

NO JUSTICE WITHIN THE LAW: THE MURDER OF WYATT OUTLAW AND ITS ABSENCE FROM THE
LEGAL-HISTORICAL RECORD

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INTRODUCTION

We are under the painful necessity of informing you of the commission of the most atrocious murder ever committed in any community. On the night of the 26th inst. a body of disguised men came into our town at about one o'clock, broke into the house of Wyatt Outlaw and took him to the public square near the court house and hung him to the limb of a tree, when he was found hanging the next morning, his neck broken, with a piece of paper writing pinned to him, "Beware you guilty both white and black."¹

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Wyatt Outlaw's murder on February 26, 1870, in Alamance County, North Carolina, helped set in motion a chain of events that culminated in the Governor's imposition of martial law,² the suspension of the writ of habeas corpus,³ a congressional inquiry into Ku Klux Klan activity in North Carolina,⁴ and, ultimately, the first-ever impeachment of an American Governor.⁵ Outlaw's murder was a turning point in the state's history.⁶ Yet, although Outlaw's

¹ Letter from H.A. Badham, J.W. Harden, P.R. Harden, Henry M. Ray & W.A. Albright, to W.W. Holden, Governor of N.C. (Feb. 28, 1870), *reprinted in* 2 TRIAL OF WILLIAM W. HOLDEN, GOVERNOR OF NORTH CAROLINA, BEFORE THE SENATE OF NORTH CAROLINA, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 1133, 1133 (Raleigh, "Sentinel" Printing Office 1871) [hereinafter TRIAL OF WILLIAM W. HOLDEN].

² See Proclamation of Mar. 7, 1870, *reprinted in* A REPORT OF THE PROCEEDINGS IN THE HABEAS CORPUS CASES 21, 21 (William H. Battle ed., Raleigh, Nichols & Gorman, 1870) [hereinafter HABEAS CORPUS PROCEEDINGS] (declaring Alamance County in a state of insurrection). It is worth noting at the outset that although the *Proceedings* are an invaluable collection of materials, many of which are not available elsewhere, the collector had a significant bias; William H. Battle represented the alleged Klan members in each of the three habeas corpus cases.

³ See *Ex parte* Moore, 64 N.C. 802, 806 (1870) (framing the first legal question as whether "the fact that the Governor has declared the County of Alamance to be in a state of insurrection, and has taken military possession, ha[s] the legal effect to suspend the writ of *habeas corpus* in that County").

⁴ The situation in North Carolina was ultimately brought to the attention of the United States Senate, which formed a committee ("Senate Committee") to investigate "the truth or falsehood of the crimes and outrages of a political character alleged to have been committed in the Southern States, and whether there be in those States security for persons and property." S. REP. NO. 42-1, pt. 1, at i (1871). Wyatt Outlaw's name was at the top of the list of outrages in Alamance County. *Id.* at xix.

⁵ Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2058 (1999).

murder is cited frequently in the historical literature and, to a significantly lesser extent, the legal literature discussing Reconstruction in North Carolina, the scholarship largely omits an analysis of the habeas corpus cases that followed his killing.⁷ This paper aims to fill the gap in the legal-historical literature, analyzing Outlaw’s murder and its place in the legal—and, consequently, the historical—record. It does so in the context of the habeas corpus case most directly associated with his murder, that of *Ex parte Moore*.

Outlaw’s murder, and *Moore*, arose in the context of a tense and often violent period in North Carolina’s history: Reconstruction. After the Civil War, President Johnson allowed southern states to reenter the union upon repeal of their secession ordinances, ratification of the Thirteenth Amendment, and repudiation of any war debts, which were relatively lenient terms.⁸ The mild conditions of reentry, coupled with the demobilization of Union forces, allowed ex-Confederates to seize a pivotal role in the new political system.⁹ Thus, Reconstruction began with the implementation of laws like the infamous “Black Codes,” which attempted to restrain the rights of ex-slaves within the bounds of the law.¹⁰ Reconstruction also saw an upsurge in violence against black and white Unionists alike.¹¹

⁶ See, e.g., HORACE W. RAPER, WILLIAM W. HOLDEN: NORTH CAROLINA’S POLITICAL ENIGMA 174 (1985) (“The Outlaw murder was the precipitating reason for Governor Holden’s declaring Alamance County in a state of insurrection.”).

⁷ The term “habeas corpus cases” refers to three cases that arose as a result of Governor Holden’s imposition of martial law in Alamance and Caswell Counties: *Ex parte Moore*, 64 N.C. 802 (1870), *Ex parte Kerr*, 64 N.C. 816 (1870), and *In re Bergen*, 3 F. Cas. 261 (C.C.D.N.C. 1870) (No. 1338). See HABEAS CORPUS PROCEEDINGS, *supra* note 2 (naming these cases in the title, and grouping them together for reporting purposes). Even at the time these cases were before the courts, they were considered as a group. See *The Habeas Corpus Cases Before His Honor Chief Justice Pearson*, THE DAILY STANDARD, July 21, 1870 (referring to *Ex parte Moore* and *Ex parte Kerr*). *In re Bergen*, which followed from the federal district court’s decision in *In re Moore* (D.N.C. 1870), reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 85, was added later.

