# Habeas Corpus in Three Dimensions

# Dimension I: Habeas Corpus as a Common Law Writ

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CONTENTS



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I am solely responsible for the contents of this piece, including certain deviations from THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) that have been made at my insistence in the interest of clarity, and all statements of fact and opinion contained herein.

## Project Overview

This is the first of three planned articles in a project whose overall title is "Habeas Corpus in Three Dimensions." This piece considers the significance of the fact that, until the first decades of the nineteenth century, American habeas corpus was embedded in a system of common law writs. The second article will discuss habeas corpus as part of the overall structure of constraints on government power being constructed in this country until approximately 1830. The third installment will trace the role of habeas corpus in the system of separation of powers that subsequently developed.

## I. Introduction: Expanding the Suspension Clause Canon by Taking a Functional View of "Habeas Corpus"

With the generous support of the Harvard Civil Rights–Civil Liberties Law Review's editors, I present this article as a Special Project so that, freed from some of the constraints of format that might apply if it were published in a more narrowly focused outlet, I can sketch out in broad strokes a few ideas regarding habeas corpus that may prove useful to historians, legal scholars, and members of the bench and bar.

I offer two principal suggestions:

1. In researching the history of habeas corpus we need to get beyond the label "habeas corpus." The constitutional importance of the writ is in its function, not its name.[1]

As shown in Part II, demands for release from unlawful imprisonment could be made during the colonial and early national periods by seeking a variety of writs, including certiorari, supersedeas, prohibition, trespass, and replevin—or even by pleadings that asked for no particular writ at all. Although much work remains to be done, the New Hampshire examples upon which I frequently rely are wholly consistent with cases that other researchers have described in a variety of Anglophone jurisdictions of the seventeenth, eighteenth, and early nineteenth centuries.

In many of the contexts in which researchers today are working,[2] the question of why the litigant chose one writ over another is (a) simply antiquarian;[3] (b) in many instances unanswerable because of the informality of colonial legal recordkeeping;[4] and (c) seeking insight into a litigation deci-

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[1] U.S. CONST. art. I, § 9, cl. 2, the Suspension Clause, provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Many state constitutions have long contained similar provisions. *See, e.g.*, N.H. CONST. art. 91 (effective June 2, 1784 and still in force) ("The privilege and benefit of the Habeas Corpus, shall be enjoyed in this State, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months.").

[2] Much recent interest in common law habeas corpus originated in *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that the statutory procedure for Guantanamo detainees to test imprisonments was invalid under the Suspension Clause for failure to provide rights commensurate with common law habeas corpus. No prior statute had ever been invalidated on these grounds and only a very few even challenged, *see id*. at 774–76, so that lawyers generally had previously lacked any practical reason to explore the common law terrain.

[3] That is, as further discussed *infra* Part III.A, the question may have a discernable answer but one that, like assessing the advantages of particular materials for making buggy whips to be used under specific conditions, is of only specialized interest. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897) (warning against "pitfall of antiquarianism" and stating that "for our purposes our only interest in the past is for the light it throws upon the present").

Of course, arranging the same historical materials into different narratives depending on the goal at hand is the very thing lawyers do. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110–42 (2000); Michael N. Burt, *The Importance of Storytelling at all Stages of a Capital Case*, 77 UMKC L. REV. 877, 877 n.2 (2009); *see also* Eric M. Freedman, *Re-stating the Standard of Practice of Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 669–71 (2008). But to the extent that legal arguments are based on history, the building blocks of the story should be accurately described. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 46 (2001) [hereinafter FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT]. *See generally* John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993) (describing how history is practiced for purposes of constitutional adjudication).

What talented historians do is no different. They advance the discipline by taking verifiable facts and using them to fashion new explanatory frameworks. *Cf.* Jonathan Rose, *Studying the Past: The Nature and Development of Legal History as an Academic Discipline*, 31 J. LEGAL HIST. 101 (2010) (surveying motivations for study of legal history).

[4] Professor Nelson's ongoing survey of colonial law emphasizes this point. *See, e.g.*, 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660, at 37, 71, 92 (2008); William E. Nelson, *Legal Turmoil in a Factious*

sion that in reality made no difference to the outcome when the issue was a potentially wrongful public or private imprisonment.[5] Such imprisonment consistently led courts on both sides of the Atlantic to cut through whatever technicalities they might otherwise have been inclined to enforce.[6]

Hence, when considering the constitutional command against suspension of the writ, we should adopt a functional rather than a formal definition of habeas corpus,[7] thus giving force to John Marshall's statement that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law."[8]

Functionally defined, a petition for a writ of "habeas corpus" is a demand, however denominated, challenging the legal basis of a detention and calling upon the custodian to justify it.[9] Any such case belongs in the Suspension Clause canon.

The adoption of this suggestion would augment the supply of material useful for Suspension Clause jurisprudence and scholarship, both of which have to date invariably restricted themselves to the territory of writs specifically labeled "habeas corpus."[10]

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*Colony: New York, 1664–1776*, 38 HOFSTRA L. REV. 69, 150–51 (2009); *see also* A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810, at 57–60 (1981); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 8 (2001) (noting that the habeas corpus practice inherited by the new country was "obscure").

[5] As discussed *infra* Part II.A.3 and note 76, habeas corpus would lie against private parties such as masters claiming custody over alleged slaves and apprentices. *See* Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("Whether the petitioner had been placed in physical confinement by executive direction alone, or by order of a court, or even by private parties, habeas corpus was the proper means of challenging that confinement and seeking release.").

[6] *See infra* Part III.B.2. For examples of the technicalities that might have been available, see *infra* note 81 and text accompanying notes 79–81.

[7] *Cf.* Mark D. Falkoff & Robert Knowles, *Bagram*, Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851, 884–86 (2010) (analyzing *Boumediene* in terms of functionalism and formalism).

[8] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807); *accord* United States v. Hayman, 342 U.S. 205, 210 (1952).

[9] *Cf.* Boumediene v. Bush, 533 U.S. 723, 783 (2008) (holding that statutory substitute for traditional habeas violated Suspension Clause because "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain"); *Preiser*, 411 U.S. at 484 ("It is clear . . . from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."); FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT, *supra* note 3, at 34–35, 169 n.30 (setting out series of chambers release orders from Circuit Court for District of Georgia in early 1800s, one of which was injunction to jailer against further imprisonment).

[10] Even within the material used, the arguments center on the same handful of printed cases, although these constitute a small fraction of the data that scholars have helpfully begun to make available. *See, e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 588–93 (2008); *see also* John H. Baker, *Why the History of English Law Has Not Been Finished*, 59 CAMBRIDGE L.J. 62 (2000).

2. The cases in the expanded canon share informative methodological elements.[11]

As Part III describes, at common law a potentially wrongful imprisonment was an emergency and in responding to it the legal system emphasized the importance of the received common law approach to problem solving.[12] The decisions are united by a strong impetus towards speedy and pragmatic resolutions based on case-specific facts as revealed by direct investigation and a disinclination to pronounce broad rules of law.[13]

As an extended survey of the cases by distinguished scholars shows, "judges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention."[14] Employing a variety of procedural devices, they simply nullified the legalism that the custodian's return to a writ of habeas corpus was conclusive as to the facts it contained.[15] For instance, even after receiving an application for habeas corpus supported by extensive affidavits, the judges might not issue the writ (thereby triggering a return) but rather issue a rule *nisi* ordering the jailer to show cause why the writ should not issue (thereby triggering an answer to the order to show cause that would be fully litigated).[16]

Thus, by the 1730s, "[m]any prisoners now had a full review of their imprisonment without the writ ever issuing: habeas corpus without the writ."[17]

A recent article by Professor Philip Hamburger illustrates the distorting effect of banishing such cases from the canon.[18] He groups them under the

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[11] The later installments of this project will suggest additional unifying features. In particular, I will argue in the second installment that all of the cases in the group played the same structural role in curbing abuses of public power.

[12] *See* Henry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 454–55 (1975).

[13] *Cf. id.* at 449 (observing that common law lawyers "are uneasy with doctrinal generalizations [and] more comfortable with the facts of cases than with general concepts"); Oliver Wendell Holmes, Jr., *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) ("It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . It is only after a series of determinations on the same subject-matter that it becomes necessary to 'reconcile the cases,' as it is called, that is, by a true induction to state the principle which has until then been obscurely felt."). *See generally* Graham Mayeda, *Uncommonly Common: The Nature of Common Law Judgment*, 19 CAN. J.L. & JURIS. 107, 123–24, 131 (2006) (arguing that legitimacy of common law flows from its methodology).

[14] Brief for Legal Historians as Amici Curiae Supporting Petitioners at 29, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196), 2007 WL 2441583, at *29 [hereinafter Brief for Legal Historians].

[15] *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 112–15 (2010) (listing these devices); *see also Boumediene*, 553 U.S. at 779–82 (agreeing with this account).

[16] *See id.*; Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756-1816*, 29 J. LEG. HIST. 215, 216–18 (2008) (describing many such cases); Brief for Legal Historians, *supra* note 14, at 22–26 (describing cases using other devices for same purpose); *see also infra* Part III.B.2.

[17] HALLIDAY, *supra* note 15, at 113.

[18] Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1888–90, 1985 (2009).

rubric of "pre-habeas proceedings" that, he says, were used "to avoid giving habeas to persons outside allegiance."[19] This terminological distinction does not describe any substantive difference. Rather, it elides two different meanings that might be contained in a statement that a prisoner was (or was not) granted a writ of habeas corpus. This statement could mean either that: (1) the prisoner was (or was not) judicially heard with respect to the lawfulness of his imprisonment, or (2) the prisoner was (or was not) granted an order directing the custodian to discharge him.

