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Review essay

Habeas Corpus: from England to Empire
By Paul D. Halliday, Cambridge, MA: Harvard University Press, 2010.
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The 'Great Writ' of habeas corpus has long had an iconic status as the 'writ of liberty' which ensured that no person could be detained in prison without being put to trial by a jury of his peers. According to the traditional version, popularised by Whiggish constitutional writers from the late seventeenth century onwards, the English constitution as embodied in the common law had, since time immemorial, striven to protect the fundamental rights of Englishmen and women, which included the right to personal liberty. The common law had supplied the writ of habeas corpus, which secured the provision of Magna Carta, that no freeman be imprisoned save by the judgment of a jury of his peers. In the course of the seventeenth century, the Whig version ran, kings with an absolutist bent sought to undermine ancient liberties, by claiming prerogative powers to imprison without trial, and by appointing supine judges who would not protect people's liberties. It took the triumph of Parliament to restore and perfect them. For William Blackstone, one of the key statutes which secured 'the complete restitution of English liberty' was the Habeas Corpus Act of 1679, 'that second *magna carta*'. As Blackstone put it:

> '*Magna carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.'[1]

This Whiggish interpretation of the history of the writ continues to shape understandings of habeas corpus in the English-speaking world: habeas corpus encapsulates a commitment to the rule of law, guaranteed by a democratic parliamentary order, which has matured and ripened over centuries. However, as Paul Halliday argues in this magisterial work, this is a highly misleading view of the nature and operation of the writ. One cannot, he contends, understand what the law was in the past by reading only the work of treatise writers such as Blackstone, or a handful of printed case reports. Rather, one must look at the practice of the court of King's Bench in issuing the writs, and making decisions on their return over whether to release, bail or remand the prisoner. Halliday is as good as his word: rather than taking his law from the books, he has made an exhaustive survey of records in the National Archives to explore all uses of the writ from the start of the sixteenth to the end of the eighteenth centuries. His survey – examining every fourth

1 Blackstone (1765–69, vol. 1, p. 133; vol. 4, p. 432). See also Care (1719, p. 226).

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year across three centuries – has yielded information on 2,757 individual prisoners. This Herculean task of archival research has given him a far richer and infinitely more nuanced understanding of the scope and operation of the writ than any previous lawyer or historian has had. It has allowed him to question some of the myths behind the writ, while providing us with a definitive history of it.

The subject matter of the book is the writ of habeas corpus *ad subjiciendum et recipiendum*. This was one of a number of procedural devices whose purpose was to move bodies from one place to another in the judicial process. Its uniqueness lay in the fact that it was concerned with examining the reasons why people were detained. Halliday shows that the use of the writ by the King's (or Queen's) Bench to supervise other jurisdictions on the king's behalf originated in the first decade of the seventeenth century. At the start of this century, the role of supervising England's multiple jurisdictions was exercised by the king's advisers who sat on the Privy Council, but when Sir John Popham and then Sir Thomas Fleming were chief justices of the King's Bench, this court began to assume the power. Since these men were also members of the Privy Council, no objection was taken to this; and indeed the two bodies continued to share the task of supervision until the late 1620s. Halliday shows that the court's development of the writ took place at the same time that it was developing other writs (such as mandamus) to supervise inferior jurisdictions, and at a time when the use of quo warranto 'skyrocketed' (p. 42). He points out that habeas corpus was a more precise tool to supervise jurisdictions than quo warranto, since it examined the use of a delegated power, rather than only asking whether the power existed. The origin of the 'writ of liberty' thus had nothing to do with Magna Carta or liberty: it was a writ to check whether those who exercised powers derived from franchises granted by the king had done so in the right way. At its base, the writ sought to check whether the gaoler – who had assumed the royal power to detain one of the king's subjects – had a right to do so: it was not a writ to vindicate the prisoner's abstract right to liberty.

Although the writ issued from the principal common law court, Halliday argues, it borrowed some of its ideas from the Court of Chancery. The writ was not available of course. To obtain a writ of habeas corpus, the petitioner had to present a prima facie case – in effect telling a story – that the prisoner was being wrongly detained. Although this could be done orally, it was increasingly done through affidavits which were filed in court, a process which in some ways might be seen to parallel the bill procedure in Chancery. Once the writ was issued, the gaoler had to produce the body of the prisoner, as well as making a return giving the cause of the detention. If the gaoler refused to obey the writ, the court could resort to attachment and imprisonment for enforcement, which had parallels in Chancery's *subpoena* procedure. Halliday argues that some of the wording of the writ borrowed from Chancery's *corpus cum causa* form, with judges and lawyers of the one court influencing the other.

Halliday's close examination of the practice of the court allows him to correct some misleading information included in the classic textbooks. For instance, he shows that (despite Sir Edward Coke's comments to the contrary in the *Institutes*), writs were issued in vacation as well as in term time; and that judges were not simply bound by what was put in the return by the gaoler. In the seventeenth century, judges were prepared to look to wider sources of information than merely the return. By the eighteenth century, some judges who had read their Coke became more convinced that such a rule existed, but evaded it by ensuring that the relevant discussions would be conducted before the writ was issued, for instance by issuing orders to release the prisoner unless cause was shown for his detention.