⁸ MARK L. BRADLEY, BLUECOATS & TAR HEELS: SOLDIERS AND CIVILIANS IN RECONSTRUCTION NORTH CAROLINA 2 (2009).

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

At the heart of the violence were groups like the White Brotherhood, the Constitutional Union Guard, the Invisible Empire, and, most notably, the Ku Klux Klan.¹² The motives of the Klan, loosely summarized, were “to drive black voters away from the polls, while threatening whites who voted Republican.”¹³ In this respect, the Klan’s *raison d’être* went beyond “elemental racism” to include a political purpose.¹⁴ This is why, historians have suggested, Klan attacks were concentrated in counties where the number of Democratic and Republican voters was relatively even.¹⁵ Alamance County, Wyatt Outlaw’s home and the location of his murder, was just such a county.¹⁶

The historical literature has described the state of affairs in Alamance County in the years surrounding Outlaw’s murder as involving a “rapid escalation of Klan violence.”¹⁷ Certainly the

¹² All three groups were active in Alamance County during the relevant time period. See Letter from W.W. Holden, Governor, N.C., to R.M. Pearson, Chief Justice, N.C. Supreme Court, *reprinted in Ex parte Moore*, 64 N.C. 802 (1870) (“[T]here is a wide-spread and formidable secret organization in this State, partly political and partly social in its objects; that this organization is known, first, as ‘*Constitutional Union Guard*,’—secondly, as ‘*The White Brotherhood*,’—thirdly, as ‘*The Invisible Empire . . .*’”). Scholars have treated the Brotherhood and the Klan as interchangeable at times. See SCOTT REYNOLDS NELSON, *IRON CONFEDERACIES: SOUTHERN RAILWAYS, KLAN VIOLENCE, AND RECONSTRUCTION* 100 (1999) (“[T]he White Brotherhood . . . began a campaign of terror that sought to undermine the newly reconstructed municipal governments in Alamance. When Loyal Leaguers [a Republican group] tried to prosecute Klansmen in the first few months of 1869, Klan violence escalated.”). Likely, there was significant crossover on the groups’ membership rosters, though the two do appear to be distinct. This paper uses the term “Klan” loosely, as does most of the scholarly literature, to refer to all pro-Klan and Klan-related groups that were active at the time, but it is important to recognize that there were distinctions between the groups, some likely more important than others. For an authoritative history of the Klan in the context of Reconstruction in the South, see ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

¹³ NELSON, *supra* note 12, at 97.

¹⁴ *Id.*

¹⁵ See *id.* (“Other historians have suggested that because the Klan also attacked white Republicans, and attacked citizens in counties where the number of Republican and Democratic voters were evenly balanced, that the Klan had an expressly political purpose.”). As Professor Nelson notes, however, “Klans did not emerge overnight and they did not emerge in every county where votes were contested.” *Id.* at 98. While this paper discusses the Klan violence that served as a direct antecedent to Outlaw’s murder, it does not attempt to assess the underlying reasons for the heightened Klan violence in Alamance County. Other scholars have, however, attempted to do just that. Nelson, for example, argues that the railroads facilitated the creation of Republican groups like the Loyal League, which became targets for Klan violence. *Id.* at 95–114. Professor Troxler, on the other hand, cites a body of literature that traces the tension in Alamance back to wartime challenges to Confederate conscription efforts. See Carole Watterson Troxler, “*To Look More Closely at the Man*”: *Wyatt Outlaw, a Nexus of National, Local, and Personal History*, 77 N.C. HIST. REV. 403, 422–23 (2000) (presenting this theory).

¹⁶ NELSON, *supra* note 12, at 97.

¹⁷ *Id.* at 98; see also BRADLEY, *supra* note 8, at 219, 221 (describing Outlaw’s murder, in the context of “[t]he Klan’s campaign of terror,” as “an unqualified success,” and noting “the overwhelming evidence of a crisis”).

