predicated by the said Attorney.

On or about the 10th of February, Charles Hall of Hereford, Lower Canada, came to Stewartstown in the night [evading our patrols by taking a] circuitous route through the snow where there was no road. . . and took up his residence at [a] house [that] has been a common receptacle for Canadians and smugglers.²⁵ Being apprised of Hall's situation, I have secured him as a proper prisoner of war to the United States.²⁶

25 The elided material describes the house as belonging to Thomas Eames of Northumberland, a person "whose character is notorious for smuggling, and who once fled his country for adding 'ty' to a word in a note of hand, without the consent of the signer," Hodsdon, *supra* note 23, at 3.

26 *Id.* A long and scathing response to this account was published as Letter to the Editor, *To Isaac Hodsdon*, THE [CONCORD] GAZETTE, Apr. 5, 1814, at 1 (demanding to know, "who invested you, most noble captain, with authority to act as Judge, Jury, and Executioner, upon these men?"). See also *infra* text accompanying notes 78–79 (supporting this viewpoint).

On February 24, 1814, Herman Beech, Esq. presented to Justice Arthur Livermore of the New Hampshire Supreme Court an application for a writ of habeas corpus on behalf of Charles Hanson, Sanders Welch Cooper, and Charles Hall, "all citizens of the United States" who had "been arrested by persons claiming to act under the authority of the President of the United States," and were being confined by Hodsdon "without colour of authority."²⁷ The application sought a court order for production of the petitioners "together with the time and causes of their imprisonment on said writ returned before your honor that they be dealt with as to law and justice appertains."²⁸

In order to show that the three applicants were being held by Hodsdon, counsel filed several supporting affidavits.²⁹ The affidavit of Joseph Loomis, a local judge,³⁰ reported that he had been at the fort in January "and there saw imprisoned Austin Bissell a private citizen of the United States who has since been discharged."³¹ Loomis continued:

At that time I remonstrated with said Hodsdon against such unreasonable arrests. Said Hodsdon observed that he was acting under the authority of the United States and that he should continue to arrest all such persons as said or did anything disrespectful to the army or the laws.

. . . [T]he conduct of those now commanding the

27 The document is in the New Hampshire State Archives file *In re Hodsdon*, Strafford County Superior Court Records 1814, Folder 38, Doc. 1. A newspaper account asserts that a similar application had been made to the Court of Common Pleas during the month but denied on the grounds that the writ could not issue from that court. See *Extract of a Letter dated Orford, N.H., February 27, 1814*, FED. REPUBLICAN, Mar. 16, 1814, at 2.

28 *In re Hodsdon*, *supra* note 27, Doc. 1.

29 *Id.*, Docs. 2–6.

30 This detail comes from the clerk's endorsement to his affidavit, Joseph Loomis Aff., Feb. 15, 1814, *In re Hodsdon*, *supra* note 27, Doc. 2.

31 Bissell's affidavit dated February 16, 1814 in which he states briefly that he was imprisoned without cause on January 10 and thereafter released is in the *In re Hodsdon* file, *supra* note 27, as Doc. 6. On May 24, 1815, the New Hampshire Supreme Court ordered Hodsdon to pay Bissell a fine of \$50 and court costs of \$18.92. See House Committee on Claims, Report No. 8, 19th Cong., 1st Sess., at 3–4 (Dec. 23, 1825). The context of this report is described *infra* text accompanying notes 60–73.

military post at that place is such as to make the civil wholly subservient to the military law and unless suitable measures are taken to remedy the grievances of the inhabitants of that part of the country many of the peaceable inhabitants will be driven from their homes and be compelled to abandon their property to a lawless military force.³²

In response to the application, Justice Livermore on February 28 issued an order requiring Hodsdon to produce the prisoners by March 24 at the home of Colonel William Webster in Plymouth.³³ On the night of March 3, Hodsdon moved Hall and Cooper to an Army barracks in Canaan, Vermont under the command of his subordinate, Lieutenant Thomas Buckminster.³⁴ Justice Livermore's order was

32 Affidavit of Joseph Loomis, Feb. 15, 1814, *In re Hodsdon*, *supra* note 27, Doc. 2. A substantially similar account of the facts appears in a letter from Coos County dated February 18, 1814 that was printed as *Highly Interesting Communication*, THE CONCORD GAZETTE, Mar. 1, 1814, at 3. Hodsdon's letter cited *supra* note 23 was a response to this account.

33 Writ of Habeas Corpus, Feb. 28, 1814, *In re Hodsdon*, *supra* note 27, Doc. 7. A newspaper account of this appeared as *Capt. Hodgdon [sic] – and Military Despotism*, THE [WINDSOR, VT.] WASHINGTONIAN, Mar. 21, 1814, at 3 (commenting "It is doubted whether Capt. Hodgdon [sic] will permit the writ to be executed.").

34 Affidavit of Jeremiah Eames, Apr. 14, 1814, *In re Hodsdon*, *supra* note 27, Doc. 12. As noted in the second paragraph of Hodsdon's letter to Justice Livermore quoted *infra* text accompanying note 38, Hanson does not appear to have been in Hodsdon's custody.

Moving a prisoner in an attempt to evade a writ of habeas corpus from the New Jersey courts during the Revolutionary War had led to a rebuke to a subordinate from George Washington. See Letter from Elias Dayton to George Washington, June 8, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08636>, ver. 2013-06-10; Letter from Pierre De Peyster to George Washington, June 9, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08644>, ver. 2013-06-10; Letter from George Washington to Pierre De Peyster, June 10, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08650>, ver. 2013-06-10; Letter from George Washington to Elias Dayton, June 11, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08661>, ver. 2013-06-10; Letter from Elias Dayton to George Washington, June 17, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08706>, ver. 2013-06-10. See generally HALLIDAY, *supra* note 5, at 240–41 (describing similar

served upon Hodsdon on March 4,³⁵ and he endorsed upon it:

Stewartstown NH March the 14th 1814

I hereby certify that the within named Charles Hanson, Charles Hall, and Sanders Welch Cooper are not imprisoned or detained in my Custody in the State of New Hampshire nor were they on the receipt of the within Writ. Isaac Hodsdon Captain 33d Regt. US Infantry³⁶

Perhaps realizing the vulnerability of this literally true but fundamentally evasive return,³⁷ Hodsdon also wrote an accompanying letter to Justice Livermore:

Sir, Enclosed is a writ commanding me to have before you on the twenty fourth instant Charles Hanson Charles Hall and Sanders Welch Cooper prisoners in my custody together with the time and cause of their imprisonment alias confinement.

Charles Hanson of Canaan Vt. and the only person whom I ever knew by that name is not a prisoner in the custody of any person. But is

misconduct in period surrounding English Habeas Corpus Act of 1679); *infra* note 116.

- 35 See Affidavit of Nathaniel Beach, Apr. 12, 1814, *In re Hodsdon*, *supra* note 27, Doc. 11:

[O]n the fourth day of March A.D. 1814 I called at Captain Isaac quarters and asked him to take bonds for Charles Hall and Sanders Welch Coopers appearance to any amount. He said no I cannot for I have had a Writ of Habeas Corpus today ordering me to take them to Plymouth. If I should take bonds they might be out of the way. He then observed that he should not make any return of Charles Hall but holds him as a prisoner of war that he did not know in what way he should make return on the writ whether by taking them down or sending them. He then said that he should not take any council on the subject but consult his own feelings and make such returns as he thought proper.

A similar account appears in the Affidavit of Jeremiah Eames, *supra* note 34, who accompanied Beach on this visit. The March 4 service date is also supported by Rule on Isaac Hodsdon, [Apr. 19, 1814], *In re Hodsdon*, *supra* note 27, Doc. 13.

- 36 Writ of Habeas Corpus, *supra* note 33.

- 37 See *infra* note 87 and accompanying text.

about his ordinary business at home and elsewhere.

Charles Hall, of Hereford Lower Canada, now a prisoner of War in the United States barracks at Canaan Vt. under command of Lieutenant Thomas Buckminster, will probably remain at that post until the pleasure of the President of the United States is made known touching that point.

As the civil authority takes no cognizance of prisoners situate[d] like him, I deem it inconsistent with my duty to deliver him into the hands of a civil officer.

Sanders Welch Cooper of Canaan Vt. having been arrested and being in confinement in a Guard house in said Canaan in possession of U.S. troops under command of Lieutenant Buckminster under a charge of furnishing provisions to the enemy. Supported by respectable testimony and a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody. Your Honor will therefore readily excuse me for not producing the prisoner agreeable to the directions of the enclosed writ.³⁸

At this point, counsel for the petitioners sought and obtained from the court an order requiring Hodsdon to show cause in Cheshire at the beginning of May why he should not be held in contempt for having failed to make “any legal and sufficient return” to the writ.³⁹ Hodsdon responded by providing an affidavit stating:

that being under necessity of repairing to Boston from Stewartstown on public business he left said

38 Letter from Captain Isaac Hodsdon to Justice Arthur Livermore, Mar. 14, 1814, *In re Hodsdon*, *supra* note 27, Doc. 9.

39 Rule on Isaac Hodsdon, [Apr. 19, 1814], *id.*, Doc. 13. This document recites that it was issued “on motion of Parker Noyes and James Wilson Counsel for the said Hanson Hall and Cooper” but contains no indication of service upon Hodsdon. As will appear in the block quote that follows in text Hodsdon admittedly did receive some version of this document but it may not have contained these items of information, of which he later professed ignorance. See *infra* text accompanying note 49.

Stewartstown [and] on his journey . . . received . . . a copy of an order of the Honorable Supreme Judicial Court to appear before said Court at Cheshire on the first Tuesday of May next to shew cause why an attachment should not be awarded against him for a contempt of and neglecting to make a legal return on a certain writ of Habeas Corpus to him previously directed by the Honorable Arthur Livermore one of the Justices of said Court. That he has no time or opportunity to obtain evidence to appear at said court. But that he has important and necessary testimony that he shall be able to procure by the next term of the said Honorable Court and that he could not safely go to trial without said testimony and writings, and that such is the great necessity of the business which calls him to Boston, having commenced the journey he is altogether unable to appear agreeably to the order of the Honorable Court aforesaid and shew cause as aforesaid.⁴⁰

What had so far been civil contempt proceedings now became criminal contempt proceedings captioned *State v. Isaac Hodsdon*. The court issued a *capias*.⁴¹ Directed to any sheriff or deputy sheriff in the state, it recited the procedural history and commanded the recipient to “apprehend the body of the said Isaac Hodsdon . . . and him safely keep . . . to answer for said Contempt.”⁴² Hodsdon was in fact taken into custody and, accompanied by counsel, appeared in August before a Justice of the Peace who took his recognizance for \$500 as well as that of a surety, Jacob M. Currier, in the same

40 Affidavit of Isaac Hodsdon, Apr. 27, 1814, *In re Hodsdon*, *supra* note 27, Doc. 14.

41 Actually it issued two, but the first was returned *non est inventus*. *Id.*, Doc. 15.

42 *Id.*, Doc. 16. This document described the contempt proceedings, noted *supra* text accompanying note 39, as being commenced “on motion of Parker Noyes and James Wilson Esqs Counsel for the said Hanson Hall and Cooper.” Considering that, as will appear in the next sentence of text, Hodsdon was taken into custody on the authority of this document it seems improbable that he did not see it, but, as noted *supra* note 39, he consistently claimed not to know the identity of those pursuing the private criminal contempt action.

amount for an appearance at the September term of court.⁴³

In Hodsdon's account, he did duly appear with his lawyer, John Holmes, who demanded a trial.⁴⁴ Hodsdon continued that the Attorney General had responded that:

“although he was unapprized of the nature of the transaction out of which the prosecution originated and although it was commenced by some private person, if the Court should be of an opinion that it was his duty, he would pursue the prosecution.” And the answer from Judge Smith (who was the only Judge on the bench) was that he did not consider that the States Attorney was holden to pursue the prosecution.⁴⁵

The case was, Hodsdon thought, then adjourned until

43 The apprehension and recognizance are endorsed on the capias itself, *supra* note 42, and reported by Hodsdon in Affidavit of Isaac Hodsdon, Feb. 11, 1816, *In re Hodsdon*, *supra* note 27, Doc. 18. The presence of counsel is noted in Statement of the Case, [n.d.], *id.*, Doc. 20.

44 Affidavit of Isaac Hodsdon, Feb. 11, 1816, *id.*, Doc. 18. He also seems to have filed a written justification for not responding to the order served upon him during his trip to Boston. See Affidavit of Isaac Hodsdon, n.d., *id.*, Doc. 17. This contains an apparent slip of the pen that may be of significance. With respect to Cooper the document literally reads:

That Saunders Welch Cooper was held upon suspicion of smuggling until information could be sent to the District Attorney of the District of Vermont and his warrant to arrest him be obtained. And that the District Attorneys warrant was *in* his justification when he returned the Writ of Habeas Corpus and that on the twenty first day of the same month or as soon as an officer could be obtained, Cooper was arrested under the praecipe from the District Attorney and was recognized to appear before the District or Circuit Court of Vermont.

I have emphasized the word “in.” It seems to be unnecessary and the remainder of the sentence reads fine without it. My speculation is that Hodsdon began to write “was in his possession,” but instead decided upon “was his justification,” and inadvertently failed to delete the “in.” If this is correct, Hodsdon's story was variously that he was holding Cooper in expectation of the arrival of a warrant from Vermont (this version), was holding him because he had received a warrant from Vermont, *see infra* text accompanying note 51, and that Cooper had already been arrested on the Vermont federal charges at the time the writ was served, *see infra* text accompanying notes 52, 64.

45 Petition of Isaac Hodsdon, Dec. 7, 1816, Legislative Petitions Collection, New Hampshire State Archives.

February on the same security.⁴⁶ The clerk, however, recorded his appearance as being due in November.⁴⁷ Hodsdon did not appear then, resulting in an order forfeiting his and Currier's bonds.⁴⁸ When Hodsdon got back to the court to explain all this, it responded with an order to the effect that if he paid costs and notified the private prosecutor, he would have his day in court and a trial on the original cause of action as fully as if there had been no default.⁴⁹ However, Hodsdon maintained, being ignorant of the identities of the private prosecutors he could not fulfill this condition, and execution was issued against him and Currier for the \$500 bonds.⁵⁰

Hodsdon now turned for relief to the New Hampshire legislature, filing a long petition that (a) provided an account of the procedural history and (b) complained of the injustice of the public-private enforcement framework in which he found himself.⁵¹

46 Affidavit of Isaac Hodsdon, *supra* note 43.

47 In his petition, *supra* note 45, Hodsdon had a plausible explanation for the confusion:

[Y]our petitioner begs leave to suggest that the cause of this default was as follows viz. that under the new arrangement of Courts it was required for the first time that the S.J.C. should be holden in Novbr in that county and the Clerk having been accustomed to take recognizance at the September term returnable in February at the time of speaking the recognizance did not recollect that an intermediate Court was to be holden between September and February and afterwards when recording the said recognizance, recollecting the November term, he recorded it in such a manner as to require your petitioner to appear in November.

48 *Id.*

49 *Id.*

50 *Id.*

51 In addition to filing a petition, Hodsdon also had his lawyer, William Merchant Richardson (who had by now become Chief Justice), write a letter to State Representative (later Congressman) Josiah Butler, who had formerly clerked in his office. See CHARLES H. BELL, *THE BENCH AND BAR OF NEW HAMPSHIRE* 72, 230 (Boston, Houghton Mifflin & Co. 1894) (presenting biographical sketches of Richardson and Butler).

Richardson recounted in his letter that the habeas "application was made to Judge Livermore . . . not by the men arrested but by certain characters who thought it not for their interest to have the intercourse with Canada checked," that he had suspected one Curtis Coe, an active Federalist, see RANSOM H. GILLET, *DEMOCRACY IN THE UNITED STATES* 74 (New York, D. Appleton & Co. 1868), as the private prosecutor but had discovered this not to be the case and still did not know "but have understood it was one of Coe's associates in the upper part of the state." In any event, Richardson continued:

As recounted above, when Hodsdon replied by letter to the writ of habeas corpus he reported with respect to Cooper that “a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody.”⁵² The transcription of this letter contained in Hodsdon’s petition to the legislature, however, rendered the last few words as “complaint and warrant & taken him into custody.”⁵³

In addition to explaining his non-appearance as resulting from confusion over court dates, Hodsdon in his petition denounced the structure of the legal proceedings against him. The State, he said, had accused him of an “offence of a public nature,” and brought him into court, where the State’s attorney had declined to prosecute.⁵⁴ But, he continued, the court had stated that it could not dismiss the charges because it “had not authority [nor was] at liberty to proceed, either to acquit or condemn the accused, until he himself should (if possible) procure some private citizen to prosecute him,” and pursue or settle the private contempt action.⁵⁵ Hodsdon called this “unprecedented in the Jurisprudence of every other court, but that of New Hampshire for 1814 and 1815 . . . [Y]our petitioner is ignorant

I have never doubted that he intended to act honestly and justly, but his situation was a difficult one. I was his counsel, but was so well convinced that his conduct was correct and his case was a hard one that I have taken no fees nor do I ever intend to take any. I hope you will look into his case and exert your self in his behalf as far as is proper.

Letter from William Merchant Richardson to Josiah Butler, Dec. 7, 1816, Collection of Personal Papers, Document Case 5035, Folder 37, New Hampshire State Archives.

Interestingly, as the third installment of this project will discuss further, Richardson in his capacity as Chief Justice was soon to write *Merrill v. Sherburne*, 1 N.H. 199 (1818) (invalidating on separation of powers grounds legislative interference with judicial proceedings).

There is a full discussion of the background of Richardson’s assumption and occupancy of the Chief Justiceship, as well as his low opinion of Livermore, in JOHN PHILLIP REID, *LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE* 183–86, 191–92 (2012).

52 See *supra* text accompanying note 38.

53 Petition of Isaac Hodsdon, *supra* note 45, at 7. Of course, if this had been so, Hodsdon would have had a much stronger excuse for not producing Cooper than simply the circumstance of his being wanted for an appearance in federal court in Vermont, whether a warrant had arrived or not. See *supra* note 44.

54 *Id.* at 4.