Halliday's marvellous work in the archives also sheds important light on whose conduct was supervised by the writ. The first, and politically most important, use of the writ was to obtain the release of those held on the order of the central executive. Halliday shows that the effectiveness of the writ in coming to the aid of political prisoners often depended on the approach taken by individual judges. For instance, during the chief justiceship of Sir John Holt, an era of high

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political tension (which saw habeas corpus periodically suspended), the King's Bench was vigorous in exercising its authority to release or bail those accused of treasonable practices. By contrast, Lord Kenyon in the era of the French Revolution took a much narrower view of the scope of habeas corpus than some of his predecessors. Halliday also discusses the constitutional issues raised by the Crown's attempts to imprison without cause stated. The power of the writ to reach prisoners gaoled on the orders of the king or his council was famously raised in the case of the Five Knights in 1627, with the decision of the King's Bench in the Crown's favour being followed by the Petition of Right in 1628. As is well known, in the debates of 1627–1628, lawyers like John Selden and Edward Coke made sweeping claims about the power of the writ to secure the freedom of Englishmen. But Halliday shows that their grand rhetoric was misplaced: the judges who held that the king did indeed have the power to detain by his special mandate were simply following precedent. Moreover, judges after 1628 continued to allow imprisonment on the order of the Council without cause stated. At the same time, Halliday shows that in practice, judges before 1641 did not simply surrender all their power when faced with a return from the council which gave no cause, but looked beyond it to the substantive reason for the detention in deciding whether to remand or release those gaoled on the order of the council. After 1641, when the power of the king and council to imprison without cause stated was ended by the Star Chamber Act, judges were faced with the problem of such imprisonments made by Parliament. In theory, the judges had jurisdiction to free those gaoled by the Commons (unless for contempts of the House): but in practice, the later seventeenth-century Commons continued to commit many more people to prison, and the judges struggled to assert their authority.

A second group protected by judges using habeas corpus (beginning during Lord Mansfield's tenure) consisted of free men who had been deprived of their liberty by the action of other officers of the central state, who (unlike 'political' prisoners) were suspected of no wrong and were not held in prison. They were men who had been impressed into military service, in the army or navy. In examining these cases, Halliday shows how creative some judges could be to secure the release of those held. For instance, since releasing a man from custody would not discharge him from the navy – and would render him liable to prosecution for desertion – Mansfield used orders *nisi* to craft settlements, whereby the authorities discharged from service those who had been wrongly impressed. Mansfield's policy was controversial, since the Admiralty felt that it would cause difficulty in manning ships; but the authorities soon came routinely to comply.

A third area of jurisdiction – and the most important in terms of the quantity of writs – was the supervision of local courts, especially justices of the peace. In supervising these officials' use of their powers, judges did not simply look at whether the return to the writ on the face of it stated a legal cause for the detention. Rather, they looked closely at the meaning of statutes which conferred power on justices, seeking to interpret whether the bare words of the statute did grant the power exercised. In many areas where the wording of statutes was vague, judges trimmed it down. Similarly, where other bodies – such as the College of Physicians – were given powers to imprison, the judges looked closely at their powers.

A fourth kind of jurisdiction emerged in the chief justiceship of Sir Matthew Hale. This was the use of the writ to test the detention of one private individual by another, particularly in family cases. From the 1670s, the writ was used to consider questions of who had the right to the custody of a child, whether a husband could detain his wife (or whether her family could keep her from him) and whether those alleged to be lunatics should be freed from their confinement. In the eighteenth century, at least until the conservative Lord Kenyon reasserted the traditional values of patriarchy, habeas corpus could be used to create a neutral space in which a woman could choose whether to return to her husband. Judges in this era also strove to give older children the choice of which parent to go to in child custody cases. In many cases, judges using the writ sought to secure settlements of complicated disputes, rather than merely ordering the release of a body. Habeas

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corpus could also be used to test the lawfulness of other kinds of constraint put by one individual over another – most famously, perhaps, in the case of the slave James Somerset, who used the writ to secure his release from custody on board a ship which was to return him to America.