Governor of North Carolina at the time, William W. Holden, believed the situation was dire.¹⁸ He responded to the Klan attacks by declaring Alamance County in a state of insurrection in March of 1870,¹⁹ an act which he argued gave him the power to suspend the writ of habeas corpus²⁰ and allowed him to arrest alleged Klan members without probable cause.²¹

Though the Governor declared Alamance County in a state of insurrection in March of 1870,²² Adolphus G. Moore, the lead petitioner in *Ex parte Moore*, was not arrested until July 15 of the same year.²³ On that date, he was detained and subsequently arrested by Colonel George W. Kirk,²⁴ who was acting under the orders of Governor Holden.²⁵ On July 16, Moore's petition for a writ of habeas corpus was before the Chief Justice of the North Carolina State Supreme Court,²⁶ and by August 26, newspapers were trumpeting Moore's release by a federal district court judge,²⁷ who took up the case after the state court declined to act.²⁸ The Governor

¹⁸ The Governor's response, as documented in Part II, *infra*, suggests as much. The Minority Report of the Senate Committee demonstrates that not *all* were willing to concede this point, however. See S. REP. NO. 42-1, pt. 2, at 3 (1871) ("But [the testimony and charges against the Klan discussed are] manifestly the result of a plan 'cut and dried' by a conspiracy formed of disappointed politicians who have lost the confidence of their people, and have been cast out of office by the almost unanimous voice of a betrayed and injured constituency. At the head of this conspiracy plainly stands William W. Holden, the Governor of North Carolina . . .").

¹⁹ Proclamation of Mar. 7, 1870, *supra* note 2, at 21.

²⁰ As a practical matter, Holden's actions suspended the writ. See WILLIAM C. HARRIS, WILLIAM WOODS HOLDEN: FIREBRAND OF NORTH CAROLINA POLITICS 294 ("[Holden's] refusal to turn Kirk's prisoners over to civil authorities in effect constituted a suspension of the writ of habeas corpus . . .") (1987). Whether the writ was *properly* suspended was the question before the courts in the habeas corpus cases. See *Ex parte Moore*, 64 N.C. 802, 806 (1870) ("The main question, and one on which both motions depend, is this: Does the fact that the Governor has declared the County of Alamance to be in a state of insurrection, and has taken military possession, have the *legal effect* to suspend the writ of *habeas corpus* in that County?" (first emphasis added)).

²¹ Suspension of the writ of habeas corpus enables prisoners to be held without probable cause. See Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 149 (2008); see also *id.* at 149 n.178 ("A suspension of habeas is usually understood not as affecting the legality of a seizure, but rather as affecting only the prisoner's remedies—in particular preventing the prisoner from obtaining release." (citing WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980))).

²² Proclamation of Mar. 7, 1870, *supra* note 2, at 21.

²³ Petition for Writ of Habeas Corpus, *Ex parte Moore*, 64 N.C. 802 (1870), reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 5, 5.

²⁴ *Id.* at 5–6.

²⁵ Letter from W.W. Holden to Richmond M. Pearson, *supra* note 20, at 804.

²⁶ *Ex parte Moore*, 64 N.C. at 802.

²⁷ The actual release date is unclear. Neither *The Old North State* nor *The Daily Standard* refer to Moore's release specifically. Rather, they speak of the discharge of the prisoners, see *The Habeas Corpus Cases—Release of the Prisoners*, THE OLD NORTH STATE (Aug. 26, 1870), and dismissal of the rule in Moore's case before the federal

disbanded the militia in September, and rescinded the proclamations that declared Alamance and Caswell Counties in a state of insurrection two months after that.²⁹ By December 23, 1870, Governor Holden was officially on trial for impeachment before the State Senate for high crimes and misdemeanors in connection with his activities during the Kirk-Holden war,³⁰ as the period has come to be known.

Moore was widely considered the man responsible for Wyatt Outlaw's murder,³¹ yet Outlaw's name does not appear once in *Ex parte Moore*. In part, this is due to the legal claims at issue. The Governor initially attempted to secure probable cause for the arrest of those responsible for Outlaw's murder.³² Because the state was unable to secure that probable cause,³³ the Governor imposed martial law and effected the warrantless arrests of the petitioners, which meant that the case did not come before the courts as a criminal charge, but in a very different form: on a petition for a writ of habeas corpus. The form of the legal proceedings inevitably affected the historical record in a way that downplayed the contemporary significance of Outlaw's murder, a point which scholars in the field have overlooked.

judge, see *Answer to the Rule To Show Cause*, THE DAILY STANDARD (Aug. 26, 1870). However, another source states that the prisoners were released before the judge's decision, on August 19. RAPER, *supra* note 6, at 196.

²⁸ The state Supreme Court's decision is discussed at greater length in Part III, *infra*.

²⁹ BRADLEY, *supra* note 8, at 233.

³⁰ 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 20.

³¹ See *infra* Part II.

³² Prior to the arrests, Governor Holden issued a Proclamation offering a reward "for the arrest of each of the murderers . . . of Wyatt Outlaw, . . . together with such evidence as will lead to the conviction of the persons thus arrested." Proclamation of June 6, 1870, reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 23, 25.

³³ At least, it seems safe to assume they were unable to secure probable cause, given how events proceeded. See *infra* Part II. As the Senate Committee noted, this was hardly surprising. See S. REP. NO. 42-1, pt. 1, at xxi (1871) ("When it is remembered that a disclosure of their [the Klan's] secret proceedings incurs the penalty of death, and that of all other secrets, such as involve the members in the guilt of assassination, murder, and violence would be most sacredly guarded, it is remarkable, not that so little evidence has been procured bearing upon particular cases, but rather that any should have been elicited.").