55 *Id.*

who the private prosecutor is, and if he could ascertain who he is, your petitioner would be compelled by the said decree to pay him whatever sum his corrupt inclination might lead him to extort from your petitioner, or not obtain the discharge aforesaid.”⁵⁶

On June 26, 1817, both Houses passed and the Governor signed, “An Act Granting Relief to Isaac Hodsdon in Certain Proceedings had Before the Supreme Judicial Court.”⁵⁷ After a recitation of the procedural history, this enactment provided that if Hodsdon appeared at the September term of Strafford Superior Court and tendered security acceptable to the state’s attorney for his continued appearance “to answer for any contempt towards the late Supreme Judicial Court,”⁵⁸ the state’s attorney was authorized to discharge Hodsdon and Currier from their prior recognizances. No detailed account of these proceedings has yet surfaced,⁵⁹ but the two recognizances were in fact discharged.⁶⁰

On January 31, 1822, Hodsdon signed a petition to Congress seeking compensation for his expenses in connection with his various legal entanglements.⁶¹ In this document Hodsdon recounted that, in conformity with his orders,⁶² he had

detected sundry persons who were furnishing the

56 *Id.*

57 8 LAWS OF NEW HAMPSHIRE: SECOND CONSTITUTIONAL PERIOD, 1811–1820, at 641 (1920).

58 The prior Supreme Court had been abolished in 1816, an episode in the ongoing struggle for control of the New Hampshire judiciary that will be further discussed in the next installment of this project. See JOHN PHILIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 154–62 (2009); see also 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 65 (Alfred S. Konefsky & Andrew J. King eds., 1982); see generally JOHN H. MORISON, LIFE OF THE HON. JEREMIAH SMITH, LL.D. 265–79 (Boston, Charles C. Little & James Brown 1845).

59 However, there is a fair chance that one will surface when resources exist to complete the archival processing of unsorted court papers resident in the New Hampshire State Archives. Recovering this material would likely help to illuminate the issues raised *infra* Part III(B)(1)(b), which are currently obscure, see *infra* text accompanying notes 177–84.

60 See Judgment Book of Superior Court, Vol. H, Feb. 1817 - Sept. 1819, at 270, New Hampshire State Archives.

61 Petition of Isaac Hodsdon, Jan. 31, 1822. This document was submitted with a copy of General Cushing’s orders described *supra* note 21, and the two are attached to each other at the Maine Historical Society, Coll. 8, Box 1/4.

62 See *supra* text accompanying note 21.

Enemy with Provisions . . . some of whom being citizens of the United States were found crossing into the Province of Lower Canada. These your petitioner caused to be conducted from Lower Canada into the United States . . . [Y]our petitioner has been prosecuted in three separate actions for falsely imprisoning those citizens who were found within the Province of Canada, and were brought into the United States and were restrained of their liberty no longer than was necessary for that purpose . . . [Y]our petitioner has been compelled to appear and answer from Court to Court. . . for doing what he was ordered to do by his superior officer, and which if he had omitted the doing of, would have rendered him obnoxious to martial law.⁶³

As to the three prisoners sought by the writ of habeas corpus, Hodsdon wrote, one had been at liberty, one “was a prisoner of war and not entitled to any benefit of such a writ,”⁶⁴ and “one was in the Custody of the Civil Authority of Vermont at the instance of the District Attorney on a charge for furnishing the enemy with provisions.”⁶⁵ None of the three, he said, “were subjects of New

63 Petition of Isaac Hodsdon, *supra* note 61, at 4. Nothing in the elided material explains the “that purpose.”

64 *Id.* This is a reference to Charles Hall, *see supra* text accompanying note 38, who, Hodsdon, reported, “died before the prosecution was commenced,” Petition of Isaac Hodsdon, *supra* note 61, at 8. Presuming that “the prosecution” refers to Hodsdon’s prosecution for contempt, this would put the date of Hall’s death sometime between March of 1814, when the writ was served, *see supra* note 35 and accompanying text, and late April of that year, when Hodsdon was served with the order to show cause why he should not be held in contempt, *see supra* note 40. If this dating is correct, it is possible that there was never an inquiry (or at least a response to an inquiry) made to Washington as to how Hall should be dealt with. *Cf. supra* text accompanying note 38 (reporting Hodsdon’s statement that Hall would probably remain in military detention until the President’s pleasure were known). In any event I have not been able to locate any such correspondence.

65 *Id.* at 4. As set forth, *supra* note 44, Hodsdon’s accounts on this point displayed considerable variation. Recall that in writing to Justice Livermore Hodsdon had said that “Sanders Welch Cooper of Canaan Vt.” was “in confinement in a Guard house in said Canaan in possession of U.S. troops under command of Lieutenant Buckminster under a charge of furnishing provisions to the enemy.” *See supra* note 38 and accompanying text.

Hampshire nor imprisoned within the State.”⁶⁶ Hodsdon accordingly sought reimbursement from “the Government of the United States, the orders of whose officers he has strictly obeyed,” for his expenses “in defending himself in prosecutions brought against him for doing a duty, which he was bound as a subordinate officer to do.”⁶⁷

This petition in due course resulted in a report from the House Claims Committee.⁶⁸ In addition to the legal proceedings already noted, this document reported that Cooper had recovered a verdict against Hodsdon in Vermont for \$24.50 in damages and \$35.84 for his conduct in causing Cooper’s arrest by the District Attorney in the federal criminal proceedings,⁶⁹ which were ultimately dropped.⁷⁰ The committee also reported that on May 24, 1815, the New Hampshire Supreme Court had ordered Hodsdon to pay Bissel a fine of \$50 and court costs of \$18.92.⁷¹ The committee noted that it had obtained confirmation of the facts from “the Honorable John Holmes, now of the Senate.”⁷² It continued:

The committee deem it unnecessary to enter into an argument to prove that, where an officer of the Government, acting under its orders, in good

66 Petition of Isaac Hodsdon, *supra* note 61, at 4. As already noted Hodsdon had made the same statement to Justice Livermore but had not denied that, inasmuch as the men were in the custody of his military subordinate, he had the ability to produce them. See *supra* text accompanying note 36; *infra* note 86 and accompanying text.

67 Petition of Isaac Hodsdon, *supra* note 61, at 4.

68 See House Committee on Claims, Report No. 8, 19th Cong., 1st Sess. (Dec. 23, 1825).

69 See *supra* note 44 (containing Hodsdon’s account of having sent information to the District of Vermont to procure Cooper’s arrest).

70 See MERRILL, *supra* note 22, at 96 (reporting that Cooper was sent to Vermont “to be tried for treason. He was accused of being a smuggler, and of having joined the militia that he might give assistance to those desiring to aid the enemy. He was not tried, however, on account of his youth and the close of the war, and, after his death, years later, his widow obtained a pension for his services”). For an extended biographical sketch of Cooper that passes over this episode see Chester Bradley Jordan, “Saunders W. Cooper,” in 1 PROCEEDINGS OF THE BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE 169 (n.s. 1900). As indicated in the various documents already cited, the most common spelling was “Sanders.”

71 See *supra* note 31.

72 See Report No. 8, *supra* note 68, at 4; see also *supra* text accompanying note 44 (noting Holmes’s appearance as Hodsdon’s counsel).

faith, has been subjected to the payment of money [the officer] has a just claim for indemnity; as this principle has been frequently recognized by different committees, and in several acts of Congress.⁷³

The committee accordingly recommended that Congress pass a bill compensating Hodsdon for the amounts assessed against him and the costs of his defense in the various proceedings.⁷⁴

The committee's report aroused a fair amount of newspaper comment. A letter in the *Concord Statesman & Register* attacked the committee's conclusion that Hodsdon was entitled to be paid "both on principle and precedent,"⁷⁵ demanding to know why "the injured and insulted people of the United States" should refund the penalties imposed upon "this upstart tyrant" who considered "his epaulette and sword to contain a charm of irresistible power over the civil law" and "shut up republican citizens with. . . as little ceremony as he would pen his pigs."⁷⁶ The *New-Hampshire Patriot* responded that Hodsdon had done "his duty in stopping and arresting traitors that were aiding the public enemy," and had been "illegally arrested and fined for executing the orders of his superior officer, . . . which orders were in conformity to law and right."⁷⁷

In any event, the legislation passed and Hodsdon was paid.⁷⁸

73 Report No. 8, *supra* note 68, at 4.

74 *Id.*

75 *Id.* The full text of the report had been published as *Isaac Hodsdon's Case*, N.H. PATRIOT, Jan. 16, 1826, at 2.

76 Tax Payers, Letter to the Editor, *For the Statesman & Register*, THE CONCORD STATESMAN & REGISTER, Feb. 14, 1826, at 2. The letter noted that the Committee's information had been "confirmed by Mr. Holmes of the Senate, who was counsel for this Capt. Kid." *Id.*

77 N.H. PATRIOT, Feb. 16, 1826, at 2. The two competing views reflected in this paragraph of text mirror a larger political transformation in which military officers were coming to be seen "as apolitical instrument[s] of public policy" rather than political actors like other public officials. See William B. Skelton, *Officers and Politicians: The Origins of Army Politics in the United States Before the Civil War*, 6 ARMED FORCES & SOC'Y 22, 27-28 (1979).

78 See Act of May 16, 1826, 6 Stat. 342, Ch. 54 (compensating Hodsdon for "judgments recovered against him, in the states of New Hampshire and Vermont, by reason of his enforcing the laws of the United States, while acting as a captain . . . during the late war, and for his expenses in defence of a proceeding against him before the Supreme Judicial Court of New Hampshire."); [Annual Report of the Department of War to the Senate], Nov. 26, 1827, at 167 (showing

III. The Interwoven Strands of Legal Remedies for Government Misconduct

As Hodsdon's story illustrates, those aggrieved by perceived abuses of government power through the early decades of the 19th century had a variety of means to achieve legal redress. This section describes, first in the habeas context and then more generally, some of the principal remedies that litigants could invoke to confine public officials to the lawful exercise of their authority. This section also shows that the period was in certain respects a transitional one, which saw some remedies beginning to face challenges.

A. Habeas Corpus

Hodsdon would not have encountered his difficulties if he had just appeared in court with the prisoners in response to the writ of habeas corpus and asserted any legal grounds he wished supporting his entitlement to retain them in custody.⁷⁹ That is what he should have done, following the contemporaneous example of his superior officer, General Thomas Cushing.⁸⁰

payment to Hodsdon from appropriated funds of \$423.68, the amount of his approved compensation).

A number of similar cases beginning around 1800 are reported in James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1913–14 (2010), which describes the development of the practice by which courts found wrongdoing by officers but expected them to be routinely reimbursed by Congress if it made the determination that doing so was in the public interest. Under this two-step transparent process the officer assumed the initial risks but Congress effectively provided the immunities that it concluded were necessary for officials to exercise their duties zealously. *Id.* at 1925–26. For another example of this process at work see *infra* text accompanying note 114 (describing case of Andrew Jackson). Cf. *infra* note 266 (observing that modern Supreme Court has failed to acknowledge this history).

79 See *State v. Dimick*, 12 N.H. 194, 197 (1841) (observing that “If the laws of the United States justify the detention of the applicant, there is nothing illegal,” and rejecting on merits claim of soldier for discharge from Army). See also Freedman, *supra* note 2, at 607–08 & 608 n.86 (emphasizing that core principle of writ is that determination of whether or not an imprisonment is lawful is made by a judge); *supra* note 26 (describing 1814 newspaper piece taking same position).

80 The details in the following paragraph are taken from *Commonwealth v. Cushing*, 11 Mass. (10 Tyng) 67 (1814). For a similar case at the same time see *Commonwealth v. Harrison*, 11 Mass. (10 Tyng) 63 (1814) (granting habeas

In March of 1814, Cushing received a writ of habeas corpus from the Massachusetts Supreme Court ordering him to produce a soldier named William Bull, who had allegedly been enlisted in the Army while underage. General Cushing filed a return to the writ explaining that Bull was in custody pursuant to the sentence of a court martial that had convicted him of desertion and personally brought Bull before the court. The court heard full argument from counsel and, construing the relevant federal recruitment statutes,⁸¹ ordered his discharge. Cases like this were common⁸² and regularly adjudicated by the state courts.⁸³

corpus discharging from service soldier enlisted as a minor). This latter case was of the type that I have previously dubbed a “nested habeas corpus,” Freedman, *supra* note 2, at 606 n.76. The writ was brought by the captain of a Russian ship claiming the minor’s services as an apprentice. But the court set the minor free, discharging him from the Army and leaving the ship’s captain to pursue whatever legal remedies he might have on the apprenticeship claim. See Oaks, *supra* note 5, at 275–76.

81 Act of Jan. 20, 1813, 2 Stat. 791, Ch. 12, Sec. 5; Act of Jan. 11, 1812, 2 Stat. 671, Ch. 14, Sec. 11.

82 See, e.g., *In re John Lewis Connor*, July 18, 1812, Pennsylvania State Archives, Habeas Corpus 1809–1812. In that case, the Chief Justice of the state Supreme Court directed a writ of habeas corpus to the commander of a Navy gunboat in Philadelphia harbor calling for the production of Connor. The commander responded in a return of the same date that Connor was lawfully enlisted and continued, “I have here in Court the said John Connor . . . to do and be subject to, whatsoever the Court shall consider in his behalf.” On consideration of the matter the Court remanded Connor to his commander. See also *State v. Brearly*, 5 N.J.L. 555 (1819) (holding soldier properly enlisted).

83 See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 375–76 & n.a (1826) (citing cases from Pennsylvania, Maryland, South Carolina, Massachusetts, Virginia, and New York, including *In re Stacy*, described in the next paragraph of text, in which he wrote the opinion); Letter from [President] Thomas Jefferson to [Secretary of War] Henry Dearborn, June 27, 1801 (suggesting, successfully, that Dearborn discharge a minor soldier inasmuch as the father has “a compleat right in Virginia to [take him from] the military by a Habeas Corpus, which any of the state’s [. . .] will give [him]. of this I have known examples,” available at <http://founders.archives.gov/documents/Jefferson/01-34-02-0364>, ver. 2013-06-10. Scholars are in accord on this point, see Freedman, *supra* note 5, at 558 n.66 (collecting sources); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 98 VA. L. REV. 753, 788–89 (2013); see generally Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862, 886–87 (1994).

The state courts lost this authority through the rulings of the Supreme Court in *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871) and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). See Ann Woolhandler & Michael Collins, *The Story of Tarble’s Case: State Habeas and Federal Detention*, in *FEDERAL COURTS*

Similarly, in one well-known case during the War of 1812, General Morgan Lewis, the commander of a key American military post, arrested a citizen named Samuel Stacy on suspicion of spying for the British.⁸⁴ Lewis ordered a subordinate to confine Stacy, planning to try him as a spy before a court-martial.⁸⁵ In response to a writ of habeas corpus from the New York courts Lewis returned that Stacy “is not in my custody.”⁸⁶ Chief Justice Kent unsurprisingly considered this return “a contempt of the process,” inasmuch as Lewis had not (and could not have) returned that Stacy was not “in his possession custody or power.”⁸⁷ The case, he wrote, called for prompt initiation of contempt proceedings because a “military

STORIES 141 (Vicki C. Jackson & Judith Resnick, eds., 2010) (describing cases); see also Wilkes, *supra* note 5, at 1062–66 (describing jurisprudence in period between the cases).

Because they are in such tension with the original understanding, see Halliday & White, *supra* note 5, at 682 n.330, and because they are associated with attempts by the federal government to prevent northern state courts from freeing by habeas corpus fugitives claimed to be slaves, see generally Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1355–58, 1440 (2015), these cases are still controversial among many commentators, see ANTHONY GREGORY, *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING’S PREROGATIVE TO THE WAR ON TERROR* 310 (2013) (calling for cases to be overruled); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1807 (2013) (“Scholars now regard the reasoning of *Ableman* (and its sequel, *Tarble’s Case*) as reflecting a deep misunderstanding of the Constitution”) (citations omitted); Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1084–85 (2010); John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1740–42 (2012); see generally Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 754, 786–94 (2013), although there is no evidence that the Court is in any way troubled by them.

- 84 See TAYLOR, *supra* note 16, at 341. See also Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s Forgotten War*, 98 NW. U. L. REV. 1567, 1580–92 (2004) (discussing this and similar cases and their modern implications). There is a briefer discussion of the same issues in Jennifer K. Elsea, Cong. Research Serv., R42337, *DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS* 13–14 (2014). Sources relevant to Lewis’s claim of authority are to be found at Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WISC. L. REV. 681, 728 n.308 (2014).

85 See *In re Stacy*, 10 Johns. 328, 330–31 (N.Y. Sup. Ct. 1813).

86 *Id.* at 329.

87 *Id.* at 331–32. Hodsdon, of course, was in just this position. His return that two of the prisoners were not in his custody failed to mention that they were in the custody of an officer under his command, which is doubtless why he

commander is here assuming criminal jurisdiction over a private citizen . . . and contemning the civil authority of the state.”⁸⁸ The Chief Justice accordingly ordered that General Lewis be attached for contempt unless he either released Stacy or produced him in court in obedience to the writ of habeas corpus.⁸⁹ Stacy was released on the orders of the Secretary of War, who had already concluded that the detention was unjustifiable.⁹⁰

But we should not allow the brightness of habeas corpus in the historical constellation to mislead us into a belief that its rays alone were considered sufficient to chase the shadows of unlawful imprisonments from Earth.

Already in 1799, Alexander Hamilton, in his capacity as the country’s senior military commander,⁹¹ had written to the United States Attorney for the District of New York following the release of a soldier by a Virginia judge to express unease at the growing phenomenon of “the enlargement of soldiers on writs of Habeas Corpus issued by and returnable before state judges.”⁹² Hamilton requested a formal legal opinion “on the legality of this practice, and . . . also . . . whether upon such return it is necessary to produce the person who is the object of the Habeas Corpus.”⁹³ And in issuing such writs some state judges thought it necessary to defend their power to do so.⁹⁴

Furthermore, a nationally publicized episode during the War of 1812, and its highly visible aftermath, re-taught the enduring

felt the need to write his explanatory letter. *See supra* text accompanying note 37.

88 *In re Stacy*, 10 Johns. at 334.

89 *Id.*

90 *See* TAYLOR, *supra* note 16, at 341 & 538 n.71; Wuerth, *supra* note 84, at 1583 & n.103.

91 *See* RON CHERNOW, ALEXANDER HAMILTON 555–60, 562–66, 584 (2004).

92 Letter from Alexander Hamilton to Richard Harison, Aug. 24, 1799, *available at* <http://founders.archives.gov/documents/Hamilton/01-23-02-0356>, ver. 2013-06-10.

93 *Id.* It would of course be of considerable interest to read any reply from Harison, but I have been unable to locate one. Since both men were in New York City and had long known each other at the New York bar, *see* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 1–2 (Julius Goebel Jr. ed., 1964), there is a chance that Harison told Hamilton informally that he would not write the opinion because it would be unhelpful.

