

PLEASE NOTE

**This is a draft paper only and should not be cited without the author's express
permission**

11,000 Prisoners: Habeas Corpus, 1500-1800

**Paul Halliday
University of Virginia
for the
British Legal History Conference
Oxford, July 2007**

I began a systematic survey of King's Bench files in the late 1990s, but for any historian working since 2001 on the writ of habeas corpus, especially for an American, there is now a large presentist elephant sitting in the room. I want to begin then with a story, telling it in part to acknowledge that the elephant is indeed sitting with us today, and has been since the cases of al Odah and Boumediene—just revived by the Supreme Court last Friday—and others have followed their shambling courses through the American courts. I also tell the story—to a room full of historians—to suggest how I hope to honor my commitments as a historian, all the while aware that any history of habeas corpus will be *used*: by American lawyers and judges who insist that they must base decisions on an understanding of what the writ was in 1789 and the generations preceding.¹

¹ The U.S. Supreme Court has said repeatedly that it must decide about the writ's possibilities and limits based, "at the absolute minimum... 'as it existed in 1789'." That this should be the standard by which to assess the writ's availability has been often repeated. The original quotation is from *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996), repeated in *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Among briefs making use of this standard, see "Brief of Amici Curiae Retired Federal Jurists in Support of Petitioners," in *Al Odah v. U.S. and Boumediene v. Bush*, in the U.S. Court of Appeals for the District of Columbia (2006), at p. 16. Both Justices Randolph and Rogers of that court referred to this standard in explaining their contradictory positions as to whether or not the petitioners might use habeas corpus. Randolph, Circuit Judge, for the majority, depends

So first, a story, before delving into the archives whence the story comes in order to suggest how it is that the English history of such a legal device might be recovered.

One Story

Given the names of the ships involved, this may sound like the proverbial tale proving fact is stranger than fiction. It was late 1692. Britain and France were at war, and though erstwhile King James II had been decisively defeated at the Boyne two years earlier, those who supported William and Mary still felt keenly their fears of rebellion at home and of invasion from Ireland or France. In such circumstances, that an Irishman—John Golding—should have captained a ship commissioned by Louis XIV called the *Sunn* is a detail made for anyone with an eye for irony. That Golding's ship should then have been captured by an English galley called the *James* is simply too good to be true. Yet there it is, all recounted in the return to the writ of habeas corpus sued by Golding from the court of King's Bench in 1693. And the writ accomplished all that Golding might have wished: his release on bail.²

The warrant for Golding's imprisonment—transcribed fully in the return to his writ—had been made out by the Commissioners for Sick and Wounded Seamen and for the Exchange of Prisoners of War. Their warrant called Golding a "prisoner at war." With one story, we have added 50% to the total number of pre-1800 habeas cases discussed by historians or lawyers

on Chambers in *Boumediene v. Bush*, U.S. Court of Appeals, No. 05-5062 (2007) at p. 14, and Rogers opinion at p. 11.

² TNA. KB16/1/3, writ for John Golding, teste date 4 November 1693, and KB21/24, p. 264. There is some confusion in the record: though the teste date on the writ is 4 November 1693, the order to issue the writ is in the Crown Side rule book dated 8 February, in the following Hilary term of 1694. The notation of bail—entered on the return, the usual place for such notation in this period—is quite clear.

concerned with whether or not people called “prisoners of war” could raise questions about their detention by using habeas corpus.³ But we can add more to the mix.

At least nine more prisoners in five other cases were called “prisoners at war” or “enemy aliens” in the returns to their writs of habeas corpus in the 1690s. Not only were they able to use the writ, four of them were released.⁴ Suddenly, when we increase by 300% the number of

³ The other two are Schiever’s Case of 1759 and the case of the Three Spanish Sailors of 1779: 2 Keny. 473 and 2 Black. W. 1324.

⁴ These nine users appeared on five writs, as follows:

1. Writ for John alias Peter Depremont, Bartholomew Medy, Nicholas Medy, and Anthony Didier, teste 25 January 1690, in TNA, KB11/14. These were French merchants, seized in September 1689 in reprisal for English merchants imprisoned at Morlaix (St. Malo). The Privy Council ordered their release on giving sureties in December. They were retaken on 23 January 1690, at which point they jointly sued out their writ. They were remanded by King’s Bench after hearing the return to the writ. For court orders, see TNA, KB21/23, pp. 367, 370, and 372. They were later released as part of the routine work of prisoner exchanges that were ongoing throughout the wars of the 1690s. For Privy Council discussions of their case, see TNA, PC2/73, pp. See also CSPD 1690-91, p. 429 and Luttrell, v. 2, p. 13.

2. Writ for Abraham Fuller, teste 23 January 1690, in TNA, KB11/14. Fuller was arrested for “suspicion of dangerous and treasonable practices” and, according to the return to his writ, ordered held as “a prisoner at war.” He was then discharged without bail upon consideration of this return on 1 February 1690: TNA, KB21/23, p. 362. See also CSPD 1689-90, p. 329 and TNA, PC2/73, p. 351. Though the return to his writ referred to him as a “prisoner at war” and explained his detention by order of the Privy Council, it made no mention of a suspicion of “treasonable practices” mentioned in the original conciliar order.

3. Writ for John Dupuis, teste 12 April 1695, in TNA, KB16/1/5. The return to his writ reported that he had been captured at Exeter in September 1694 and ordered jailed by the mayor there, as “a Frenchman, on suspicion of being a spy.” King’s Bench ordered Dupuis remanded to the royal messenger who then had custody of him when the return to his writ was examined in court. In September 1695, the Privy Council ordered that he be turned over to the Commissioners for Sick and Wounded Seamen, who also handled prisoners of war, and ordered that he be exchanged with the French “when there is any exchange of prisoners”: TNA, PC2/76, f. 116v.

4. Writ for Garrett Cumberford, teste 9 February 1697, in TNA, KB16/1/6; the order for his writ is at TNA, KB21/25, p. 120. The return explained that Cumberford had been detained two years earlier, first in Newgate, and later in the Savoy, where other military prisoners were held. He was bailed by King’s Bench. A Privy Council order of May 1695 (TNA, PC2/76, f. 65v.) suggests that he may have been given the chance to be released upon giving security and swearing the oath of allegiance. Whether he refused these terms, or other circumstances intervened, is unclear. No mention of any intervening release is made in the return to his writ in the winter of 1697.

5. Writ for Daniel Ducatsre and Francis La Pierre, teste 23 January 1697, in TNA, KB16/1/6. They were called “alien enemies and spies” in the return to their writ, which quoted the warrant for their commitment made out by Secretary of State the Duke of Shrewsbury. They

known cases concerned with prisoners of war and enemy aliens, we dramatically enrich our understanding of the writ's history. This matters, and not only because lawyers and federal judges in the United States want a history of habeas corpus to tell them what to do. It matters because it suggests a wider problem in the methods and sources previously used in writing the writ's history. *That* we now know Golding's story at all tells us how we can solve that problem.

The problem is leading case history.⁵ Though such an approach to law's past has generally been out of favor, habeas corpus remains a legal device whose historical outlines have usually been traced along a thin line of some dozens of case reports linked in connect-the-dots fashion.⁶ That we know this story results from setting aside the reports—even the manuscript ones—until we have first done our work in the appropriate court archives: in this case, those found on the Crown Side of King's Bench. Golding's case points out the surprises that await us there, one at a time. If we go further into the archives, if we sum such cases in a systematic way,

were initially bailed, and after appearing on their recognizances for two terms, were discharged altogether: TNA, KB21/25, pp. 149 and 210. Both names appear in highly varied forms in the record, La Pierre at one point being called "Stone." This is the only one of these writs to be reported in any form: Fortescue 195; 92 ER 816, as "Du Castro's Case." This report appears to have concerned not the hearing of the return, but the hearing two terms later on the motion to discharge them from their bail. Tellingly, counsel argued against them that as foreigners, they were not entitled to bail. The result shows that this view was not accepted by the court.