When Outlaw is discussed in the historical literature, it is often in passing.³⁴ Lengthier treatments tend to contextualize his murder by examining the Klan violence in Alamance County prior to his death, rather than the legal proceedings that eventually followed from it.³⁵ Discussion of the habeas corpus cases is rare, and when it does occur it follows the progress of the cases and petitioners through the courts, as opposed to examining the legal issues.³⁶ Governor Holden is a more popular subject, but Outlaw—and even, arguably, the Kirk-Holden War—is just one part of the Governor’s own, complicated history.³⁷

The cases, and Wyatt Outlaw, fare worse in the legal literature. Outlaw’s murder is mentioned in passing in a handful of law review articles.³⁸ The habeas corpus cases appear more frequently in the legal literature than Outlaw, but their coverage is similarly sparse. With few

³⁴ See HARRIS, *supra* note 20, at 284 (mentioning Outlaw’s murder); TRELEASE, *supra* note 12, at 205–07; Scott Reynolds Nelson, *Red Strings and Half Brothers: Civil Wars in Alamance County, North Carolina, 1861–1871*, in ENEMIES OF THE COUNTRY: NEW PERSPECTIVES ON UNIONISTS IN THE CIVIL WAR SOUTH 37–53 (John C. Inscoe & Robert C. Kenzer, eds. 2001) (discussing the situation in Alamance County from 1861 to 1871, with a focus on intrafamilial conflict); Otto H. Olsen, *North Carolina: An Incongruous Presence*, in RECONSTRUCTION AND REDEMPTION IN THE South 156–201 (Otto H. Olsen ed. 1980) (discussing Reconstruction in North Carolina and briefly mentioning Outlaw’s murder).

³⁵ See BRADLEY, *supra* note 8, at 217–58 (providing a historical overview of Outlaw’s murder, the Kirk-Holden War, and the process of the habeas corpus cases through the courts); NELSON, *supra* note 12, 95–114 (analyzing Klan activity in Alamance County, including Outlaw’s murder, and the local Republican response, suggesting reasons for the violence). The obvious exception is Troxler, which provides the most thorough historical treatment of Outlaw’s life and death. See *generally* Troxler, *supra* note 15.

³⁶ The most detailed discussion of the cases comes in a biography of Governor Holden, and its treatment provides further support for this paper’s argument. Though the book spends over twenty pages discussing the cases—from a historical, as opposed to a legal, perspective—only two discuss Outlaw’s murder. See RAPER, *supra* note 6, at 174–98. See also BRADLEY, *supra* note 8, at 217–58 (providing a historical overview of Outlaw’s murder, the Kirk-Holden War, and the process of the habeas corpus cases through the courts); HARRIS, *supra* note 20, at 284–97 (providing a brief overview of the cases in connection with the Kirk-Holden War).

³⁷ See *generally* HARRIS, *supra* note 20; RAPER, *supra* note 6. Although not addressing Outlaw’s murder, an article by Stephen Massengill discusses Holden’s attempts to gather evidence against Klan members using a force of “detectives.” See *generally* Stephen E. Massengill, *The Detectives of William W. Holden, 1869–1870*, 62 N.C. HIST. REV. 448 (1985).

³⁸ See Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 756 n.290 (2002) (citing Outlaw’s murder for the note pinned to his body); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 530 (1985) (mentioning Outlaw’s murder as an example of Klan violence in congressional testimony pertaining to the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13); Andrew Owens, *North Carolina’s Superintendent of Public Instruction: Defining a Constitutional Office*, 4 CHARLOTTE L. REV. 103, 147 n.281 (2013) (mentioning Outlaw’s murder in the context of Governor Holden’s decision to send troops into Alamance County); Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as a Tool of Legal Interpretation*, 39 SW. L. REV. 103, 120 n.53 (2009) (mentioning Outlaw’s murder as an example of “vigilantism and terror” in congressional testimony pertaining to the Ku Klux Klan Act of 1871).

exceptions,³⁹ when the cases *do* appear it is in the context of the Governor’s power to impose martial law.⁴⁰ Governor Holden appears in law review articles on a more consistent basis than either Outlaw or the habeas corpus cases, but as with the habeas corpus cases, the military aspect of the situation is the focus.⁴¹ When an article addresses the habeas corpus proceedings, it is often only as a historical footnote, meaning the legal issues are accorded little or no treatment.⁴²

This paper fills a gap in the legal-historical literature. It considers one of the habeas corpus cases, *Ex parte Moore*—the only fully litigated *legal* response to Wyatt Outlaw’s murder—and examines the legal structure of the proceedings to shed light on the role that Outlaw’s murder played in shaping the debate surrounding the Klan violence in Alamance County. Part I describes the situation in Alamance County, and the series of events that led

³⁹ The article in the legal literature that provides the fullest discussion of the cases—still only a paragraph—merely summarizes the situation that sparked the suspension of the writs, and the subsequent controversy. Allen, *supra* note 5, at 2057–58. A Note mentions the cases obliquely in the context of Chief Justice Pearson’s tenure on the court. Reuel E. Schiller, Note, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1220 n.61 (1992).