In the cases Professor Hamburger describes, the judges' purpose in conducting their extended factual and legal inquiry into the merits was to determine whether some order directing discharge should ultimately issue. As he puts it, persons held as "prisoners of war could not get writs of habeas" but their lawyers could apply for them, which would trigger a judicial investigation that would give the court "an opportunity to conclude [the prisoner] was actually within protection and thus not really a prisoner of war, in which instance the court could issue the writ."[20] On the assumption that Professor Hamburger is entirely correct—that a decision against the prisoner would result in an order that a writ of habeas corpus not issue—his discussion would merely prove that the various legal proceedings that he labels "pre-habeas" were in every meaningful way habeas proceedings.

An accurate understanding of the legal situation requires recapturing the judges' intellectual environment,[21] the felt urgency of the possibility that a person might be imprisoned contrary to the bedrock principle of the King's justice that his servants infringe no one's liberty unwarrantably, and the amount of judicial energy devoted to obviating this possibility.[22]

The thought unifying Part III is that if today's students, like those of yesterday, search the forest of prerogative writs seeking "habeas" trees from which to extract data, they risk failing to see that judicial responses to claims of wrongful imprisonment displayed a common methodology regardless of the form in which the claims were advanced.

Part IV responds to the anticipated objection that my approach is of no use for the law because, in the context of today's novel national security problems, the application of common law methodology is impractical. The problems, I reply, are not novel, and recent evidence shows that for current

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[19] *Id.* at 1890.

[20] *Id.* at 1888. Procedurally this is accurate and uncontroversial. I leave for elsewhere discussion of whether it correctly sets forth the legal framework governing the merits disposition. A further assessment of Professor Hamburger's article is contained in Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 988–90 (2011) (reviewing HALLIDAY, *supra* note 15).

[21] *See infra*, Part III.B.1.

[22] *See* Boumediene v. Bush, 553 U.S. 723, 739–41 (2008); HALLIDAY, *supra* note 15, at 9, 77–83. I have sketched out some of the implications of this King-centered theory in my review of Halliday's book, Eric M. Freedman, *Liberating Habeas Corpus*, 39 REVS. AM. HIST. (forthcoming 2011). *See also infra* note 85.

courts to apply the framework of this article they need only apply long-tested tools to a historically familiar task.

Part V summarizes the possible value of the ideas presented.

## II. Some Illustrative Cases for Suspension Clause Expansion

This Part presents the facts and procedural histories of a series of cases successfully challenging illegal detentions.[23] Those in Section A are "habeas corpus" cases and those in Section B nominally are not. But the cases in Section A differ from those in Section B only formally, not functionally. The cases in each group not only display factual isomorphism but, as Part III will describe, share core values of both habeas corpus and common law adjudication.

### *A. Formal Habeas Cases*

#### *i. An Unappreciated Constable*

In 1714, Charles Banfild was an appointed constable for the town of Portsmouth, New Hampshire. One of his duties was to collect taxes from the townspeople and remit them to the Selectmen. But things did not go well.[24]

As he explained to the New Hampshire Superior Court in mid-August of that year, he used his best endeavours to collect but the "people would not pay."[25] And as fast as he hauled the delinquents before the local Justices of the Peace ("J.P.s") for non-payment, just as fast did the J.P.s discharge them.[26] This process was interrupted only by his own imprisonment for non-payment of the taxes to the Selectmen, which he had been unable to end by posting bond so that he might return to his collection efforts.[27]

Banfild complained (1) that his incarceration was contrary to the provincial statute under which he had been appointed,[28] inasmuch as he had

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[23] Copies of the documents from the New Hampshire State Archives that undergird my descriptions of these cases are available from the reference desk of the Deane Law Library of Hofstra Law School. 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.

[24] The account given in this and the following two paragraphs of text is drawn from Provincial Case File No. 17944, New Hampshire State Archives. That file contains three petitions: one dated August 10, 1714, one undated which I believe to be from August 11, 1714, and one dated August 12, 1714.

[25] Petition of August 10, 1714, *supra* note 24.

[26] *See id.*

[27] *See id.; see also* Petition of August 11, 1714, *supra* note 24, ¶ 2 ("If this be not unjust I know not what is or can be unjust.").

[28] An Act to Compell Constables to Doe Their Duties in Collecting Rates, Passed March 9, 1692–93, *in* 1 Laws of New Hampshire: Province Period, 1679–1702, at 555 (Albert S. Batchellor ed., 1904).

sufficient assets to pay the taxes in dispute;[29] (2) that the Selectmen who had first appointed him and then procured his imprisonment were without authority because they had been invalidly chosen;[30] and (3) that it could "in no way be justifiable" for him to be imprisoned for not remitting to the Selectmen taxes from those townspeople whose obligations had been discharged by the J.P.s.[31] Banfild accordingly sought from the Superior Court "an order . . . agreeable to & in the nature of an habeas Corpus . . . to bring your petitioner (in Custody) before your honors that so he may have a proper hearing of his Complaint & may have such remedy as to your honors shall seem Just & Agreeable to Law."[32]

When the Court considered the matter on August 11, 1714, it ordered Banfild to be brought before it, "which order the Sheriff refused to obay."[33] Irritated, the Court told the Sherriff to have before it the next day not only Banfild "in safe custody," but also the Justices of the Peace who had committed him to prison, and the Selectmen complained of.[34] This was done and the parties worked out an arrangement for Banfild's prompt release.[35] Banfild and a guarantor would enter into a penal bond obligating themselves to pay twice the amount due unless within five weeks Banfild paid to the Selectmen the taxes they claimed, less the amounts owed by taxpayers whose obligations the J.P.s had forgiven.[36]

### *ii. J.P. Chase Feels Insulted; Benjamin Whittemore is Imprisoned*[37]

On May 31, 1771, Benjamin Whittemore of Nottingham West, New Hampshire was called before J.P. Ezekial Chase to acknowledge his signature on a land deed. Instead of complying, Whittemore violently ripped his

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[29] *See* Petition of August 11, 1714, *supra* note 24, ¶ 1.

[30] *See id*., ¶ 4. The underlying dispute between rival slates of officeholders was resolved over the summer by the provincial House of Representatives. *See* Journal of the House of Representatives, July 24, 1714, *in* 19 PROVINCIAL PAPERS OF NEW HAMPSHIRE 55 (Albert S. Batchellor ed., 1891).

[31] Petition of August 11, 1714, *supra* note 24, ¶ 3.

[32] Petition of August 12, 1714, *supra* note 24.

[33] Superior Court Docket Book, 1699–1738, at 86, New Hampshire State Archives (spelling in original). I infer from what followed that the Sheriff may have deemed Banfild (possibly a cantankerous sort) to be a security risk.

[34] *Id.*

[35] *See id*. at 87; *see also* Superior Court Minutes, 1699–1750, Superior Court Docket Box 1, Folder 1710–1719, New Hampshire State Archives (containing rough draft of ultimate docket entries).

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

[37] This is a condensed account, focused on the matters of relevance to this article. It does not fully convey the richness of the story revealed in the archives, *see infra* note 38, much less the extended litigation history among the various actors as they engaged in disputes on a whole range of subjects.

signature off the page and fled.[38] On June 2, the irate J.P. issued an order for the imprisonment of Whittemore, which resulted in his being jailed on June 5.[39] On June 7, Whittemore filed a petition for a writ of habeas corpus with New Hampshire Superior Court Chief Justice Atkinson that simply alleged that he was being "unjustly held and detained without any lawful cause for such detainer set forth by the said Ezekial Chase, Esq. in his order of commitment."[40] The writ was granted on June 8; on June 9, Whittemore came before the justice, posted bail, and was released.[41] When the full court convened at the beginning of September, a paperwork glitch emerged requiring the issuance of another writ of habeas corpus; this took place within a day.[42] In mid-September, the underlying proceedings against Whittemore were quashed without objection.[43]

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[38] This behavior is easily explained; Whittemore had also given a deed to the same land to another party. *See* Provincial Case File No. 29935, New Hampshire State Archives. It was that part of the tale, rather than Whittemore's brief contretemps with Chase, that involved the greater number of players and expenditure of judicial resources.

Tersely stated, the story that emerges from Provincial Case File No. 29935, *supra*, is this: On April 30, 1770, Whittemore sold at auction land in Nottingham West that he had inherited from his father, also named Benjamin Whittemore, who had died the previous year. *See* Will No. 3677, New Hampshire State Archives. The winning bidders were Captain Moses Barrett and Captain Ezekial Greeley, to whom Whittemore gave a deed on the spot. The witnesses were Joseph Kelly and Samuel Greeley. This deed was not recorded. Subsequently, Whittemore, after assuring Kelly that he had cleared the Barrett-Greeley title, gave a warranty deed for the same property to Kelly, which was recorded on January 2, 1771 in Lib. 101, Fol. 54, New Hampshire State Archives. On March 14, 1771, Barrett and Greeley sued Kelly in ejectment. It was in that case (the subject of Provincial Case File No. 29935, *supra*) that Whittemore was called before Chase to acknowledge the deed he had given to Barrett and Greeley but instead ripped his signature off the document. Kelly defended the ejectment action on the legal ground that Barrett and Greeley were unable to produce a signed deed to the property, a defense that was rejected by the lower court but that prevailed on appeal. *See* Judgment Book of Superior Court, Vol. G, Feb. 1771–Sept. 1773, at 155–57, New Hampshire State Archives.