94 *See, e.g.,* State v. Brearly, 5 N.J.L. 555, 559–61 (1819) (defending in dictum right of state court to adjudicate matter). An example from a later period appears in *State v. Dimick*, 12 N.H. 194, 197 (1841) (discussed *supra* note 79).

lesson that habeas corpus, state or federal, was ultimately no stronger than the willingness of government officials to honor it.⁹⁵

After arriving in New Orleans to take charge of its defense, General Andrew Jackson on December 16, 1814 put the city under military government.⁹⁶ Following a series of engagements highlighted by the American victory at the Battle of New Orleans on January 8, 1815, the British withdrew on January 18.⁹⁷ General Jackson's proclamation of martial law, however, remained in effect week after week. The state militia remained in service, the populace became more restless, and General Jackson grew increasingly irritable in treating the city as a military camp that he had the absolute power to control. He even issued an order to a local newspaper on February 21 requiring it to receive official approval of its reporting on the progress of peace negotiations.⁹⁸ Because foreign citizens were entitled to release from the militia, a number of militiamen claimed (with a greater or lesser degree of accuracy) to be French citizens and obtained certificates to that effect from the French counsel Louis de Tousard; Jackson responded by ordering Tousard (who had fought for the Americans in the Revolution) and the newly-certified

95 The episode is the subject of the monograph MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP* (2006) and is well summarized by Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233 (1981). For a recent retelling making full use of these sources see Caleb Crain, *Bad Precedent: Andrew Jackson's Assault on Habeas Corpus*, THE NEW YORKER, Jan. 29, 2007, at 78, available at http://www.newyorker.com/arts/critics/books/2007/01/29/070129crbo_books_crain, which the author supplemented with a historiographical note, *Notebook: Jackson and Habeas Corpus*, available at http://www.steamthing.com/2007/01/my_essay_on_and.html. A very well-sourced account of the events is contained in 2 JAMES PARTON, *LIFE OF ANDREW JACKSON* 304–21 (New York, Mason Brothers 1860); see also ANDREW BURSTEIN, *THE PASSIONS OF ANDREW JACKSON* 212–14 (2003).

For examples of contemporaneous reports in the New Hampshire newspapers see *From New Orleans*, DARTMOUTH GAZETTE, May 31, 1815, at 4 (published in Hanover, N.H.), *Trial of General Jackson*, CONCORD GAZETTE, May 23, 1815, at 3, and *From New-Orleans*, THE FARMER'S CABINET, May 22, 1815, at 1 (published in Amherst, N.H.). Structural weaknesses of the writ are discussed *infra* note 116.

96 See PARTON, *supra* note 95, at 60–61 (reprinting proclamation).

97 See Sofaer, *supra* note 95, at 240; see also PARTON, *supra* note 94, at 259–76.

98 See PARTON, *supra* note 95 at 306–08 (reprinting interchange between Jackson and newspaper); Sofaer, *supra* note 95, at 240–41.

Frenchmen out of the city.⁹⁹

This measure led to an outraged letter to the editor of the *Louisiana Courier*:

[W]e do not know any law authorizing General Jackson to apply to *alien friends* a measure which the President of the United States himself has only the right to adopt against *alien enemies* . . . [I]t is time the citizens accused of any crime should be rendered to their natural judges, and cease to be brought before special or military tribunals, a kind of institution held in abhorrence, even in absolute governments.¹⁰⁰

Jackson had his soldiers arrest the letter's author, a prominent legislator named Louis Louaillier.¹⁰¹ As he was being seized he "called on people near-by to act as witnesses, and one of them, a lawyer named Pierre L. Morel, agreed to help him."¹⁰²

Morel first applied to Justice Francois-Xavier Martin of the Louisiana Supreme Court for a writ of habeas corpus. Judge Martin, however, responded, according to his own account, that the court

had determined in the preceding year . . . that its jurisdiction being appellate *only*, it could not issue the writ of *habeas corpus*. Morel was, therefore, informed that the judge did not conceive he could interfere; especially as it was alleged the prisoner was arrested and confined for trial, before a court martial, under the authority of the United States.¹⁰³

Morel then approached United States District Judge Dominick A. Hall "and requested a writ of prohibition against Louaillier's court

99 See PARTON, *supra* note 95, at 308; Sofaer, *supra* note 95, at 241–42; Crain, *supra* note 95, at 81.

100 Letter to the Editor, *Letter from A Citizen of Louisiana of French Origin*, LA. COURIER, Mar. 3, 1815, reprinted in PARTON, *supra* note 95, at 309–11 (publishing translation of letter to editor originally written in French) (original emphasis).

101 See *id.* at 311; Sofaer, *supra* note 95, at 242. For more on Louaillier, see 2 FRANCOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD 387–88* (New Orleans, Lyman & Beardslee 1829).

102 Crain, *supra* note 95, at 81.

103 MARTIN, *supra* note 101, at 394–95 (original emphasis). For a summary of the prior case, see *id.* at 402–03.

martial.”¹⁰⁴ Judge Hall, however, “felt that a prohibition could not properly issue without a hearing.”¹⁰⁵ Morel soon returned with an application for a writ of habeas corpus¹⁰⁶ on his client’s behalf, and Judge Hall ordered General Jackson to produce Louailler the following morning.¹⁰⁷ But Morel promised Judge Hall that prior to formal service of the order he would inform General Jackson of it, and did so.¹⁰⁸

Jackson exploded, arresting Hall and confiscating the writ itself from the hands of the court clerk.¹⁰⁹ The United States Attorney for the District of Louisiana, John Dick, then sought a writ of habeas corpus on Hall’s behalf from a state trial judge, who issued it; Jackson refused to obey it and ordered the arrest of both the judge and Dick.¹¹⁰ As it became clear that a peace treaty had been signed,

104 Cf. Freedman, *supra* note 2, at 606 n.77 (discussing “the sometimes obscure overlap between prohibition and habeas corpus”).

105 Sofaer, *supra* note 95, at 242 (footnote omitted). This may well have been Judge Hall’s reasoning but there does not appear to be any direct primary support for the proposition. Cf. MARTIN, *supra* note 101, at 394 (recounting, “Hall expressed a doubt of his authority to order such a writ at chambers, and said he would take some time to deliberate.”).

106 If in fact Hall’s prior concern had been with his authority to act in chambers, this application would have allayed it. Individual federal judges in the early national period routinely issued chambers orders granting writs of habeas corpus. See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 33–35 (2003).

107 See PARTON, *supra* note 95, at 312 (reprinting documents).

108 See *id.* (reprinting informational note from Morel to Jackson); Sofaer, *supra* note 95, at 242.

109 See Crain, *supra* note 95, at 82.

110 See MARTIN, *supra* note 101, at 403. The judge was not actually arrested, see Sofaer, *supra* note 95, at 243, but the United States Attorney was. See Letter from [United States Attorney] John Dick to [President] James Madison, Mar. 10, 1815, available at <http://founders.archives.gov/documents/Madison/99-01-02-4166>, ver. 2013-06-10:

[Jackson] denied the jurisdiction of the State judge, and immediately ordered him, for issuing the writ, and Me, for praying for it, to be arrested and Confined. The order, as far as it respected Myself, has been executed, and I now Occupy an apartment in the Military barracks, awaiting the turn of Events, or the Caprice of the Commanding General to be released.

The ground assigned by General Jackson for conduct which I must, until better instructed, deem an outrage upon the Constitution and the law, and a violation of the rights of the Citizen and of a Co-Ordinate branch of the government, is the Operation of Martial law, declared by him to exist. This Code, he alleges, annuls all others:

Jackson released his prisoners and discharged the militiamen from service.¹¹¹

When celebrations in the city had died down, Dick moved before Judge Hall for an order requiring General Jackson to show cause why he should not be held in contempt.¹¹² This was granted, and Jackson appeared in court. The only defense his attorneys would make was a lengthy statement discussing the perceived necessity of his actions; Jackson refused to respond to a series of factual inquiries about his conduct. The upshot was that Judge Hall fined Jackson \$1,000, which he paid, and that the Madison administration sent him a letter expressing its concern.¹¹³ After that, the country's acclaim for the Hero of New Orleans led to the matter fading into the background.¹¹⁴

Some decades later, when Jackson's finances were poor and his heroism firmly established in the public mind, his allies in Congress began a movement to have his fine refunded; after an extended political debate as to the propriety of his actions, this was done in 1844.¹¹⁵

the city of New-Orleans is a Camp, and its Military possession, as
Such, Suspends the power and arrests the operations of the judiciary.

For a further exposition of Jackson's views, see MARTIN, *supra* note 101, at 406–11.

111 See PARTON, *supra* note 95, at 315–16.

112 The account of the proceedings in the remainder of this paragraph is taken from MARTIN, *supra* note 101, at 416–27; PARTON, *supra* note 95, at 317–20; Sofaer, *supra* note 95, at 244–49; and Crain, *supra* note 95, at 83. These accounts differ in points of detail but all concur in supporting the summary in text.

113 See PARTON, *supra* note 95, at 320–21 (reprinting letter of Apr. 2, 1815 from Acting Secretary of War A.J. Dallas to Jackson). For a summary of the further correspondence between the two, see Sofaer, *supra* note 95, at 249–50; see also Crain, *supra* note 95, at 83–84.

114 See PARTON, *supra* note 95, at 321; Sofaer, *supra* note 95, at 250.

115 See ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833–1845*, at 478–79, 490–91 (1984); Sofaer, *supra* note 95, at 250–52; Crain, *supra* note 95, at 84; see generally *supra* note 78. On a personal level, Jackson seems to have reconciled with Judge Hall a few years after the events, see ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767–1821*, at 324 (1977).

When many of the same issues were raised by *Ex Parte Merryman*, 17 F. Cas. 144 (C.C. D. Md. 1861), key players, including Chief Justice Roger Taney and President Abraham Lincoln, had these events much in mind. See WARSHAUER, *supra* note 95, at 200–35 (observing that during the Civil War both men reversed their positions of the 1840's). For a well-done study of *Merryman*, see JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE*

These events must be understood in the context of the web of mutually reinforcing restraints on power that existed until the middle of the 19th century.¹¹⁶ However great or little the usefulness of habeas corpus in specific situations in the 18th and early 19th centuries,¹¹⁷ it was not a remedy that existed in isolation.¹¹⁸ As the

CIVIL WAR: THE TRIALS OF JOHN MERRYMAN (2011), which I reviewed at 99 J. AM. HIST. 929 (2012).

116 See *infra* Parts III(B)-(E).

117 As Hodsdon's case shows, the very nature of the habeas remedy was such that under some circumstances, even ones involving an unjust imprisonment, it might be of no use, e.g., if the prisoner had been released (like Bissell) or spirited away (like Cooper) prior to service of the writ. See *supra* note 34 and text accompanying notes 30, 33. See also 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730*, at 54 (2013) (noting that utility of writ was limited by need for petitioner to be within control of court). See generally JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM* 256–57 (2011) (observing that although habeas corpus is “indispensable” in safeguarding individual liberty it is “a limited and imperfect tool” because prisoner may be held in secret location or transferred abroad).

Moreover, continuing English controversies over suspensions of the writ, beginning with the American Revolution and continuing through 1801, made clear the potential vulnerability of the writ to majoritarian hostility, see HALLIDAY, *supra* note 5, at 250–56, a vulnerability reinforced in the American context by John Marshall's dicta in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) to the effect that the power of the federal courts to issue writs of habeas corpus (1) did not extend to state prisoners except in very limited circumstances, and (2) was exclusively dependent on Congress. Both views were wrong, see FREEDMAN, *supra* note 106, at 25–46. But the first survived until the enactment of the Habeas Corpus Act of Feb. 5, 1867, 14 Stat. 385 (current version at 28 U.S.C. § 2254), and, as will be discussed at length in the next installment of this project, the second was not repudiated by the Supreme Court until *Boumediene v. Bush*, 553 U.S. 723 (2008).

Meanwhile, as readers of New Hampshire newspapers would have been aware, see, e.g., *Further Suspension of Habeas Corpus*, N.H. GAZETTE, Aug. 12, 1817, at 3; *Foreign News*, May 30, *id.*, July 15, 1817, at 3, there was a controversial partial suspension of the writ in England during 1817–18 in consequence of disorderly protests in support of political and industrial reform. See JOHN PLOWRIGHT, *REGENCY ENGLAND: THE AGE OF LORD LIVERPOOL* 24–25 (1996); Van Vechten Veeder, *The Judicial History of Individual Liberty*, 16 GREEN BAG 529 (1904). See also [Lord] George Gordon Byron, “Beppo,” Canto XLVII (1817), reprinted in *THE POETICAL WORKS OF BYRON* 446 (Robert F. Gleckner ed., 1975) (“England! With all thy faults I love thee still . . . I like the Habeas Corpus (when we’ve got it”).

118 From this thought it follows that — notwithstanding the allure of habeas corpus as a subject for legal and historical writing — the efficacy of habeas corpus

next Part discusses, habeas was supplemented by, and often used in tandem with, not just other writs¹¹⁹ but also many different sorts of legal remedies.¹²⁰

B. Other Legal Remedies

1. Private

a. Damages Action

Private actions for damages against public officials for misconduct in office, whether denominated as false imprisonment, malicious prosecution,¹²¹ trespass,¹²² negligence, or otherwise, were

at any one moment is not necessarily a good proxy for how well government power is being constrained by law. A fair assessment of that question requires consideration of all the legal remedies available to those aggrieved. Cf. Freedman, *Past and Present*, *supra* note 1, at 42 (“Relying on a single legal remedy denominated habeas corpus to keep government power in check is a dangerous concentration of eggs in a single basket. . . [T]he existence of belt-and-suspenders systems for constraining the government multiplies the probabilities of success.”) As suggested *infra* Part IV, if the multiple systems are administered by different governmental actors whose incentives are to check rather than collude in each other’s improper aggrandizement so much the better for liberty.

119 See Freedman, *supra* note 2, at 597–608. Thus, for example, an alleged slave might challenge that status bringing a habeas corpus action, *see id.*, at 600–01. But the plaintiff might proceed under a writ of trespass, *see id.* at 600 n.47, or a writ of personal replevin, *see id.*, at 602–03 & nn.56–58. *See generally* LEA VANDERVELDE, *REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT* 8, 18–21, 49 (2014) (noting significance in Missouri of statutory freedom suits as supplement to habeas corpus).

120 See Meltzer, *supra* note 3. For example, the damages lawsuit by Peter Pearse against Clement March described *infra* text accompanying notes 142–45 took place after Pearse had utilized a writ of certiorari (rather than a writ of habeas corpus) to obtain his release from an imprisonment for contempt. *See* Freedman, *supra* note 2, at 602, 606–07. Similarly William Licht, who was summarily incarcerated for harboring a potentially indigent stranger, released on bail and awarded a writ of certiorari quashing the proceedings, *see id.* at 607 n.81, then sued the complainants for damages. *See infra* text accompanying notes 146–48.

121 See WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 41 & 195 n.67 (1994 ed.).

122 *See Morgan v. Hughes*, 2 T.R. 225, 231 (K.B. 1788) (“[W]here the immediate act of imprisonment proceeds from the defendant [e.g., a Justice of the Peace

a pervasive feature of the 18th and early 19th century Anglo-American legal landscape.¹²³ This section presents some representative colonial and early national cases.¹²⁴

(“J.P.”)], the action must be trespass, and trespass only; but where the act of imprisonment . . . is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other.”); *see also* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602-1791, at 593-96 (2009) (describing expansion of trespass action in England and colonies during 1760's to cover illegal searches and seizures).

The case of William Licht, who sued both the J.P. who imprisoned him and the townspeople whose complaint brought about the imprisonment, *see infra* text accompanying notes 146-48, presents a common fact pattern.

- 123 *See* William E. Nelson, *The Legal Restraints of Power in Pre-Revolutionary America: Massachusetts as a Case Study*, 18 AM. J. LEG. HIST. 1, 8-9 (1974); *see also* ELWIN L. PAGE, *JUDICIAL BEGINNINGS IN NEW HAMPSHIRE*, 1640-1700, at 67-68 (1959) (describing successful damages action in 1675 against marshal's deputy for false imprisonment in civil case); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-17 (1987) (describing Marshall-era suits against revenue officers). With respect to England, numerous examples appear at 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 927-28 (1992); *see also* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 473 (4th ed. 2002). *See generally* *Adams v. Dawson*, (Unreported, Supreme Court of NSW, Mar. 24, 1827, available at http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/adams_v_dawson) (reporting award, after directed verdict on liability for plaintiff, of £50 in false imprisonment action against magistrate); *Broadbear v. McArthur* (Unreported, Supreme Court of NSW, Mar. 14, 1827, available at http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/broadbear_and_wife_v_mcarthur_et_al) (affirming false imprisonment award of £290 against magistrates); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (1774) (affirming a verdict of £3,000 plus £90 costs recovered in England by a subject of Minorca against the Governor of Minorca for a false imprisonment in Minorca and Spain).

Such suits against officers for misconduct are to be distinguished from claims against the government generally (e.g. for compensation for services rendered or destruction of property), which was the area to which sovereign immunity extended, with the result that the legislature was the proper forum from which to seek redress. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1442-45 (1998) (studying pre-Revolutionary New York); *infra* text accompanying note 287.

- 124 My free mixing of the two periods reflects the fact that there was no relevant change on the American side as a result of Independence. *See, e.g., infra* note 156. *See generally* Richard F. Upton, *Centennial History of the New Hampshire Bar Association*, 15 N.H. B.J. 36, 41 (1973) (“With the advent of the Revolution in

(i) The False Imprisonment Strand and Its Neighbors

A money damages action for false imprisonment might be the only remedy sought against the responsible officer. A straightforward example from New Hampshire is the lawsuit that Richard Sinkler brought against a Justice of the Peace named John Tasker.¹²⁵ In October 1785, one Jacob Daniels commenced a criminal prosecution against Sinkler for assault.¹²⁶ Tasker ordered Sinkler to find sureties

1775, the colonial system of courts was continued in effect as was the great body of statute and common law.”). For additional examples from colonial Massachusetts of the sorts of private civil actions described in the next two sections of text, see NELSON, *supra* note 121, at 17–18.

- 125 Because local J.P.’s or magistrates played a central role in the administration of justice, see J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1600–1800*, at 36 (1986) (“The justices of the peace formed the essential link between the victim and the courts.”); HALLIDAY, *supra* note 5, at 147–53; RACHEL N. KLEIN, *UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY, 1760–1808*, at 40 (1990); Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in Marbury v. Madison*, 107 AM. POLI. SCI. REV. 241, 244 (2013) (describing powers Marbury would have exercised had he become a Justice of the Peace); Steedman, *supra* note 6, at 395; Edward Surrency, *The Courts in the American Colonies* (pt. 2), 11 AM. J. LEG. HIST. 347, 348–51 (1967); see also JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE 5–118* (1974) (providing detailed account of evolution of office in England before the middle of the 17th century); Patrick Peel, *The American Justice of the Peace, Legal Populism, and Social Intermediation: 1645 to 1860*, Paper Presented to Conference on Colonies and Postcolonies of Law, Princeton University (Mar. 18, 2011) (unpublished manuscript) (on file with Hofstra Law School Library) (discussing differences between social role of American and English J.P.’s), they were a natural target of damages actions, see, e.g., *Casbourn v. Ball*, 96 Eng. Rep. 507 (1773).