Alongside explaining the uses of the writ, the book also explores its theoretical basis. Where much of the hagiography of the writ talks of its roots in the common law rights of Englishmen, Halliday stresses the prerogative nature of the writ. He argues that it was grounded in the prerogative powers of the king to supervise all persons to whom he had granted power, and to protect the bodies of those who owed him allegiance. He explains the nature of the prerogative power by referring to the distinction made in early political thought, derived from medieval theology, between the absolute and ordinary power of princes. Just as God occasionally departed from the ordinary laws of nature through performing miracles, so the king had a power to go beyond the ordinary law. Just as miracles were an extraordinary intervention to secure a greater good, so the exercise of prerogative power existed to complement the ordinary law, but to go beyond it when equity and the common good required it. Halliday says that the King's Bench captured this prerogative for its own use at the start of the seventeenth century, and that it was able to do so because it was par excellence the king's court, the court which had been peripatetic with the king in the middle ages, and the court in which he was always presumed to be present. In the King's Bench, the judges represented the king's 'his majesty's person' in so high a degree that they could exercise his powers (p. 95).[2]

In explaining the theoretical basis of the writ, Halliday also looks at the notion of liberty which lay behind it. He argues that the concept of liberty which prevailed in the early seventeenth century was not the Lockean one which has dominated modern liberal thought, and which sees liberty as a sphere of individual autonomy. It was rather taken from the language of Christian theology, which saw liberty as a gift from God, and one which came from being part of a corporate community. The concept of liberty – in contrast to licentiousness – required that one act to promote salvation and the common good: it was therefore bound up with the concept of servitude and subjection, to God and king. Liberties were like franchises or rights which were granted by the laws: it was the law which determined and set the liberties which people had. It is this concept of liberties which (Halliday argues) lay behind the writ. When the Crown (or the King's Bench in its name) checked how franchisees exercised the powers granted to them, it was asking whether they had the 'liberties' which were claimed. When it offered a remedy to people who were detained unjustly, it was not protecting an abstract individual sphere of freedom, but was seeing whether particular rights or 'liberties' which the individual enjoyed as a result of his subjecthood had been infringed by another subject. Halliday argues that these rights or liberties derived not from their abstract personhood, but from their allegiance to the king. When the two kinds came into conflict – when a subordinate body sought to exercise its 'liberties' to deprive another subject of his liberty – the court often had to make a judgment balancing rival claims in the name of the public good. Those, like John Lilburne or Granville Sharp, who tried to argue for liberty as a pre-legal birthright, were not only wrong, Halliday suggests, but did not get very far with their claims.

In Halliday's view, the prerogative nature of the writ explains how it could extend its geographical range so far. As he shows, the King's Bench claimed an authority to supervise any body which derived its powers from the Crown of England. The writ ran not only to supervise franchise jurisdictions within the realm of England – such as the palatine courts – but also those outside the realm, such as Berwick, the Channel Islands or Canada. It could supervise the rule of the East India Company in the subcontinent, since that body acted under charter granted by the Crown. It could supervise the legality of the detention even of alien enemies captured outside the

2 The quotation is taken (by Halliday) from Birch (1848, vol. 2, pp. 97–98).

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realm. For, in each of these cases, it was the power of the gaoler, derived from the Crown, which was being tested. While only those owing some kind of allegiance to the king could seek his protection, Halliday argues, the notion of local allegiance was fluid enough to allow alien enemies access to court. The major impediment to the court's power to enforce was not theoretical but practical: for it was very difficult for a court in Westminster to enforce its jurisdiction in the far-flung reaches of the empire. The solution to this was to create supreme courts, which were held to have the same powers of supervision as the King's Bench held.

Halliday relates how the writ was exported throughout the world. But his story is not one of the inexorable march of the writ of liberty, unifying the empire under the rule of the law of Westminster Hall. For if the seventeenth-century King's Bench had managed to capture the king's prerogative power of supervision, it was unable to neutralise Parliament's power to override the writ. Halliday unpicks the Whig mythology that the writ was protected and secured by Parliament. Rather, he argues, the corollary of Parliament's power to define the scope of the writ was a power to qualify and remove it. This power was exercised on numerous occasions domestically in the eighteenth century. Parliament also began to distinguish between the rights of different kinds of subjects, and in 1777 passed a suspension specifically aimed at Americans. Within the empire, habeas corpus proved less effective than subjects might have hoped, given the dependence of the judiciary on colonial governors. Moreover, in many places, power was given to the governor himself to suspend habeas corpus. As a result, when rebellions broke out in the empire, whether in nineteenth-century Quebec or New Zealand or twentieth-century Kenya, the response was to suspend the writ. Rather than seeing the history of habeas corpus as revealing the inexorable march of British liberties, Halliday contends that the 1780s were probably a high point, before the decline in the writ as Parliament asserted its controlling power.

As this lengthy summary testifies, this is a magnificent book. It will no doubt be the definitive work setting out the history of the writ. More than this, it is an example of legal history writing at its best. It is beautifully written, by an author with a keen eye for the detail which illuminates the wider story, and with a deep familiarity with the social, political and intellectual history of this era, as well as its legal history. Every chapter is filled with rich detail and subtle arguments which contribute greatly to our knowledge. The very significant impact this historian's archival research has already had on how the reach and operation of the writ are to be understood can be seen from its influence on the US Supreme Court's use of historical material in *Boumedienne v. Bush*, where it rejected the argument that habeas corpus could not reach beyond the territory of the United States, to allow the petitions of detainees at Guantánamo Bay to be heard.[3]