⁴⁰ Articles citing *Ex parte Moore*, 64 N.C. 802 (1870), for example, use it for its holding, to support their legal claims, as opposed to discussing the case itself. See Henry Winthrop Ballantine, *Unconstitutional Claims of Military Authority*, 24 YALE L.J. 189, 208 n.52 (1915) (citing *Moore*, with no discussion, as an example of military arrests); Note, *Habeas Corpus—Strikes—Suspension*, 38 YALE L.J. 545, 546 (1929) (citing *Moore* for courts’ noninterference with Governor-imposed suspension of the writ, even where suspension was improper); Note, *Martial Law*, 26 HARV. L. REV. 636, 637 n.13 (1913) (citing *Moore* as an example of “the old rule,” under which a court would be forced to issue writs without the power of the posse comitatus to enforce those writs); Comment, *Use of Military Force in Domestic Disturbances*, 45 YALE L.J. 879, 883 n.28, 888 n.64, 889 n.65 (1936) (citing *Moore* chiefly for its holding that the suspension of the writ must not only be necessary, but also proper, and that it was not proper in that instance). *Ex parte Kerr*, 64 N.C. 816 (1870), and *In re Bergen*, 3 F. Cas. 261 (C.C.D.N.C. 1870) (No. 1338), have not received even the minimal scholarly treatment that *Ex parte Moore* has.

⁴¹ See Carole Emberton, Symposium, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL’Y REV. 615, 623 (2006) (discussing Holden’s decision to form his militia troops from predominantly white sections of North Carolina); Rebecca Blackmon Joyner, Note, *An Old Law for a New World? Third-Party Liability for Terrorist Acts—From the Klan to Al Qaeda*, 72 FORDHAM L. REV. 427, 432 n.53, 435 n.77 (2003) (mentioning Holden’s appeal to President Grant for suspension of the writ, but focusing, for the duration of the discussion, on his use of martial law); Joseph A. Ranney, *A Fool’s Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 9 (2002) (discussing Holden’s judicial appointments, as well as his “vigorous use of the state militia to suppress Ku Klux Klan violence in the state’s central counties”); Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT L. REV. 1013, 1049 (1995) (noting Holden’s impeachment for misuse of martial law).

⁴² See Paul Taylor, *The Historical and Legal Norms Governing the Detention of Suspected Terrorists and the Risks Posed by Recent Efforts To Depart from Them*, 12 TEX. REV. L. & POL. 223, 230 (2008) (mentioning, briefly, suits filed against Kirk for “false arrest”); Wang, *supra* note 41, at 1018–19 (noting Holden’s situation, in passing, in the context of state constitutions’ prohibitions against suspensions of the writ).

Governor Holden to declare it in a state of insurrection. Part II briefly describes Wyatt Outlaw’s murder before establishing the link between his death and *Ex parte Moore*: specifically, that Moore and his co-defendants were the men considered to be Outlaw’s killers. Part III describes the legal proceedings in *Ex parte Moore*, with a brief discussion of the case as it went before the federal district court. Finally, Part IV considers how the legal structure of the proceedings shaped the legal and historical records, ultimately minimizing the important, contemporary role that Outlaw’s murder played in the events as they unfolded.

I. THE KU KLUX KLAN IN ALAMANCE COUNTY.

The severity of the situation in Alamance County was hotly debated by conservatives and liberal Republicans.⁴³ Legally, it was important: it was an issue in the habeas corpus cases as well as the Governor’s impeachment trial. In the habeas cases, the North Carolina Supreme Court was asked by the petitioners to determine whether Alamance County was actually in a state of insurrection, though it ultimately refused to conduct the inquiry out of deference to the

⁴³ For example, even though Governor Holden’s impeachment trial took place a year after Outlaw’s murder, the nature of the situation in Alamance County at the time of his death was still contested. One of the Governor’s witnesses, a “colored” citizen of Alamance County named Samuel Garrison, described an attack in November of 1869 by disguised men in white gowns and masks. Testimony of Samuel Garrison, *in* 2 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 1221, 1222. When asked if he reported the attack, Mr. Garrison said that he went to Yanceyville to report it. *Id.* at 1222. One of Governor Holden’s lawyers pressed him further: “Why did you not go to [Alamance] to have them indicted?” to which Mr. Garrison responded, “I was afraid to go.” *Id.*

This sentence sparked a debate between the Governor’s lawyer and one of the lawyers for the Managers of Impeachment, who argued that the testimony was not competent, as “[t]he law gives its protection to everybody in this country and it is no excuse to a man that he was afraid.” *Id.* at 1223. The Governor’s lawyer immediately countered:

Here is a set of men embracing hundreds of the citizens of a county who are banded together to commit crime and intimidate a large portion of the people of the country, and counsel gravely suggest that it is a contempt of court for a witness to say that he will not apply to that kind of people for redress. . . . That was one of the very reasons why the county was declared in a state of insurrection. The people were intimidated by the violence committed upon many of the citizen [*sic*] and they dared not go to the courts.