[39] Chase's mittimus and the jailer's endorsed receipt are in Provincial Case File No. 30379, New Hampshire State Archives.

[40] *Id.*

[41] *Id.*

[42] It appears that in June, Chief Justice Atkinson had wrongly (but understandably in view of the minimal documentation in front of him, which did not include any sheriff's return to the writ) believed that Whittemore was facing criminal contempt charges and had therefore conditioned bail on his returning to face such charges. The recognizance Whittemore signed on June 9, 1771, which can be found in Provincial Case File No. 30379, *supra* note 39, requires him to appear to answer "what may be . . . objected against him by our sovereign Lord the King." When the full court convened for its September sitting on September 3, 1771 and it became clear that the actual moving parties before Chase were Barrett and Greeley, Whittemore was briefly returned to custody so that another writ of habeas corpus could issue. This was done on September 5, and the sheriff made a complete return to it on September 6, 1771. The new writ and return are in Provincial Case File No. 30379, *supra* note 39, and descriptions of the proceedings are to be found in Judgment Book of Superior Court, Vol. G, *supra* note 38, at 180, 186.

The relationship between public and private criminal proceedings, especially in the context of contempt, will be discussed in the second installment of this project.

[43] *See* Provincial Case File No. 30379, *supra* note 39. There was a subsequent indictment of Whittemore for assaulting Chase and carrying away the deed, to which he pleaded not guilty. *See* Hillsborough County Case File, No. 8133, New Hampshire State Archives. I have been unable to find any further records of this proceeding.

*iii. An Alleged Slave*

In New Hampshire, as elsewhere, suits by alleged slaves claiming freedom were common,[44] and they could be brought in many legal forms. One possibility was to petition for a writ of habeas corpus and thereby commence ordinary proceedings under that writ.[45] That is what Peter Johnson of Portsmouth, New Hampshire did in the summer of 1748 in claiming that he had been wrongfully "imprisoned for refusing to serve as a slave."[46] The Superior Court ordered that the alleged owner appear, and when he did, the case seemingly morphed into a trespass action.[47] The issue of Johnson's status

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[44] *See* Robert B. Dishman, *Breaking the Bonds: The Role of New Hampshire's Courts in Freeing Those Wrongfully Enslaved, 1640s–1740s*, 59 HIST. N.H. 79, 81 (2005). *See generally* JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780–1860 (1998); Robert B. Dishman, *"Natives of Africa, Now Forcibly Detained": The Slave Petitioners of Revolutionary Portsmouth*, 61 HIST. N.H. 7 (2007); Valerie Cunningham, *The First Blacks of Portsmouth*, 44 HIST. N.H. 181 (1989); Howard T. Oedel, *Slavery in Colonial Portsmouth*, 3 HIST. N.H. 3 (1966).

[45] For English examples, see 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1225–35 (1992); HALLIDAY, *supra* note 15, at 174–75, 211–12. For post-Independence examples, see PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 25, 121, 258 (1985). Another such example is to be found in the file Habeas Corpus 1788–1790, Pennsylvania State Archives, recording the proceedings in the summer of 1788 entitled Respublica v. Negroes Sam and John. There is a general discussion of the use of habeas corpus in slave cases of this period in Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. CHI. L. REV. 243, 267–70 (1965). *See also* MORRIS, *supra* note 4, at 11–12.

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

[47] This would have been the appropriate form for asserting a false imprisonment. *See* 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 422 (Alfred S. Konefsky & Andrew J. King eds., 1982). It is also possible that the actors mentally transformed the action into one for personal replevin as described *infra* note 57. In any event, the use of a jury shows that this case was not litigated as a habeas corpus action. *See infra* note 58.

An unambiguous use of trespass instead of habeas corpus is to be found in Provincial Case File No. 13058, New Hampshire State Archives. In the spring of 1767, Anna Foss left her husband Zachariah Foss on account of alleged maltreatment and sought refuge in the house of her son, John Adams. Zachariah might have brought a habeas action against John requiring him to produce Anna, which would have resulted in an equitable ruling by the bench. *See* HALLIDAY, *supra* note 15, at 131–33, 199–201; *infra* text accompanying notes 103–104. Instead, Zachariah sued John for trespass. This resulted in the taking of deposition testimony as to the claimed mistreatment and to three jury trials, one below and two on appeal, *see infra* text accompanying note 91, with an ultimate resolution in favor of John. *See* Judgment Book of Superior Court, Vol. F, 1767–70, at 385–87, New Hampshire State Archives (reversing the result reported in this same volume at 330–32). As recorded in the Legislative Petitions File, New Hampshire State Archives, Anna's petition to the New Hampshire legislature that year for a divorce was denied after an evidentiary hearing. *See generally* 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS, *supra*, at 455.

went to a jury, which found him to be free, and the order of the court was that "he be enlarged and the Sheriff set him at Liberty."[48]

*iv. Impoverished Service Members*

Members of the armed forces in the early 1800s who were imprisoned in violation of a federal statute exempting active duty military personnel from arrest for debt would routinely seek and gain release through writs of habeas corpus. Thus, for example, in May 1814, George Daze:

> presented to United States District Court for the Eastern District of Pennsylvania a petition setting forth that he was "an enlisted seaman in the service of the United States," currently "in confinement in the debtors apartment of the City and County of Philadelphia" by virtue of an execution (a copy of which is attached to the petition) issued on a state court judgment for debt; that "by the provisions of an Act of Congress approved the 11th of July 1798," he was "exempted from all personal arrests for any debt or contract"; and praying for "a Habeas Corpus directed to the keeper of the debtors apartment that he may be discharged according to Law."
>
> [T]he court promptly issued the requested writ, requiring the keeper of the debtors apartment to produce Mr. Daze "forthwith."
>
> It appear[ed] from the keeper's return . . . that the petitioner had correctly set forth the cause of his detention, the court rendered an endorsement order the same day, May 27, 1814: "Discharged. The Act of Congress forbids arrests of persons lawfully engaged in *naval* Service."[49]

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[48] *See* Judgment Book of Superior Court, Vol. A, Aug. 1744–[June 1750], at 341–42, New Hampshire State Archives. In other words, the court was ordering Johnson's release from the custody both of the Sherriff and the alleged owner. For a discussion of a similar dual discharge from custody by means of habeas corpus in the case of an apprentice, see *infra* note 76 and text accompanying notes 63–67. *See also infra* text accompanying notes 103–104.

[49] FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT, *supra* note 3, at 42–43. This account of the Daze case relies upon the case documents on microfilm reel M-987 produced by the National Archives and Record Administration. The federal statute in question is Act of July 11, 1798, ch. 72, § 5, 1 Stat. 595 (exempting enlisted servicemen from personal arrest for debt or contract). For a similar New Hampshire case, see *In re* Mills, Strafford County Ct., Dec. 18, 1819, Strafford County Court Records, Folder 11, New Hampshire State Archives (petitioner discharged on habeas corpus after successfully invoking federal statute in state court). Two other cases, from 1822 and 1832, are described in FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT, *supra* note 3, at 43.

### *B. Functional Habeas Cases*

#### *i. Certiorari: J.P. March Feels Insulted; Peter Pearse is Imprisoned*

One winter's day in 1769, seventeen months before Benjamin Whittemore ripped the deed from the hands of J.P. Chase,[50] Peter Pearse had an encounter on a New Hampshire street with Clement March, a J.P. whom he had just seen inside the courthouse. Pearse asked March "what reason he had to call him a chattering fellow in the Court," and "added that the said March was a Blockhead as much as any in a Barber's Shop and called him a Rogue afterwards."[51] March responded by having Pearse presented for contempt to his own inferior court, which denied requests for counsel and jury trial, summarily convicted Pearse of contempt, and ordered him imprisoned until such time as he could provide sureties for good behavior.[52] His incarceration lasted approximately 8 hours.[53] Within that time he filed with Chief Justice Theodore Atkinson of the Superior Court a petition for a writ of certiorari; it was granted and Pearse was released on bail the same day, December 23, 1769.[54] The contempt proceedings were eventually quashed without objection.[55]

#### *ii. Personal Replevin: Another Alleged Slave*

Late in 1750, an alleged slave named Phebe Nung of Dover, New Hampshire, gained her freedom by a route wholly different from the one Peter Johnson followed.[56] She brought an action of replevin against her al-

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[50] *See supra* Part II.A.2.

[51] As appears from the inferior court's order to show cause and the response thereto in Provincial Case File No. 25352, New Hampshire State Archives, these were the facts as found below. Pearse did not contest them during the subsequent proceedings. For similar incidents in mid-seventeenth century Virginia and Maryland that did not result in appellate proceedings, see JAMES HORN, ADOPTING TO A NEW WORLD: ENGLISH SOCIETY IN THE SEVENTEENTH-CENTURY CHESAPEAKE 345–49 (1994). A folder of genealogical material on J.P. March is available on request from the Deane Library of Hofstra Law School.

[52] For the contempt proceedings, including the denial of a jury trial, see Provincial Case File No. 25352, *supra* note 51. As to the denial of counsel, Pearse alleged in his certiorari petition, *see infra* note 54 and accompanying text, that he attempted to retain counsel, "but they all refused to assist him" and that he then asked the court for the appointment of counsel, which was denied.

[53] This detail comes from Provincial Case File No. 16916, New Hampshire State Archives, which contains documentation respecting Pearse's subsequent civil damages action against March. That lawsuit will be discussed in greater detail in the next installment of this project.

[54] The petition, the writ, and Pearse's bond are all to be found in Provincial Case File No. 25352, *supra* note 51.

[55] *See* Judgment Book of Superior Court, Vol. F, *supra* note 47, at 459–62.