Halliday's revisionist argument is a powerful challenge to the assumptions often made about the writ. At its heart is a notion of the writ as being rooted in the royal prerogative and as being equitable in its operation. These are striking claims, given that the writ is often associated with notions of the rule of law. For example, when seeking to demonstrate how the constitution was pervaded by the rule of law, A. V. Dicey wrote that the writ of habeas corpus invested the judges 'with the means of hampering or supervising the whole administrative action of the government, and of at once putting a veto upon any proceeding not authorised by the letter of the law'.[4] In similar vein, when hearing a case of habeas corpus brought against the Governor of Nigeria in 1931, Lord Atkin ruled:

> 'In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality

3 See Halliday and White (2008), and *Boumedienne v. Bush* 553 US 723 (2008).

4 Dicey (1959, p. 222).

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of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.'[5]

In his famous dissent in *Liversidge v. Anderson* eleven years later, he said, 'in English law every imprisonment is prima facie unlawful and … it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge.'[6] Moreover, the prerogative writs in general – certiorari, mandamus and prohibition, as well as habeas corpus – have long been seen as the tools used by judiciary to ensure that those who have authority to make decisions affecting the rights of others do not exceed that authority.[7] Legal readers may therefore be surprised to find how little attention Halliday devotes to discussing the idea of the rule of law. It is largely dismissed in one footnote, where he writes that 'habeas decision-making did not fit a "rule-of-law" paradigm' (p. 374, ftn 26).

Halliday's dismissal of the rule-of-law view is not accidental: it is central to his theory of the writ. In his view, those who look at habeas through this paradigm – and who can see no ground between 'rule-following and indeterminacy' – are looking at it in the wrong way. For as he sees it, 'Habeas jurisprudence was characterized by principles rather than rules, making it an all-but-equitable instrument in the judges' hands' (p. 97). It was 'an equitable device in all but name, enabling action in response to the particulars of a given circumstance rather than imposing obedience to a set of rules inscribed in precedents' (p. 102). The 'equitable' nature, Halliday argues, derives from the very 'prerogative' nature of the writ. As he puts it, 'The miraculous making of "an exception of the law of God … from the general rules of the law of man" was the key to the prerogative as well as the heart of equity. Both were held together [in habeas corpus] in the hands of the justices of King's Bench' (p. 88).

Let us examine these two aspects in turn. First, in what sense was the writ an emanation of the royal prerogative? One answer offered by this book lies in the notion that the jurisdictions supervised by the writ derived from grants made by virtue of the king's prerogative powers (rather than owing their origin to the common law). Since it was the king who created the franchises, it was for the king (or his advisers on the council) to supervise how they exercised their powers. The King's Bench may have appropriated this power of supervision (which might equally have been appropriated by the Star Chamber or Chancery), but it used it to ensure that the inferior jurisdiction acted in accordance with whatever powers it had been given, rather than applying the common law administered in its own civil and criminal jurisdiction. The idea that it was doing the king's work might be seen further from the fact that whereas the ordinary writs of the central common law courts did not run to franchise jurisdictions (such as palatine courts), 'prerogative' writs issued on behalf of the king did. This argument is certainly an attractive one. Nevertheless, it also needs to be borne in mind that not all the powers supervised by the King's Bench through the writ of habeas corpus derived from royal grants. The powers of justices of the peace, for instance, derived from statute, while the power of husbands over their wives, or fathers over their children, derived from the common law or local custom. Even if the king could be seen as *parens patriae*, the law relating to families did not come from a royal grant.

The book also sees habeas corpus as a manifestation of the prerogative in a second sense: that is, as an exercise of a discretionary 'absolute' prerogative. Halliday's learned discussion of the 'absolute' powers of the king quite correctly argues that these powers were not designed to undermine the

5 *Eshugbayi Eleko v. Officer Administering the Government of Nigeria and Another* [1931] AC 662 at p. 670.

6 *Liversidge v. Anderson* [1942] AC 206 at pp. 245–46.

7 See, e.g., Lord Atkin's comments in *R. v. Electricity Commissioners, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171.

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law, but to work for the public good, the *salus populi*, in situations where the ordinary law was imperfect. Since all law aimed at the public good, the king's use of his power fulfilled it, rather than undermining it. However, we should not overlook the point that medieval and early modern discussions of this 'absolute' power regarded it as a discretionary power in the king, relating to matters of government which were not subject to control by the courts. For instance, in a late Elizabethan draft outline of a treatise on the prerogative, Sir John Doddridge wrote of 'Of the Absolute Power of the Monarche of England called Plenitudo Potestatis fullness and plenartie of Power pervsed in divers Perticulars'. These 'absolute' prerogative powers concerned 'publicke goverment and Matter of State'.[8] Chief Justice Fleming similarly said in *Calvin's Case*, the king's 'absolute power hathe no lawe to dyrecte him: he is absolute in warre & peace, & maye Commaunde the subject to goe whither he pleaseth'.[9] James I himself weighed into the debate, in a speech to the Star Chamber in 1616: 'As for the absolute Prerogatiue of the Crowne,' he said, 'that is no Subiect for the tongue of a Lawyer. Nor is lawfull to be disputed.' James was quite specific: 'If there fall out a question that concerned my prerogatiue or mystery of State, deale not with it, till you consult with the King or his Councell, or both.'[10] The very nature of this prerogative made it unsuitable for judicial review.