Id. The Chief Justice allowed the questioning to continue, as “the evidence [was] competent as tending to prove one of the allegations in the answer, to wit: that the county was in such a condition that the people were afraid to apply to the magistrates, and that they dared not deal out justice.” *Id.* Legally, it was not much of a victory for Governor Holden—questioning simply continued—but from a historical perspective, it emphasizes exactly how hotly contested the state of affairs in Alamance County was.

Governor.⁴⁴ The Governor’s power to declare a county to be in a state of insurrection was also at issue in his impeachment trial; the Managers of Impeachment contended that he declared Alamance County to be in a state of insurrection when it was unwarranted.⁴⁵ A brief overview of the events preceding Wyatt Outlaw’s murder is thus appropriate, as an understanding of the facts is necessary to follow the North Carolina Supreme Court’s inquiry in *Ex parte Moore*.

As discussed above, the Klan was particularly active in Alamance County around the time of Wyatt Outlaw’s murder, causing significant unrest.⁴⁶ The reason for this unrest was clear, at least to Governor Holden. One of the Governor’s earlier proclamations declared that the State government should not be upset “because the colored people have been allowed to vote; or because they will vote with a certain party; or because a few public men are out of office and a few are in.”⁴⁷ And voting was just what groups like the Loyal League, of which Outlaw was a prominent member,⁴⁸ had in mind. The League “aimed to, as one member put it, ‘cause voters to have courage to go to the polls and vote.’”⁴⁹ More specifically, the aim was to strengthen their resolve to go to the polls and vote *Republican*.⁵⁰ The Klan and its affiliated groups wanted to prevent that, and the result was growing tension within the county.

⁴⁴ See *Ex parte Moore*, 64 N.C. 802, 805, 807 (1870).

⁴⁵ See 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 9–10 (charging, in the Articles of Impeachment, “[t]hat by the Constitution of the State of North Carolina, the Governor . . . has power to call out the militia thereof to execute the laws, suppress riots or insurrection, and repel invasion, whenever the execution of the law shall be resisted, or there shall exist any riot, insurrection or invasion, but not otherwise; that William W. Holden, Governor of said State . . . of his own false, corrupt and wicked mind and purpose, [did] proclaim and declare that the county of Alamance in said State, was in insurrection . . . when in fact and truth there was no such or any insurrection in said county of Alamance”).

⁴⁶ See *supra* notes 8–21 and accompanying text.

⁴⁷ Proclamation of Oct. 12, 1868, reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 12, 13.

⁴⁸ See Troxler, *supra* note 15, at 416 (describing Outlaw’s organization of the Loyal League and ongoing role within it); see also NELSON, *supra* note 12, at 102 (describing the same).

⁴⁹ NELSON, *supra* note 12, at 102.

⁵⁰ This issue arose during the Senate Committee’s investigation. See S. REP. NO. 42-1, pt. 1, at iv (1871) (“It is alleged, and some instances are quoted as sustaining the charge, that the members of the League seek to deter the colored voters from voting the democratic ticket. That the sentiment of the League, and of its colored members, is against that party, is entirely clear from the testimony; and the colored man who votes it runs counter to the dominant opinion of his race in the State.”).

Martial law was not Governor Holden's first response to the unrest. In 1868, he issued a proclamation which, while threatening to use force to ensure the right of the State's citizens to vote freely, also "admonish[ed] the people to avoid undue excitement, to be peaceable and orderly and to exercise the right of suffrage firmly and calmly, without violence or force of any kind."⁵¹ The legislature, with the Governor's blessing, attempted in 1869 to use the civil law⁵² to curb the violence, passing an Act that made it a felony to go masked, disguised, or painted.⁵³ Although the proclamation did not mention the Ku Klux Klan specifically, it seems clear which groups were the Act's target.⁵⁴ The proclamation stressed that "[b]ands of men who go masked and armed at night, causing alarm and terror in neighborhoods, and committing acts of violence on the inoffensive and defenceless, will be followed and brought to justice."⁵⁵ Governor Holden appealed to public opinion to "repress[] these evils."⁵⁶ In the alternative, he threatened to declare Lenoir, Jones, Orange, and Chatham Counties to be in a state of insurrection.⁵⁷

It was Alamance County, however, that he declared to be in a state of insurrection on March 7, 1870.⁵⁸ According to the Governor's proclamation, "the civil authorities of the County of Alamance are not able to protect the citizens of said County in the enjoyment of life and property."⁵⁹ The proclamation refers to a number of "outrages" to support this statement.⁶⁰ Wyatt

⁵¹ Proclamation of Oct. 12, 1868, *supra* note 47, at 14–15.