Thus, for example, in a single action Jonathan Shaw sued three J.P.’s for “unjustly and illegally” signing distress warrants resulting in his imprisonment for 10 days and claimed £600 in damages. He lost against all three defendants before three separate juries at three levels of proceedings ending in November 1764. See *Shaw v. Moulton*, Judgment Book of Superior Court, Vol. E, May 1764 - Feb. 1767, at 83–84, New Hampshire State Archives.

As to Tasker, the inhabitants of Barnstead (of which he was Town Clerk) had held a town meeting and sent a petition to the legislature in June of 1777 requesting that he be appointed as Justice of the Peace. This is recorded in the legislative petitions file of the New Hampshire State Archives as *Petition of the Inhabitants of Barnstead*, January 15, 1778.

- 126 Private criminal prosecutions are discussed *infra* Part III(B)(1)(b). In this case, Daniel filed a petition with Tasker beginning, “Humbly complaining in

for his good behavior until trial¹²⁷ but Sinkler, according to Tasker, refused.¹²⁸ The upshot was that Tasker ordered the constable to arrest Sinkler, who remained jailed for five days until eventually getting bailed out.¹²⁹ Sinkler sued Tasker for £200 in damages occasioned by the five days of false imprisonment. Tasker responded with a sham plea,¹³⁰ with the consequence that Sinkler was awarded the £200 plus costs.¹³¹ On Tasker's appeal, where the action was

Behalf of the People of the State of New Hampshire . . .,” and alleging that the assault was against the peace and dignity of the good people of the state. The document is to be found in Strafford County Case File No. 132, Strafford County Courthouse, Dover, New Hampshire.

- 127 This was routine procedure. *See generally* HENRY CARE, ENGLISH LIBERTIES, OR, THE FREE-BORN SUBJECT'S INHERITANCE BEING A HELP TO JUSTICES AS WELL AS A GUIDE TO CONSTABLES 137–39 (photo. reprint 2010) (1703) (describing duties of J.P.'s under English law in taking recognizances and noting, “Where one is bailable by law, action lies against the Justice of Peace that committed him” for failing to grant bail).

For a case similar to the one described in text see 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 428.

- 128 The lower half of the page containing the petition described *supra* note 126 contains Tasker's order to the sheriff for Sinkler's arrest and on the reverse a note from Tasker recording that “Sinkler Refused to find Bondsmen.” It would appear from the ultimate outcome of the false imprisonment action that Sinkler denied this.
- 129 The mittimus to the constable is in the same file as described *supra* note 126, along with notes that appear to be from the constable recording the dates of incarceration. These are consistent with the civil complaint described in the remainder of this paragraph of text.
- 130 The practice of interposing sham pleas, which, depending on the creativity of counsel for the defendant, might result in very amusing pleadings, had the effect that either party could assure that there would not be a trial in the court of first instance. (As to trials on appeal, see Freedman, *supra* note 2, at 609–10.) The practice worked as follows. If defendant put in a bad plea (as in this case, where Tasker's response to the complaint was, “He says he thinks it would be greatly for the peace of Barnstead if said Sinkler were always confined”), plaintiff would (as in this case) move successfully for judgment and defendant would appeal. If defendant put in a good plea, then plaintiff could either (a) move for judgment, which would be denied and plaintiff would appeal, or (b) join issue, in which case a trial would follow. *See* 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 64; Nelson, *supra* note 123, at 6. The same practice existed in Massachusetts and Connecticut, *see* NELSON, *supra* note 121, at xiii. For a more detailed discussion of the Massachusetts practice see William E. Nelson, *The Persistence of Puritan Law: Massachusetts, 1160–1760*, 49 WILLAMETTE L. REV. 307, 366–67 (2013).
- 131 These proceedings took place in the June term of 1786 and are recorded in the binder containing Judgments and Levies of the Strafford County Court of

tried for the first time,¹³² the jury awarded Sinkler £3 damages plus £13.9s.2d in costs; as far as the records reflect he actually was able to collect £9.¹³³

Similar simple lawsuits might be brought against other officers.¹³⁴ For example, during a clerical ordination service in February 1763, David Ring was allegedly harassing women seated in their portion of a church – “hugging and squeezing them pushing his hand around their necks and under their cloaks,” according to one witness – and was accosted by constable Offin French on the orders of magistrate John Page.¹³⁵ An altercation ensued in which, depending on which account one believes, Ring either tendered sufficient money to pay any fine or declared vociferously that he would neither pay nor be placed in the stocks.¹³⁶ This led, Ring claimed, to his being placed briefly in the stocks and detained for several hours.¹³⁷ It also led to a lawsuit by Ring against both officers.¹³⁸ When this was initially tried it led to a jury verdict of £13.15s. against Page

Common Pleas 1785 to 1790, at 112–15, Strafford County Courthouse, Dover, New Hampshire.

132 See *supra* note 130.

133 The proceedings on appeal are recorded in 1 Strafford County Superior Court Judgment Book, 1774–89, at 387–90, Strafford County Courthouse, Dover, New Hampshire.

134 See, e.g., Pickering v. Greley, Judgment Book of Superior Court, Vol. D, May 1760 - Nov. 1763, at 15–18, New Hampshire State Archives (recording claim, rejected by both trial and appeals juries, by John Pickering against Sheriff Richard Greley that Greley had wrongfully imprisoned him for three days on a civil attachment notwithstanding his tender of full amount required).

135 We have particularly good knowledge of the underlying facts in this case because a number of depositions were taken from witnesses living at a distance, and these are to be found in Provincial Case File No. 07956, New Hampshire State Archives. The quote in the text is drawn from the deposition of Ebenezer Stevens taken September 5, 1763 in *id.*

Various instances of criminal prosecutions in Massachusetts from the late 1600's through the mid 1700's arising from the disruption of church services are reported in Nelson, *supra* note 130, at 378. See also Freedman, *supra* note 2, at 614 (reporting 1629 English case of release on habeas corpus of parishioner who disrupted service by laughing at preacher).

136 The first version is in the deposition of Moses Jones taken November 12, 1763, in *id.*, and the second in the deposition of Simon Clough, n.d., in *id.* Cf. Hill v. Bateman, 93 Eng. Rep. 800 (1726) (holding that plaintiff stated a valid claim against Justice of the Peace who allegedly imprisoned him for destroying game rather than distraining his goods, which would have covered any penalty).

137 See Ring v. Page, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 424, New Hampshire State Archives.

138 *Id.*

and nothing against French.¹³⁹ Page successfully appealed this on procedural legal grounds,¹⁴⁰ and after remand Ring pushed ahead.¹⁴¹ This time he recovered nothing at trial or on appeal, and the defendants eventually collected court costs from him.¹⁴²

Sometimes the damages remedy for false imprisonment supplemented the relief that the injured party had already obtained by securing his release through other legal proceedings. Thus, for example, when a Justice of the Peace named Clement March secured the summary incarceration of one Peter Pearse for calling him a blockhead and rogue during a street-corner encounter in late 1769, Pearse gained his release within eight hours through certiorari proceedings.¹⁴³ After the underlying contempt proceedings had been quashed without objection,¹⁴⁴ Pearse brought a damages action against March. The latter's initial defense on legal grounds succeeded below but was reversed on appeal.¹⁴⁵ On remand, the jury rendered a verdict for March, but Pearse prevailed on appeal in September 1771, recovering a jury verdict of £7 damages plus costs of £9.10s.¹⁴⁶

In a similar case in 1770, a Justice of the Peace named Jethro Sanborn, acting on the complaint of two townspeople of Chester, New Hampshire, Stephen Moses and John Ordway, who were seeking to recover a statutory bounty, summarily incarcerated William Licht

139 *Id.* at 429. The jury's decision regarding French was plainly an exercise of its broad authority to do justice, *see, e.g., infra* text accompanying notes 163–66. As a matter of long-established law all the subordinate officers involved in a false imprisonment could be held liable. *See* 6 JOHN H. BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND*, 1443–1558, at 88 & n.7 (2003).

140 *See* Judgment Book of Superior Court, Vol. D, *supra* note 134, at 429 (ordering that the writ abate on the plea saved below). Provincial Case File No. 07956, New Hampshire State Archives, contains the text of French's plea in abatement that he was misnamed in the action.

141 *See* Ring v. Page, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 88–89, New Hampshire State Archives.

142 *See id.*

143 *See* Freedman, *supra* note 2, at 602 (detailing proceedings).

144 *See id.* at 602 & n.55.

145 Judgment Book of Superior Court, Vol. G, Feb. 1771 - Sept. 1773, at 3–7, New Hampshire State Archives. The defenses contained in the successful plea in abatement below were that Pearse had (1) failed to allege his actual innocence of the contempt charges and (2) been properly convicted of contempt by a court of record, *id.* at 6.

146 These proceedings are detailed in *id.* at 128–32. The trial-level proceedings are collected in Provincial Case File No. 16916, New Hampshire State Archives.

for harboring a potentially indigent stranger.¹⁴⁷ After being released on bail Licht succeeded in having the action terminated through certiorari proceedings.¹⁴⁸ The following year he sued all three men for damages, recovering £6.1s.¹⁴⁹

(ii) The Negligence Strand and Its Neighbors

Improper official behavior was not confined to false imprisonments and neither were damages actions.¹⁵⁰

Thus, for example, in 1766 Nathaniel Woodman of Salem, New Hampshire found himself on the losing end of a lawsuit tried before a Justice of the Peace named John Ober.¹⁵¹ Ordered to pay the plaintiff 20 shillings, Woodman requested an attested copy of the judgment in order to take an appeal. But, Woodman complained, Ober, “contrary to his . . . office, oath and duty,” refused to provide the document, thereby damaging Woodman to the tune of £10. Woodman recovered 5 shillings plus court costs at the trial level, a sum increased to 30 shillings plus costs when Ober appealed.

In a similar case in 1797, George Jaffrey had prevailed in a civil action against George Fowler, who was imprisoned for the debt

147 See An Act in Addition to the Act Directing the Admission of Town Inhabitants, Passed June 27, 1766, in 3 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1745–1774, at 395 (Henry Harrison Metcalf ed., 1915); Freedman, *supra* note 2, at 607 n.81 (describing proceedings and providing citations).

148 See An Act in Addition to the Act Directing the Admission of Town Inhabitants, *supra* note 147. Cf. Kevin Costello, *The Writ of Certiorari and Review of Summary Criminal Convictions, 1660–1848*, 128 LAW Q. REV. 443, 452, 459–60 (2012) (suggesting that many certiorari proceedings against summary criminal convictions at King’s Bench were brought to lay a predicate for subsequent trespass or private criminal actions against the convicting magistrate).

149 These proceedings are recorded in Rockingham County Case File No. 144, New Hampshire State Archives. The jury verdict is recorded on a separate slip of paper dated July 30, 1771.

150 One frequent subject of litigation was the legality of a tax imposed by local officials. See Nelson, *supra* note 123, at 7–8 (listing variety of grounds on which such challenges could be made); see generally *infra* note 156. For a New Hampshire example from 1765, see *McCrellis v. Sheppard*, Judgment Book of Superior Court, Vol. E, *supra* note 126, at 201 (recording successful action by McCrellis against Selectmen for taxing him for the support of a Congregational minister, “knowing the plaintiff to be a member of the Church of England”).

151 The account in this paragraph is taken from Judgment Book of the Superior Court, Vol. E, *supra* note 125, at 357–58, New Hampshire State Archives.

and held in custody by the jailer, Thomas Footman.¹⁵² But Footman, Jaffrey charged, “not regarding the duties of his said Office did not safely keep [Fowler] as by law he was required but suffered and permitted him to escape,” losing Jaffrey the benefit of the judgment. Claiming \$200 in damages, Jaffrey sued Theophilus Dame, the county Sheriff, who “was and still is responsible” for Footman’s doings in office.¹⁵³ After a sham defensive plea,¹⁵⁴ the action was tried for the first time on appeal. There, the issue was whether the release of Fowler had been with or without Jaffrey’s consent. The jury determined that issue in Jaffrey’s favor, and he was awarded \$148.76 plus costs.

Because cases like this were numerous,¹⁵⁵ it is possible by looking at verdicts to infer some of the distinctions being made by

152 The account in this paragraph is taken from Judgment Book of the Rockingham County Superior Court, Vol. N, Feb. 1797 - Sept. 1798, at 99–101, New Hampshire State Archives.

153 See An Act to Direct the Mode of Appointment of Deputy-Sheriffs Within This State, Approved Dec. 13, 1796, in 6 LAWS OF NEW HAMPSHIRE: SECOND CONSTITUTIONAL PERIOD, 1792–1801, at 370 (Henry Harrison Metcalf ed., 1917) (providing formal system for registering appointments and discharges of deputy sheriffs and enacting “that the Sheriff in each county shall in all respects be responsible for the Acts, malfeasance, misfeasance and Nonfeasance of each of his Deputies” until the recording of a discharge). On the basis of the pleadings in and results of the cases in the remainder of this section both before and after passage of this act, there is no reason to believe that the statute changed either the substantive tort law or jury behavior, namely to impose liability on the superior when that seemed the just thing to do and not otherwise.

154 See *supra* note 130.

155 For three cases alleging that sheriffs wrongly allowed debtors to go at large, see *Willson v. Reid*, Judgment Book of the Rockingham County Superior Court, Vol. M, Sept. 1793 - Sept 1796, at 377–79, New Hampshire State Archives (recording 1794 lawsuit by Willson against Sheriff Reid alleging Reid’s deputy allowed a defendant in jail under attachment to escape; after sham plea below, Reid defaults on appeal; Willson proves damages and is awarded 10 cents plus costs); *Simpson v. Webster*, Judgment Book of the Rockingham County Superior Court, Vol. L, Apr. 1789 - Apr. 1793, at 96 (recording lawsuit by Simpson against Sheriff Webster alleging Webster allowed a defendant in jail for a judgment to escape; after two victories for Webster below, Simpson in 1790 awarded £41.9s.8d plus costs, which he collects); *Sandborn v. Reid*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 375–77, New Hampshire State Archives (recording lawsuit by James Sandborn and his wife Esther against Deputy Sheriff Rand alleging he allowed a defendant in jail for a judgment to escape; after winning judgment below, Rand defaults on appeal in 1766; Sandborns, who claimed £25 damages, awarded £18 plus costs).

juries,¹⁵⁶ sometimes on the basis of what we would now call issues of fact (e.g. exercise of due care, causation) and at other times on what we would now call issues of law¹⁵⁷ (e.g. official immunity, respondeat

For two cases alleging that sheriffs had mishandled property seizures under process, see *Warner v. Dame*, Judgment Book of the Rockingham County Superior Court, Vol. M, *supra*, at 494–96, (recording 1796 lawsuit by Warner against Sheriff Dame alleging failure of Dame’s deputy to file writ of attachment he had served on debtor; after sham plea below claim rejected by jury on appeal); *Kimball v. Kelly*, Judgment Book of the Rockingham County Superior Court, Vol. J, Sept. 1785 – Sept. 1788, at 4–5 (recording lawsuit by Kimball against Sheriff Kelly alleging failure of Kelly’s deputy to execute a money judgment; after jury verdict for plaintiff below claim rejected by jury on appeal in 1785).

For a number of cases in 17th century Maryland in which creditors sued sheriffs for freeing a prisoner or dissipating his assets, see 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660*, at 123 & 192 n.89 (2008). For a series of similar Massachusetts cases during the following century, see Nelson, *supra* note 130, at 372 & 388 n.427 (describing *Petition of Druce*). For a similar case from New Hampshire, see *infra* note 268 (describing *Piper v. Greley*).

For an example of a successful case against a South Carolina sheriff for allowing a debtor’s escape, see *Harvey v. Huggins*, 18 S.C.L. (2 Bail.) 252 (1831).

156 In the majority of cases we forced to impute rationales to juries because the available records reveal no more than the allegations of the plaintiff and the legal outcomes. Even when we have somewhat fuller records, *see, e.g., supra* note 135, they rarely include the arguments of counsel, much less the reasoning process of the jury.

The cases of *McGregore v. Packer*, Judgment Book of Superior Court, Vol. F, 1767–1770, at 7–9, New Hampshire State Archives, *McHard v. Packer*, *id.* at 5–7, and *Clement v. Packer*, *id.* at 3–5, are illuminating exceptions to the second lacuna. In all three cases creditors claimed that Sheriff Thomas Packer had allowed their debtors to escape from jail on September 1, 1765. Packer prevailed below in all the actions, and on appeal the jury (composed of the same individuals in each case) rendered an “opinion that the Gaol was insufficient when the breach was made,” and gave judgment to Packer. *Id.* at 5, 7, 9.

An exception to the first lacuna is found in *Morey v. Webster*, Judgment Book of the Rockingham County Superior Court, Vol. L, *supra* note 155, at 17–19. This was an action brought by Morey against Deputy Sheriff Webster for carrying off one yoke of oxen and one yoke of steers. After a sham plea below, Webster on appeal put in an extended plea to the effect that “he was a deputy sheriff lawfully authorized and qualified. . .and took the aforesaid oxen and steers by virtue and in obedience to [a writ of execution].” Morey replied to this that “Webster. . .carried away the oxen and steers. . .of his . . . own wrong, and without any such cause as is by the said Webster in his plea alledged.” Issue was joined on this point, resulting in a jury verdict for Webster. *Id.* at 19.

157 To take one common example, in New England tax litigations like those described *supra* note 150, which continued after Independence as before,

superior liability), a distinction that, because of the range of jury discretion, was of little practical significance in civil cases¹⁵⁸ until the early part of the 19th century.

Thus, for example, in both *Larkin v. Reid*¹⁵⁹ and *Gile v. Hilton*,¹⁶⁰ a deputy sheriff seems to have seized a wrong tract of land. But in both cases it is plausible on the facts that he was unaware of the true ownership and in both cases the officer prevailed.¹⁶¹ On the other hand, in *Perley v. Webster*,¹⁶² the plaintiff claimed that one of Sheriff Webster's deputies had been ordered to make a pendente lite attachment and had filed a return detailing the goods seized. But when Perley was granted final judgment, the goods were nowhere to be found. Perhaps the deputy never seized them or perhaps he converted them. But either way, as Perley saw it, the deputy's conduct was clearly culpable. The third jury to hear the case agreed and awarded \$150.00 in damages plus \$181.01 in costs.¹⁶³

In other cases the bases for the jurors' distinctions are

plaintiffs routinely alleged simply that the tax had been imposed "illegally" and went to the jury on the general issue. See, e.g., *Pickering v. Fabian*, Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 254 (successful action brought in 1792); *Calfe v. Philbrick*, *id.*, Vol. I, Mar. 1782 - Apr. 1785, at 383 (successful action brought in 1784); *Kimball v. Calfe*, *id.* at 384 (successful action brought in 1783); *Weare v. Weare*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 428 (unsuccessful action brought in 1766); see also *Pert v. Odel*, *id.* at 194 (unsuccessful action tried in 1765 alleging that the collection was "against the peace and the laws of the land"); cf. *Langdon v. Clark*, *id.* at 189 (successful action brought in 1764 alleging same in which by agreement town seemingly substituted on appeal for defendant Selectmen). The jurors thus decided both whether the tax was illegal and whether or not the defendant officers knew or should have known of the illegality.