The king's prerogative powers could not, of course, be delegated. Consequently, no inferior jurisdiction could claim to be beyond the scrutiny of the courts in the way the king himself was, on the ground that they were exercising an 'absolute' power of their own, derived from him. The aim of the writ of habeas corpus was therefore precisely to ask inferior jurisdictions by what lawful authority they acted, its 'prerogative' nature lying in the king's ubiquitous power to demand reasons for detention. In *Bourn's case*, Montague CJ hence described habeas corpus as 'a prerogative writ, which concerns the king's justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned'.[11] The notion that the king's 'supreme power' over all the courts in his dominions enabled him to demand an account of anyone imprisoning his subjects was also made by Henry Rolle in the middle of the seventeenth century.[12] In the 1730s, Matthew Bacon similarly said that it was called a prerogative writ, since 'the King may issue [it] to any Place, as he has a Right to be informed of the State and Condition of the Prisoner, and for what Reasons he is confined'.[13] Judges who issued the writ in this era did not think that they were exercising the 'absolute' prerogative powers of the king, but ensuring that the 'king's justice' was done. While the king could not delegate his 'absolute' prerogative power to the judges, his power to ensure that justice was done was routinely exercised by the judges, both through ordinary legal procedures, and through prerogative writs which had a broader reach.

By the middle of the seventeenth century, jurists like Matthew Hale were treating this as one of the regular functions of the court of King's Bench, and not as an exceptional or extraordinary jurisdiction. In his *Prerogatives of the King*, Hale wrote that 'regularly all courts and jurisdictions newly created' were subordinate to the King's Bench in two ways: either by writ of error, or by the power to 'supersede or prohibit, where they exceed the bounds of their jurisdiction'.[14] When

8 British Library, MS Harl. 5220, ff 8, 10.

9 Quoted in Burgess (1996, p. 82).

10 'A Speach in the Starre-Chamber. The XX of June Anno 1616' in McIlwain (1918, pp. 332–33).

11 *Bourn's Case* (1619) Cro Jac 543.

12 Rolle (1668, vol. 2, p. 69).

13 Bacon (1736, vol. 3, p. 2).

14 Hale (1986, p. 184). He added: 'Though where they keep within the bounds of their jurisdiction, their errors are not properly examinable in the king's bench because they are enabled to judge by a different rule.'

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discussing what was done in habeas corpus cases, common lawyers made it clear that their office was not to dispense with the law in a particular case, or to go beyond law, but to check whether the action which was being reviewed had been taken in accordance with legal powers. In Coke's view, the court's power to issue writs such as habeas corpus ensured that 'no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other *by due course of law*'.[15] Hale, in *Bushell's case*, similarly observed that 'a *certiorari* and an *habeas corpus*, whereby the body and proceedings are removed hither, are in the nature of a *writ of error*'.[16]

Nor did the fiction of the king's presence in court generate the notion that the judges could therefore exercise his 'absolute' powers on his behalf. Judges were very clear on the distinction between what was judicial and what was kingly. The fiction of the king's presence in the King's Bench was certainly oft-repeated in the seventeenth century. Coke himself wrote, 'It is truly said that the justices *de banco regis* have supream authority, the king himself sitting there as the law intends'. But he was equally clear that when the king had been present in court, he did not himself judge.[17] Seventeenth-century common lawyers held that, although all courts derived their powers from the king, as the fount of all justice, he had delegated that power to them, and could not exercise it in person. In Coke's argument, the court was called the King's Bench because the court was concerned with determining the 'king's own causes' – and of course 'the king himself cannot be judge *in propria causa*'. Coke identified three things as the king's *proprias causas:* pleas of the Crown, writs of error and the jurisdiction given by writs such as habeas corpus and mandamus.[18] Looking at it this way made it look like part of the regular jurisdiction of the 'Crown side' court.

Let us turn to the second point, the 'equitable' nature of the writ. Halliday is quite right to warn against the assumption that equity and common law were worlds closed to each other.[19] Nonetheless, there were significant differences between the two jurisdictions in the minds of early modern jurists. The common law dealt with matters of right, which were founded on ancient custom, and reason as developed over the course of English history by the 'artificial' learning of the judges. By contrast, the Court of Chancery did not settle matters of right, but rather directed the conscience of the parties, for instance by preventing them from asserting their rights.[20] Like the king's power to pardon, with which it was sometimes compared, equity was used to relieve the claimant from the rigours of the law. Those who favoured the jurisdiction saw the equity which was administered by the Lord Chancellor as the application in individual cases of principles derived from the pure fountains of justice, which could override harsh common law rules. Those who feared it saw it as the arbitrary and uncontrollable – and hence dangerous – discretion of one man, which might (if not kept

15 Coke (1797, p. 71), emphasis added.

16 *Bushell's Case* (1674) 1 Mod 119.