⁵ As Christopher Columbus Langdell—transformative dean of Harvard's law school more than a century ago—put it as he promoted the virtues of leading case learning, "the vast majority [of cases] are useless and worse than useless." Quoted by Simpson in "Legal Iconoclasts and Legal Ideals", 837. For a synopsis of Langdell's influence, see Christopher Tomlins, "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative", *Law and Society Review* 34 (2000), 924-34. Sir Frederick Pollock took a similar view of leading cases compared to those that did not "lead": "Unreported cases are in theory no less binding on the court than reported ones. But here the difference also comes in. The science of case-law being wholly conventional, we might, if we chose, absolutely limit the field of observation to reported cases, as it now is practically limited with trifling exceptions, or even to the authorised Law Reports, without any loss to the scientific character of our work." "The Science of Case-Law", in Pollock, *Jurisprudence and Legal Essays*, selected by A. L. Goodhart (London, 1961), 174.

⁶ In the most recent work considering the writ's English history, 159 reports of 143 cases are cited from the writ's formative period, the three centuries before 1789: R. J. Sharpe, *The Law of Habeas Corpus* (2nd edition, Oxford, 1989). The principal American work on habeas corpus cites 72 reports of 59 cases from the same period: William F. Duker, *A Constitutional History of Habeas Corpus* (1980). Earlier historians of the writ worked with far fewer cases: e.g. Hurd, *Habeas Corpus*, pp. 75-91, and Church, *Habeas Corpus*, 4-16.

we can begin to see patterns of usage in their full, multi-dimensional shapes, shapes that help us make sense of the leading cases, and more important, less-than-leading cases like *Golding's*. But this is a point that hardly needs emphasizing before such an audience, so let us get to work.

Four Conceptual Foundations of Habeas Corpus

Before going further, I need to stipulate four conceptual premises of habeas corpus as it appears when viewed from thousands of cases in the court's archive.

First, habeas corpus is a writ of the prerogative, not a writ of liberty.⁷ The writ's history has generally been written from the assumption that because it has come to provide a means by which we might protect modern liberal norms concerning individual rights, we must seek the writ's origins in ideas about liberty that resemble or foretell our own. Americans in particular have needed this kind of history, in which habeas corpus is a synecdoche for modern liberal ideals. But that habeas protected what was always called "the liberty of the subject" goes straight to the heart of the writ's conceptual origins: in subjecthood, not the modern autonomous self.⁸ Once we see the writ's genesis in a system of mutual obligations binding subject to sovereign, we can understand why it packed enormous legal force. That this was a prerogative writ is not simply a neat label by which we can group habeas with certiorari, mandamus, and others, but the key to this legal force.⁹ In the years right around 1600, especially in the years 1604-1606, court files allow us to watch the justices of Queen's and King's Bench perform a rhetorical capture of the most critical kind: taking for their own use the greatest power of all, the king's. This would

⁷ For more on the role of the prerogative in the writ's conceptual foundations, see Paul D. Halliday, *The Liberty of the Subject: Conceiving Habeas Corpus in England and Empire* (forthcoming), chapter 2.

⁸ For more on the pre-liberal concepts of liberty that operated in early modern habeas litigation, see Halliday, *Liberty of the Subject*, chapter 4.

⁹ On the prerogative writs, see S. A. De Smith, "The Prerogative Writs," *Cambridge Law Journal*, v. 11 (1951-53), pp. 40-56.

give to habeas corpus the capacity to protect ideas about liberty and the modern self as they developed in later epochs and largely outside of law.

Second, taking the prerogative in this way gave the judges an instrument of such force and flexibility that we may rightly call it equitable, though many might have blanched at using that name given the personal and institutional competition surrounding relations between common law and equity in just these years. This should not surprise us, given that one of the chief functions of habeas corpus was to monitor the conciliar courts and other courts of equity, and in so doing, to restrict if not seize their jurisdiction. But there was more here than the poaching of purview; there was imitation of equitable practice, as King's Bench used habeas to speak to matters well beyond the status of prisoners and as they did so by means often in apparent violation of their own rules.¹⁰ Furthermore, given the conceptual proximity of habeas

¹⁰ See for instance the writ for Ralph Brooke in 1615, committed by the High Commission for neglecting their order to cohabit with his wife and to provide for her maintenance. King's Bench ordered him to pay £20 yearly as maintenance when they bailed him: TNA, KB145/14/13 (teste 5 May 1615) and KB21/4, f. 116 and KB21/5a, ff. 10v.-16v., passim. A report is at Moore KB 840; 72 ER 940.

It is apparent too in the violation of the court's ostensible procedural rules, most notably in their tendency to consider evidence well beyond that which was in the return, contrary to oft-stated dicta that they should not do so without the help of a jury. In such cases factual matters not in the return were raised in court, though there was no jury to hear the facts. In a spousal custody case in 1701, Chief Justice Sir John Holt asserted that "it will be most proper to try the truth of what is sworn [in the affidavits required for issuance of the writ] when the young lady is present in court, upon the return of the habeas corpus." *Lincoln's Inn, MS Misc. 713*, p. 164. The young lady, Eleanor Archer, was then examined on oath. The printed report of this case (Fortescue 196; 92 ER 816) says she was examined "by the court secretly," probably to avoid public scandal. Facts might also be raised by affidavit after return. These were used to certify the "lewdness" of Elizabeth Claxton in 1701, ensuring that she returned to jail. Holt KB 406; 90 ER 1124. In a capital matter, an accused highway robber was bailed after affidavits were produced "containing very strong circumstances to show that the prisoner did not commit the fact." Crisp's case, 1733: 2 Barn. KB 271; 94 ER 495. Judicial practices such as these amounted to a consideration by the court of facts that were based on sworn testimony rather than stipulated in the return.

Given this quality—equitable in all but name—we should not be surprised that the key period of development on habeas corpus was also the moment for key developments on certiorari, for the vigorous rebirth of quo warranto, and for the birth of mandamus, which Sir Edward Coke in 1615 said was "not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial...so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law." 11 Co. Rep. 93b, at

corpus to judicial instruments like mandamus and quo warranto, we must see that habeas was much less concerned with what we might like to call the rights of the prisoner than with the wrongs of the jailer. Like quo warranto or mandamus, habeas was for inspecting the use of royal franchises: in this case, the franchises of jailers and the courts or officers who wrote their orders. The writ was concerned to protect the relationship between king and subject by ensuring that subjects' bodies were held by the king's officers in accordance with law. Ironically, by appreciating that the writ's focus was on jailers, not on prisoners, we can see how this would ultimately widen the writ's ambit rather than narrow it.¹¹

Third, the relationship of King's Bench and the writ of habeas corpus to Parliament and to statute was ambivalent. This matters. The writ's history has often been told in statutory terms, especially by Americans, who followed Blackstone in celebrating the Habeas Corpus Act of 1679 as "that second Magna Carta."¹² Since much authority to imprison was given by statute to officers commissioned by the king—justices of the peace; special commissioners; and after 1689, the Privy Council—we should see statute as typically posing problems to be solved in habeas jurisprudence. Using habeas, King's Bench carefully policed the bounds of statutes, sometimes even pulling in those bounds. We can see this in the tendency of the court to bail or discharge those imprisoned apparently in strict accordance with statutes concerned with bastard bearing or alehouse keeping in the early seventeenth century. In the eighteenth century, we can watch impressment statutes contained in much the same way.¹³ Nonetheless, King's Bench always

98; 77 ER 1271-81, at 1277-78: *Bagge's Case* (1615). Though judges would never admit they acted equitably, it was a charge often made against figures like Lord Mansfield, in the eighteenth century, who used habeas corpus as creatively as any justice ever has. "Junius" attacked Mansfield's "arbitrary power of doing right" and "his natural turn to equity" in releasing some on habeas. *The Letters of Junius* (London, 1775), v. 2, pp. 192 and 196.

¹¹ For more on this, see the discussion of the writ's use in India, in Halliday, *Liberty of the Subject*, chapter 7.

¹² 1 *Commentaries* 133.