158 As the next installment of this project will report, criminal juries retained their powers longer than civil ones did. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 140-41, 285-86 (2011), which I reviewed at 43 J. INTERDISC. HIST. 333 (2012); *infra* note 254.

159 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. O, Feb. 1799 - Sept. 1800, at 236-41, New Hampshire State Archives.

160 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 347-51.

161 The first action was brought against the sheriff, see *Larkin v. Reid*, *supra* note 159, at 236, and the second against the deputy, see *Gile v. Hilton*, *supra* note 160, at 347.

162 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 255-59.

163 *Id.* at 259.

not now clear but the jurors clearly were making distinctions, as shown by the varying outcomes reached on closely similar facts.¹⁶⁴ As to respondeat superior, one might compare the 1759 case of *Monson v. Greley*¹⁶⁵ with the 1771 case of *Packer v. Renkin*.¹⁶⁶ In both instances deputy sheriffs had executed judgments and pocketed the proceeds,¹⁶⁷ resulting in lawsuits against the Sheriff as the party responsible for the conduct of his subordinates. In the first case, the judgment creditor succeeded and in the second he failed. The difference presumably reflects the degree of relative fault that the jurors were willing to attribute to the superior and the subordinate under the circumstances.¹⁶⁸

So too, George Reid, the Sheriff of New Hampshire's Rockingham County, was sued twice within a few months because different ones of his deputies had failed to serve writs of execution, thereby causing losses to the judgment creditors. On appeal, he

164 The cases described *supra* note 157 would seem to fall into this class.

165 The case is recorded in Judgment Book of Superior Court, Vol. C, 1755–1757 [sic – should be 1759], at 499–500, New Hampshire State Archives. The jury verdict in plaintiff's favor at the trial level was affirmed when the defendant defaulted in appearing for the appeal. *See id.* at 500. Plaintiff in 1760 collected from the deputy as much of her judgment as he had converted. *See id.* at 499. She subsequently pursued the original defendant for the remainder. This was ultimately successful but by that time she was non compos mentis so the money was paid to her daughter for her support. *See Monson v. Banfill*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 27–28, New Hampshire State Archives.

For a similar 1799 case, in which a deputy sheriff pocketed the proceeds of a judgment on which he had executed, suit was brought against the sheriff, he entered a sham plea and defaulted on appeal, and the judgment creditor therefore prevailed, see *Eastman v. Kelly*, Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 161–63.

166 The case is recorded in Judgment Book of the Superior Court, Vol. G, *supra* note 145, at 56–59, New Hampshire State Archives.

167 For similar actions, see *Merrill v. Woodbury*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 16–17, New Hampshire State Archives (recording lawsuit in which Israel Woodbury unsuccessfully sues constable Peter Merrill for converting goods he had seized for the payment of rates); *Sanders v. Woodbury*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 399–400 (recording lawsuit in which Israel Woodbury successfully sues constable Oliver Sanders for pocketing the surplus proceeds of cow he had seized for the payment of rates).

168 The varying jury verdicts against the two defendants in the first trial of David Ring's action described *supra* text accompanying note 139 may reflect similar thinking.

won one of the actions in early 1797¹⁶⁹ and lost one in late 1798.¹⁷⁰

He was also sued around the same time in an action illustrating the fact that the influence of statutes in damages cases against public officials was peripheral¹⁷¹ to the point of invisibility.¹⁷² In *Nason v. Reid*,¹⁷³ Shuah Nason alleged that Reid had permitted her judgment creditor, the father of her illegitimate child, to escape from the jail to which he had been confined for non-payment of his support obligations. The fact pattern is thus identical to that which we have already seen a number of times in this section.¹⁷⁴ In contrast to the complaints in those cases, Nason's complaint cited a statute – a lineal successor to one that had been in force since at least 1714 – declaring that jailers were liable to judgment creditors for negligently allowing incarcerated judgment debtors to escape.¹⁷⁵

169 See *Bartlett v. Reid*, Judgment Book of the Rockingham County Superior Court, Vol. N, Feb. 1797 - Sept. 1798, at 101–03, New Hampshire State Archives. This result reversed a jury verdict in Bartlett's favor.

170 See *Ball v. Reid*, *id.* at 378–80, New Hampshire State Archives. Reid had interposed a sham plea below, see *supra* note 130, and the case was tried for the first time on appeal.

171 See Pearson, *supra* note 11, at 97 (“Present-day readers may find it astonishing to learn how small a part statute law played . . . [u]p to and beyond the Civil War.”); see also Freedman, *supra* note 2, at 610 n.93.

172 An exception to this statement must be made with respect to actions in which plaintiffs sued public officials for misconduct in office in order to collect penalties provided by statute. See Nelson, *supra* note 123, at 9 (providing numerous Massachusetts examples and observing that as a combined result of the private and statutory damages remedies there was “little that one acting on behalf of the government could do without rendering himself liable to an action at law in the event that he wronged another”); see also NELSON, *supra* note 121, at 18. For a New Hampshire example, see *Clendenen v. Clark*, Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 57–59, in which plaintiff unsuccessfully claimed that the defendant constable had charged more for the service of a warrant than authorized by statute and sought the statutory penalty of \$30. See An Act Regulating Fees, Approved Dec. 16, 1796, in 6 LAWS OF NEW HAMPSHIRE, *supra* note 153, at 381, 383–84, 387; see also PUBLICOLA, NEW VADE MECUM; OR A POCKET COMPANION FOR LAWYERS, DEPUTY SHERIFFS AND CONSTABLES . . . ADMINISTERING THE LAW OF NEW HAMPSHIRE 25–60, 84–85, 98–100 (Boston, Hews & Goss 1819) (complaining at length that officers regularly charged excessive fees and proposing remedies).

173 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 506–07, New Hampshire State Archives.

174 See *supra* note 155 and text accompanying notes 151–54.

175 See An Act Regulating Prisons, Passed Feb. 10, 1791, in 5 LAWS OF NEW HAMPSHIRE: FIRST CONSTITUTIONAL PERIOD, 1784–1792, at 656–57

None of the other plaintiffs had thought it worthwhile to cite the statute.¹⁷⁶ Nor did it seem to make the slightest difference to the progress of this lawsuit. After a sham plea below, the case went to a jury on appeal, which awarded her \$100.87 of the \$300 she had demanded, plus costs.¹⁷⁷

b. Criminal Prosecutions

A truly useful history of private prosecution in America has yet to be written. Notwithstanding some initial efforts by

(Henry Harrison Metcalf ed., 1916) (providing that if any jailer “shall through negligence suffer any prisoner to escape . . . [who was] committed for debt [the jailer] shall be liable to pay the Creditor the full amount of his debt”); An Act for the Regulation of Prisons and to Prevent Escapes, Passed May 15, 1714, in 2 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1702–1745, at 130, 132 (Albert S. Batchellor ed., 1904) (providing that if “the escape of any prisoner happen through the negligence of the [jailer and] . . . if the prisoner so[] escaping were imprisoned for debt the prison keeper shall be answerable to the creditor for the full debt.”).

176 They were surely aware of it because Nason’s lawyer in this case, Edward St. Loe Livermore, was himself the plaintiff’s lawyer in, e.g. *Ball v. Reid*, *supra* note 170, and *Jaffrey v. Dames*, *supra* text accompanying notes 152–54, both of which took place shortly after Nason’s case. In any event, the bar was small and its members interacted closely, sharing their legal knowledge. In Nason’s case Edward Livermore’s adversary was his brother Arthur, who had studied law in his offices. See 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 152 n.16.

177 See Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 507.

academics,¹⁷⁸ lawyers,¹⁷⁹ and courts,¹⁸⁰ the story of the evolving

178 See, e.g., JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 7, 39 (1980) (observing that origin of American public prosecutor “presents something of a historical and social puzzle,” and suggesting explanation in varying models available in differing colonies and willingness of populace to experiment); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989) (tracing rise and decline of private prosecution in 19th century Philadelphia); Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311 (2002) (studying New York and finding “public prosecution evolved from a private model in a slow, uneven manner in response to fears of social disorder”); see also Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673–81 (2010) (surveying historiography); see generally Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012).

179 See, e.g., John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 511–43 (1994) (summarizing historiography and case law in wake of *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)); Brief for The National Crime Victim Law Institute as Amicus Curiae Supporting Respondent at 4–8, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010).

180 The most recent foray of the Supreme Court into the area is *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (dismissing writ of certiorari as improvidently granted). The Supreme Court had agreed to review a challenge by John Robertson to his conviction for criminal contempt arising out of his violation of an order of protection that had been obtained in the District of Columbia courts by his former girlfriend, Wykenna Watson. Robertson resolved a parallel criminal action brought by the government through a plea bargain, which, he claimed, precluded the prosecution brought by Watson. The Court re-wrote the question presented to read “Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States,” *id.*, and granted certiorari, with the apparent intention of answering the question “no.”

After oral argument, however, the Court dismissed the writ of certiorari as improvidently granted, over a dissenting opinion by four Justices who did want to answer the question that way. Of course the reasons for this disposition are purely speculative but it may be that one Justice (perhaps Thomas) who originally voted to grant certiorari concluded from the merits briefing that the original intent was not as clear on a second look as it had appeared to be at first glance, or that the majority concluded, as Watson had argued, that prosecutions for criminal contempt are subject in this respect to a different rule than other criminal cases. See *id.* at 2189–90 (explaining why four Justices rejected that position); Brief for Respondent at 13, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (arguing that Robertson’s argument “rests on an incorrect assertion that there are no relevant differences between criminal contempt proceedings and other criminal proceedings.”). See also Brief for the United States as Amicus Curiae Supporting Respondent at 10–11,

relationship between public and private prosecution on this side of the Atlantic,¹⁸¹ which varied in the past between jurisdictions¹⁸² and

24–29, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (arguing that unique separation of powers considerations apply to District of Columbia and that Robertson had waived any due process claim).

In the Supreme Court, Watson's position received considerable support from advocacy groups concerned with the enforcement of domestic orders of protection and child support, who argued that an insufficiency of public resources devoted by prosecutors' offices to the enforcement of such orders made it vital that the private parties concerned have the ability to prosecute violations of them. See Brief for Domestic Violence Legal Empowerment and Appeals Project and other Domestic Violence Organizations, Scholars, and Professionals as Amici Curiae Supporting Respondent at 7–12, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010); Brief for Family Law Judges, Practitioners & Scholars as Amici Curiae Supporting Respondent at 3–24, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010); Jordan Weissmann, *Victim Fights for Her Name*, NAT'L. L.J., Mar. 29, 2010, at 21 ("Advocates for domestic violence victims are sounding the warning about a little-noticed U.S. Supreme Court case that they say could make it much harder for battered women and men to enforce restraining orders against their abusers.")

181 Cf. CLIVE EMSLEY, *CRIME AND SOCIETY IN ENGLAND, 1750–1900*, at 178–215 (2d ed. 1996) (describing evolution of English prosecution system over period); BARRY GODFREY & PAUL LAWRENCE, *CRIME AND JUSTICE, 1750–1950*, at 28–38 (2005) (describing English system of private prosecutions from late 18th to late 19th century); Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?*, 41 J. LEGAL STUD. 95 (2012) (describing formation of private groups in early 19th century England to prosecute efficiently crimes of concern to them); John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314 (1999) (illuminating pressures converging to alter English private prosecution system in 18th century); Bruce P. Smith, *English Criminal Justice Administration, 1650–1850: A Historiographic Essay*, 25 L. & HIST. REV. 593, 620–21 (2007) (summarizing existing literature on English prosecution practices); Bruce P. Smith, *The Emergence of Private Prosecution in London, 1790–1850*, 18 YALE J.L. & HUMAN. 29 (2006) (controverting prior historical accounts of English developments).

182 See Tyler Grove, *Are All Prosecutorial Activities "Inherently Governmental"?: Applying State Safeguards for Victim-Retained Private Prosecutions to Outsourced Prosecutions*, 40 PUB. CONT. L.J. 991, 1006–08 (2011); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 290–96 (1989). See generally NELSON, *supra* note 121, at x ("[T]he colonies were initially settled over a span of more than one hundred years . . . by quite diverse peoples, and . . . for distinctly different purposes. What they shared was a willingness to alter received legal doctrine to suit their needs and purposes."); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 326–27 (1982) (emphasizing that because of geographical and temporal variations, "The character of each colony at its earlier and later

which is still in transition,¹⁸³ has not been told in any comprehensive and well-documented way,¹⁸⁴ with the result that much of the recent discussion has taken place with only a shallow grounding in primary sources. “A lot of research remains to be done . . . and the story is

stages needs to be considered in order to assess the process of change through time”).

- 183 See, e.g., *State v. Martineau*, 808 A.2d 51 (N.H. 2002) (holding private prosecutions not permitted where imprisonment possible); *Rogowicz v. O’Connell*, 786 A.2d 841 (N.H. 2001) (holding court may not appoint representative of interested party to prosecute criminal contempt action); *Bokowsky v. Rudman*, 274 A.2d 785 (N.H. 1971) (holding public prosecutor may terminate prosecution over objection of private prosecutor); Grove, *supra* note 182, at 1007–11 (surveying recent cases in various states). A discussion of current caselaw in the states and lower federal courts appears in Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 11–16, *Robertson*, 130 S. Ct. 2184. See generally Rich Lord, *Privately Funded Prosecutor Pursues Drug Cases in Altoona*, PITTSBURGH POST-GAZETTE, (Dec. 1, 2014), <http://www.post-gazette.com/news/state/2014/12/01/privately-funded-prosecutor-pursues-drug-cases-in-altoona/201411300089>.

- 184 Because courts and lawyers are operating under this handicap, it might be wise for the former to move with caution before laying down any sweeping rules. Cf. Transcript of Oral Argument, at 41, *Robertson*, 130 S. Ct. 2184:

[Counsel]: The Framers . . . would not have thought it was unconstitutional because private prosecutions . . . were common at the time of the Framers.

Justice Scalia: Oh, I don’t think that’s right. Private prosecutions were common at the time of the framing?

You have to go back a long way before they were common.

As a scholar, my observation on this exchange would be that, although evidence contrary to Justice Scalia’s position certainly exists, *see infra* text accompanying notes 185–89, we currently do not have enough knowledge of the circumstances existing at diverse times and places to support a meaningful conclusion one way or the other. Cf. Freedman, *Liberating*, *supra* note 1, at 395 (noting importance to habeas corpus field of recent scholarly publication of numerous cases from English archives).

The normative implications of this observation for purposes of pronouncing a legal rule is of course a separate issue. Cf. FREEDMAN, *supra* note 106, at 38 & nn.17–18. (discussing common law crimes and suggesting that there may well have been sound reasons to repudiate them in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) notwithstanding contrary original intent); Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 265 & 296 n.125 (discussing contractual outsourcing of prosecution function to private lawyers and finding it inappropriate in light of “concerns about ethics, fairness, transparency, accountability, performance, and the important values advanced by the public prosecution norm”).

on the whole rather murky.”¹⁸⁵

Hence, I make no claim that Hodsdon’s story is typical of any general practice. But it does illustrate the power of private prosecution as a potential check on government officials.

The key feature of his situation, quite apparent to all concerned, was that the private prosecutor, not the government, had the power to drop the action.¹⁸⁶ The judge in Hodsdon’s case specifically told the state’s lawyer that he was under no obligation to prosecute but told Hodsdon that he would not be off the hook until the private prosecutor was satisfied.¹⁸⁷ This aspect of the matter was central to Hodsdon’s complaint to the legislature.¹⁸⁸

Indeed, at just the same moment that the New Hampshire legislature was lifting Hodsdon’s default¹⁸⁹ the Governor was asking it to reform the system of private prosecutions, complaining that the ability of the private prosecutor to drop (or, more importantly, not drop) the action left the state in the position of having to pay costs:

Groundless, vexatious and trivial prosecutions, are sometimes commenced and carried on in the name of the State, which subject the county where they are prosecuted to the payment of large bills of cost. In some of these, the prosecutor makes use of the name of the State as an engine to gratify his revenge on the accused, more than for the purpose of convicting and punishing those who have violated the laws.¹⁹⁰

185 LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 479 n.29 (1999).

186 Cf. *Robertson*, 130 S. Ct. at 2188–89 (stating that under English and American precedent the government, whether represented by a public prosecutor or a private attorney, had the power to drop the criminal action); Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L.J. 209, 233 (1955) (surveying existing case law and proposing statutory reform under which court could dismiss prosecution after hearing from both private and public prosecutor).

187 See *supra* text accompanying notes 44–50.

188 See *supra* text accompanying notes 53–56.

189 See *supra* text accompanying notes 57–58 (noting passage of act for Hodsdon’s relief on June 26, 1817).

190 [Annual Message of Governor William Plumer to the New Hampshire Legislature], June 5, 1817, at 12, 21 in JOURNAL OF THE HONORABLE SENATE, OF THE STATE OF NEW HAMPSHIRE, AT THEIR SESSION, BEGUN AND HOLDEN AT CONCORD, ON THE FIRST WEDNESDAY OF JUNE, ANNO

Doubtless the exercise of private control over a criminal prosecution sometimes appeared, as indeed it did to Hodsdon,¹⁹¹ less like a remedy against oppression than an invitation to crush those against whom one bore a grudge.¹⁹² In fact, viewed as one strand in the overall tapestry in which it existed, it was not. As described below,¹⁹³ the remedy of private prosecution was itself subject to a meaningful check in the form of an action for malicious prosecution by the wrongfully-prosecuted defendant.¹⁹⁴

DOMINI, 1817 (Isaac Hill ed., 1817). No action was taken and Plumer renewed his request, equally unsuccessfully, the following year. See [Annual Message of Governor William Plumer to the New Hampshire Legislature], June 4, 1818, at 289, 290 in 19 NILES' WEEKLY REGISTER (2 N.S.) (H. Niles ed., 1818). See generally 4 WILLIAM BLACKSTONE, COMMENTARIES *356–57 (denouncing practice of terminating public prosecutions on favorable terms if private prosecutor is satisfied, noting that private prosecutions are “too frequently commenced [] rather for private lucre than for the great ends of public justice”).

191 See *supra* text accompanying note 56 (reporting Hodsdon’s complaint that even if he discovered identity of private prosecutor he “would be compelled . . . to pay him whatever sum his corrupt inclination might lead him to extort”).