17 Coke (1797, p. 73) proceeds: 'In this court the kings of this realm have sit in the high bench, and the judges of that court on the lower bench at his feet; but judicature only belongs to the judges of that court.' Discussing the king's presence on the medieval bench, Hale disagreed with Coke's view that the king has *no* voice, but said that the law had 'fastened a coordinate power in judicature in the rest of the judges'; Hale (1986, pp. 182–83).

18 Coke (1797, p. 71).

19 Christopher St German had written in the sixteenth century that the Lord Chancellor should 'order his conscience after the grounds and rules of the law of England', while Edward Hake had argued that the common law was 'altogether guided and directed by *Epieikeia*'; see Lobban (2007, pp. 20–28), from where these quotations are taken.

20 As Edward Coke (1797, p. 84) put it: 'This court of equity proceeding by English bill is no court of record, and therefore it can bind the person only, and neither the state of the defendants lands, nor property of his goods or chattels.'

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within its just boundaries)[21] undermine the common law, just as the king might undermine it through the unfettered used of 'absolute' prerogative powers.

Was the King's Bench's use of habeas corpus itself a foray into the discretionary sphere of equity? Halliday is right to point out that in some respects, such as the inquisitorial approach to fact-finding, the procedure in habeas corpus seems to imitate equity. But in other respects, we may doubt how close it was to equity. After all, when it came to determining whether to remand, bail or release, the judges looked to whether the law allowed the gaoler to detain the prisoner, not at whether it was right or fair for him to do so, nor at whether the petitioner came 'with clean hands'. The point of the writ was not to set aside the law, but to uphold it. Many commentators clearly did not regard the writ as discretionary. For instance, Matthew Bacon claimed that, 'in regard to the Subject', it was 'deemed his Writ of Right, that is such a one as he is intitled to *ex debito Justitae*'.[22] While it was not given as a matter of course, neither was it a writ of grace, granted entirely at discretion. As Justice Wilmot explained, 'There is no such thing in the law, as writs of grace and favour issuing from the Judges: they are all writs of right; but they are not all writs of course.'[23] Habeas corpus was a judicial writ, which was not granted of course, but which was granted on cause being shown.[24] Sir John Comyns therefore noted that 'it ought to be granted of right'.[25] Summarising the nature of the writ for his students, the second Vinerian professor, Robert Chambers, described it thus:

> 'This writ is with respect to the king called a prerogative writ which the king may issue to any place within his dominions as protector of his subjects; and with respect to the subject, it is termed a writ of right, to which every man has a claim not as an act of *favour*, but of *justice*; *non ex gratia sed ex merito justitiae*.'[26]

All this might suggest that the notion of the rule of law might be more important to the story than Halliday's account allows. One example provides a good illustration: the case of the Five Knights, imprisoned by the special commandment of the king, and the subsequent debates over the Petition of Right. In his discussion of this central case, Halliday convincingly shows that those who argued on behalf of the Five Knights, invoking general principles of the *lex terrae*, were bested by the Crown lawyers' use of precedents. They got the law wrong, and their invocation of broad principles could not make up for it. For Halliday, the contests of 1627–1628 were not so much about the 'law of the land' as over who had authority to declare what counted as jurisdiction: 'Thus the common law was not superior; King's Bench was' (p. 139). But was the King's Bench acting here as the voice of the king's absolute power, or as the voice of the *lex terrae*? The very fact that court was considering the case at all might suggest the latter: for it would be odd to argue that the king, fictitiously present in court, was using his prerogative powers to test his own prerogative powers. It seems less artificial to see it as the court pronouncing on whether the king had the power claimed according to the law of the land, from which all his powers derived.

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21 Coke (1797, p. 84) felt that the court of equity had a proper jurisdiction over fraud, accident and breach of confidence, for which there was no remedy at common law.

22 Bacon (1736, vol. 3, p. 2).

23 Opinion on the Writ of Habeas Corpus (1758) Wilmot 77 at p. 87.

24 'Habeas corpus is no original writ. And if it be in the nature of a judicial writ, there must be a cause for it' (per Vaughan CJ). *Anonymous* (1672) Carter 221 at p. 222.

25 Comyns (1762, vol. 3, p. 460).

26 Chambers (1986, vol. 2, p. 7). He added (p. 8) 'that upon due examination of the cause alleged the judge may at his discretion continue him in custody, admit him to bail, or discharge him entirely'.

