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Making Habeas Work : A Legal History [Book review]

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Eric M. Freedman, *Making Habeas Work: A Legal History*. New York: New York University Press, 2018. xiii+ 197pp.

This is a short book, but heavy reading. It also has an agenda. This is to defend habeas corpus in its original purpose to restrain extrajudicial, arbitrary imprisonments of individuals by federal or other legal authorities within the jurisdiction of the United States. The highpoint of this legal history is the decision of *Boumediene v. Bush* 2008 in which the Supreme Court upheld the right of some Guantanamo prisoners to petition the writ of habeas corpus—against the Bush administration's and Congress's wishes.

It is an interesting question whether history can truly prove anything about the validity of an individual court decision today, even if common law practice is based on precedents. We know of a number of "precedents" once set by the Supreme Court, which have since been overturned by that same Court, because the common American understanding of decent social norms changes over time.

Be that as it may, Freedman narrates dozens of cases from the colonial era up to recent time, some of them in considerable detail, as related to habeas corpus or to a number of other legal proceedings by which the legality of detentions by local and government officials have been protested, prosecuted, and occasionally rejected in court, with fines levied.

To offer examples of the scope of Freedman's cases, in England in 1588, two women walking on a street were imprisoned and maltreated as prostitutes by two officials, who were eventually punished for this action. Many free African Americans benefitted from habeas corpus when jailed on mere suspicion of being runaway slaves. In such cases habeas corpus often worked just as it was supposed to: in the cases reported by Freedman it truly fell on the jailer to prove his case for detention before the court, not for the individual in jail to prove one's status as a free citizen.

During the War of 1812, tricky situations evolved in New England with U.S. military officials trying to stop the large-scale smuggling and other forms of suspicious interaction between some Americans and Canadians over the Canadian border. While the author retails the individual cases vividly, some readers would no doubt benefit from a more detailed discussion of Jefferson's 1808 Embargo policies as a context for "Madison's War."

One might wonder why Lincoln's famous suspension of habeas corpus is not even mentioned. But interesting cases also resulted from Andrew Jackson's declaring several weeks of martial law in New Orleans after his famous victory there in 1815. The illegal imprisonments cost Jackson himself 1,000 dollars in fines, for which he was reimbursed only in 1844. Law, indeed, remains linked to our past. As Freedman argues, the *Boumediene v. Bush* decision defused "a sea mine" in American judicial system (p. 106) set there by the *Bollman* decision of the Supreme Court dating back to the time when its chief justice was a Virginia slaveholder, the legendary John Marshall.