192 See Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485, 1502–03 (2011) (arguing due process requires some public official be available to hear defendant’s assertion that private criminal contempt proceeding “is based in personal animosity or a desire for illegitimate private gain – part of a blackmail threat, perhaps, to be withdrawn if the defendant complies with the beneficiary’s wishes.”). See also *supra* note 183 (citing limitations New Hampshire places on private prosecutions today).

193 See *infra* Part III(C)(2).

194 A plaintiff in such an action who demonstrated conditions like the ones hypothesized, *supra* note 192, would be well on the way to prevailing. See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–05 (2012) (unanimous) (discussing malicious prosecution actions against private prosecutors as of 1871 and contrasting subsequent development of law as “the prosecutorial function was increasingly assumed by public officials”). Cf. *Private Prosecution*, *supra* note 186, at 232–33 (proposing as part of reform plan continuation of existing rule that private prosecutors be liable for malicious prosecution).

In Hodsdon’s situation, a jury might well take the view that there was nothing at all malicious about a prosecution for contempt being brought by the beneficiaries of a writ of habeas corpus that he had disobeyed. In any event, as a predicate to any malicious prosecution action Hodsdon would have to show that the criminal proceedings terminated in his favor. See *Morgan v. Hughes*, 2 T.R. 225, 232 (K.B. 1788); NELSON, *supra* note 121, at 195 n.67; *supra* note 148. That is a fact which is unknown now but may be known in the future. See *supra* note 59.

2. Public Criminal Prosecutions

In a thought-provoking article on a generally overlooked aspect of *Marbury v. Madison*,¹⁹⁵ Karen Orren and Christopher Walker have observed that Attorney General Levi Lincoln might have been indicted for a variety of crimes including non-performance of his duty to deliver the commissions,¹⁹⁶ destruction of official documents, and resistance to the process of a federal court.¹⁹⁷ They add that the same reasoning would apply to Madison and perhaps Jefferson too.¹⁹⁸

There is nothing implausible about their position, as shown by the broad range of official misconduct that we know to have resulted in criminal prosecutions of officeholders by the government. A few examples of conduct of varying degrees of culpability will illustrate the point.

In a sensational case whose “legal proceedings . . . fill almost an entire volume of *State Trials*,”¹⁹⁹ General Thomas Picton, the first British governor of Trinidad after its acquisition from Spain,²⁰⁰ was tried and convicted in 1806 at King’s Bench in London for ordering a young native woman to be tortured to secure her confession to participation in a robbery plot.²⁰¹ Following a successful motion for a new trial he was tried again at King’s Bench in 1808.²⁰² This trial

195 5 U.S. (1 Cranch) 137 (1803).

196 Cf. 1 NELSON, *supra* note 155, at 114 & 189 n.59 (describing 1642 Maryland indictment of officer “for failing to lead an attack against some Native Americans”); Lee Offen, *A Brief Military History of the Colony of Maryland, 1634–1707*, http://historyreconsidered.net/Maryland_1634_thru_1707.html (last visited July 18, 2013) (reporting that the Assembly had called for attack in late 1641 but “Captain Brent refused to force men to serve on the expedition,” thereby depriving it of enough manpower to continue).

197 See Orren & Walker, *supra* note 125, at 243.

198 *Id.* at 47–48. See generally Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999) (arguing that sitting President may be prosecuted criminally).

199 James Epstein, *Politics of Colonial Sensation: The Trial of Thomas Picton and the Cause of Louisa Calderon*, 112 AM. HIST. REV. 712, 714 (2007).

200 *Id.* at 716.

201 See *id.* at 718–21. See generally BRIDGET BRERETON, *A HISTORY OF MODERN TRINIDAD, 1783–1962*, at 34–38 (1981) (describing “Picton’s Monstrous Tyranny” during a governorship characterized by gross physical brutality to slaves and free people of color).

202 The material in the remainder of this paragraph is taken from Epstein, *supra* note 199, at 724, 724 nn.59–60, 740. Picton’s later career in the military until his death at Waterloo in 1815 is summarized in *id.* at 713, 730, 739 n.133. See THE LONDON GAZETTE, June 22, 1815, at 1214–15 (No. 17028).

resulted in a special verdict by the jury that because torture had been legal in Trinidad at the cession of the island to Britain, Picton had behaved without malice, even if illegally under the applicable British law. In an ordinary case, a court presented with such a verdict would probably have adjudged the defendant guilty while imposing only a nominal punishment. But to have followed that course in this case might have been seen as denigrating the seriousness of the offense. So the court, while remitting Picton's recognizances, simply took no action on the special verdict.

In the middle of 1762, Wyseman Claggett, a New Hampshire Justice of the Peace,²⁰³ was indicted on a charge that he had on December 3, 1761 signed a mittimus bearing the date of November 3, 1761 against one James Dwyer of Portsmouth, resulting in Dwyer's imprisonment for twenty hours, after which, on December 4, 1761, Claggett did

("Extraordinary Edition" publishing the Duke of Wellington's account of the battle) ("In Lieutenant-General Sir Thomas Picton, his Majesty has sustained the loss of an Officer who has frequently distinguished himself in his service, and he fell gloriously, leading his division to a charge with bayonets, by which one of the most serious attacks made by the enemy on our position was defeated.").

203 See HISTORY OF HILLSBOROUGH COUNTY, NEW HAMPSHIRE 8 (D. Hamilton Hurd ed., Philadelphia, J.W. Lewis & Co. 1885) (reporting that "In the exercise of this office he was strict, severe and overbearing . . . When one person threatened another with a prosecution, it was usual to say, "I will Claggett you."); *infra* text accompanying note 225.

Claggett later served as King's Attorney in a notorious prosecution that resulted in the 1768 hanging of Ruth Blay, who had delivered a stillborn child out of wedlock and concealed its body. See CAROLYN MARVIN, HANGING RUTH BLAY: AN EIGHTEENTH CENTURY NEW HAMPSHIRE TRAGEDY (2010); Carolyn Marvin, *The Hanging of Ruth Blay, December 30, 1768: Separating Fact From Fiction*, 63 HIST. N.H. 3, 8–9, 11, 16 (2009). The case is recorded in Judgment Book of Superior Court, Vol. F, *supra* note 156, at 203–04.

Afterwards Claggett (perhaps remembering that a mob had broken the windows of his house during the Stamp Act crisis, see Jim Piecuch, *Empowering the People: The Stamp Act in New Hampshire*, 49 HIST. N.H. 229, 247 (1994)) became an active revolutionary and served as a post-Independence state official. He is the subject of a number of biographical sketches, notably the detailed and vivid essay Charles H. Atherton, *Memoir of Wyseman Claggett*, in 3 COLLECTIONS OF THE NEW HAMPSHIRE HISTORICAL SOCIETY 24 (J.B. Moore ed., 1832). See also BELL, *supra* note 51, at 264; 2 COLLECTIONS HISTORICAL AND MISCELLANEOUS 145 (J. Farmer & J.B. Moore eds., 1823); Salma Hale, *The Judicial History of New Hampshire Before the Revolution*, 3 GRAFTON & COOS COUNTIES B. ASSOC. J. 53, 77–78 (1895).

wittingly, willingly, unlawfully and wickedly alter the said mittimus with regard to the date thereof as to the month by erasing the word November and interlining the word December in stead thereof and thereby made the said mittimus a new mittimus against the peace of our Lord the King.²⁰⁴

Claggett demurred to the indictment and it was quashed by the court, putting an end to the criminal case.²⁰⁵ This is a disposition that seems reasonable enough because on the pleaded facts the change both corrected a prior error and in any event could have caused Dwyer no harm.²⁰⁶

In contrast, in an 1800 case from North Carolina, Secretary of State James Glasgow was indicted for fraudulently issuing a duplicate warrant for land that was allocated to military veterans. He defended on the grounds, *inter alia*, “that no injury is stated to have ensued [from] the act of thus issuing the duplicate.”²⁰⁷ Rejecting this, the court wrote:

[I]f a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purpose of fraud and wrong, which were committed to him as instruments of benefit to the citizens If to constitute an indictable misdemeanor a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code where

204 Judgment Book of Superior Court, Vol. D, *supra* note 134, at 256. There is another copy of the indictment in Provincial Case File No. 23475, New Hampshire State Archives, which also contains a copy of the altered mittimus.

205 See Judgment Book of Superior Court, Vol. D, *supra* note 134 at 257; Minutes of Superior Court, Box 2, Folder Nov. 1761 - May 1763. On demurrers to the indictment see GOEBEL & NAUGHTON, *supra* note 5, at 598–99.

206 Fortunately for history, the dispute between Claggett and Dwyer did not end at this point. The latter subsequently brought a civil suit that sheds a good deal of light on the surrounding circumstances. See *infra* text accompanying notes 211–34.

207 State v. Glasgow, 1 N.C. (Cam. & Nor.) 264, 275 (1800).

attempts and conspiracies have been so prosecuted.²⁰⁸

There were also a relatively few cases of criminal prosecutions against officeholders for breaching duties that had a purely statutory, rather than common law, origin. For example, a series of New Hampshire statutes dating back to the 1600's required the selectmen of towns of specified population to set up grammar schools under pain of monetary penalty.²⁰⁹ Thus, in 1771 a grand jury indicted the three selectmen of Chester for neglecting this duty, "contrary to the Law of this Province in that case made and provided."²¹⁰ Two of the three selectmen appeared, went to a jury trial, were convicted, and fined £10.²¹¹

208 *Id.* This ruling was consistent with the well-known decision in *James Bagg's Case*, 77 Eng. Rep. 1271, 1278 (1615), which invalidated as ultra vires the removal of a magistrate from office by a town council while observing that the magistrate was subject to criminal indictment for any misbehavior, and indeed, "if he intends, . . . or conspires with others, to do a thing . . . to the prejudice of the public good . . . but he does not execute it, it is a good cause to punish him."

A recent commentator, noting that "the United States Supreme Court has made pursuing a civil case against a prosecutor or judge practically impossible," through "a host of protections it has given to prosecutors and judges to shield them from liability," see *infra* note 266, has called for a renewed emphasis by the Department of Justice on "federal criminal prosecutions of state judges and prosecutors who flout the law." Brandon Buskey, *Prosecuting the Prosecutors*, N.Y. TIMES, Nov. 27, 2015, at A31.

209 See NATHANIEL BOUTON, A DISCOURSE DELIVERED BEFORE THE NEW HAMPSHIRE HISTORICAL SOCIETY 11–13 (Concord, Marsh Capen & Lyon 1833) (summarizing statutes).

210 The statute then in force was An Act to Regulate the Fines Set on Towns and Select Men for Not Keeping Schools, Passed Jan. 15, 1771, in 3 LAWS OF NEW HAMPSHIRE, *supra* note 147, at 545 (amending An Act for the Settlement & Support of Grammar Schools, Passed May 2, 1719, in 2 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 336 and An Act in Addition to the Act for the Settlement and Support of Grammar Schools, Passed Apr. 25, 1721, in *id.* at 358 to provide that the penalty upon conviction for neglect of the duty to maintain such a school be set at £10).

211 See *King v. Selectmen of Chester*, Judgment Book of Superior Court, Vol. G, *supra* note 145, at 340–41, New Hampshire State Archives. Similar Massachusetts cases during this period are reported in Nelson, *supra* note 130, at 397 n.514.

C. Interweaving Actions

1. Multiple Actions as Reinforcement

As Hodsdon discovered, remedies for official misconduct might be sought in combination. The case of Wyseman Claggett described above²¹² provides an example. Even as Claggett was defending against the criminal charges presented by the grand jury, he was also defending against a suit brought by Dwyer for false imprisonment.²¹³

An extended narrative of the underlying facts was prepared in connection with this action, possibly by Claggett himself.²¹⁴ According to this account, Dwyer agreed with one Gunnison that the latter would build him a new coach body in exchange for an old coach body and some cash.²¹⁵ Relying on this arrangement, Gunnison sold the old coach body to Ayers for £80, who took possession of it.²¹⁶ At this point, Mrs. Dwyer was heard from, declaring that the old coach body belonged to her estate and that she objected to its sale.²¹⁷ On December 2, 1761, Dwyer's lawyer, Shannon, sent Claggett a warrant against Gunnison and Ayers charging theft of the old coach body. Claggett, surprised to see a charge of theft against Gunnison,²¹⁸ went to the tavern to get Shannon's explanation of the

212 See *supra* text accompanying notes 203–06.

213 Documentation of these proceedings is in Provincial Case File No. 23536, New Hampshire State Archives.

214 See State of Case, in *id.* This four-page document is unsigned but sometimes uses “I” for Claggett. It also sometimes uses “the Justice” or “the defendant.” My best guess is that the document was not actually written by Claggett but rather represents notes taken by his lawyer or lawyer's clerk from Claggett's narration. Perhaps supporting this possibility is the fact that the document contains at the end two apparent legal ruminations, “Court open during above transactions,” and “The Justice appears to be in a Judicial Capacity Even after leaving the Tavern,” *id.* at 4. In any event, the document portrays Claggett as reasonable and Dwyer as unreasonable and plainly presents Claggett's viewpoint.

215 See *id.* at 1.

216 See *id.* at 1–2.

217 See *id.* at 1.

218 It would appear that the two men had business dealings with each other as reflected in several suits involving notes of hand. See *Claggett v. Gunnison*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 280–82; see also *Claggett v. Waldron*, *id.* at 377.

case.²¹⁹ In Claggett's version, "I told Shannon I thought the steps taken would not do."²²⁰ Just then, Dwyer appeared with Ayers and the coach body in the custody of Constable Fitzgerald.²²¹ Gunnison was also summoned.²²² According to Claggett, "I told the Prisoners they were free," and told Dwyer that his criminal complaint was dismissed and that he could bring a civil action if he liked.²²³ He then ordered the constable to "put everything in the same condition as before, for this is no robbery."²²⁴ While a convivial punch bowl circulated in the tavern, the constable attempted to return the coach body to Ayers but returned to report that Dwyer had locked it up.²²⁵

The Justice demanded of Dwyer to open his warehouse and deliver possession of the goods to the constable . . . [H]e was very saucy and said he would not.

The Justice called for a hammer to break open the door which officious Dwyer readily presented. But at the same time impudently told the Justice if he broke open the door he would Claggett him,²²⁶ Parker him,²²⁷ and Livermore him²²⁸ and at the same time clenched his fist and put it up to the face of the Justice. This effectually stopped the operation of the Hammer.²²⁹

At this this point, on Claggett's account, he told Dwyer that he would have to post a recognizance "for your good behaviour and to answer this insolence at the next Sessions."²³⁰ Dwyer refused, and on December 3, 1761 Claggett reluctantly signed a mittimus

219 See State of Case, *supra* note 214, at 1.

220 *Id.*

221 *Id.* at 2.

222 *Id.*

223 *Id.*

224 *Id.*

225 See *id.* at 3.

226 See *supra* note 203.

227 This is probably a reference to magistrate William Parker, see BELL, *supra* note 51, at 551, or possibly his father, Judge William Parker, see *id.* at 26.

228 This is most likely a reference to Samuel Livermore, see *id.* at 34, who was then in legal practice and afterward served as Chief Justice and in both Houses of Congress. See *id.* at 36.

229 State of Case, *supra* note 214, at 3.

230 *Id.*

committing him to jail.²³¹ “[B]y mistake [he] dated it 3d November instead of December which he afterwards at gaol keepers request rectified.”²³²

Dwyer subsequently brought a false imprisonment action against Claggett and Fitzgerald, claiming £1,000 damages for ten days of imprisonment.²³³ The initial jury verdict, on June 1, 1762, awarded Dwyer £100 against Claggett and 10 shillings against Fitzgerald. On appeal, this was reduced to a verdict of 5 shillings against Claggett.²³⁴ But the execution of that judgment was suspended, and when neither party appeared to pursue the appeal, the case was dismissed.²³⁵

2. Multiple Actions as Restraint

The system described to this point contained checks and balances. If a particular action were abused the victim might have recourse to a damages action of his or her own. One common fact pattern arose when someone who had been the defendant in a criminal action initiated by a private prosecutor was acquitted and sued the prosecutor for malicious prosecution.²³⁶

For instance, in a 1762 New Hampshire case, Oliver Farwell launched a private criminal prosecution against Daniel Stearns and others for trespassing on his property, assaulting him, and destroying his crops.²³⁷ Stearns was acquitted in a jury trial and sued Farwell.²³⁸ After losing below, Stearns prevailed on appeal and was awarded damages of £40 plus £34.8s in costs.²³⁹

An action also lay if instead of bringing a private prosecution

231 See *id.* at 3–4.

232 *Id.* at 4.

233 Provincial Case File No. 23536, *supra* note 213, New Hampshire State Archives, contains a copy of the Common Pleas docket entry containing this information and that reported in the next sentence of text. It seems probable that Dwyer’s period of actual imprisonment was more like the 20 hours reported *supra* text accompanying note 204. The claim here may be for the period during which he was under recognizance to appear.

234 Judgment Book of Superior Court, Vol. D, *supra* note 134, at 337.

235 See *id.* at 366.

236 See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–05 (2012) (unanimous).

237 See *Stearns v. Farwell*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 72, 74.

238 See *id.* at 75.

239 See *id.*

a person wrongfully brought about the initiation of a public one. For example, in late 1769 one Abraham Libbee of Rye, New Hampshire, complained to a Justice of the Peace that Joseph Jenness had stolen two of his oxen.²⁴⁰ This resulted in the issuance of a warrant, the seizure of two oxen from Jenness, and the indictment of the latter for theft.²⁴¹ After the Attorney General dropped the case Jenness sued Libbee for malicious prosecution, asserting that he had “caused such a misrepresentation of facts to be made to the . . . Grand Jury as induced them” to return the indictment.²⁴² Jenness prevailed both at trial and on appeal and was eventually awarded £30.8s damages and £14.8s.9d in costs.²⁴³

Both types of action continued after Independence. Indeed, in *Wedgwood v. Gilman*, plaintiff’s action for damages, which was commenced in 1782 and ultimately proved unsuccessful, alleged that the defendants had wrongfully both (a) instituted a private criminal action for receiving stolen goods that was eventually dismissed for non-prosecution, and also (b) procured his indictment by the State of New Hampshire on the same charges, of which a jury acquitted him.²⁴⁴

D. The Unifying Strand: The Jury

Regardless of the particular action being pursued against an officeholder, the most powerful legal tool for restraining government power until the early decades of the 19th century was the jury.²⁴⁵ “Juries were expected to check official power, ensuring

240 See *Jenness v. Libbee*, Judgment Book of Superior Court, Vol. G, *supra* note 145, at 45–47.

241 *Id.* at 47–48. There is a copy of the indictment in Provincial Case File No. 21991, New Hampshire State Archives, endorsed with the prosecutor’s *nolle*.