⁵² The "civil law" referred to here is not civil as opposed to criminal law, but civil as opposed to *military* law.

⁵³ Act of Apr. 12, 1869, *reprinted in* Proclamation of Apr. 16, 1869, *reprinted in* HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 16, 16–17.

⁵⁴ If not the Klan itself, it seems likely it was an earlier iteration of the same group. The Senate Committee found that the Ku Klux Klan and associated groups ("The White Brotherhood," "The Constitutional Union Guards," and "The Invisible Empire") "was instituted in North Carolina, some time in 1868; certainly before the presidential campaign that year, and according to some allegations, as early as 1867." S. REP. NO. 42-1, at iv (1871).

⁵⁵ Proclamation of Apr. 16, 1869, *supra* note 53, at 17.

⁵⁶ *Id.*

⁵⁷ Proclamation of Oct. 20, 1869, *reprinted in* HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 18, 20.

⁵⁸ Proclamation of Mar. 7, 1870, *supra* note 2, at 21.

⁵⁹ *Id.*

⁶⁰ *See id.* at 21–22.

Outlaw is not mentioned by name, but his murder is included in the list.⁶¹ Governor Holden stressed that insurrection was not his initial solution. He noted that he had “issued proclamation after proclamation,” and “invoked public opinion,” and he even “waited in vain,” “to see if the people of Alamance would assemble in public meeting to express their condemnation of such conduct by a portion of the citizens of the County.”⁶² No such condemnation materialized, and declaring the county in insurrection was, the Governor implied, his only option.

Even with Alamance County formally declared to be in a state of insurrection, Governor Holden appeared reluctant to begin arresting insurgents in the County. His next relevant proclamation, issued on June 6, 1870,⁶³ went farther than previous proclamations in that it placed the blame for the violence squarely on the shoulders of the Klan. It listed a number of “outrages” that it attributed to the group,⁶⁴ including Wyatt Outlaw’s murder “by disguised persons known as the Ku Klux.”⁶⁵ “[A]ll these evils,” Governor Holden said, in reference to the stated outrages, “are to be traced to the Ku Klux Klan.”⁶⁶ However, the Governor did not call for the arrests of any Klan members. Rather, he offered a reward of five hundred dollars for “the arrest of each of the murderers . . . together *with such evidence as will lead to the conviction of the persons thus arrested.*”⁶⁷

When the proclamation was issued, then, Governor Holden had yet to order Colonel Kirk to make the arrests. It was not until July 15, 1870, that Adolphus Moore and his co-petitioners were arrested,⁶⁸ and by that point Governor Holden was apparently desperate. As he told Chief

⁶¹ See *id.* at 21 (describing the hanging of a man outside the courthouse in Alamance County on February 26, 1870).

⁶² *Id.* at 22.

⁶³ Proclamation of June 6, 1870, *supra* note 32.

⁶⁴ *Id.* at 23–25.

⁶⁵ *Id.* at 23.

⁶⁶ *Id.* at 25.

⁶⁷ *Id.* at 25 (emphasis added).

⁶⁸ Petition for Writ of Habeas Corpus, *supra* note 23, at 5.

Justice Pearson, in his response to Pearson’s request for more information regarding Colonel Kirk’s refusal to deliver the bodies of Moore and the others,⁶⁹

The Constitution and laws of the United States and of this State are set at naught; the civil courts are no longer a protection to life, liberty and property; assassination and outrage go unpunished, and the civil magistrates are intimidated and are afraid to perform their functions. . . . [T]he approach of night is like the entrance into the valley of the shadow of death; the men dare not sleep beneath their roofs at night, but abandoning their wives and little ones, wander in the woods until day.⁷⁰

Declaring Alamance County in a state of insurrection was, he determined, the only answer.⁷¹ It is with this context that Outlaw’s murder should be examined.

II. THE MURDER OF WYATT OUTLAW.

Then they said to me “Where is Wyatt” One says, “Say! say! say!” There were two who had swords and there were pistols. One said, “Cut her head off,” and another said “Blow her brains out.” . . . They went out of that room and as they passed, one says to the other, “Let us set the house afire,” and they went around to the room and I heard the little child cry—that is the baby—“Oh daddy!” oh daddy!” I was at the middle door and I ran and opened that door and they were standing with the light . . . and they were around [my son].⁷²

* * *

That chilling testimony came from Wyatt Outlaw’s mother, Jemima Phillips, who testified at the Governor’s impeachment trial as to events on the night of Outlaw’s murder. Her account speaks for itself. Outlaw’s murder was brutal, senseless, and inexcusable. Yet it was ultimately excused by the legal system; Outlaw’s mother never saw her son’s killers brought to justice in a court of law. Although there was an abortive attempt to criminally charge Outlaw’s killers years later, the eighteen indictments in the case were dropped after the conservative legislature provided for full pardons of all crimes committed on behalf of secret societies like the

⁶⁹ Letter from R. M. Pearson, Chief Justice, N.C. Supreme Court, to W. W. Holden, Governor, N.C. (July 18, 1870), *in* HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 9, 9–10.