¹³ Literally hundreds of foreign seamen, caught up by press gangs in English, Caribbean, or even foreign ports, successfully used habeas corpus to gain release from naval service in the

recognized that Parliament was the greater court, and only Parliament's imprisonment orders, not the Privy Council's, would remain above question by habeas corpus. We can thus appreciate all the more the irony of every statute after 1689 that suspended bail in cases of treason—what we usually call the suspension of habeas corpus—as such statutes returned the very powers to the Privy Council that had been taken from it by Parliaments in 1628 and 1641.¹⁴

We might, like Blackstone, try to compensate for this statutory embarrassment—and that's what many MPs thought suspension acts were—by pointing to the glories of the Habeas Corpus Act of 1679. But a close look at thousands of writs granted before 1679 shows that the procedural requirements detailed in that Act had long been accomplished in the work of the

second half of the eighteenth century. The statute of 13 George II, c. 17 excepted from impressment "every person being of the age of fifty-five years or upwards, and every person not having attained the full age of eighteen years, and every foreigner..." Reference to these and other exempt categories were the chief grounds on which sailors used habeas corpus to challenge impressment. Foreign sailors in the merchant marine were supposed to be issued letters of protection (13 George II, c. 17, §3), explaining their foreign status, which could be presented whenever the press came on board. This did not always prove effective when press officers anxious to meet their quotas were at work. In such cases, when foreign sailors used habeas corpus, the Admiralty's solicitor usually recommended that the sailor simply be released. In one such case, the Admiralty solicitor explained that two foreign sailors were "entitled to be discharged by virtue of the said writs of habeas corpus." He added, as he often did, that releasing them would be advised, "in order to save a great expense." TNA, ADM1/3678, f. 4 (letter of Samuel Seddon, Admiralty solicitor, to John Cleveland, secretary to the Admiralty board, 22 January 1760). While protections were desirable, they were not required since aliens, by virtue of that status, were exempt from this form of detention. Thus even when a sailor lacked a protection, the Admiralty ordered release: ADM1/1787 (letter of Capt. John Falkingham to John Cleveland, 16 October 1760, noting that a Swede and a Spaniard had no protection, with order to discharge on the verso). Admiralty solicitor letters in TNA, ADM1 and ADM7 provide a unique body of evidence for the perspective of counsel opposing writs of habeas corpus. By studying these along with captains' letters (TNA, ADM1), the writs (KB16), the affidavits used to gain those writs (KB1), and the attendant orders on those writs (KB21), impressment cases give us a singular opportunity to examine habeas usage from every conceivable angle. For background on impressment, see N. A. M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (New York, 1986), chapter 5, especially pp. 164-88.

¹⁴ For more on suspension, see Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," forthcoming. On the transposition of constraints on habeas corpus from Privy Council to Parliament over the course of the seventeenth century, see Halliday, *Liberty of the Subject*, chapter 6.

judges themselves.¹⁵ That judges did not need that Act in order to innovate in the use of the writ is suggested by the formulaic note on the verso of John Golding's writ, showing that it had been granted by the judges at common law rather than according to the Act's terms. The common law writ, not the statutory one, would permit innovation on habeas corpus across the eighteenth century.

Fourth, we see in the writ's operation the concept of subjecthood taken to its outer limits. For subjecthood relied on the idea of the king's protection. All who came within his protection were his subjects.¹⁶ This helps to explain why allegations of foreign status, even enemy alien status, were almost never discussed in early modern habeas cases and did not bar use of the writ.¹⁷ When we appreciate that it was royal power that empowered the judges, we can see how a habeas jurisprudence focused more on the wrongs of jailers acting by the king's franchise than on the rights of prisoners had the surprising effect of making the writ widely available to those

¹⁵ For instance, it has long been said that one could not get a writ of habeas corpus during the court's vacations before 1679. The source for this mistake may well come from Coke, who said that "neither the King's Bench nor Common Pleas can grant that writ but in the term time." 4 *Institutes* 81. But King's Bench rulebooks and recorda files show hundreds of writs used during vacations throughout the sixteenth and seventeenth centuries. 39% of writs issuing under Coke's predecessors as chief justice—Sir John Popham and Sir Thomas Fleming—issued during vacations, while only 14% of the writs used during Coke's tenure in King's Bench issued in vacation. For a more general statement of the point that judicial accomplishments prefigured the Act of 1679, see Helen Nutting, "The Most Wholesome Law: The Habeas Corpus Act of 1679," *American Historical Review*, v. 65 (1959-60), 527-43.

¹⁶ As Sir Matthew Hale put it, "Every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection." Yale, ed., *Hale's Prerogatives*, p. 56. Protection, derived from the king's prerogative, a form of mercy "flow[ing] from the fountain of grace" to all the king's subjects, both "natural" and "local." BL, MS Harleian 5220, f. 11v. "Protection," according to Thomas Blount, is "that benefit and safety, which every subject, denizen, or alien, specially secured, hath by the king's laws." *NOMO-ΛΕΞΙΚΟΝ: A Law-Dictionary* (London, 1670), unpaginated, at title "protection," signature Fff4.

¹⁷ Sir Francis Ashley, in his 1616 reading on Magna Carta, chapter 29, argued that "none may be freemen except those who are subjects, or born, or resident within the fee of the king and within his protection." An alien then was a freeman for purposes of Magna Carta, but this status pertained only while one was within the king's dominions, "because his allegiance and protection is only local." Even an alien enemy, who came by safe conduct, was a "freeman because he has the protection of the king and thus by the law of nations (which is only the law of nature) must have the privilege of the laws of the realm." BL, MS Harleian 4841, ff. 6-7.

who were not the king's "natural subjects," but were nonetheless under his protection as what Sir Matthew Hale called "local subjects."¹⁸ The force of the prerogative and the concern with franchises explain how the writ would go well beyond England and cover much more than the English.¹⁹ It explains how the writ would go to America, where it would be used in many colonies without any explicit grant; and how later, at the same time it was being lost to Americans by the suspension statutes of 1777 and following, the writ would be extended to natives of Bengal, a part of the world in which the 1765 Treaty of Allahabad had not made anything like a British sovereignty properly understood.²⁰

With these conceptual premises in mind, let us turn to examine a few of the patterns we can see if we aggregate information from many writs.

The Survey

If we make a thorough search in the archives of the Crown Side of King's Bench across three centuries, we find evidence concerning 2752 users of the writ: hence the conclusion that 11,000 prisoners—and probably something more than that—used the writ from 1500 to 1800. One more number: 53%. This was the likelihood that you would be bailed or discharged if you used habeas corpus at any time during these three centuries. Sharp deviations from such an average, correlated to variations in the wrongs alleged, the type of official who ordered your imprisonment, or many other variables can thus identify for us the moments that need closer

¹⁸ Yale, ed., *Hale's Prerogatives*, p. 54.

¹⁹ For more on the vastness of subjecthood, see Halliday, *Liberty of the Subject*, chapters 2 and 7.

²⁰ On the writ's movement to America and India, see Halliday and White, "Suspension Clause," and Halliday, *Liberty of the Subject*, chapter 7.

scrutiny.²¹ Across three centuries, we can closely track judicial practices, and by correlating outcomes to numerous other variables such as the wrong alleged against each prisoner, we can use habeas as a barometer of popular anxieties, charting from one generation to the next the shifting problems society addressed by locking people up.

Wrongs

Let us begin with large numbers in a long view (see Appendix, figure A). Multiplying by four the totals derived from our quadrennial survey, we can make some estimates about total activity in the use of habeas corpus. Setting aside the prominent spike in the middle of the sixteenth century—explained by just two writs of early 1554 used to move 97 of Sir Thomas Wyatt’s partners in rebellion to trial and their doom (an important reminder that habeas was not always sued by the prisoner)—we can identify three distinctive periods.²² The first peak, in the decades around 1600 to 1630, we might call the era in which habeas was made great, or by an easier title, the age of Popham and Fleming. The second peak, at century’s end, we might call the age of Holt. The final peak we can call the age of Mansfield, from the late 1750s to the late 1780s. I name these peaks for judges not only in recognition of the theme of this conference, but to suggest that there may be more than simple correlation between periods of interesting activity and the tenure of certain justices.

Looking closely, we can see that each peak displays a different underlying geology. By placing the writs into four bands of alleged wrong—plus that ever-maddening category of the

²¹ Among the other things we can see or do with information out of the returns, we can compare the experience of prisoners using habeas corpus to review imprisonment orders made before conviction for an alleged wrong with those using it after conviction. We can compare usage in term with usage during vacations; we can compare those returned en banc with those returned in chambers. We can explore varying experience of writ use according to gender, social status, locale of imprisonment, and so on.