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Was the *lex terrae* the same as the common law? In the early seventeenth century, it was a notoriously tricky question whether the *jus coronae* was part of the common law, or a distinct system of law. Even Coke himself spoke of the *lex coronae* as one of 'the divers lawes within the realme', another of which was the common law. However, he also made it clear that the king's prerogative was made up of 'all powers, preheminences, and priviledges, *which the lawe giveth to the crowne*'.[27] In exercising its jurisdiction to decide whether the king had the power to imprison, the King's Bench judges were asserting that this was a legal question; and that it was for the highest common law judges to determine what was lawful by the *lex terrae*. During the constitutional debates generated by imprisonment of the knights, the common lawyers continued to assert this point, a point which can be seen to have been expressed in Coke's comment to Sir Henry Marten that 'Our common law bounds your martial law'. In the same debates, Selden observed that all law came from custom or act of Parliament, including martial law, which was 'known to the common law and incorporated in the common law'.[28] In making these arguments, Coke and Selden did not mean that soldiers were subject to the particular rules of common law, but rather that there was no area of prerogative power whose existence or scope could not be tested by the common law judiciary in their highest court. They may have been wrong on the particular point in the Five Knights' case, but their broader point that questions of power were to be tested by the judges, and not left to the absolute power of discretionary prerogative, may have been one that others on the bench would have shared.

Certainly, by the time Hale composed his *Prerogatives of the King*, he was in no doubt that prerogative power was bounded by the rule of law. For he spoke of the 'irritant' power of the law, which entailed 'making void of an act done contrary to the direction of the law'. While the king was not bound by the coercive power of the law, he was bound by its directive power: the judges could therefore declare void any act of the king's contrary to the directive power of the law.[29] In Hale's view, the king's prerogative powers – which pertained to him absolutely – were those which had been retained by him in the original agreement between king and people, on which the constitution was presumed to be founded. As Hale made clear in his own work, this prerogative power could be reshaped by what was in effect a renegotiation of the presumed original contract of government, which occurred when the king-in-parliament passed legislation limiting the power.[30] It did so, of course, in 1641, in the Star Chamber Act. This is to say that it was recognised – at least by constitutionalist lawyers like Hale – that the king's own prerogative power was bounded by law: while common lawyers could not review the exercise of prerogative powers which the king had, it had a jurisdiction to ask whether those powers existed.

Halliday's argument relating to the prerogative looks most persuasive when he turns to jurisdictions beyond the realm of England. After all, it was the king who granted charters, whether to the East India Company, or to North American colonists (many of whom were arguing by the 1770s that their connection was only with the British king, but not its Parliament). Moreover, it was in the king's name that lands were conquered, and such lands were not subject to English law until such time (if ever) that the king chose to impose it.[31] In this context, it does seem plausible

27 Coke (1794) 11b, 90b, emphasis added.

28 Johnson *et al.* (1977, vol. 3, pp. 548 and 25).

29 Hale (1986, pp. 14 and 176). Cf. his comments in his draft reply to Hobbes: 'the king I oblig'd by his owne Laws for these Acts y^{t} are done by his command ag^{t} the Laws are void, & the Instrum^{ts} therein are not Indemnified by such comand because the virtus legis irritans makes the Command void.' BL Add MS 18235, f. 39.

30 See further Lobban (2007, pp. 70 and 81).

31 The classic exposition of these views were found in *Calvin's Case* (1608) 7 Co Rep 1a at 17b, *Blankard v. Galdy* (1693) 4 Mod. 215, Salk 411, *Anonymous* (1722) 2 P Wms 75, and *Campbell v. Hall* (1774) Lofft 655.

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to argue, as Halliday does, that the remedy of habeas corpus relied on two aspects of the prerogative: the relationship of allegiance between sovereign and subject; and the use of the prerogative to grant franchises, which were given as acts of special grace – 'language [which] echoes the metaphors of miracle that ran through ideas about the prerogative' (pp. 265–66).

Nevertheless, we might again suggest a 'rule-of-law' interpretation of the working of the writ. The key point to note is that the writ only ran to jurisdictions which the king acquired in the capacity of the Crown of England. Discussing the conquest of Ireland, Hale wrote that the king held that country only in his capacity of king of England. He held it 'as parcel and in right of the crown of England and not as a dominion purely distinct from it'.[32] Discussing the American plantations, seized by commission, Hale also noted that they were 'acquired by the king in right of the crown of England and are parcel of the dominions though not of the realm of England'.[33] The writ of habeas corpus lay to these territories, held by the Crown of England, even if they were ruled under distinct courts with distinct laws, for the king 'must have an Account of the Cause of any of his Subjects Loss of Liberty'.[34] But it is noteworthy that the writ did not lie to Scotland.[35] Even though *Calvin's Case* had shown that allegiance to the king was a personal, rather than a territorial matter – so that a subject of the king in Scotland could hold land in England – the King's Bench could not issue a writ to protect the king's subjects north of the border or in any other territory which he did not hold by virtue of the Crown of England, such as the electorate of Hanover. It only ran to dominions of the Crown of England. It was the law which defined what constituted the Crown of England which gave the king the jurisdiction to issue 'prerogative' writs in the empire.