[56] *See supra* text accompanying notes 44–48. There is a detailed account of the Nung case in Dishman, *supra* note 44, at 84–86, in which the plaintiff's name is rendered "Nong" and the defendants' as "Torr."

leged owners, Vincent and Lois Tarr, to test who had the superior right to possession of herself, the subject of the action.[57] The Sheriff promptly seized her *pendente lite*—that is, he took an appearance bond from Nung—and the case was tried to a jury.[58] It found in her favor and the same result was reached on appeal, with the court ruling that she was "a free woman and that she enjoy her freedom."[59]

*iii. Bare Demands*

*a. Another Impoverished Service Member*

On February 25, 1745, Captain Jonathan Tuften Mason of the British Army presented a petition to the New Hampshire Superior Court alleging that a soldier under his command, one Andrew Downer, was being detained in prison for a debt of less than 10 pounds, in violation of an Act of Parliament,[60] and requesting no more than that "Your Worships would put the Act of Parliament in force by releasing and setting the said Andrew Downer at liberty, that his Majesty's Service may not suffer thereby."[61] The court responded the next day with an order that a writ of supersedeas "forthwith be issued" to the presiding judge in the debt action "prohibitting any further prosecution of said Downer . . . Inlargement of said Downer is ordered."[62]

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[57] She was invoking the writ *de homine replegiando*, known as the writ of personal replevin. *See* 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (3d ed. 1944) (describing writ as "in substance, the process of replevin, applied to the purpose of rescuing a person from imprisonment. Just as chattels unlawfully distrained could be recovered by their owner by the action of replevin, so a person unlawfully detained could recover his liberty by this writ." (footnote omitted)); Oaks, *supra* note 45, at 281–82. Professor Oaks adheres to the general scholarly belief, *see, e.g.*, MORRIS, *supra* note 4, at 11–12, that proceedings under this writ were antiquated and cumbersome in England by the mid-eighteenth century, *see* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 542 (3d ed. 1990); HOLDSWORTH, *supra*, at 120–21, and had largely been superseded by habeas corpus until the action was resurrected by the northern states to deal with slavery issues. Nung's case suggests that further inspection of the colonial situation would be warranted. The proceedings in her action are recorded in Provincial Case File No. 22138, New Hampshire State Archives.

[58] *See* Provincial Case File No. 22138, *supra* note 57. The availability of a jury trial was one of the key advantages of proceeding by personal replevin instead of habeas corpus. *See* MORRIS, *supra* note 4, at 11–12; *Trial by Jury, in Questions of Personal Freedom*, 17 AM. JURIST & L. MAG. 94 (1837) (criticizing Massachusetts statute providing that alleged slaves should bring habeas corpus and abolishing personal replevin but failing to provide for jury trial); *see also* An Act to Restore the Trial by Jury, on Questions of Personal Freedom, Mass. Rev. Stat., Ch. 221, § 17 (1837) (repealing statute abolishing personal replevin).

[59] Judgment Book of Superior Court, Vol. B, Sept. 1750–Mar. 1754, at 87–88, New Hampshire State Archives.

[60] Almost surely this was an invocation of the Mutiny Act, 1716, 3 Geo. I, c. 2 (Gr. Brit.), which provided that if an arrest were made contrary to the Act, the soldier or his superior officer could file a complaint demanding an inquiry into the matter and a judicial warrant discharging him. This Act was, of course, a direct ancestor of the federal statute discussed *supra* note 49 and accompanying text.

[61] *See* Provincial Case File No. 21242, New Hampshire State Archives.

[62] *See* Superior Court Minutes, 1699–1750, Superior Court Docket Box 1, Folder 1744–45, New Hampshire State Archives. Conceptually, the court was presumably trying to

*b. An Abused Apprentice*

In the fall of 1749, the widow Elizabeth Bird of Portsmouth, New Hampshire complained in forma pauperis to the Superior Court that her son John Bird, age fourteen, was apprenticed to a ropemaker named Richard Winter but that the latter (who was in prison) had for a long period neglected John—failing "to provide suitable and sufficient meat drink lodging and clothing" and not permitting him to attend public worship.[63] She prayed simply for "the advisement of this Court on the Premises and that your complainant may have some relief in the Premises."[64]

The court responded by issuing a writ of habeas corpus to have Winter brought before it,[65] which was done the same day.[66] It reviewed the indenture he produced, and there being "nothing made to appear that the said servant had ever been provided for as in said indenture mentioned and the particular facts complained of appearing to be true"—not to mention that Winter had not even taught John to read—the court concluded that Winter was not entitled to retain John's custody, which was returned to his mother.[67]

*c. A Headless Baby*

One particularly dramatic example of a petitioner succeeding on a nonspecific demand for relief was the "Case of the Headless Baby" in Massachusetts in 1662–63.[68] A free black woman by the name of Zipporah was suspected of killing her illegitimate child, but because the father was probably the scapegrace nephew of a powerful local aristocrat (rather than another black servant who was being officially blamed), the authorities were in no position to prosecute, and she languished in jail for months.[69] Eventually, she wrote to the court noting that she (unlike her putative paramour) was being held without bond notwithstanding they were both equally guilty of fornication and "humbly beseech[ing] this honored Court, to call her before

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(1) liberate Downer and stay the action below (supersedeas) and (2) end that action permanently (prohibition).

[63] *See* Judgment Book of Superior Court, Vol. A, *supra* note 48, at 463–64. *See also* Provincial Case File No. 23254, New Hampshire State Archives.

[64] This request is discussed further at the end of note 76, *infra*.

[65] As noted in the Judgment Book of Superior Court, Vol. A, *supra* note 48, at 463–64, this directed the sheriff to bring Winter from prison to court so that he might answer the charges and be dealt with "as to law and justice appertain."

[66] *See id*.

[67] *See id*. Here, as in all the cases described in this article, *see, e.g.*, *infra* text accompanying note 117, it literally goes without saying that the burden lies on the custodian to demonstrate her authority to retain custody. *See infra* note 114; Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (documenting the rule after Independence).

[68] There is a complete description of the case, reproducing the relevant documents, in Melinde Lutz Sanborn, *The Case of the Headless Baby: Did Interracial Sex in the Massachusetts Bay Colony Lead to Infanticide and the Earliest Habeas Corpus Petition in America?*, 38 HOFSTRA L. REV. 255 (2009).

[69] *See id.* at 259–64.

you, and to deal with her, as to yo[r] wisedomes and mercy shall see meet, that she may not lye where she is to perrish[.]"[70]

This document may or may not have been a petition for a writ of habeas corpus technically,[71] but it certainly was one functionally.[72] Responding to her demand to be charged or released, an indictment charging Zipporah with infanticide was presented to the grand jury; when it refused to indict her, she was freed.[73]

## III. Taking a Functional View

### A. *Through a Legal Lens*

There are surely insights for the history of judicial procedure to be found by grouping the cases in Part II to focus on why the courts denominated their orders as they did. As many judges, practitioners, and scholars have elucidated,[74] there were indeed differences, ones that varied with time and place,[75] among and between the prerogative writs such as habeas

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[70] *See id.* at 264.

[71] *See* William E. Nelson, *Categorizing Zipporah's Petition*, 38 Hofstra L. Rev. 279, 282 (2009).

[72] *See supra* text accompanying note 9; Eric M. Freedman, *Habeas by Any Other Name*, 38 Hofstra L. Rev. 275, 277 (2009).

[73] *See* Sanborn, *supra* note 68, at 267–68.

[74] Examples include the two volumes of Chester J. Antieau, The Practice of Extraordinary Remedies: Habeas Corpus and the Other Common Law Writs (1987); Horace G. Wood, A Treatise on the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari and Quo Warranto (2d ed. 1891); the two volumes of James L. High, A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition (2d ed. 1884); and the influential discussion in 3 William Blackstone, Commentaries on the Laws of England, Ch. 8, at 129–38 (1765). For a terse overview of the various prerogative writs as instruments of appellate review, see John H. Baker, An Introduction to English Legal History 164–73 (3d ed. 1990).

Among the modern contexts in which this material is relevant is construction of the All Writs Act, 28 U.S.C. § 1651 (2006). *See* United States v. Hayman, 342 U.S. 205, 221–22 (1952).

[75] Thus, for example, Elwin L. Page, Judicial Beginnings in New Hampshire 1640–1700 at 41–42 (1959), reports that for a time around 1699, "appeals" replaced review by habeas corpus or certiorari. Without doubting this, it is also clear from the cases discussed *supra* Part II that the practice had changed by 1769. Indeed, Pearse noted in his petition for certiorari, *see supra* note 54, that he had sought leave to appeal from the inferior court but had been denied. But strictly speaking, he probably could not have proceeded successfully by habeas corpus either. *See* Oaks, *supra* note 45, at 263–64; *infra* note 81 and text accompanying notes 79–81.

In another successful New Hampshire certiorari petition from 1769, Paul Pinkham gained an order quashing a lower court judgment in a tort action on the basis that the referees who decided it had not heard from him. He noted in his petition that he could not proceed by appeal because the lower court had adjourned for the term. *See* Provincial Case File No. 25800, New Hampshire State Archives; Judgment Book of Superior Court, Vol. F, *supra* note 47, at 438–39; *see also* Provincial Case File No. 7246, New Hampshire State Archives; Judgment Book of Superior Court, Vol. G, *supra* note 38, at 126–27, 178–79 (following dismissal of attempted appeal, Selectmen of Stratham in 1771 are granted certiorari to quash order obtained below by inhabitants of Exeter imposing costs of maintaining an indigent).

corpus,[76] prohibition,[77] and certiorari.[78] Thus, for example, it may well be that because Whittemore had been summarily committed by a magistrate[79] and Pearse convicted of contempt by an inferior court,[80] habeas corpus to bring up the body was thought procedurally appropriate in the first instance

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[76] *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.").