²² See the writ for Walter Redwyn, et al., teste 7 February 1554, in TNA, KB145/12/1 and KB29/187, m. 20d., and writ for Philip Robynson, et al., KB29/187, m. 20d.

unknowable²³—we can see that a different layer pushes each peak upward. Peaks of total usage thus also mark periods of transition in the writ's purposes and possibilities. In the sixteenth century, habeas corpus was a device overwhelmingly concerned with moving around bodies in aid of felony process. But beginning in the last two decades of Elizabeth's reign, and especially from 1592 to 1613, when Sir John Popham and Sir Thomas Fleming presided in King's Bench, we can see a pronounced increase in the use of habeas to inspect imprisonments for non-felony wrongs: misdemeanors ranging from adultery to whore-mongering. Looking at the stratigraphy in the bars charting the period 1580 to 1680, we might think of this as the century of misdemeanors.

The peak at century's end is made overwhelmingly of results from the 1690s, the decade with the heaviest recorded use of habeas corpus. This is also the decade with the heaviest use of habeas corpus to inspect imprisonment orders made by the Privy Council and the decade with the heaviest use for prisoners confined on allegations of wrongs against the state.²⁴ The fourteen-month period from the beginning of Michaelmas 1689 to the end of Michaelmas 1690 marks the single-most intensive period of habeas corpus use at any time in three centuries. The start of Michaelmas 1689 is significant: it marked the end of the first statutory suspension of habeas corpus. Much can and should be said about parliamentary suspension of the writ.²⁵ For now, let us simply observe that during these fourteen months after the first suspension, King's Bench handled 251 cases on habeas corpus, 147 of which concerned wrongs against the state. Despite persistent fears among beneficiaries of the Revolution of 1688 such as Chief Justice Sir John Holt and his fellows on the bench about rebellion and invasion, these same justices bailed or

²³ This includes a tiny group of writs returned with no wrong named, and a very large one of writs damaged or for which otherwise there is incomplete information.

²⁴ These include sedition, treason, and that most flexible of charges, "treasonable practices."

²⁵ Halliday and White, "The Suspension Clause."

discharged 80% of those imprisoned because they were thought to pose a danger to the new regime of William and Mary.²⁶

The results of 1690 were not isolated. Writ usage remained vigorous throughout the war years of the decades following.²⁷ The use of habeas corpus for a “prisoner at war,” like John Golding, was hardly an oddity, nor was the result surprising once placed against a backdrop of hundreds of other cases available to us in the recorda files.²⁸

The third of our peaks appears late in the eighteenth century. Once again, we see not only an increase in usage beginning before 1760 and culminating in the 1780s, coinciding with the presidency of Lord Mansfield. We see a pronounced change in the purposes served by habeas corpus. We have arrived in the age of no wrongs. Since the 1670s, and increasingly across the eighteenth century, habeas corpus had been used to adjudicate family custody contests: of husbands over wives and of parents over children. None of these cases concerned detentions behind which stood even the least hint of a legal wrong. We might say then that habeas corpus in this period had begun more clearly to be used to adjudicate claims of right. Quite true, though

²⁶ Of the 147 habeas cases concerning state wrongs found in this period, results for 14 are unknown. Percentages are thus for 133 cases. 26 were remanded, 51 bailed, and 56 discharged. Of those bailed, there is every reason to believe that most were later discharged, which was consistent with the then current practice, but no record of the discharges has survived. Writs for 1689 and 1690 are in TNA, KB11/14 and KB16/1/1, with court orders in KB21/23, *passim*. In 19 additional cases of persons jailed for being Catholic priests or for being Catholics who refused to swear the oath of allegiance—a proxy for treason—the justices bailed all but one. Of those 18, 15 were bailed and were later discharged; three others were bailed, but outcomes in their cases cannot be traced. Only one of the alleged priests, Ralph Gray, was remanded, and then only after the charge against him had been changed to sedition. Gray’s offense was dispersing “The Coronation Song,” a Jacobite pamphlet. His writ is at TNA, KB11/14 (teste date obscured by damage, but the order date was 23 October 1689), orders thereon at KB21/23, pp. 327 and 331. The warrants for his arrest are also noted in CSPD 1689-90, pp. 110 and 270.

²⁷ Release rates for the whole of the period of Holt’s chief justiceship ran at approximately 75%.

²⁸ 400 cases are in the survey years for Holt’s period in King’s Bench, giving us a projected total of approximately 1600 habeas cases for 1689-1710. In both printed and manuscript reports, we find 95 total reports for 48 distinct users of habeas corpus during this period. We thus might conclude that we have reports for roughly 3% of the total of habeas cases in these years.

these rights claims were not premised on ideas about one's condition as a human according to nature, nor as an Englishman according to English law. They were premised on ideas about status: of husband and wife, of parent and child. Such cases were numerically insignificant but conceptually quite significant, widening as they did the uses of habeas corpus.

The same cannot be said for naval impressment cases, which were both numerically *and* conceptually significant. Their use had everything to do with the expansion of the state that followed and drove the expansion of empire.²⁹ The Seven Years' War and the American Revolution, when habeas use to question naval impressment skyrocketed, were nothing if not imperial wars. The exigencies of imperial war were met with parliamentary innovation. Statute multiplied the forms of status—like wife or child—by which some people might be subject to certain forms of detention to which others were not. In this case, statute widened the kinds of people classed as seamen for the purpose of manning his majesty's ships. Foreigners used the writ with particular success in impressment cases. Alien status, far from barring their use of habeas corpus, provided the chief grounds by which hapless Portuguese sailors picked up in Caribbean ports might escape such servitude.³⁰ In all, nearly 1000 unfortunate seamen probably used habeas corpus to challenge their impressments in the last four decades of the eighteenth century.³¹

While King's Bench used habeas corpus to patrol the boundaries of the impressment acts, the writ could do little to void those acts. There was no shortage of argument, from lawyers as

²⁹ From 1750 to 1800, 18 cases concerning family custody disputes, lunacy, or apprenticeship indentures appear in the quadrennial survey years, giving us an average of just over one such case per year. Given a total of 402 cases for which the reason for detention is known (of a total of 456 cases, 1750-1800), custody disputes constitute 4.5% of the whole for this period. By comparison, we find 236 impressment cases, or 58.7%.

³⁰ For instance, see the case of Peter Fretus and Joseph Silvy, both Portuguese subjects impressed at Port Royal, in Jamaica. The Admiralty solicitor recommended that they be discharged in reply to their writ of habeas corpus: TNA, ADM1/3686 (unfoliated), 29 May 1798.

³¹ 239 sailors' writs may be found in the court files for the quadrennial survey years, yielding a projected total of 956. Given the state of the evidence, this is almost certainly an undercount.

well as impassioned laymen, that such acts were illegal, if not by English law, then by divine or natural law: why, some asked, should anyone suffer such an onerous confinement while others did not?³² But to the extent allowed them by a vigorous writ of habeas corpus, King's Bench during Mansfield's years on the court sent home many a royal sailor: 94% of impressed habeas users were ordered discharged.³³

Release Rates

From these extraordinary release rates for impressed sailors, let us turn to release rates for prisoners more generally (see Appendix, figure B). Immediately, we notice three spikes that overlap almost perfectly with the spikes in usage, spikes rising well above the average release rate of 53% across three centuries. If periods of sharply increased usage were marked by important changes in the uses to which the writ was put, then putting the writ to new uses, or using it in large quantities, apparently correlate closely with increased success for prisoners. If

³² See, for instance, Anonymous, *An Address to the People of England: Being the Protest of a Private Person against Every Suspension of Law that is Liable to Injure or Endanger Personal Security* (London, 1778), p. 59, where the author called impressment statutes "a real suspension [of habeas corpus] with respect to one part of the community." Most of the arguments in this pamphlet condemning suspension of habeas corpus by impressment or by other means derived from divine or natural law.