242 Judgment Book of Superior Court, Vol. G, *supra* note 145, at 48–49.

243 *Id.* at 50. Another example of such an action is *Cotton v. Banfill*, *id.* at 196, in which Banfill, who had been indicted by a grand jury in 1771 for forgery of a deed and acquitted, *see id.* at 164–65, sued Cotton for maliciously procuring his indictment, *see id.* at 297–98. Banfill prevailed below, but Cotton won on appeal, *see id.* at 300.

244 See *Wedgwood v. Gilman*, Judgment Book of the Rockingham County Superior Court, Vol. I, *supra* note 157, at 162. The grand jury indictment of Wedgwood appears in *id.* at 50–51.

245 See Jon P. McClanahan, *The “True” Right to Trial by Jury: The Founders’ Formulation and its Demise*, 111 W.VA. L. REV. 791, 809 (2009). The details are still being uncovered as a result of more fine-grained archival research into particular

that government was not arbitrary or, at least, was less arbitrary.”²⁴⁶

This included resisting attempts by judges to coerce verdicts.²⁴⁷ A look at some New Hampshire cases suggests that when called upon to do so²⁴⁸ juries consistently played this role in actions of all sorts.

times and places. See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1003–04 (2010).

- In the decades following Independence juries were doubly weakened. Within the judicial branch they lost their law-declaring powers to judges, see ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939*, at 29–30 (2011) (dating change in civil cases to approximately 1830); Kramer, *supra* note 9, at 31–33, 101, while the judicial branch itself was subject to significant legislative interference. See Freedman, *supra* note 2, at 608 n.88. The judicial branch subsequently recovered some of the lost ground. See *supra* text accompanying notes 11–12. As the next installment will discuss, juries did not. See, e.g., *Robertson v. Sichel*, 127 U.S. 507 (1888). See generally Renee Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448 (2013); Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195 (2014).
- 246 John Phillip Reid, *The Authority of Rights at the American Founding*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 67, 84 (Barry Alan Shain ed., 2007); see *id.* at 85 (noting “the close association between the right to jury trial and the existence of liberty in the minds of people living in the various common-law jurisdictions”); see also NELSON, *supra* note 121, at 20–21; see generally Jeremiah E. Goulka, *The First Constitutional Right to Appeal: Louisiana’s Constitution of 1845 and the Clash of Common Law and Natural Law Traditions*, 17 TUL. EUR. & CIV. L.F. 151, 154 (2002) (“When Congress enabled Louisiana to apply for statehood in 1811, all that Congress required was a constitution guaranteeing a republican form of government, the right to a jury trial, and habeas corpus relief.”).
- 247 The storied fountainhead of the right of the jury to the independence of its judgment as against that of the judge is in the writ of habeas corpus obtained by Edward Bushell, who served as a member of the jury that acquitted William Penn when tried for preaching in the streets of London. See Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 412–13 (2012). Bushell had been imprisoned for contempt by the trial judge, who desired to see Penn convicted. The case is reported as Bushell’s Case, 124 Eng. Rep. 1006 (1670). See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1815 n.1 (2002) (citing various other reports of case). See also HALLIDAY, *supra* note 5, at 235–36 & 425 n.84. See generally CARE, *supra* note 127, at 123–27. The implications of the case for jury independence in 17th century Pennsylvania are discussed in 2 NELSON, *supra* note 117, at 107–10.
- 248 In *Penhallow v. Cole*, Docket Book of Superior Court, 1699–1738, at 25–26, New Hampshire State Archives, a 1702 case, the jury reported that its verdict would go one way if the Isaac Cole before them was the owner of the subject property

For example, in a case that stirred communal feelings,²⁴⁹ John Kenniston was tried in May 1718 for the murder of an Indian.²⁵⁰ The jury acquitted him.²⁵¹ The court did not accept the verdict and sent the jury back “to consider further of the case.”²⁵² But when the jury returned “with the same verdict as at first,” the court accepted it and discharged the prisoner.²⁵³ So too, when Samuel Robie brought a private criminal prosecution in 1704 against a group of men for inciting a riot, the court refused to accept the jury’s initial verdict of acquittal but did so when the jury came back again with the same result.²⁵⁴ In yet another instance, when the 1721 jury that tried Moribah Ring “for concealing the birth of a bastard child born of her body” adhered to its decision to acquit after being sent back to reconsider, the court accepted the verdict.²⁵⁵

and the other way if not. The court, told the jury that this was an issue for it to decide, whereupon it retired and did so.

In several other cases it would appear that the interchange between court and jury simply reflected poor communications rather than any attempt at judicial coercion. In *Wincoll v. Tuttle*, a hybrid civil-criminal case from 1708 that is documented in Provincial Case File No. 15990, New Hampshire State Archives, the jury, unsurprisingly, seems to have been confused about just what it was to do. The court sent the jury back twice until it returned a verdict specifying the sum stolen, from which the court computed the amount the defendant owed (thrice the amount stolen) and also sentenced him to be whipped or pay a fine. See Docket Book *supra*, at 48–49. In the 1708 case of *Dole v. Green*, Docket Book, *supra*, at 52, the jury was sent back simply to “make their verdict plain.”

249 The court took special pains to provide translation services “to prevent all cause of complaint from the Indians,” Docket Book, *supra* note 248, at 116–17, and the Governor’s Council ordered “that the Indians that are coming on this special occasion of Kenniston’s tryal be allowed sixteen pence pr. man pr. day, during the time of the present court.” See 3 PROVINCIAL PAPERS OF NEW HAMPSHIRE 734 (Nathaniel Bouton ed., 1869) (Council order of May 12, 1718). See generally Nelson, *supra* note 130, at 334 (noting that in 17th century Massachusetts, “Special efforts were made to treat Native Americans in particular, fairly”).

250 See Docket Book, *supra* note 248, at 119.

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.* at 32–33.

255 See Superior Court Minute Entry of Feb. 13, 1722, New Hampshire State Archives. Details may be found in Provincial Case File No. 18208, New Hampshire State Archives. All the cases in this paragraph of text illustrate the general point that the independent judgment of the jury was given special weight in criminal cases. See William E. Nelson, *Law and the Structure of Power*

Turning to a nominally civil case, in *Stanyon v. Weare*²⁵⁶ the former had been successfully sued for damages for assaulting a constable, but the appeals jury overturned it. The Court required the jury to deliberate further but accepted its decision once it returned with the same decision.²⁵⁷

Wibird v. Sheafe, a case with clear political overtones,²⁵⁸ is an actual civil action and an instructive one.²⁵⁹ Appellants sought reversal of a decision below that ruled in favor of the customs collector in a dispute over four bags of wool and the appeals jury ruled in their favor.²⁶⁰ The court refused to accept the verdict and sent the jury back three times to reconsider.²⁶¹ But it adhered to its

in *Colonial Virginia*, 48 VAL. U.L. REV. 757, 864–65 (2014); see generally *supra* note 158.

256 Details of the case may be found in Provincial Case File No. 17294, New Hampshire State Archives.

257 See Superior Court Minute Entry of Aug. 13, 1723, New Hampshire State Archives.

258 There is in the library of the New Hampshire Supreme Court an anonymous manuscript, 2 DECISIONS OF THE SUPERIOR COURT OF JUDICATURE – N. HAMPSHIRE PREVIOUS TO 1816 (1824), that appears to be the notes of a student studying with then-retired Chief Justice Jeremiah Smith, see BELL *supra* note 51, at 61, which contains at 130 a notation on this case, presumably reflecting the judge's teaching: "Juries formerly in this State were sent out often by the Court if they did not like the Judgment or Verdict, particularly in Masonian cases but if the Jury persisted in their first verdict, they prevailed over the Court." The Masonian reference is to a politically-charged series of land disputes that roiled the justice system of the colony for many of its early years and was not ultimately resolved until 1790, see WILLIAM HENRY FRY, NEW HAMPSHIRE AS A ROYAL PROVINCE 25–65, 209–320 (1908); PAGE, *supra* note 123, at 181–234; 29 PROVINCIAL PAPERS OF NEW HAMPSHIRE iv–vi (Albert S. Batchellor ed., 1891); Theodore B. Lewis, *Royal Government in New Hampshire and the Revocation of the Charter of the Massachusetts Bay Colony, 1679–1683*, 25 HIST. N.H. 3 (1970). As revealed by his frequent appearance in the index to the above volume of the Provincial Papers, Richard Wibird was an active participant in these controversies. See 29 PROVINCIAL PAPERS, *supra*, at 678. Sheafe, for his part, moved in and out of government as factional control shifted, see, e.g., 1 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1679–1702, at 635 (Albert S. Batchellor ed., 1904), and this lawsuit arose from actions he took at a time when he was the deputy customs collector, see PAGE, *supra* note 123, at 149–51.

259 Details may be found in Provincial Case File No. 15810, New Hampshire State Archives.

260 Docket Book, *supra* note 248, at 19.

261 *Id.*

views and the court ultimately accepted its verdict.²⁶² Intriguingly, and reflecting the degree to which the concept of separation of powers was not the same in the colonial period as it became in the United States by the middle of the 19th century,²⁶³ the last word on this case was not spoken in court. In early 1702, the Council issued a supersedeas to bring the case before it and deprive the claimants of their victory.²⁶⁴

As to the substance of jury decisionmaking, we have already seen that New Hampshire juries, like those elsewhere,²⁶⁵ had until the early 19th century broad authority to decide for themselves what would today be considered by the Supreme Court as legal issues for judges to decide,²⁶⁶ such as the scope of respondeat superior liability

262 *Id.*

263 See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1060–64 (1997) (arguing that emergence of ideal of judicial independence was critical historical development); see *infra* text accompanying notes 297–98.

264 Docket Book, *supra* note 248, at 25.

265 See, e.g., CARE, *supra* note 127, at 121–23 (commenting that without power over law jurors in England would “be only tools of oppression, to ruin and murder their innocent neighbours with the greater formality”); Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35 (2005) (recounting Virginia history); Nelson, *supra* note 11 (summarizing results of research into various states).

266 The point is solidly established in the scholarly literature. See, e.g., JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 4–8 (2004); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WISC. L. REV. 377 (1999); Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. 553, 557–72 (2009); William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1655–56 (2008).

A famous supporting case is *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (reporting jury charge by Chief Justice John Jay in original action in Supreme Court incorporating Justices’ unanimous view: “[A]s on the one hand it is presumed that juries are the best judges of the fact; it is on the other hand, presumable that the courts are the best judges of the law. But still both objects are lawfully within your power of decision.”); see generally John T. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920–22 (1983) (describing background of case); Charles Warren, *The First Decade of the Supreme Court of the United States*, 7 U. CHI. L. REV. 631, 642 (1940) (describing trial); Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208 (2013) (analyzing procedures employed in case). A comprehensive opinion in *United States v. Courtney*, 960 F. Supp. 2d

and official immunity.²⁶⁷

1152 (D.N.M. 2013), by Judge James O. Browning rejects an effort by a modern criminal defendant to apply the case, *id.* at 1160.

Chief Justice Jay's statement of the rule is consistent with the teaching of the Zenger trial described in the next paragraph of text.

The power of this idea is illustrated by *Shannon v. Thompson*, Judgment Book of Superior Court, Vol. F, *supra* note 156, at 358–61. There, the defendant in a land dispute had successfully gotten the action abated for a defect in the pleading of title. When plaintiff appealed in 1769 the judges were divided. This did not result in an affirmance, as we might expect today, but rather in a reversal and a remand for trial by a jury. In any event, even if the plea in abatement had been upheld on appeal plaintiff could simply have done as Ring did in his lawsuit described *supra* text accompanying notes 139–41, viz., made the appropriate correction and pursued his action. See NELSON, *supra* note 121, at 20; see also GOEBEL & NAUGHTON, *supra* note 5, at 587–88 (noting that same rule existed in criminal cases so plea was “of little advantage to the prisoner”).

- 267 See *supra* text accompanying notes 165–70. See also Nelson, *supra* note 255, at 874–75 (2014) (noting 18th century Virginia legal environment in which judges were not immune from civil liability but juries distinguished between judicial mistakes and judicial oppression).

In attempting over the last thirty-five years or so to build without historical justification, see *Wyatt v. Cole*, 504 U.S. 158, 166–67 (1992); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (acknowledging that Court has “completely reformulated qualified immunity along principles not at all embodied in the common law”), a framework under which protecting officers from unwarranted personal liability is a duty to be performed by judges, see *Pearson v. Callahan*, 555 U.S. 223 (2009) (unanimous); Pfander & Hunt, *supra* note 78, at 1872, the Court has created an “incoherent” muddle, “shot through with inconsistency and contradiction” and unmoored from any functional justifications, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208–09 (2013); see Donald L. Doernberg, *Taking Supremacy Seriously, The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 456–57 (2011) (Court has reasoned backwards from a cost-benefit analysis to unsupportable history to reach results that lack even “the veneer of constitutional respectability”); John M. Greabe, Iqbal, Al-Kidd and Pleading Past Constitutional Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines From Constitutional Tort Law, 20 WM. & MARY BILL RTS. J. 1, 5 (2011) (describing this as “an area of the law that has been appropriately criticized as a conceptual disaster area”). For a notable recent criticism of the Court's performance, see Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245–50 (2015).

The situation originates in a double failure. The first is that the Court ahistorically ignores the role of juries. The second is that the Court has failed to acknowledge the way in which the competing considerations of individual accountability and zealous performance of official duty were balanced from

Thus, for example, in the famous 1735 trial of John Peter Zenger for libeling the Governor and Council of New York,²⁶⁸ Chief Justice James de Lancey told Zenger's lawyer, 80-year old Andrew Hamilton, that

the jury may find that Zenger printed and published those papers, and leave it to the court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict,

the early national period onwards: through the safety net of Congressional indemnification once the court system had decided on the occurrence of wrongdoing. See *supra* note 78. See also Nelson, *supra* note 11, at 356 (arguing "Marbury is important because it was one part of a larger process of constitutional development that directed the people to exercise their sovereign lawmaking power through centralized legislative institutions, like Congress, rather than through local entities like juries"). See generally JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 90–94, 104–05 (2011) (describing efforts of Union officials to secure federal legislation to protect themselves against damages verdicts arising out of wartime measures). Cf. Kit Kinports, *The Supreme Court's Quiet Expansion of the Qualified Immunity Defense*, at 1 (forthcoming Minnesota Law Review Headnotes) (on file at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2648920) (observing that in elaborating doctrines designed to shield officials from having to engage in the litigation process "the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983").

At minimum, the Court should disavow the "remarkable feat of judicial creativity" represented by its most recent "judge-made body of immunity law," Pfander & Hunt, *supra* note 78, at 1923, and recognize that the creation of immunity rules is a legislative, not judicial, function. See John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 Const. Comment. 189 (2008); see also Woolhandler, *supra* note 123, at 483 (noting that legislative power in area "should lessen judicial concern" over damages actions, whose historic purpose has been "to enforce constitutional and statutory limits on government"). Going farther, it is far from obvious that there is any empirical basis to distrust the ability of jurors to sort out the relevant considerations. But they would have to take this power both from legislators and from judges while legislators, judges, and executive officials would all predictably resist, inasmuch as these are just the actors "the jury was meant to check." See Thomas, *supra* note 245, at 1239.

268 For an account of the case situating it within the common law legal system, see Nelson, *supra* note 245, at 1018–20. For a general overview, see Paul Finkelman, *Politics, the Press, and the Law: The Trial of John Peter Zenger*, in AMERICAN POLITICAL TRIALS 21–42 (Michael R. Belknap ed., rev. ed. 1994). The classic monograph remains LIVINGSTON RUTHERFORD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL (1904).

where the jury leave the matter of law to the court.²⁶⁹

269 *The Trial of John Peter Zenger, for Libel, New York City, 1735*, in 16 AMERICAN STATE TRIALS 1, 16 (John D. Lawson ed., 1928). See Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 257 (1920) (noting deep common law roots of jury's right to return special verdict in both civil and criminal actions).

Sometimes, as in the case of General Picton described *supra* text accompanying note 202, the jury's insistence on rendering a special verdict rather than a general verdict of guilty was a clear message to the judges of its desire for a lenient sentence. Thus, for example, we find a Massachusetts jury in 1667 insisting on adhering to a special verdict that the defendant was lying in bed with a man that was not her husband, rather than rendering a general verdict that she was guilty of adultery. See *Colony v. Bullojne*, reprinted in 3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630–1692, at 191–93 (1928). For discussions of the case see John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152, 191 (Hall et al. eds., 1984); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 913 n.244 (1994); Nelson *supra* note 130, at 328; Carolyn B. Ramsey, *Sex and Social Order, The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J. L. & HUMAN. 191, 215 (1998) (reviewing MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996)).

But although special verdicts were “common,” see William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664–1776*, 38 HOFSTRA L. REV. 69, 129–30 (2009), they were frequently delivered in contexts that did not raise any suspicion that the court was attempting to coerce the jury. See Nelson, *supra* note 130, at 317–19 (discussing Massachusetts). In such situations, the jury — consistent with the understanding of all participants in the Zenger case as described *infra* notes 270, 275 and text accompanying notes 269–75 — might by its own choice decide to follow the court's view of the law. The remainder of this footnote presents some examples from the New Hampshire archives.

In the 1735 case of *Jacob v. Hoag*, the subject of Provincial Case File No. 14969, New Hampshire State Archives, the crux was whether Jacob could recover on an earlier judgment notwithstanding an alleged oral promise to refrain from executing on it. The lower court found for Jacob and on Hoag's appeal the appeals jury returned as its verdict that if the “circumstances be sufficient in law to find a verdict upon then we of the jury find for the appellee,” Jacob. The court determined that the evidence “was sufficient in point of law,” and Jacob was granted an execution. These proceedings are recorded in Docket Book, *supra* note 248, at 197–98, as well as in a Superior Court minute for February 1, 1735 to be found in Superior Court Minutes, 1699–1750, Box 1, Folder 1734–1735, New Hampshire State Archives.

In the 1738 case of *Nutter v. Briant*, the former unsuccessfully sued the latter for title to land. The verdict of the jury on appeal was for affirmance “in case the laws of England (at the decease of Anthony Nutter in the year 1685) were those by which this province was governed. But if not we find for the appellant one ninth part of the sixty acres which was Anthony Nutters.” On

Hamilton responded to the judge, "I know . . . the jury may do so; but I do likewise know that they may do otherwise. I know

consideration of this verdict the court was of the opinion "that the laws of England in 1685 are the laws by which this province at that time was governed. It is therefore considered by the court that the former judgment be and hereby is affirmed." The verdict, rendered February 6, 1738, is to be found among the papers in Provincial Case File No. 18115, New Hampshire State Archives, and the court proceedings are recorded in a Superior Court minute to be found in Superior Court Minutes, 1699–1750, Box 1, Folder 1738–39, New Hampshire State Archives.