In addition, of course, in the world outside of legal texts it is easy to find examples of writs that do not fall precisely within any of the formal categories. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 97–100 (1807) (explicating distinctions among writs of habeas corpus). One example is the case of the apprentice John Bird described *supra* in Part II.B.3.b. The writ there, *see supra* note 65 and accompanying text, might be dubbed a nested habeas corpus. Its purpose was not to bring Winter into court so that he could test his imprisonment but rather to secure his physical presence so that he could respond to Bird's challenge to his custody over John (which she presumably would have pursued by habeas corpus if Winter had been free) and the result was to end this latter custody. *Cf. supra* text accompanying note 48 (order in case of alleged slave discharging him from custody both of alleged master and of sheriff). *See generally* HALLIDAY, *supra* note 15, at 101, 120–21 (noting that from late seventeenth century onwards, King's Bench combined the existing forms of the writ in creative ways to deal with issues raised by private restraints such as slavery and apprenticeship, making judgments that did not just end the detentions but sought to reach negotiated arrangements addressing the problems that produced the detentions); Oaks, *supra* note 45, at 275–76 (collecting early national cases to show that most courts upheld use of habeas corpus in apprenticeship disputes). *See also infra* note 104 (discussing use of writ to test private restraints in domestic relations context).

[77] The two-volume work, CHARLES M. GRAY, THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW (1994), which focuses on England from the late sixteenth century to the middle of the seventeenth, describes the sometimes obscure overlap between prohibition and habeas corpus. *See* 1 *id*. at vii, xxv–vi; 2 *id*. at 315–16, 341–74, 401–30. The mutually supportive roles of prohibition and habeas corpus in securing liberty in Massachusetts in the middle of the eighteenth century are discussed in JOHN PHILIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 68–70 (1977). For a North Carolina example from 1728, see William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775*, 88 N.C. L. REV. 2133, 2156–57 (2010) (after obtaining prohibition from common law court against admiralty proceedings, litigant secures release from imprisonment in connection with latter by habeas corpus); *see also id*. at 2159 (recounting subsequent events).

Indeed, even a litigant who was not in prison might attach a good deal of importance to securing a prohibition against admiralty proceedings in favor of ones at common law so that his or her liabilities would be determined by a jury. *See, e.g.*, Provincial Case File No. 18120, New Hampshire State Archives (recording attempt by Captain John Owen to have common law jury consider factual issues arising out of remarkable peregrinations of his vessel, crew, and cargo, which admiralty had held legally irrelevant); Superior Court Docket Book, *supra* note 33, at 147 (denying petition on July 25, 1720); Provincial Case File No. 29730, New Hampshire State Archives (defendants in suit for seaman's wages seek prohibition because contract has been assigned and assignment is a land-based contract); Judgment Book of Superior Court, Vol. B, *supra* note 59, at 130–34 (on consideration of foregoing case granting prohibition in Feb. Term 1751 at suit of John Galton et al.).

The critical role of the jury as a constraint on governmental power will be discussed in the second installment of this project.

[78] *See* Rector v. Price, 1 Mo. 198, 200–01 (1822) (holding that court would use certiorari, like habeas corpus, to remedy fundamental failures of justice); *infra* note 81.

[79] *See supra* Part II.A.2. The same had happened to the alleged slave Johnson, *see supra* note 46.

[80] *See supra* Part II.B.1.

and certiorari to bring up the record in the second.[81] Similarly, Nung's use of self-replevin might reflect a view that the writ *de homine replegiando* was better suited than the writ of habeas corpus to deal with situations in which the restraint was imposed by a private party.

But these distinctions are of at best marginal relevance to an inquirer seeking greater insight into the Suspension Clause. A person with that goal should arrange the cases by what the courts *did* rather than what they said,[82] and should define "habeas corpus" as simply a collective name for what judges did when they "had been convinced by a story that they should examine more closely the circumstances of a person's imprisonment."[83] Once the narrative arc led to the conclusion that "a wrong had been done that only the court could right,"[84] a predictable series of judicial responses would be forthcoming regardless of their legal categorization.[85] Because the critical

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[81] *See* HALLIDAY, *supra* note 15, at 118–20; DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF § 2.4, at 95 (1996); 1 ANTIEAU, *supra* note 74, at 681.

In any event, Pearse may have been perfectly happy to proceed by certiorari because that route put before the decisionmaker the entire file containing the narration, *supra* notes 50–55 and accompanying text, rather than just a jailer's return that might well have annexed only the order committing Pearse for contempt.

As time passed, early national courts seem to have increasingly understood that, as in many English circumstances, habeas corpus and certiorari could usefully be employed in tandem. *See Rector*, 1 Mo. at 200–01; Oaks, *supra* note 45, at 259–60. Consciously or not, they were thereby returning to a practice that has been traced to the fifteenth century. *See* HOLDSWORTH, *supra* note 57, at 109; *see also* R.J. SHARPE, THE LAW OF HABEAS CORPUS 51–53 (2d ed., 1989) (discussing nineteenth and twentieth century developments in Canada and England).

To the extent that one can retrospectively impose order on the cases (*but see supra* text accompanying note 4), one key variable may have been whether the would-be appellant was still in prison. At any rate, when William Licht was summarily incarcerated by a J.P. (and then released on bail) in 1770 on the complaint of two townspeople of Chester, New Hampshire for harboring a potentially indigent stranger, he pursued his appeal, successfully, by bringing certiorari proceedings. *See* Provincial Case File No. 26274, New Hampshire State Archives; Judgment Book of Superior Court, Vol. G, *supra* note 38, at 83. The following year, Licht successfully sued the complainants for damages. *See* Rockingham County Case File, No. 144, New Hampshire State Archives.

Perhaps as a result of the developments described *infra* note 93, however, practice does seem to have gradually hardened in enforcing the boundaries between certiorari and appeal by writ of error in conformity with the English rule. *See* Groenvelt v. Burwell, (1795), 91 Eng. Rep. 231 (K.B). The New Hampshire case of the Selectmen of Stratham, summarized *supra* note 75 in the second paragraph, is evidence that New Hampshire's practice resembled that of Pennsylvania. *See* Ruhlman v. Commonwealth, 5 Binn. 24, 26–28 (Pa. 1812) (holding that certiorari is appropriate writ to review proceedings that are (1) summary or (2) newly created by statute and vary from course of common law, otherwise writ of error is appropriate); *see also* Commonwealth v. Beaumont, 4 Rawle 366, 368–69 (Pa. 1834) (applying *Ruhlman*). For an example from Massachusetts, see Cooke v. Commonwealth, 32 Mass. (15 Pick.) 234, 237–39 (1834) (applying *Ruhlman*), and for an example from Virginia, see MacKaboy v. Commonwealth, 4 Va. (2 Va. Cas.) 268, 270 (1821) (same).

[82] *Cf.* HALLIDAY, *supra* note 15, at 57 ("[W]hen we write legal history, we typically listen to what judges said . . . rather than watch what they did.").

[83] *Id.* at 92.

[84] *Id.*

[85] *See id.* at 77–83 (observing that the various prerogative writs were united by a sweeping conception that it was the role of the judges to ensure that the King's justice was being done to the prisoner). *See also supra* text accompanying note 19 (suggesting that nothing of substance turns on whether proceedings are denominated "habeas" or "pre-habeas").

privilege protected by the Constitution is judicial examination of the justification for an imprisonment,[86] we should shed our writ-denominated blinders when we seek to explore the Suspension Clause landscape.

### *B. Through a Historical Lens*

The functional view enables us to see historical commonalities among the cases in the expanded canon that an overly legalistic focus may obscure.

#### *i. The Courts' Jurisprudential Environment*

We need to keep steadily in mind that the world in which courts operated in the period covered by this article was sharply unlike our world.[87] In particular, courts functioned in two ways that made finding the governing rule of law difficult and, therefore, discouraged the disposition of cases on purely legal grounds.

First, the court system then was far less hierarchical; partially as a result of the sometimes-deliberate[88] scarcity of printed sources,[89] "all judges were

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Because of this central focus on justice rather than law in any situation where the two might be in conflict, as well as its flexible and pragmatic orientation with regard to remedies, the writ has been recognized since the seventeenth century as governed by equitable principles. *See* Holland v. Florida, 130 S. Ct. 2549, 2560 (2010); Brief of Eleven Legal Historians as Amici Curiae in Support of Petitioner, *id.* (No. 09-5327), 2009 WL 5945956 (I was one of the amici who submitted this brief); HALLIDAY, *supra* note 15, at 87–93, 102.

[86] *See supra* notes 1, 9, 76. As with any other issue of legal taxonomy, reaching a sound conclusion requires focusing on the purpose for which a particular classification is being made. *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99, 109–11 (1945) (cautioning that distinction between substance and procedure under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), must be "applied with an eye alert to essentials" of the particular problem at hand, regardless of terms' use in other contexts, because a "policy so important . . . must be kept free from entanglements with analytical or terminological niceties").