³³ Of 239 impressment cases, 1750-1800, results survive in only 36 cases (15.1%), even though returns are on file for most of the others. Unlike the usual practice in this period, these returns do not have judicial results written in the margin of the writ or return, nor is there an indication in the Crown Side rulebooks. We can only speculate—in part based on the frequent recommendation of the Admiralty's solicitor, found in his extensive surviving papers, that the Admiralty not fight one writ after another—that King's Bench and the Lords of the Admiralty worked out an accommodation with one another, by which rather than returning the body of sailors with all these writs, the Admiralty simply released them. The tone in many of the letters by Samuel Seddon, the Admiralty's solicitor during the Seven Years' War, is one of resignation as he repeatedly advised that sailors simply be discharged "by virtue of the said writs of habeas corpus...in order to save a great expense of bringing them to town." TNA, ADM1/3678, f. 4. Avoiding "further trouble and expense" is a constant theme of Seddon's: *ibid.*, f. 205. See also *ibid.*, ff. 30, 32, and 281; and ADM1/3677, f. 382, 383. A letter of Ias Dyson suggests that if a sailor was simply discharged, it would obviate the need for a return: ADM1/3680, ff. 428-29 (26 September 1778).

we dig a little deeper into these numbers—for instance, if we aggregate by chief justice rather than in groupings of two decades each—we can see more clearly what was going on in these apparently pivotal periods: individual justices making a difference.

Release rates could change abruptly from one chief justice to the next: for instance, when Holt was succeeded by Parker in 1710, when Mansfield was followed by Kenyon in the 1780s, or when Coke succeeded Fleming in 1613. The numbers show us powerful correlations; turning to other sources can help us think about causation. In Holt's case, his readiness—which we can see in the reports—to hear evidence well beyond that provided in the return to the writ suggests a temperament that helps explain the high rate of release in the decades to each side of 1700. In Mansfield's case, we can find in the affidavit files plenty of signs of his unusual willingness to entertain suitors at home, receiving supplicants there who provided on oath the information that would justify issuing the writ.

The Difference a Judge Makes

In Coke's case, what needs explaining is not a rise in release rates, but a decrease made all the more impressive by all the famed associations of Coke with this writ (see Appendix, figure C). Release rates under Coke were actually *below* average (47%). Compare this to his predecessor and his successors. Under Fleming, chief justice from 1607 to 1613, release rates ran at an *astoundingly* high 95%.³⁴ Coke's successors likewise outdid the oracle of the law in their use of the

³⁴ Looking beyond 1610—the only survey year within Fleming's period on the court—at all writs for 1607 to 1613 for which we have results information (78), we find 61 (78%) were discharged or bailed. Thus the small sample size in the survey cannot on its own explain the high rate of release under Fleming.

One possible explanation for the higher rate of release under Fleming than Coke might be that Coke was more ready to grant the writ in the first place. But the fact that Fleming's court handled nearly the same number of writs per year (25 compared to 28) as Coke's court makes this unlikely. If anything, getting the writ was harder under Coke than under his predecessor and successor, as indicated by the dramatically lower use of writs returned to an individual justice in

writ of liberty: release rates under Chief Justices Sir Henry Montagu and Sir James Ley during the decade after Coke's removal from the bench in late 1616 ran at just over two-thirds of all prisoners using the writ.³⁵ If we look more closely at other aspects of habeas activity, we see that the line charting release rates does not curve alone, but is paralleled by others tracing usages that reflect the writ's availability and utility to prisoners.

By charting activity across five periods—groupings of chief justices³⁶—we can zero in on what made the years around 1600 special, and then consider what made for the apparent retreat under Coke.

First, consider return speed. Increasingly, rather than name a specific date, writs demanded their return “immediately after receipt.”³⁷ Each writ contained in it a demand about

chambers, a proxy for writs granted during vacations. During Coke's time in King's Bench, the court granted such writs returnable to chambers twice per year, on average. In the two quadrennial survey years to each side of Coke's presidency of King's Bench, the court permitted return to chambers on average 13 times per year. Return to chambers was ordered with this frequency in those years: 1606: 18; 1610: 14; 1614: 2; 1618: 7; and 1622: 14.

³⁵ The rate under Montagu was 69%, under Ley, 70%.

³⁶ First, considering together all chief justices from 1500 to the departure from Queen's Bench of Sir Edward Saunders at the beginning of 1559; the second, treating the period 1559 through 1592, when Sir Robert Catlin and then Sir Christopher Wray presided in Queen's Bench; the third and most transformative spell when Sir John Popham and then Sir Thomas Fleming served there, from 1592 through Trinity term 1613; the fourth, the brief period when Sir Edward Coke sat as chief justice of the king's chief court; and the last, the period from the end of 1616 to the beginning of 1625, when Sir Henry Montagu and Sir James Ley ran that court. For the tenure dates of each of these chief justices, see Sir John Sainty, *The Judges of England, 1272-1990* (London, 1993), p. 10.

³⁷ William Style, writing in 1670, thought that King's Bench would not grant writs returnable immediately. According to Style, “The court will not grant a habeas corpus, returnable immediate; but in some cases they will give but a short time to return...For though the law doth favor liberty, yet it allows convenient time for doing of things.” A quick look at the recorda files for the 1660s shows dozens of writs so granted. This helps explain the modifying—if not contradictory—statement that followed: “But it is in the discretion of the court to do it.” William Style, *The Practical Register, Or the Accomplish'd Attorney: Consisting of Rules, Orders, and the most Principal Observations Concerning the Practice of the Common Law...* (London, 1670), p. 234. But Style apparently thought that a writ issuing with a demand for immediate return might only be made for prisons in London, Middlesex, or within five miles of London: *ibid*, p. 232. Hundreds of writs returnable immediately from beyond this area survive in the recorda files. This five-mile limitation was often repeated, and may well have applied only to writs in the *ad respondendum* form or other forms concerned solely with private litigation rather than to the *ad*

when it should be returned: when the body and the cause of its imprisonment should be brought into court. Initially, nearly all writs named a specific date, anywhere from one to over one hundred days in the future. Over time, more writs simply demanded their return “immediately.” As we can see, there was a marked increase in this practice under Popham and Fleming.³⁸ Little evidence survives to tell us precisely what “immediately” meant to the justices or their clerks. But by comparing teste and return dates for writs with a named date for return with those marked “immediately after receipt,” we find that the new usage amounted to a clear increase in process speed.³⁹

subjiendum writ. See, for instance, BL, MS Add. 36,103, f. 81: Hardwicke papers, rules for King’s Bench, in the hand of Philip Yorke.

³⁸ From 11% of writs with such a designation in the period 1559 to 1591, to 32% in the years 1592 to 1613. In London and Middlesex, this appears to have meant that returns should be made the day the writ issued or the day following. For a later statement to this effect, see Anonymous, *Rules and Orders for the Court of the Upper Bench at Westminster Made and Published by the Judges of the Said Court, in the Terme of St. Michael, In the yeare 1654* (London, 1655), p. 14.

³⁹ Examining 58 writs from 1550, 1570, and 1590 for which we have both the teste and return dates (excluding those teste on the last day of term, which date was often fictionalized for writs granted in vacation), we find that writs to London or Middlesex appointed on average four days for making the return. For writs to the rest of the country, twenty-nine days were allowed, on average. There was a very high degree of variation. Thus a writ sent to Herefordshire in February 1570 had a return date sixty days hence (TNA, KB29/205, m. 71d. and KB145/13/12: writ for Thomas ap Morgan, et al., teste 12 February 1570), while another to the same county in June allowed only twelve days (TNA, KB29/205, m. 96d. and KB145/13/12: writ for David Duppa, teste 14 June 1570), reflecting the probability that weather and season, as well as distance, explains much of the variation. Part of the reason for the much longer return in the former instance may concern the fact that that writ was directed to the Council in the Marches of Wales, where there might be some trouble getting the return at all. On the other hand, this would not explain why a writ to the sheriffs of Middlesex should allow twelve days for return when most London writs required return in two or three days. TNA, KB29/227, m. 43d. and KB145/13/33: writ for Richard Eaton, teste 9 November 1590, returnable on 21 November. Despite the long lead time, the court had to threaten the sheriffs of Middlesex on 23 November with fines to encourage the return, which, once made, showed that Eaton was dead: TNA, KB21/1, f. 28v.

Process could move very quickly indeed. Sarah Short, jailed by the consistory court for refusing to pay costs in a defamation suit brought against her by another woman, was brought into King’s Bench the same day her writ issued to the sheriffs of Middlesex. Order was made for her writ on Thursday, 27 June 1622. It issued, and was returned, on 29 June: TNA, KB29/271, m. 64; KB145/14/20; and KB21/7, f. 34-v.

Measuring the days between the teste and return dates for writs with a named return date is quite simple since both dates were entered on the writ. Doing so for writs marked “immediately” is more difficult since the return date must be found from other evidence. This is

Second, the use of writs during the court's lengthy vacations between terms presents a similar picture of a court giving the writ greater utility by making it more readily available all year round. This is indicated by the 10% jump in vacation writs after the 1590s.

