HABEAS BY ANY OTHER NAME

*Eric M. Freedman**

I am most grateful to Melinde Sanborn and Professor William E. Nelson for their work on a fascinating case which has enriched my thinking regarding the major project now engaging me and enabled me to put together a few preliminary ideas. Ms. Sanborn, of course, unearthed the case in the first place, thereby providing an additional source that I plan to use in the project, while Professor Nelson raised a provocative question about the purpose for which I plan to use it.

Thanks to the generosity of the Hofstra administration, I spent the academic 2008-2009 year on a research leave at the New Hampshire State Archives in Concord doing research into the roots of habeas corpus. As I write up the findings,[†] one proposal I intend to advance is that, for many purposes at least, to look only at "habeas corpus" is to look too narrowly. I have uncovered precisely parallel cases of petitioners' release from imprisonment by means of a variety of writs, including certiorari,[1] supersedeas, and prohibition—even in cases where they had originally asked for no particular writ at all.

The 1745 case of *Downer ex rel. Mason v. Gilman* exemplifies the last three situations simultaneously.[2] Andrew Downer, a British soldier, was imprisoned in connection with a suit for debt in violation of an act of Parliament exempting active duty service members from such

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† All documents cited in this Article are available on request from the Barbara and Maurice A. Deane Law Library at the Hofstra University School of Law.

1. *See, e.g.*, Pearse v. March, (N.H. Super. Ct. Feb. 1770), *in* SUPERIOR COURT DOCKET BOOK 1767-70, 459-62 (n.p. n.d.) (on file with the New Hampshire State Archives) (granting interim release and ultimate vacatur of proceedings by a writ of certiorari to petitioner imprisoned for contempt).

2. Downer *ex rel.* Mason v. Gilman, No. 21242 (N.H. Super. Ct. Feb. 25, 1745), *in* NEW HAMPSHIRE STATE ARCHIVES SUPERIOR COURT MINUTES 1744-45, Box 1 (on file with the New Hampshire State Archives).

imprisonments.[3] His superior officer, Jonathan Tuften Mason, filed a petition praying simply that "your worships would put the Act of Parliament in force, by releasing and setting the Andrew Downer at liberty, that his Maj. Service may not suffer thereby."[4] The court responded by first issuing a supersedeas to halt the debt proceedings, thereby securing Downer's immediate release, and then a writ of prohibition against their further continuance.[5] In the early 1800s, soldiers would gain release under the corresponding American statute through writs of habeas corpus.[6]

Similarly alleged slaves might claim their freedom by filing a petition for a writ of habeas corpus and find it treated as a writ of trespass on the case,[7] or an action for replevin.[8]

Although it may sometimes be possible to put forth cogent explanations for these differences, the question of why the litigant chose one writ over another is (a) somewhat antiquarian in many contexts;[9] (b) in many instances futile because of the informality of colonial legal practice;[10] and (c) one on which nothing particularly turned when the issue was a potentially wrongful imprisonment, an issue which invariably led the courts to cut through whatever technicalities they might otherwise have been inclined to enforce.

That is why I suggested to Ms. Sanborn that Zipporah's petition in which she does "humbly beseech this honored Court, to call her before you, and to deal with her, as to yo[r] wisedomes and mercy shall see meet,

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3. *Id.*

4. *Id.*

5. *Id.*

6. Three such cases, from 1814, 1822, and 1832 are described in ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 42-43 (2001). Another example is *In re Mills* (N.H. Strafford County Ct. Dec. 18, 1819) (Folder 11) (on file with the New Hampshire State Archives).

7. *See, e.g.*, Johnson v. Massey (N.H. Super. Ct. Aug. 12, 1748), *in* SUPERIOR COURT AUG. 1744 THROUGH AUG. 1748, at 341-42 (n.p. n.d.) (on file with the New Hampshire State Archives).

8. Tarr v. Nung (N.H. Super. Ct. Feb. 1751), *in* SUPERIOR COURT SEPT. 1750 THROUGH MARCH 1754 , at 87-88 (n.p. n.d.) (on file with the New Hampshire State Archives).

Of course the filing of a habeas corpus petition by a putative slave commonly gave rise to a habeas action of the usual sort. For examples, see PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 25, 121, 258 (1985).

9. Much recent interest in common law habeas corpus has been spurred by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which held that the statutory procedure for Guantánamo detainees to test their imprisonments were invalid under the Suspension Clause for failure to provide rights commensurate with common law habeas. Researchers who share that interest certainly ought to adopt the functional definition of habeas corpus that I describe in the text.

10. Professor Nelson's ongoing survey of colonial law emphasizes this point. *See* 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660, at 37, 69-71, 92 (2008); William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 149 (2009).

that she may not lye where she is to perrish"[11] might plausibly be called a petition for a writ of habeas corpus, even though it does not use those words and a lawyer might classify the document otherwise.[12]

The critical element is that this is a demand for release from unlawful imprisonment, a demand which, as indicated, could be made in the colonies by invoking many writs or none at all.

One element unifying the situations, I will propose in my more extended work, is the seriousness with which the judicial system treated them. In Zipporah's case, she got exactly what she was entitled to: submission of the charges to a grand jury and her release when it declined to press them.[13]

More generally, it is in cases alleging wrongful imprisonment that one sees in paradigmatic form what we today describe as common law methodology, characterized by a strong focus on a speedy and pragmatic resolution based on the specific facts at hand rather than any impetus to pronounce broad rules of law.

For these and other reasons, I believe that in many contexts a functional rather than a formal definition of habeas corpus is justified and that a demand, however denominated, challenging the legal basis of a detention should lie for research purposes within the domain of habeas corpus.

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11. 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, app. at 270, document 2 (2009).

12. Thus, Professor Nelson suggests that it might equally well be considered a motion to expedite the proceedings. *See* William E. Nelson, Remarks, *Categorizing Zipporah's Petition*, 38 HOFSTRA L. REV. 279, 282 (2009).

13. It would seem, as Professor Nelson suggests, that she also received just the same process that a white defendant would have. *Id.* at 280-81. My only question would be whether it took longer to give her that process than would have been usual in the case of a white defendant.