For Suspension Clause purposes, "the writ's core principle" is that it is a judge who determines whether the prisoner's detention is lawful. HALLIDAY, *supra* note 15, at 7. Indeed, the fact that it was the judiciary that made this decision, regardless of who had ordered the detention in the first place, was "[t]he single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century." Halliday & White, *supra* note 10, at 600. *See also* Vladeck, *supra* note 20, at 969 (suggesting Founders' key concern was not substantive standards governing detentions but their application by "an impartial magistrate"). Thus, *Boumediene* found a Suspension Clause violation in the inability of the prisoners to have their imprisonments judicially examined, while explicitly declining to address "the content of the law that governs petitioners' detention." Boumediene v. Bush, 553 U.S. 723, 798 (2008).

[87] This suggestion would appear to be consistent with the argument made by Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006). *See also* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 621 (2009); Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 469–70 (2003); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 18–20 (2001).

[88] The official publication of judicial opinions (as distinct from statutes) could be an extremely controversial political issue in the early Republic because it implicated the lawmaking authority not just of judges, as opposed to juries, but also of judges as opposed to legislatures—another subject that will be discussed in the second installment of this project. The New Hampshire struggle over this issue has been extensively documented by John Phillip

trial judges."[90] Indeed, during the colonial period and beyond New Hampshire and Massachusetts, appeals were normally decided by a second or

Reid. *See* JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 25–29, 157–79 (2004); *id.* at 179 (noting that in December 1816 when the governor "signed into law 'An act to repeal an act entitled "An act to provide for publishing reports of the supreme judicial court"' . . . [m]ost political observers in the state concluded that the struggle over who should control the law . . . had ended" and that "jurors would remain judges of law as well as fact"); JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 8–9 (2009) (observing that one reason legislators opposed case publication was that it "made judges' pronouncements and decisions a source of law equal to—possibly more persuasive and usually more comprehensive than—ordinary legislation enacted by elected representatives"); JOHN PHILLIP REID, LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE (forthcoming 2011) (tracing subsequent New Hampshire history of issue).

[89] In recent decades there has been an upsurge in scholarly interest in the diffusion of knowledge, legal and otherwise, through the medium of print in America in the eighteenth and nineteenth centuries.

On the scarcity of printed law reports, see, for example, RICHARD D. BROWN, KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA, 1700–1865, at 98 (1989) (discussing colonial period); M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 14–22 (2010); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 277 (2005); Baker, *supra* note 10; Mary Sarah Bilder, *Colonial Constitutionalism and Constitutional Law*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HOROWITZ 28, 36–41 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 572–73 (1993). *See also* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–35, at 154–200 (1988); Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, *in* HARVARD LEGAL ESSAYS: WRITTEN IN HONOR OF AND PRESENTED TO JOSEPH HENRY BEALE AND SAMUEL WILLISTON 159 (Roscoe Pound ed., 1934); Jenni Parrish, *Law Books and Legal Publishing in America, 1760–1840*, 72 L. LIB. J. 355 (1979). *See generally* Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009); Ian Williams, *"He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c. 1550–1640*, 28 L. & HIST. REV. 39 (2010).

For a sampling of scholarship on the dissemination of non-legal information, see 1 A HISTORY OF THE BOOK IN AMERICA (Hugh Amory & David D. Hall eds., 2007); WILLIAM J. GILMORE, READING BECOMES A NECESSITY OF LIFE: MATERIAL AND CULTURAL LIFE IN RURAL NEW ENGLAND, 1780–1835 (1989); RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE AND PUBLIC INFORMATION, 1700s–1860s (1989); THOMAS C. LEONARD, NEWS FOR ALL: AMERICA'S COMING-OF-AGE WITH THE PRESS (1995); TRISH LOUGHRAN, THE REPUBLIC IN PRINT: PRINT CULTURE IN THE AGE OF U.S. NATION BUILDING, 1770–1870 (2007).

[90] FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT, *supra* note 3, at 37. *See* Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 925, 927 (1997) (explaining non-hierarchical structure of English common law courts in sixteenth and seventeenth centuries); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 529–30 (1990) (describing how same judges heard trials and appeals).

With particular regard to habeas corpus the Supreme Court has often reiterated that at common law, res judicata did not apply to a denial of relief and that "a renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." Schlup v. Delo, 513 U.S. 298, 317 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 479 (1991) and its quotation from WILLIAM SMITHERS CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)).

sometimes a third jury,[91] and a similar practice was followed in post-independence Pennsylvania.[92] Thus, regardless of subject matter, the common law was for purely practical reasons inherently fact-centric to a degree that we—particularly those of us educated professionally from casebooks consisting largely of appellate court decisions chosen to teach legal doctrines—can only appreciate with difficulty.

Second, determining the law was difficult intellectually as well as practically. All professional actors understood that the substantive contents of the common law had an objective existence.[93] When they did engage in legal

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[91] *See* 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS, *supra* note 47, at 123; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 16 (1994 ed.); PAGE, *supra* note 75, at 96–101; Bilder, *supra* note 90, at 914 (describing colonial system of appeals as one in which second tribunal would broadly rehear both facts and law, with emphasis on achieving a just result); *see also* William M. Offutt, *The Atlantic Rules: The Legalistic Turn in Colonial British America*, *in* THE CREATION OF THE BRITISH ATLANTIC WORLD 160, 166 (Elizabeth Mancke & Carole Shammas eds., 2005) (tracing practice to 1630s Massachusetts).

[92] *See* Ruhlman v. Commonwealth, 5 Binn. 24, 27 (Pa. 1812).

After Independence practice gradually evolved at different speeds in various states in such a way as to ultimately turn appeals into a judge-centered and law-centered procedure. *See* 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS, *supra* note 47, at 286–88; NELSON, *supra* note 91, at 167–71. Where appellate proceedings were required to be brought by writ of error, as in Section 25 of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (1789), or in state cases where certiorari was unavailable, *see supra* note 81, review became limited to legal error appearing on the face of the record. The final sentence of Section 25 (governing Supreme Court review of federal questions from state courts) provided this explicitly, and the Court interpreted Section 22 (governing Supreme Court review of Circuit Court cases) to have the same meaning. *See* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

Once the Seventh Amendment took effect, the federal courts were, of course, bound by its Re-examination Clause. *See* Meyler, *supra* note 87, at 597–98 (noting interpretive difficulties for Clause posed by fact that states had different practices at the time of its enactment).

[93] *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 34–35 (1995); *id.* at 156 ("Virtually all lawyers agreed that judges did not make the common law; they merely administered the common law that already existed in nature."); G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 791–93 (2000).

As I have noted elsewhere, "[s]tatutes, of course, might be part of this existing law, but they did not define or exhaust it; rather, they would be absorbed into its overall fabric." FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT, *supra* note 3, at 37. They were thus of relatively minor importance until well into the nineteenth century. *See* Ellen Holmes Pearson, *American Legal Scholars and the Republicanization of the Common Law*, *in* EMPIRE AND NATION: THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD 93, 97 (Eliga H. Gould & Peter S. Onuf eds., 2005).

One of the important scholarly contributions made by Professor Halliday's recent work is to correct a number of prior accounts and make clear that this pattern applied fully in the field of habeas corpus. Legislative interference in the judges' work was rare and almost always unnecessary or counterproductive. *See* HALLIDAY, *supra* note 15, at 55–58, 239–43, 245–50; Halliday & White, *supra* note 10, at 631–32. *See generally* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.2 at 14–18 (5th ed. 2005) (describing views of Court on relationship between judge-made and statutory law of habeas corpus); Nathaniel H. Nesbitt, Note, *Meeting* Boumediene*'s Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244 (2010) (arguing that judiciary has performed well in Guantanamo Bay habeas cases and Congress should not intervene).

reasoning, the judges (in cooperation with counsel)[94] saw their task as finding that law, not making it.[95] This often involved the serious expenditure of effort. For example, when in the spring of 1744 the judges of the New Hampshire Superior Court were divided on appeal in a legally tangled case arising out of a bitter religious dispute, they adjourned so that counsel could "[s]tate the case and apply for advisement to the neighbouring lawyers on the Case."[96] When that consultation failed to occur, the judges considered, but apparently could not decide, whether to allow a further adjournment on the basis that there was a Superior Court session to be held at York "in June next when they might have opportunity of conversing with some of the Principal Lawyers of the neighborhood who would attend the session."[97]

*ii. The Courts' Responses to Prisoners*

*a. Facts Beat Law Because Speed Matters*[98]

In the particular instance of cases involving potentially unlawful restraints, the judicial orientation towards focusing on facts rather than law was particularly strong. Because the facts were commonly easier to find than the law, for both the logistical and intellectual reasons described in the previous section, taking this approach was likely to yield a faster result.[99]

The court's handling of Charles Banfild's habeas case—speedily calling all interested parties into the courtroom and coming to a pragmatic resolu-

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The second installment of this project will discuss the relationship between these issues and the loss of jury control over law during the early nineteenth century. *Cf.* Douglas A. Berman, *Making the Framer's Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 912–15 (2010) (relying on jury control over law in founding era to support jury participation in modern statutory habeas proceedings).

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

[95] *See* 2 OLDHAM, *supra* note 45, at 1230 (quoting Lord Mansfield to this effect).

[96] Judgment Book of Superior Court, Vol. A, *supra* note 48, at 69–71.

[97] *Id.* Additional documentation on this case appears in Provincial Case File No. 025518, and in Superior Court Minutes, 1699–1750, Superior Court Docket Box 1, Folder 1744–45, New Hampshire State Archives (Entry no. 24 for Feb. 5, 1744).

[98] *Cf.* Note, *Review of Orders in* Habeas Corpus *Proceedings*, 25 HARV. L. REV. 460, 460–61 (1912) (observing critically that, notwithstanding frequent presence of important legal issues, most states "den[y] review by appellate courts of adjudications in *habeas corpus* proceedings," and commenting that the only substantial justification for this "rests upon the doctrine underlying the writ of *habeas corpus*, namely, the need of a speedy adjudication").