Third, and more marked, is the increase in the use of writs returnable to a single justice in chambers. From only a negligible use of chamber returns before 1558, we see a jump to one-quarter of writs returnable to chambers after 1558; after 1591 their use nearly doubled again. This was good news for prisoners given the dramatically higher rate (78%) at which prisoners were bailed or discharged by a single justice in chambers than by the full court sitting en banc.

only possible after 1589, when the rulebooks (KB21)—from which we can sometimes learn when a writ was returned—commence. Unfortunately, we do not have both teste and return dates for many such writs from before the mid-seventeenth century.

There does not appear to have been a firm rule in place about the meaning of "immediately," even for prisoners held in or near the capital. Thus the teste of the writ for Edward Dewhurst, prisoner in Clerkenwell, in Middlesex, was made on 9 October 1638, but he was not brought in by the keeper until six days later: TNA, KB145/15/14 and KB21/12, f. 101v. For prisoners held in London or Middlesex, return times on writs ordered returnable "immediately" were generally one or two days, clearly faster than before. See, for instance, the writ for Charles Brook, imprisoned in London's Woodstreet Counter for refusing to be listed with the City militia in the autumn of 1642. Jailed on 19 November, his writ issued on 23 November. He was brought into court on 25 November but not actually bailed until the next day. TNA, KB29/291, m. 91d.; KB32/10; and KB21/13, ff. 22v.-24v. and 26v.

Returns always took longer for one held in the provinces, though here too, return times on writs marked "immediately" appear to have been faster than those marked with a specific date. Thus William Shirley, jailed by Lord High Admiral the earl of Nottingham at Guilford, in Surrey, on an outlawry, had a writ issued on 11 October 1605, returnable immediately, which was returned 14 October (the thirteenth being a Sunday), at which time he was discharged: TNA, KB14/3 and KB21/3, f. 44v. See also the writ for Richard Withers and Thomas Pynnock, jailed in Hampshire for riot by justices of the peace: TNA, KB29/271, m. 114d. and KB145/14/20. The court ordered the writ, and it issued the same day, on 4 November 1622. The jail keeper of Winchester brought them in on 15 November, at which time they were bailed: TNA, KB21/7, ff. 41 and 42v. From Yorkshire, a writ issuing for immediate return took eighteen days to make the round trip. See the writ for Peter Smart, jailed by the High Commission at York for contempt of that tribunal. The court ordered his writ on 11 November 1630, it issued the following day, and he was brought into court on 29 November, at which time he was committed to the Marshalsea: TNA, KB29/279, m. 107; KB32/10, part 1; and KB21/10, ff. 108v., 114, and 117v.

As we look at these lines, we see remarkably parallel curves traced through Coke's years on the bench.⁴⁰ But did *he* shape this statistical valley?

The simple answer is "yes." Demonstrating this answer takes more time than we have, but I would point to a few signs of his imprint on these numbers. Consider the vacation writs curve: it is probably Coke's pronouncement in the *Institutes* saying that habeas did not properly issue from King's Bench in vacation that explains why later justices were unsure about their authority to use the writ out of term.⁴¹ In keeping with his later words on this score, vacation activity was much reduced while Coke was chief justice. On all three markers we have used here to chart ease of writ use, Coke seems to have made it harder for prisoners to use the writ.

One of the reasons for this may lie on the curve we have not yet examined: that tracing the number of writs returned with either the alleged wrong or the jailing officer unnamed in the return. One clear pattern from the mid-sixteenth century through the early seventeenth century is a steady decline in such non-specific returns. Under Coke, such returns very nearly disappeared. One reason is the marked increase in orders to amend returns we can see in the rulebooks in 1615. Orders to amend had first appeared in habeas proceedings about twenty years earlier.⁴² But such orders were rare: the justices apparently preferred to take returns as they received them, and if found deficient, to order the prisoner's release rather than to ask the jailer

⁴⁰ Because only one year of the quadrennial survey (1614) falls within the period when Coke was chief justice, for this period all surviving writs have been studied to ensure that we get the most balanced picture possible of this critical period.

⁴¹ Speaking of Chancery, Coke writes: "if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant a habeas corpus and do him justice according to law, where neither the King's Bench nor Common Pleas can grant that writ but in the term time..." 4 *Institutes* 81. This was not published until 1644: Stephen D. White, *Sir Edward Coke and "The Grievances of the Commonwealth"* (Chapel Hill, 1979), p. 10.

⁴² From the beginning, such orders often took a nisi form: that the jailer amend his return or be fined for failure to do so. The first such order went to the mayor and aldermen of London—an authority with powers to imprison that were a frequent source of conflict—for an unnamed prisoner in Easter 1595: TNA, KB21/1, f. 94.

for a second, more full answer to the writ.⁴³ This pattern now changed dramatically as Coke's court asked one jailer after another to make a better return. Perhaps the chief justice's concern was not to let people out of prison more readily, but to ensure that he received the fullest possible answer to his commands to jailers. In other words, perhaps his principal interest in using habeas corpus was the jailer, not the prisoner.⁴⁴

By ordering returns amended, Coke's court taught the officers of other tribunals how to answer their demands. This is shown well by the eleven prisoners whose writs the judges considered in a June 1615 conference held in Coke's chambers in Serjeants' Inn. All had been jailed by command of the Privy Council, the Chancery, or the High Commission. The story of one of these prisoners, Richard Glanville—jeweler and cheat, imprisoned by the Chancellor—is

⁴³ When they did issue orders to amend returns, more often than not they concerned returns that challenged the court's purview of the returning officer—a return, then, that usually bid defiance to the authority of King's Bench—rather than one that included some but not enough information about the prisoner and the charges against him. Thus Queen's and King's Bench fought battles to receive more respectful returns from the University of Cambridge, in 1598, and with the Council in the Marches of Wales and with the corporation of Berwick-upon-Tweed, prevailing in the end in each instance. TNA, KB21/2, ff. 17v. and 19 (Cambridge), 87 (Berwick), and 166; and KB21/3, ff. 24, 28, and 39v. (Council in the Marches).

⁴⁴ Consider an example. We do not know what was wrong with the first return made by the sheriff of Leicestershire to the writ for George Herd and Agnes Wallyn in Easter 1615, but the court asked him to amend it. This second return explained fully their arrest on a writ of *excommunicato capiendo* for their failure to receive the Eucharist according to the rites of the Church of England, a sign of their probable Catholicism. We might reasonably surmise that the court simply did not want to release them; they wanted to ensure they had good legal ground for holding them in prison. By ordering that an amended return be prepared, perhaps by giving some instruction about what language it needed to contain, the court gave the sheriff a second chance to produce just this result: the return came back, was found good, and they were remanded. For the writ and return, see TNA, KB145/14/13, writ teste 13 February 1615. For the amend order of May 1615, see KB21/5a, f. 10v. Another amend order issued in Trinity term to the sheriff of Glamorgan on behalf of one Nicholls: KB21/5a, ff. 29 and 30v. Another amend order issued in the case of John Oliver to the Council in the Marches of Wales, which had returned that the writ had arrived too late to be performed in accordance with the terms spelled out in the writ: KB29/259, m. 68 and KB145/14/13 (teste 20 May 1615). Further amendment orders, issued to support a second writ teste 13 June 1615, were required that autumn, but Oliver was ultimately bailed, then discharged on a return that he had refused to appear before the council after three summonses and a fine: KB29/259, m. 72; KB14/13; and KB21/5a/, ff. 22-53v., passim.

well known.⁴⁵ The court had ordered that the return to his writ—his second, actually—and those for these ten others, should be amended. To make a rather complex story very short, the bulk of the judges' discussion focused on the fullness of the returns. Glanville and one other prisoner were bailed, the returns to their writs striking for their lack of specificity.⁴⁶ But the other nine prisoners were remanded. Throughout the numerous printed and manuscript reports of the discussions of these cases, it is Coke's voice we hear most often declaring the sufficiency of each return and explaining the factors that made it so.⁴⁷

⁴⁵ John Baker, "The Common lawyers and the Chancery: 1616", in Baker, ed., *The Legal Profession and the Common Law: Historical Essays* (London), pp. 205-29.