Drawing a distinction between property law, which was determined by place (so that land law in Berwick or Jersey differed from the common law), and the law of persons, which was 'bounded only in the relationship of allegiance', Halliday writes that 'The king's *brevia mandatoria*, like habeas corpus, entered a territory prior to any other formal accession of that territory to the crown' (p. 265).[36] But in fact, the king's writ did not have a universal reach, following his subjects as a simple consequence of their allegiance: an English woman living in Edinburgh could not obtain the assistance of the King's Bench to free her from the custody of her English husband, any more than an English woman in France could. The reach of the writ rested on whether the Crown of England had a jurisdiction over the area or person in question. Moreover, those who could obtain the writ, because the 'franchise' exercised was derived from the Crown of England, did not have the same personal rights everywhere, simply because of their allegiance: the court's decision whether to free the detainee or not depended on its view of the local law, which determined whether the gaoler in question acted within jurisdiction.[37]

Nor did the king have autonomous powers in the empire: his right as conqueror in parts of the empire did not displace Parliament's overriding power to pass legislation binding the colony, any more that the king's prerogative was itself immune to parliamentary reshaping. The king's prerogative power within the empire, no less than the prerogative powers he exercised at home,

32 Hale (1986, p. 34).

33 *Ibid.*, p. 43.

34 Hale (1713, p. 188).

35 See *R. v. Cowle* (1759) 2 Burr 834 at p. 856.

36 In developing this argument, Halliday develops Hale's comment (1986, pp. 43–44): 'the English planters carry among with them those English liberties that are incident to their persons. But those other laws that concern the lands, and propriety, and disposal of them, are settled according to the king's pleasure, who is lord and proprietor of them, till he shall dispose of them by patent.'

37 See, e.g., the controversial Indian appeal of *Skinner v. Orde* (1871) 8 Moore NS 261, where the Privy Council decided upon the custody of a child claimed by relatives from different religions.

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derived from the rights he obtained by the *lex terrae*, the legal system of England. Viewing it this way might suggest that when the court of King's Bench issued the prerogative writs, it was not concerned with applying a discretionary royal prerogative in an 'equitable' way, and thereby departing from the ordinary rules of law, but was rather concerned to monitor the exercise of powers derived from law. Indeed, this very point is perhaps implicit in Halliday's own argument that the judges developing the writ sought 'a jurisprudence of normalcy' (pp. 139, 147ff.).

Is Halliday right, then, to dismiss the 'rule-of-law' paradigm as irrelevant in explaining the writ? Two different approaches can be taken to the concept of the rule of law.[38] According to the first approach, the concept is concerned with formal questions about how the law is made and applied. It argues that the rule of law requires that laws be properly enacted by a body with authority to do so, that the rules be clear, stable and prospective, that officials conduct themselves in accordance with such rules, and that citizens have access to courts staffed by an independent judiciary. According to the second, the concept is also concerned with substantive issues, and requires certain rights such as the right to liberty to be upheld.[39] Taking these two approaches, it would be reasonable to conclude that the point of the writ was to uphold the rule of law in the first sense, if not in the second. It was a device to give people access to court to check that gaolers had acted under authority derived from a valid law. By contrast, despite the natural-right arguments of Lilburne and Sharp to the contrary, it was not used as a device to secure a fundamental right of liberty. Halliday may well be right, in other words, to reject the rule-of-law paradigm in this second sense, but wrong to reject it in the first.

He is right to reject it in the second sense, for English common lawyers in the era discussed by this book looked for their law in positive legal sources, rather than taking it from higher general principles.[40] But the fact that this was so meant that habeas corpus could not itself guarantee the rule of law. Even Dicey, who argued that rights were much safer when they were left to the protection of judges than guaranteed in the words of constitutions or legislation, had to concede that the rule of law might be undermined by parliamentary sovereignty, as when habeas corpus was suspended. 'The Suspension Act, coupled with the prospect of an Indemnity Act,' he noted, 'does in truth arm the executive with arbitrary powers'[41] – which violated his own procedural notion of the rule of law. Dicey sought to square this circle, by noting that at least such acts counted as law passed by the sovereign.[42] But as Halliday's broad-ranging discussion shows, even this stretch could not rescue the concept of the rule of law in cases where colonial governors were given powers to suspend the remedy – or when in 1914 the executive at home was empowered to introduce indefinite detention by decree. This clearly undermined any idea of the rule of law as popularly understood, presenting a problem for judges who had to find ways to tame the new tiger, and subject those exercising powers of detention to the rule of law. Whether or not readers will agree with Halliday's interpretation of the grounding of the writ in the king's 'absolute' prerogative powers rather than in a rule-of-law paradigm, they will surely agree with his

38 For a helpful survey, see Craig (1997).

39 See, e.g., Ronald Dworkin's (1985, pp. 11–12) comment: 'The rule of law on this ['rights'] conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights.'

40 For a fuller elaboration of this view, see Lobban (2007).

41 Dicey (1959), p. 236.

42 'It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law' Dicey (1959, p. 237).

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conclusions that the writ could not act as a guarantee. And they will surely agree that this book is a wonderful piece of work.

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