[99] For a powerful argument that present-day legal actors forgot this lesson in the context of the Guantanamo Bay habeas litigations, see Sabin Willett, *Clericalism and the Guantanamo Litigation*, 1 NE. U. L.J. 51, 52, 56–58 (2009). *See also* William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMP. L. REV. 305, 314–15, 323–24 (2009) (observing that "the very essence of habeas demands that the judiciary sort out the facts"). *See generally* Lumen N. Mulligan, Essay, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 543, 547–49, 584–86 (2010) (predicting that lasting legacy of *Boumediene* will be its holding that Suspension Clause requires availability of independent judicial factfinding into cause of detention).

tion to secure Banfild's prompt liberation[100]—is didactic both for what it did and did not do. It made no ruling on any of the three perfectly reasonable legal arguments Banfild had presented.[101] The court's impulse was to deal with facts, not law. In this respect, the court's behavior is typical of many other cases that have been brought to light by modern scholars investigating habeas corpus trends on both sides of the Atlantic. The next few paragraphs offer several examples.[102]

On Saturday, January 24, 1761, Mrs. Deborah D'Vebre, who had been confined to a private madhouse by her husband, sought habeas corpus in London.[103] The court responded with an order that a medical expert, her nearest relation, and her attorney "be admitted and have free access" to her at all reasonable times "in order to consult with, advise and assist the said Deborah D'Vebre." On Monday, January 26, the court convened to take the affidavit and live testimony of the medical expert, who reported that he had seen no indications of mental disorder. After hearing this, Lord Mansfield said, "Take a writ of habeas corpus: and if [the medical expert's report] should appear to be the case, we ought to go further." So the keeper of the madhouse brought in Mrs. D'Vebre herself, but "no return was indorsed upon the writ."[104] In interchange with the bench she "appeared to be absolutely free from the least appearance of insanity," and—since she did not wish to return to the madhouse but the court thought that she could not safely be trusted to the custody of her husband—she was released overnight in custody of her attorney. "It afterwards ended in a compromise, and an agreement to separate."

As Professor Jonathan L. Hafetz observed early in his scholarly career, habeas courts in England dealing with impressment cases often "made findings of fact to *avoid* reaching particularly difficult questions of law."[105] Thus, in 1779 when habeas was sought on behalf of two boys who had been

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[100] *See supra* Part II.A.1. The judicial system valued negotiated outcomes of this sort. *See* HALLIDAY, *supra* note 15, at 60 (noting instances in which "discharge occurred only after a settlement had been negotiated, at the court's behest, among the parties involved in the original controversy"); *id.* at 117 (describing how many detentions ended in settlements after the judges had "worked out solutions to the problems that had led to imprisonment in the first place"). For additional examples, see *infra* note 108 and text accompanying notes 104, 108.

[101] *See supra* text accompanying notes 28–31.

[102] Additional examples are to be found in the sources cited *supra* notes 14–16.

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

[104] For the procedural significance of this, see *supra* text accompanying notes 14–16. More broadly, the case illustrates the use of habeas corpus to test private restraints, *see supra* note 76, which included issues of domestic abuse and child custody. *See* HALLIDAY, *supra* note 15, at 124–33. The Supreme Court has observed that this use of the writ was well established by the time of independence. *See* Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

[105] Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2536 n.209 (1998) (citing Goldswain's Case, (1778) 96 Eng. Rep. 711 (C.P.) 712 ("reviewing the facts in the sailor's affidavit to avoid ruling on the legality of Admiralty's general press warrant") and Richard Good's Case, (1760) 96 Eng. Rep. 137 (K.B.) ("accepting the petitioner's affidavit stating that he was a ship-carpen-

impressed into military service and sought release on the grounds that they were apprentices, Lord Mansfield could likely have issued the writ as a legal matter,[106] but his actual response was that "a shorter way to work" would be for him to issue a warrant to have the boys brought into court to sort the matter out between the two claimants.[107] Indeed, many habeas challenges to military impressments never got to court at all because military authorities began internal investigations on receipt of the writ and discharged petitioners who appeared to have been illegally conscripted.[108]

Similarly, the most famous English slave case of the eighteenth century, *Somersett v. Stewart*,[109] would never have reached its celebrated judgment in favor of liberty had not the parties insisted on rejecting Lord Mansfield's repeated efforts to broker a settlement.[110]

*b. In Dealing With Law, Merits and Focus Matter*

Notwithstanding the strong judicial preference to take a fact-specific approach, legal issues might obtrude in two different ways. First, a procedural technicality might pose a potential delay to reaching the merits. In that case, the courts would knock aside the barrier as happened in Whittemore's case.[111] As Professor Stephen I. Vladeck puts it, the writ would "transcend jurisdictions, championing substance (whether the jailer had a legal basis for confining the prisoner) over the jurisdictionally-varied procedural forms."[112] This might happen in a variety of ways, including that a nominal rule ceased being enforced in practice or that an actual rule was bent more or less sharply in a particular instance.[113] Indeed, I have not seen a case in my

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ter and thus entitled to a previously established exemption to avoid ruling on the legality of another exemption based on the petitioner's status as a freeholder")).

[106] *See supra* note 76; Costello, *supra* note 16, at 234–39.

[107] *See* 1 OLDHAM, supra note 45, at 77–78. For the relationship between practice by habeas corpus and by warrant, see HALLIDAY, *supra* note 15, at 116; Costello, *supra* note 16, at 247–48.

[108] *See id.* at 236–37, 239–41. One example is *Goldswain's Case*, 96 Eng. Rep. at 713.

[109] 20 Howell's State Trials 1 (1772). The alleged slave was brought into court six days after the habeas application was made and remained free on bail until his ultimate discharge seven months later. *See id*. at 1, 23, 80–82.

[110] *See* Costello, *supra* note 16, at 79–80; 2 OLDHAM, *supra* note 45, at 1228 (describing background to *Somersett*).

[111] *See supra* note 42 and accompanying text. For a collection of twentieth century Supreme Court statements supporting this approach, see 1 HERTZ & LIEBMAN, *supra* note 93, § 2.2 at 19. *Cf.* James Robertson, Quo Vadis, *Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1087 (2008) (suggesting that the Court adopt same approach in dealing with statutory post-conviction habeas cases).

[112] Vladeck, *supra* note 20, at 948; *cf.* Holiday v. Johnston, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety.").

In the American colonies, this process was greatly facilitated by the absence of the tangle of ecclesiastical courts, marshal's courts, corporation courts, and many other courts that existed in the home country. *See* HALLIDAY, *supra* note 15, at 140–53.

[113] For an example of the first situation, *see supra* note 15 and accompanying text (showing nullification of "rule" that jailer's return to the writ was conclusive). For an example of the second, see *supra* notes 46–48 and accompanying text (describing case of alleged slave commenced by habeas corpus but decided by a jury). Of course, in order to know what the

period in which an incarcerated petitioner was denied relief on the grounds that he or she had made a procedural misstep.

Second, in some instances a ruling on the merits might ineluctably require determination of a legal question. In that case, the judges worked actively to see that the core legal issue was stated as narrowly as possible and resolved quickly.[114] For example, as Professor James Oldham reports, when Lord Mansfield had before him a habeas corpus case in which the dispositive question would be whether the conceded fact of petitioner's employment as a liveryman on the Thames exempted him from impressment, the court assisted counsel in formulating accordingly the issue to be litigated.[115] Indeed, *Somersett* itself followed a similar pattern.[116]

Similarly, in an English case of 1629 reported by Professor Halliday, Margaret Symonds disrupted a church service by laughing at the preacher in alleged violation of statute and was imprisoned—although promptly granted bail *pendente lite*.[117] "All agreed that Margaret had laughed in church. But her case remained surrounded by factual, and thus legal, doubts. What made Margaret laugh? . . . [W]as laughter a sign of her contempt for what she considered dubious doctrine? The return to the writ did not say." As the justices of the Kings Bench approached the case, "[t]here was no mention of precedents, no analogizing to ostensibly similar cases." Instead, the justices construed the statute to apply only to situations in which the disruption was intended to express opposition to the doctrine being taught. Since the return to the writ was silent on that critical legal issue, it was insufficient, and "they sent Margaret home."

## IV. The Utility of a Functional View

At this point, I hear a reader who has managed to penetrate this far objecting that my historical discussion has little to teach a present-day America that faces novel national security problems as to which responses derived from the common law are simply impractical. To this reader, I reply by denying both the novelty of the problems—which, indeed are as old as, and will last as long as, organized government—and the impracticality of the solutions.

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putatively governing "rule" actually was, we need a certain number of data points, *see* Nelson, *supra* note 71, at 279–80, which are not yet available in every instance.

[114] *See, e.g.*, Nelson *supra* note 77, at 2166–67 (describing how imprisonment of disbarred attorney for contempt in North Carolina in 1732 was terminated by habeas corpus on determination that return failed to show sufficient cause for his detention). The Daze case described *supra* text accompanying note 49 is another example of this pattern.

[115] *See* 1 Oldham, *supra* note 45, at 78.

[116] *See Somersett v. Stewart*, 20 Howell's State Trials 1, 1, 23, 80, 82 (1772) (having heard counsel, court finds return legally insufficient).

[117] The account in this paragraph is taken from Halliday, *supra* note 15, at 99–100.