⁴⁶ Their returns were quite different. Glanville's stated simply that he had been committed by the command of the Chancellor, with no further details, and Apsley for his contempt of the Chancery with nothing further to explain of what his contempt consisted: ugly words, defiance of a Chancery order, or worse, nonperformance of a Chancery decree, and if so, of what decree in what suit? TNA, KB29/259, mm. 68 and 69d.; KB145/14/13 (teste 15 June for Apsley and 16 June for Glanville). Orders are at KB21/5a, f. 28v. Apsley had used the writ earlier, apparently without effect, as no result survives, despite more than one order to amend the return. The return stated simply that he had been jailed by order of Chancery: KB145/14/12 (teste 7 February 1615) and KB21/5, f. 48 and KB21/5a, ff. 7, 9v., 10v., 13v., 14, 17, and 19v. We might be tempted to say that the court found the returns insufficient for their vagueness and that this led to their release. This is suggested in the reports for Glanville and Apsley: 1 Rolle 218-19; 81 ER 445 and MS Bod. Rawl. C.382, f. 71.

⁴⁷ As Coke explained, a return containing all the elements in Rosewell's return was a good return as it "comprehend[ed] the effect of the [Chancery] decree." 1 Rolle 219; 81 ER 445. A very full report of the discussion in Rosewell is in Bod., MS Rawl. C.382, f. 56v.-57v. As Coke noted here, "if a man is committed by the warrant of the privy council and no cause is expressed in the warrant no court may bail him nor examine the cause." Ibid, f. 56v. But if the differences in the fullness of the return for Rosewell compared to those for Glanville and Apsley explains the different outcomes, then we have a problem explaining why William Smyth and Gilbert Beare were remanded since the returns to their writs said nothing more than that each had been jailed for contempt of Chancery. TNA, KB29/259, m. 69 and KB145/14/13 (writ for Smyth teste 17 June 1615 and for Beare teste 21 June), and KB21/5a, ff/ 26 and 27.

The return to William Allen's writ gave only slightly greater detail, noting his detention for contempt in not obeying that court's decree in a case that the return named, but for which it gave no further specifics. TNA, KB29/259, m. 73 and KB145/14/13 (teste 16 June 1615), and KB1/5a, ff. 23v., 25, 27, and 28v. Moore KB 840; 72 ER 940. Allen had an earlier writ, teste 28 April 1615: KB29/259, m. 50 and KB145/14/14. The court ordered the return to this writ amended, though he was ultimately remanded on a return quite like the one given to his writ later that summer: KB21/5a, ff. 6v., 12, 12v., 15, 17v., and 19v.

Sir Samuel Saltonstall likewise had a return to his writ saying he had given a contempt to Chancery, without further explanation of the contempt. TNA, KB29/259, m. 71 and KB145/14/13 (teste 19 June 1615), and KB21/5a, ff. 27 and 28v. Saltonstall had also used habeas

We have, in the end, returned to the reports, the *Institutes*, and other traditional sources for habeas history. But we have done so only after working in the court's archive to identify the serious questions we must answer and to provide the many contexts for understanding those answers. If it is with judges and judging that we are concerned, such an approach suggests that we must attend to what judges *did* before we can hope to make sense of what they *said*. Only then can we appreciate the enormous shaping influence judges had—for better or worse—on the use of this greatest of writs. Only then can we understand how they took the prerogative to their own use, enabling them to inspect the behavior of all other courts and officers. Only then can we see how they crafted a writ that could wander the globe, following those courts and officers wherever they claimed to act in the king's name. That judges like Holt made this a great writ was a lesson learned by John Golding as well as anyone. We don't know the legal reasoning that informed that decision. But we do know that an Irish captain, sailing under the French king's commission, defending an erstwhile English king, had made great use of this great writ. *That* we know this story certainly matters. *How* we know it matters too. After all, there are 11,000 more.

earlier in the year, only to be remanded on a return that was the same in substance as this later return: KB145/14/12 (teste 8 February 1615), and KB21/5, f. 48 and KB21/5a, ff. 7, 9v., 10v., 13v., 14v., and 17v. But Saltonstall's return added a further wrinkle, noting that he had also been jailed on the order of the Privy Council. Reports of the discussion of his writ all focus not on the part of his return noting his confinement by Chancery order for contempt, but on this command of the Privy Council. No wrong was specified in the Council's return, only that he had been jailed by their command. The justices, led by Coke, decided to remand on this return. 1 Rolle 219; 81 ER 444-45, LI MS Maynard 22, f. 117, and Bod., MS Rawl. C.382, f. 71v.

Appendix

Sources and Data from a Quadrennial Survey of the Use of Habeas Corpus, 1500-1800

A survey of the use of habeas corpus *ad subjiciendum* has been made by examining King's Bench Crown Side records for every fourth year, 1502 to 1798, inclusive. A writ is taken to belong to a given year by its teste date—the ostensible date of issuance—rather than any other date in the process, which sometimes fell across two calendar years. This sample yields information on 2752 prisoners, giving us a projected total of just over 11,000 prisoners using the writ across three centuries. This is almost certainly an undercount. Owing to problems with record survival, only partial information exists for the following years in the quadrennial series: 1510, 1518, 1534, 1674, 1678, and 1686.

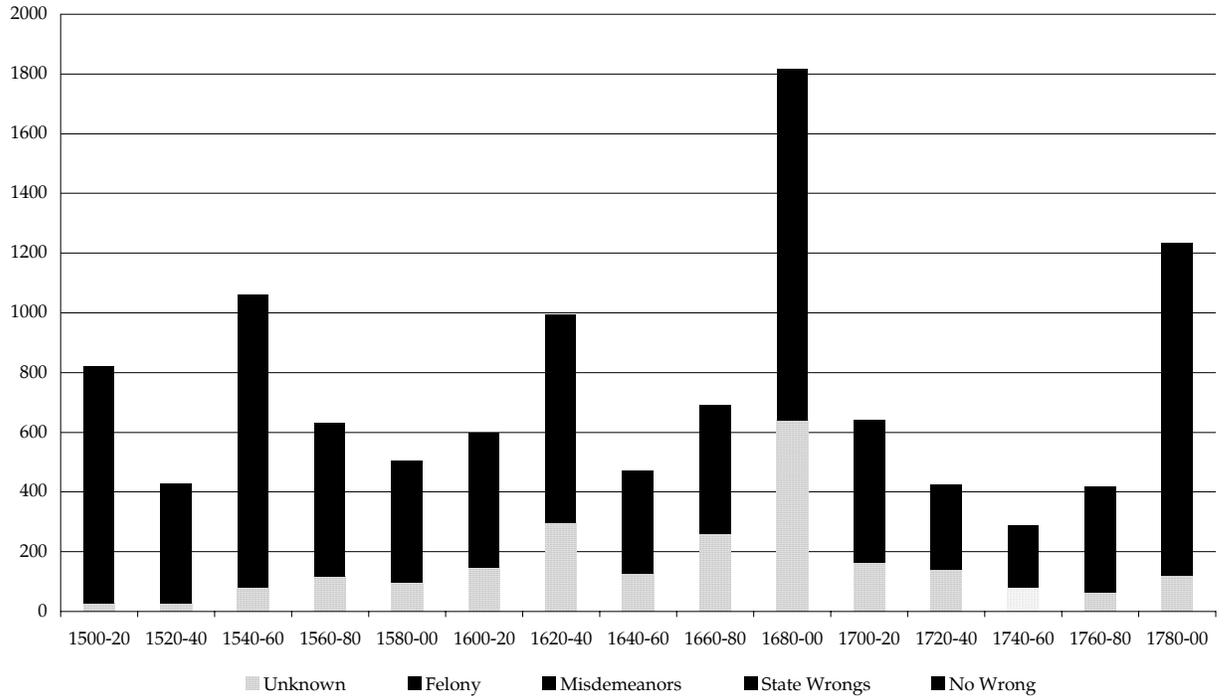
In addition to the quadrennial survey years, the records were also searched in other years of probable importance, including most years from 1590 to 1660; the 1690s; and the war years of the decades after 1756. This resulted in information on more than 2000 further prisoners using the writ of habeas corpus.