In the same year, in *Piper v. Greley*, documented in Provincial Case File No. 12010, New Hampshire State Archives, Piper sought damages against Greley, an under-sheriff, because Greley had taken Piper's judgment creditor, Ebenezer Godfrey, into custody but neither put him in jail nor taken bond from him, with the result that Godfrey absconded. As recorded in Docket Book of the Superior Court, *supra* note 246, at 252, the jury hearing Piper's appeal from his loss below decided that there should be an affirmance "if detaining the Body of Ebenezer Godfrey answers the same end [as] shutting the man up in Gaol according to the law of the province and if not they reverse." The court took cognizance of that question, ruled that "the officer['s] detaining the defendant in his custody answer'd the same end as if he had been shut up in Gaol according to the law of the Province," and ordered an affirmance. *Id.* These proceedings are also recorded in a Superior Court Minute Entry of Aug. 13, 1723, New Hampshire State Archives.

In the 1759 case of *Mason v. Tuttle*, documented in Provincial Case Files Nos. 027467 and 06873, New Hampshire State Archives, Ebenezer Tuttle sued for trespass. The jury found specially that the land had belonged to Tuttle's late father, John, but that his will had not bequeathed it nor was Ebenezer the oldest son. The jury decided that the land should go to whichever party had the right to it under the laws of the Province, an issue that the court on appeal decided in Mason's favor. See Judgment Book of Superior Court, Vol. C, *supra* note 165, at 514–17; Superior Court Minute Entry of Nov. 13, 1759, New Hampshire State Archives.

In *Moulton v. Hill* in 1763, the endorsee of a note payable in lumber sued the maker. The jury hearing plaintiff's appeal made special findings setting forth the endorsements on the document and concluded that plaintiff should prevail "if such note is by law endorsable." The court gave its "opinion that the note in the case is a negotiable note," and ordered judgment for the plaintiff. See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 599–61; Superior Court Minute Entry of July 5, 1763, New Hampshire State Archives.

The 1798 case of *Haven v. Colbath* was an action on a note payable in three installments. The jury found the full amount for the plaintiff, "subject to the opinion of the Court" as to whether plaintiff was now limited to a third of that amount. The court concluded that "by law" plaintiff was so limited and ordered the entry of judgment accordingly. See Judgment Book of the Rockingham County Superior Court, Vol. N, *supra* note 152, at 398–400. In 1799, plaintiff, overcoming a defense of *res judicata*, recovered on the remaining two installments. See *id.*, Vol. O, *supra* note 159, at 227–31.

they have the right beyond all dispute, to determine both the law and the fact.”²⁷⁰ He then argued to the jury:

A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion that there is no falsehood in Mr. Zenger’s papers . . . you ought to say so; because you do not know whether others (I mean the court) may be of that opinion. It is your right to do so, and there is much depending on your resolution.²⁷¹

The outburst of popular rejoicing that followed when the jury accepted this argument and found Zenger not guilty is well-known to history.²⁷² Less remarked-upon is the fact that in his charge to the jury the Chief Justice had, although with little grace,²⁷³ agreed with Hamilton’s position.²⁷⁴ Had DeLancey accepted the argument of the Attorney General – that the jury was only empowered to decide the fact of publication, a fact that Hamilton had quite dramatically conceded in the first few sentences of his argument,²⁷⁵ but not whether the words were libelous – the Chief Justice would never have sent the case to the jury to decide.²⁷⁶

270 *The Trial of John Peter Zenger*, *supra* note 269, at 16.

271 *Id.* at 35. See generally Nelson, *supra* note 254, at 873–74 (suggesting that jury was more likely to exercise its independent law-finding powers where issue involved public liberty and that counsel might argue this explicitly).

272 See *The Trial of John Peter Zenger*, *supra* note 269, at 4.

273 See *id.* at 38 (prefacing substantive direction set forth *infra* note 274 with “The great pains that Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges; and his insisting so much upon the conduct of some judges in trial[s] of this kind, is done no doubt with a design that you should take very little notice of what I might say upon this occasion”).

274 See *id.* at 38–39 (charging jury that issue of “whether the words as set forth in the information make a libel . . . is a matter of law . . . which you may leave to the court”) (emphasis supplied).

275 See *id.* at 7.

276 See William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1151 (2014) (“Note that Chief Justice DeLancey did not direct the jury that it must leave the law to the court. By implication, he agreed with the defense counsel’s argument and told the jury . . . that it had the authority to determine the law by itself.”); see also Alschuler & Deiss, *supra* note 269, at 873; Nelson, *supra* note 269, at 153.

E. The Dual Strand: Legislative Intervention

There is a familiar *trompe d'oeil* image that is, viewed one way, of a fresh-faced young woman and, viewed another, is of a wizened old one.²⁷⁷ So too, legislative involvement in individual cases during the early national period presented two very different aspects. From one viewpoint, the one that is the focus of this installment of my overall project, legislative intervention might be a means for an individual to achieve substantive justice in litigated matters or at

Another example of counsel successfully taking the position that Hamilton did in *Zenger* is to be found in *Sawyer v. Perman*, documented in Provincial Case File No. 029003, New Hampshire State Archives. In this fascinating land dispute, involving a chain of title passing without challenge through a Black couple who had been emancipated by will, the plaintiff appealed from the grant of a demurrer below. Before the case went to the jury on appeal, “the appellant moved the court to order the counsel to draw up a Special Verdict.” The appellees opposed this motion, framing a disagreement between the parties as to “whether the Court had by Law a Power to order a Special Verdict where the point or points in question were only matters in law.” Minute Entry of Superior Court for June 29, 1762 in Minutes of Superior Court, *supra* note 205. After consideration of that issue at the next term, the court sent the case to the jury for a general verdict, which it rendered in favor of the appellees. See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 288–90; Minute Entry of Superior Court for Nov. 9, 1762 in Minutes of Superior Court, *supra* note 205.

As the reference to counsel in the previous paragraph indicates, there is good reason to believe that juries rendering special verdicts were often following a roadmap that had previously been agreed upon by the lawyers. For example, in *Walton v. Greley*, documented in Provincial Case File No. 03184, New Hampshire State Archives, plaintiffs’ title depended on a conveyance by only two of the three administrators of an estate. Plaintiffs prevailed below and on defendant’s appeal the jury returned a detailed special verdict in November 1762, determining that “if two administrators only . . . can legally execute a deed . . . they find for appellees [but] otherwise they find for the appellant.” See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 337–38. As recorded in a Minute Entry of Superior Court for Nov. 9, 1762 in Minutes of Superior Court, *supra* note 205, the court concluded that the conveyance was good and ordered judgment for the appellees. Subsequently, in August 1765, defendant brought an action for review, which resulted in a special verdict in the same terms as the first one—a most implausible coincidence unless both juries were working from a common template. The reviewing court, agreeing with the prior legal judgment, ordered judgment for the plaintiffs. See Judgment Book of Superior Court, Vol. E, *supra* note 125, at 203–06.

277 An example appears at <http://www.justriddlesandmore.com/images/Illusions/woman1.jpg> (last visited July 27, 2013).

least, as in Hodsdon's case, the opportunity to achieve it.²⁷⁸ From a second viewpoint, the one that is the focus of the next installment of my overall project, legislative intervention might be a means to weaken the independent authority of the court system.²⁷⁹ And, of course, depending on one's view of substantive justice, legislative action in any particular situation might be calculated to achieve both,²⁸⁰ just as an image may simultaneously depict a young woman and an old one.

With full awareness of this latter constraint, I seek in this section to present some examples of cases falling into the first category, deferring a discussion of those in the second to my next installment.

In many situations, a legislative act was simply intended to

278 See *supra* text accompanying notes 57–58 (describing legislative act designed to relieve Hodsdon of inadvertent default).

279 This might take place either piecemeal, through legislative interference with fully-adjudicated judgments, or wholesale, through structural attacks like the abolition of entire courts or the removal of particular judges whose opinions were displeasing. See REID, *supra* note 58, at 9–17.

280 For example, if the legislature were to grant an individual relief from judicial application of a harsh legal rule, this might be praised as achieving substantive justice or criticized as undermining judicial autonomy.

Consider, for example, the picture that emerges from reading An Act to Impower the Superior Court of Judicature to Render Complete and Perfect Judgment for Damages and Costs in an Action Brought at Said Court by Zebulon Marsh Against Edward Hilton and to Award Execution Thereon, Passed February 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 110 together with *Marsh v. Hilton*, Judgment Book of the Rockingham County Superior Court, Vol. J, *supra* note 155, at 267. In 1771, Edward Hilton sued Zebulon Marsh for slander, alleging that Marsh had accused Hilton, a married man, of having had sexual relations with (among other women) Marsh's wife. Hilton lost the first round but prevailed on appeal the following year. In 1773, Marsh brought another appeal, which – doubtless in consequence of the Revolution – was not heard until 1779. At that point, Marsh won a jury verdict ordering that Hilton return the damages he had won and pay court costs. But Hilton objected that inasmuch as Marsh held a judgment payable in the prior legal tender he could not be ordered to pay it nor could the court tax costs. Lacking equitable powers, see *infra* note 281, the court was unwilling to make the appropriate alteration. After “a full and fair hearing of the parties appearing,” the New Hampshire state legislature in 1786 enacted a statute enabling the court to perfect the prior judgment as may be “just and equitable . . . notwithstanding any objections which have been or may be made thereto on account of said Judgment's being incomplete or otherwise,” Act, *supra*, at 111–12, with the result that Marsh was granted a verdict in current money, which he collected in 1787, see *Marsh v. Hilton*, *supra*, at 269, 270.

relieve the litigant of the consequences of a procedural misfortune.²⁸¹ Thus, for example, in 1700, the New Hampshire provincial legislature granted Abraham Clements a new opportunity to appeal because between the time of a case that had resulted in a ruling against him and the scheduled appeal in Superior Court, “the government being changed the said Superior Court was altered and at the next Superior Court that was held the Judges [ruled that the appeal] could not

281 In the case of New Hampshire this meant that the legislature in many individual lawsuits, including the one described *supra* note 280, was serving as a substitute for the equity courts that the state’s republican government had been unwilling to create after the Revolution. See REID, *supra* note 58, at 67–68; see also [Chief Justice] Frank R. Kenison, *The Judiciary Under the New Hampshire Constitution, 1776–1976*, in NEW HAMPSHIRE AMERICAN REVOLUTION BICENTENNIAL COMMISSION, *THE FIRST STATE CONSTITUTION* 12, 13 (1977) (“Equitable relief was available only by special legislative action. Not until 1832 did the legislature vest the courts with full authority to grant equitable relief.”); see generally WILLIAM PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 171 (1965) (noting similar situation prior to Independence in those American colonies that lacked chancery courts).

An example is to be found in the Petition of John Dustin, June 16, 1786, Legislative Petitions File, New Hampshire State Archives. The quotations in the next paragraph are taken from the petition and the endorsements thereon.

Filed by his mother on behalf of the imprisoned Dustin, the petition recounted that he had been incarcerated for more than a year on an execution for debt and “is almost in despair, seeing no probability of relief from said confinement.” He could not take the debtor’s oath to secure his release, Dustin explained, because he owned land. But he could not sell the land to apply to the debt because the creditor held the deed as security. “In this unhappy situation your petitioner has no prospect but of living in confinement the remainder of his days unless your Honours will interpose in his behalf and point out some way for his release.” On the day this petition was filed both Houses issued an order directing that a hearing be held later in the week and that in the meanwhile the creditor’s attorney be served with a copy of the petition so that he “may appear and show cause (if any he hath) why the said Dustin may not be liberated from his confinement.”

After a brief delay to allow service to be effected, see Journal of the New Hampshire House of Representatives, June 20, 1786, New Hampshire State Archives, the House, after “hearing and considering” the petition, voted on June 23, 1786 that Dustin be permitted to take the debtor’s oath provided that the Justices before whom he did so should agree that he had no property other than the deed in question. See *id.*, June 23, 1786. The upper house concurred the same day. See Journal of the New Hampshire Senate, June 23, 1786, New Hampshire State Archives.

be tried before them.”²⁸² Similarly, when Hugh Tallent wound up on the wrong end of a judgment for £47.16s.9d as a result of “not knowing of a summons which had been left by the . . . deputy sheriff between the boards and ceiling of [his] house,” the New Hampshire state legislature gave him a second chance, with the result that the ultimate 1789 judgment against him (which he paid in pieces until 1794) was for £27.²⁸³ In another case, Elizabeth Lamson’s second chance turned out less satisfactorily for the parties involved. She was sued as administratrix of her late husband’s estate for the balance due on a £50 note of hand after she had only been able to scrape together £27.15s. as a partial payment. She lost by default because the lawyer who was supposed to take care of it for her forgot about the matter.²⁸⁴ The New Hampshire state legislature determined in 1786 that she “be restored to her law, that the default aforesaid be taken off, & that she be permitted to . . . defend said action.”²⁸⁵ But when the time came, she, perhaps knowing that she was insolvent, defaulted once more.²⁸⁶ In any event, the second default judgment went uncollected.²⁸⁷

In other situations, as in claims for money damages against the government, the legislature was the only available forum.²⁸⁸

In yet other cases, aggrieved citizens in the early national period turned on their own initiative to the legislature where they might once have turned to the courts. For example, when in 1714 Charles Banfield, a constable in Portsmouth, New Hampshire, was incarcerated for not remitting taxes to the Selectmen even though he had done his best to collect them from the recalcitrant townspeople, he sought a writ of habeas corpus and the court brokered an

282 See An Act to Allow Abraham Clements a New Trial in the Superior Court, Passed June 12, 1700, in 1 LAWS OF NEW HAMPSHIRE, *supra* note 258, at 671.

283 See An Act to Restore Hugh Tallant to His Law, Passed Feb. 27, 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 124; Johnson v. Tallant, Judgment Book of the Rockingham County Superior Court, Vol. L, *supra* note 155, at 3. For descriptions of similar cases see HAMBURGER, *supra* note 7, at 526–29 (Massachusetts) and REID, *supra* note 58, at 67–68 (New Hampshire).

284 This is the recital of the facts contained in An Act to Restore Elizabeth Lamson to Her Law, Passed Dec. 25, 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 202.

285 *Id.* at 203.

286 See Lamson v. Tilton, Judgment Book of the Rockingham County Superior Court, Vol. J, *supra* note 280, at 380.

287 See *id.*

288 See REID, *supra* note 58, at 9; Desan, *supra* note 123, at 1442–45.

arrangement for his prompt release.²⁸⁹ In a remarkably similar case in 1784, James Rundlet chose another route. He petitioned the New Hampshire legislature²⁹⁰ setting forth that he was one of the constables of the town of Epping to collect tax for 1782, that he had attended to his duty as constable in collecting the tax as fast as was in his power, but that “the extreme scarcity of Money [had] prevented his collecting the whole.” As a result, he was in jail notwithstanding his ability to pay at least part of the necessary sum. Rundlet continued that if he were “liberated it would be in his power soon to collect a sum sufficient to enable him to settle with the Treasurer, but if not he must either pay the Taxes of his delinquent Townsman out of his own estate or remain in Gaol how long he knows not.” On April 12, the legislature granted the petition, ruling that Rundlet should pay over the amount he had collected and be granted 60 days to pay the remainder.

IV. Preview: The Slow Development of Separation of Powers as Checks and Balances

The third installment of this project will situate the writ of habeas corpus in the context of the system of checks and balances that evolved here during the first half of the nineteenth century.²⁹¹

Although it is sometimes loosely said that the English system had no separation of powers, this is imprecise.²⁹² “Separation of powers” as we know it today consists of:

(a.) assigning duties to the government instrumentality best able to perform them, taking into account both efficiency and policy considerations. Thus, for example, courts not cabinets should try criminal charges against individuals. This concept, whose focus is at the level of the particular governmental action at issue, might be

289 The case is fully described in Freedman, *supra* note 2, at 597–98; *see also id.* at 611–12.

290 *See* Petition of James Rundlet, Apr. 1, 1784, Legislative Petitions File, New Hampshire State Archives. The quotations in the remainder of the paragraph are drawn from this document. The disposition recorded in the last sentence of the paragraph is recorded by endorsement on the document.

291 *See* Eric M. Freedman, *Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. (forthcoming 2016).

292 The remainder of this paragraph is drawn from Freedman, *Liberating*, *supra* note 1, at 396.

called “allocation of roles.”²⁹³

(b.) assigning duties to various branches in furtherance of the structural purpose of having them limit each others’ power.²⁹⁴ This concept, whose focus is at the architectural level, is encapsulated in the American term “checks and balances.” Its premise is that in general requiring interaction between the branches before any problem can be finally disposed of will lead to decisionmaking that is both substantively sounder and more consistent with the goals of a representative non-tyrannical government than giving a single branch the first and last word.

The British system of government in the North American colonies understood and largely respected allocation of roles. The distribution of powers to particular officials, which judges and juries enforced through habeas and other legal remedies, had the effect of insuring that individuals were treated justly and in accordance with law. Indeed, because the Crown was presumed to desire that the law be obeyed,²⁹⁵ subjects could judicially invoke the law against the King himself.²⁹⁶

The case of *Hodsdon* — a subordinate executive officer accused of abusing his powers — illustrates that judicial enforcement of separation of powers in the sense of allocation of roles passed uncontroversially into American law.²⁹⁷

But because government power had ultimately flowed from the Crown rather than the People during the colonial period, there had been no sense then that in keeping individual officeholders

293 Aziz Huq has given this principle the name “institution matching.” See Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012).

294 See THE FEDERALIST No. 51, at 320–22 (James Madison) (Clinton Rossiter ed., 1961) (advocating “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.”).

295 See Timothy Endicott, *Habeas Corpus and Guantanamo Bay: A View From Abroad*, 52 AM. J. JURIS. 1, 28–29 (2009).

296 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”); HAMBURGER, *supra* note 7, at 71–73, 80–81, 97–98, 101, 113–14, 194–217, 234.

297 See Kramer, *supra* note 9, at 38; see also HAMBURGER, *supra* note 7, at 217, 319, 391, 612–14 (noting that situating the well-recognized power of judicial review within a structure of separation of powers could lead to political conflict with the other branches).

within their prescribed roles the judges were also promoting good government by reinforcing the overall structure of a consciously divided system, one in which “the interior structure of the government” was so contrived “that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”²⁹⁸ Separation of powers as checks and balances was a new concept²⁹⁹ and, as the next installment will describe, took some time to work out.

298 THE FEDERALIST NO. 51, *supra* note 294, at 320.

299 See G. Edward White, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1160 (2010) (persuasively criticizing HAMBURGER, *supra* note 7, for drawing normative conclusions from historical data without recognizing this point). See also Halliday & White, *supra* note 5, at 673.