*Novelty.* The Glorious Revolution[118]—soon celebrated for constraining royal power by law[119]—was born in the midst of a national security crisis. In December 1688, the Catholic James II of England, having lost all political support, fled the Kingdom to be succeeded by William and Mary.[120] But James (who had also been King of Ireland and Scotland, where he retained many supporters)[121] mounted a re-invasion, landing in Ireland in March 1689.[122] His allies won a battle in Scotland in July[123] and were not subdued for some months as fears of a possible supporting invasion from France mounted.[124] He was defeated at the battle of Boyne in Ireland in that same month and fled for the last time,[125] but open warfare persisted into the fall of 1691.[126] Meanwhile, "there were plenty of Jacobites in England who could not foreswear their allegiance to the man they considered their divinely anointed king. Rebellion seemed imminent, especially when so many were arrested for printing seditious libels, for conspiring against the king and queen, or for being priests—or worse, Jesuits."[127]

When the judges (appointed largely by William and hence unlikely to have any sympathy for his rival) examined 147 such cases on writs of habeas corpus in 1689–90, they found that 20% of the prisoners "posed a danger known to law" and should therefore be remanded for trial on criminal charges.[128] But in the remaining 80% of the cases, a closer look at the suspicious circumstance—such as an ill-timed trip to France or Ireland[129]—showed that "many men and women had been jailed on the thinnest evidence or caught in indiscriminate trawls for suspects," and they were released.[130]

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[118] For a more detailed account of the events summarized in this paragraph, see JOHN MILLER, JAMES II 205–33 (2000).

[119] *See* J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 7, at 328–31 (1972).

[120] *See id.* at 5–6, 298–301.

[121] *See id.* at 6.

[122] *See* JOCK HASWELL, JAMES II: SOLDIER AND SAILOR 300 (1972).

[123] *See* CRAIG ROSE, ENGLAND IN THE 1690S: REVOLUTION, RELIGION, AND WAR 14 (1999).

[124] *See* HASWELL, *supra* note 122, at 303–04.

[125] *See id.* at 302–03.

[126] *See* ROSE, *supra* note 123, at 14, 16–17.

[127] HALLIDAY, *supra* note 15, at 134–35. *See* ROSE, *supra* note 123, at 48; *see also* Halliday & White, *supra* note 10, at 613, 626–27. It may be worth recalling as well that early in the century there had indeed been a plot engineered by some Catholics to blow up the opening day of Parliament with thirty-nine barrels of gunpowder. *See* ANTONIA FRASER, THE GUNPOWDER PLOT: TERROR AND FAITH IN 1605 (1996); *see also* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [103] (Lord Hope of Craighead) (appeal taken from Eng.).

[128] *See* Halliday & White, *supra* note 10, at 626–27.

[129] *See* HALLIDAY, *supra* note 15, at 135.

[130] *Id.* Interestingly, when the U.S. military, acting through tribunals that applied basic due process norms, reviewed the cases of 1,196 detainees captured during the Persian Gulf War, it found that 310 (26%) of them were legitimately held as prisoners of war, with the remainder (74%) entitled to refugee status. *See* DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (PUBLIC LAW

*Impracticality.* In June 2004, the Supreme Court ruled that prisoners at the United States naval base at Guantanamo Bay, Cuba were entitled to bring writs of habeas corpus to contest their captivity.[131] Notwithstanding this, Judge Richard J. Leon of the United States District Court for the District of Columbia ruled in December 2004 that—as a matter of law—they were not entitled to petition for such writs.[132] After lengthy delays caused by two intervening Acts of Congress, the United States Supreme Court in 2008 reiterated that the prisoners were entitled to petition for the writs.[133] Late that year, Judge Leon actually sat down to scrutinize the factual underpinnings of the cases against Lakhdar Boumediene and the five other men accused with him.[134] As to five of the men, Judge Leon found the government's allegation that they planned to travel to Afghanistan to engage in hostilities against U.S. forces wholly unsupported, and he ordered their release,[135] which indeed took place.[136] As to the final petitioner in this group, Belkacem Bensayah, the Court of Appeals for the District of Columbia reversed Judge Leon's ruling that the petitioner had been properly detained and ordered another look at the evidence.[137]

When Judge Leon sat down in 2008 and focused on the facts in the cases before him rather than the law behind those cases, he was acting practically and exemplifying the common law traditions of habeas corpus. Judge Leon then acted in conformity with the case law surveyed above, by approaching his cases in the interest of speedily restoring to freedom people who had been wrongly deprived of it.

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102-25) app. L, at 577 (1992), *available at* http://www.dod.gov/pubs/foi/reading_room/404.pdf.

[131] Rasul v. Bush, 542 U.S. 466, 481 (2004).

[132] Khalid v. Bush, 355 F. Supp. 2d 311, 324–26 (D.D.C. 2005).

[133] Boumediene v. Bush, 553 U.S. 723, 771 (2008). For a summary of the 2004–2008 judicial history, see JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 156–62 (2009).

[134] *See* Boumediene v. Bush, 579 F. Supp. 2d 191, 193 (D.D.C. 2008).

[135] *Id.* at 197–98. In reading his ruling from the bench, he added a direct (and ultimately successful) plea to the Justice Department lawyers that they not appeal his ruling and thereby further delay the petitioners' long-deserved release. *See* William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1. He noted that any legal issue the Department wanted to preserve would be dealt with on the appeal of the remaining petitioner. *See* Del Quentin Wilber, *5 at Guantanamo Ordered Released; Men Not Considered Enemy Combatant*s, WASH. POST, Nov. 21, 2008, at A2.

[136] *See* Peter Finn & Julie Tate, *4 from Guantanamo Are Sent to Europe; Detainees, One Part of Supreme Court Case, Going to Three Countries*, WASH. POST, Dec. 1, 2009, at A6.

[137] Bensayah v. Obama, 610 F.3d 718, 727 (D.C. Cir. 2010). As of the end of 2010, fifty-six Guantanamo Bay habeas cases had been decided on the merits, of which thirty-seven (66%) had been won by the petitioners and nineteen (34%) by the government. A compilation of these cases is available at *Guantanamo Bay Habeas Decision Scorecard*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/GTMOscorecard (last visited Dec. 28, 2010).

## V. Conclusion

If the foregoing suggestions were to be accepted, the consequences might be:

The discipline of history would benefit from a re-grouping of the cases that would place legal demands for judicial examination and termination of assertedly unlawful imprisonments into a single category. A discussion of the travails of Whittemore and Pearse, both imprisoned by piqued judges,[138] would probably be more insightful if it focused on their essential similarities rather than separating them on the basis of legal distinctions arising from a structure created long ago to address problems no longer in existence.

Legal doctrine would benefit from the expanded Suspension Clause canon that this re-grouping would create because the existence of more data relevant to elucidating a problem is likely to improve the quality of solutions.

The rule of law would benefit since modern judges would consider the history of habeas corpus as a common law writ. Long before English settlers arrived on the shores of what would become the United States, they had learned an enduring political truth: like fire, government was both friend and foe—the indispensable protector of liberty and its potent enemy.[139] As encapsulated in a few lines penned at the time of the framing of the Constitution, "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[140] The "flexible, adaptable, and evolving"[141] remedial characteristics of the writ of habeas corpus, well-established by the time the country was founded and its Constitution written,[142] were based on that insight.

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[138] *See supra* Parts II.A.2, II.B.1.

[139] Political philosophers had long suggested that both phenomena had a common cause: humans' fear of violence. *See* Eric M. Freedman, *A Rational Constitutional Faith: Remarks in Response to Professor Amsterdam*, 33 Hofstra L. Rev. 417, 417–18 (2004); *see also infra* note 143.

[140] The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). *See* Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 Tenn. L. Rev. 783, 810 & n.114 (1993) (documenting extensively proposition that seventeenth and eighteenth century politicians and citizens of every shade of opinion considered political power a corrupting force on human character requiring ceaseless vigilance).

[141] Vladeck, *supra* note 20, at 992.

With respect to the Guantanamo litigations specifically, many District Judges have shown that existing law provides ample tools to handle the perceived unique exigencies of the cases with respect to discovery and other commonly-encountered issues. For a full database of the relevant decisions, see *Guantanamo Bay Habeas Jurisprudence*, Roderick MacArthur Justice Ctr., Nw. Law, http://www.law.northwestern.edu/macarthur/guantanamo/caselisting/index.cfm (last visited Jan. 15, 2011).

[142] Thus, in this as in other constitutional areas, there is solid historical basis for deeming an anticipation of future evolution part of original intent. *See* Eric M. Freedman, *On Protecting Accountability*, 27 Hofstra L. Rev. 677, 687 & n.17 (1999). *See also* L. Kinvin Wroth,

In the long quest to build a cathedral of government under law, the inevitable failures of fallible humans to act in accord with our government's promise of freedom and liberty periodically arouses tempests that damage the partially-completed structure.[143] The invocation of the writ of habeas corpus by those unlawfully detained is a central tool to the restoration and preservation of the government under law. Through petitions for writs of habeas corpus, judges can hear the previously inaudible sighs of prisoners,[144] and utilize the "protean dynamism"[145] of the writ to inspect our government's failures and efficaciously repair its freedoms.

*The Constitution and the Common Law: The Original Intent About the Original Intent*, 22 SUFFOLK U. L. REV. 553, 560–63 (1988); Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 162–64, 165 (1978).

[143] *Cf.* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 332–33 (describing Madison's skepticism that any constitutional guarantee against suspension of the writ could withstand a passionate burst of public alarm).

[144] *See* HALLIDAY, *supra* note 15, at 1 ("The writ of habeas corpus has served in Anglophone legal cultures for more than four centuries as the judicial practice by which we hear [the] sighs [of prisoners].").

[145] Vladeck, *supra* note 20, at 991.