The following King's Bench records have been consulted for the survey:

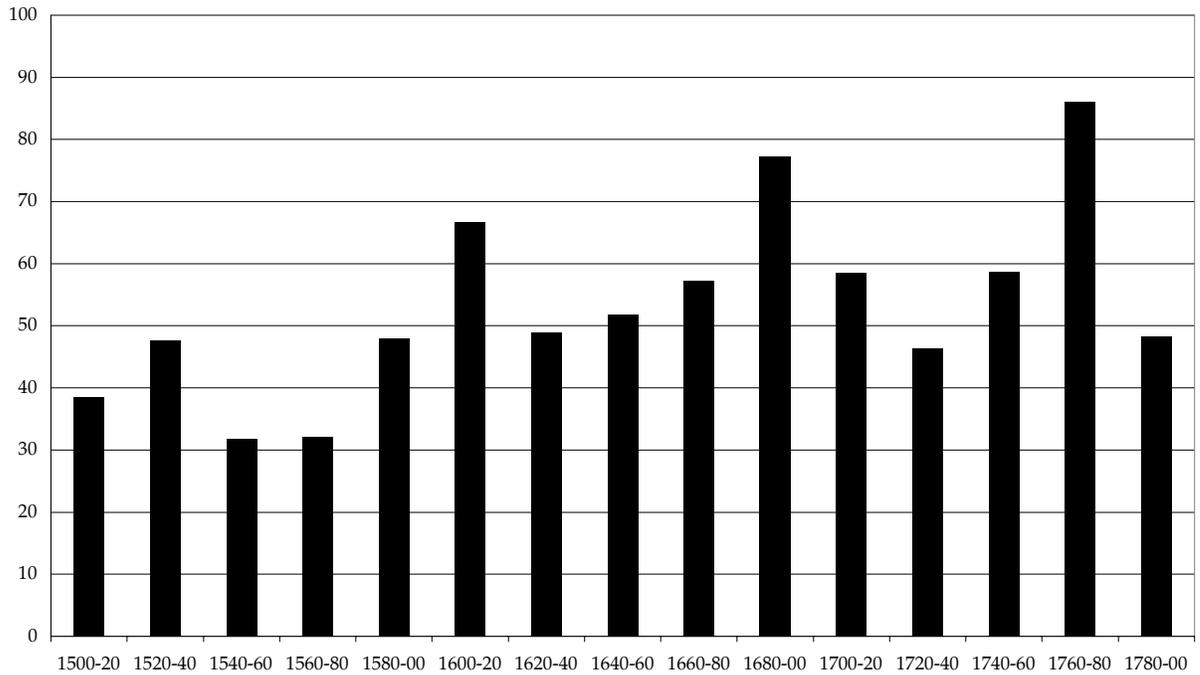
- 1) Recorda Files, KB145 (to 1688) and KB16 (post 1688), with strays in KB11 and KB32. These are bundles containing writs and other instruments of process on the Crown Side, including quo warranto and writs of mandamus and certiorari, as well as writs of habeas corpus and the returns to them. The recorda files are the only source in which writs issuing and/or returned during vacation, and those returned to a justice in chambers, may reliably be found.
- 2) Controlment Rolls, KB29. Across the sixteenth century, both the full text of writs of habeas corpus and their returns were typically enrolled here. A decision on each writ was usually recorded in the margin. Over the late 16th and early 17th centuries, the fullness of information on the controlment rolls began to decline. From the late 1670s, the rolls contain only lists of names of habeas users; even these lists disappear by the mid-1690s.
- 3) Crown Side Rule and Order Books (KB21): These paper volumes, surviving from 1589, contain information on how and when writs issued, and often, about the outcome. These also contain information on later appearances on bail and on ultimate discharge from bail, information not usually recorded on the writ or on the controlment roll. Most important, the rulebooks allow us to watch aspects of process observable nowhere else: the use of alias and pluries writs issued with sub pena clauses; the use of attachments for contempt and

finer to enforce the return of writs; and the use of affidavits supporting claims for issuance and in support of later enforcement process.

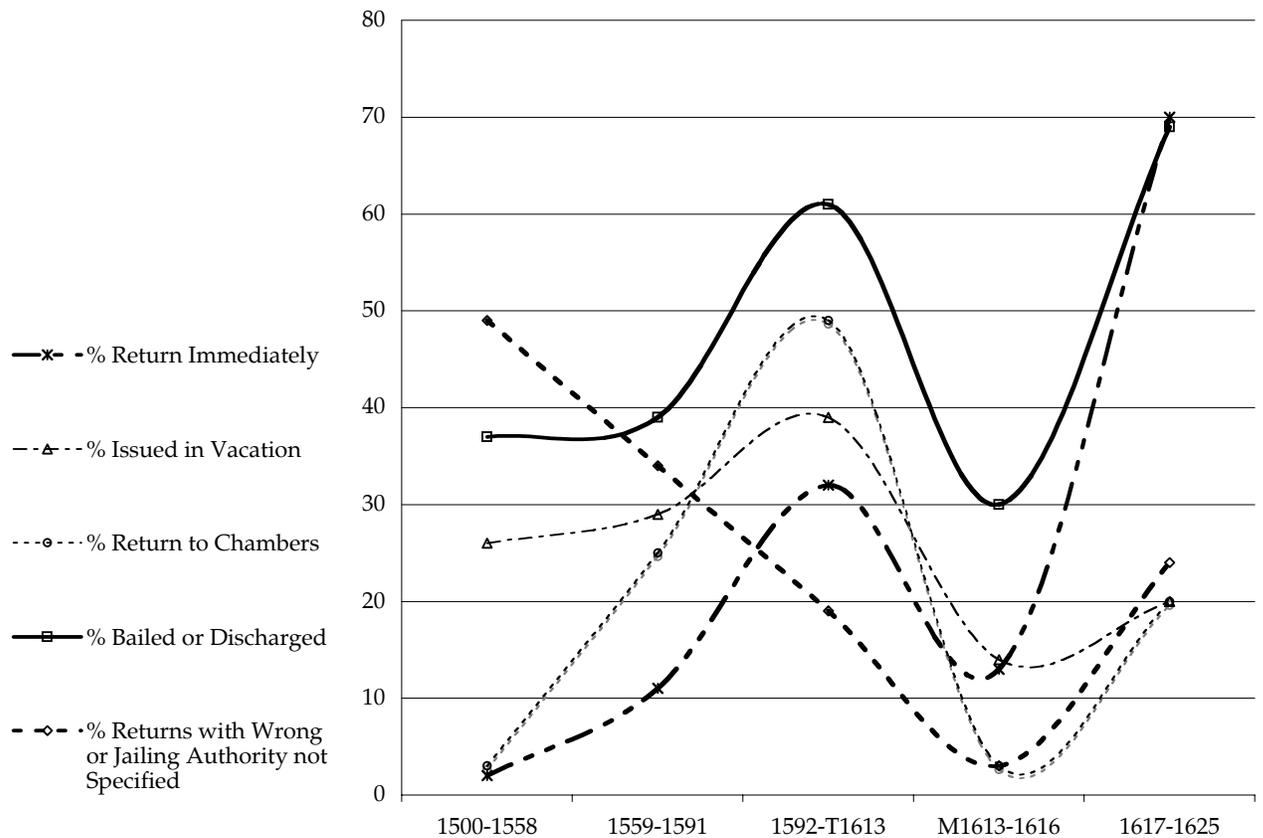
A. Projected Totals of Habeas Corpus Use, 1500-1800
 (Totals per quadrennial survey year, by alleged wrong, x 4)



B. Release Rates when Using Habeas Corpus, 1500-1800
 (% bailed or discharged of 2000 prisoners: 2752 - 752 for whom result is unknown)



C. Changing Usages on Habeas Corpus, 1500-1625



Chief Justices	Fyneux to Saunders 1500-1558	Catlin + Wray 1559-1591	Popham + Fleming 1592-1613	Coke 1613-1616*	Montagu + Ley 1617-1625
% Return Immediately	2	11	32	13	70
% Issued in Vacation	26	29	39	14	20
% Return to Chambers	3	25	49	3	20
% Bailed or Discharged	37	39	61	30	69
% Returns with Wrong or Jailing Authority not Specified	49	34	19	3	24
Total # Writs Studied	577	209	179	119	109

* To produce the most reliable results, all writs for the period of Coke's presidency of King's Bench have been studied since only one survey year (1614) falls within this period. Information for the other four periods comes from the survey years.