⁷⁰ Letter from W. W. Holden, Governor, N.C., to Richmond M. Pearson, Chief Justice, N.C. Supreme Court (July 19, 1870), *in* HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 10, 11.

⁷¹ *See id.*

⁷² Testimony of Jemima Phillips, *in* 2 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 1363, 1364–65.

Ku Klux Klan.⁷³ This left the habeas corpus cases, specifically *Ex parte Moore*, as the only fully litigated *legal* response to Outlaw's murder.

The lead petitioner in that case, Adolphus Moore, was the man widely considered responsible. Demonstrating the connection between Outlaw and Moore is more difficult than it might at first appear, however. Because the legal proceedings involved writs of habeas corpus, as opposed to criminal charges, Outlaw's murder is not discussed. Nonetheless, a careful examination of the sources supports a strong inference that Moore was Outlaw's killer, in popular opinion if not in fact.

First, what little it is possible to glean from the legal proceedings supports this conclusion. Though Outlaw's name is not mentioned in *Ex parte Moore*, Chief Justice Pearson may refer to his murder obliquely. He states that the petitioners' motion was "made at the instance of one who is under arrest for the horrid crime of murder by midnight assassination!"⁷⁴ Moore was the only named petitioner in the opinion, and he was the one who filed the original petition.⁷⁵ Thus, it seems likely he was the petitioner to whom Pearson referred, and the midnight murder that of Outlaw.⁷⁶

Second, testimony elicited at Governor Holden's impeachment trial supports this conclusion. According to two of the Managers' witnesses in Holden's trial, Colonel Kirk's men believed Moore was responsible for Outlaw's murder. Although only two witnesses mention Moore by name, three accounts—those of William Patton, George S. Rogers, and Lucian H. Murray—are included in this discussion, as all three relate to the same night in question. In

⁷³ Olsen, *supra* note 34, at 184. For a more thorough discussion of Outlaw's particular circumstances, see Troxler, *supra* note 15, at 428–29.

⁷⁴ *Ex parte Moore*, 64 N.C. 802, 809 (1870).

⁷⁵ Petition for Writ of Habeas Corpus, *supra* note 23, at 5.

⁷⁶ As noted, Outlaw's murder occurred at about one o'clock in the morning. See *supra* note 1 and accompanying text.

addition to testifying at the impeachment trial, Rogers and Murray submitted affidavits for Moore's case when it came before a federal district court, and both were examined by a United States Senate Committee in connection with the events.⁷⁷ Their testimony is largely consistent across accounts.

The first of the three witnesses, William Patton, testified that he was arrested by a Lieutenant Hunnicutt in 1870 and taken out of town. Colonel Burgen,⁷⁸ Patton said, told him to come to his tent, and when he did, Patton claimed that Burgen "told me that I was a Kuklux, that I was along when Wyatt Outlaw was hung and that I would have to come out and tell what I knew."⁷⁹ Patton said he did not know who was along, and Burgen called him "a God d—d liar."⁸⁰ Burgen then threatened him with a pistol.⁸¹ When that proved unsuccessful, he took Patton outside and allegedly threatened to hang him.⁸² Throughout, Patton insisted he had nothing to confess. Even when Burgen raised the rope, suspending Patton until he fainted, Patton claimed no knowledge of the incident.⁸³

George S. Rogers also claimed he was arrested by Lieutenant Hunnicutt, who cited the Governor's orders as his authority for the arrest.⁸⁴ Hunnicutt brought him to Burgen, who proceeded to interrogate him:

Burgen asked me to come into his tent. I went with him; he asked me if I knew anything about the hanging of Outlaw; I told him I did not, and he told me it was a d—d lie, that I did, and then he asked me if I didn't know that Adolphus Moore hung Outlaw. I told him I didn't know, and he called me a d—d liar again, and he told me to go back to my tent, and said he would give me till ten o'clock that

⁷⁷ Patton testified in the Governor's trial, but does not appear to have submitted an affidavit to the federal district court or come before the Senate.

⁷⁸ Burgen's name is spelled different ways. *See In re Bergen*, 3 F. Cas. 261 (C.C.D.N.C. 1870) (No. 1338). "Burgen," the spelling used in Holden's trial, is the one adopted here.

⁷⁹ Testimony of William Patton, *in* 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 672, 673.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Testimony of George S. Rogers, *in* 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 702, 702.

night to tell about it. I went back in the tent and stayed there until about ten o'clock that night, when he came there and called me out again to his tent, and he told me I must confess who hung Outlaw; he says I know you were one; we know that Adolph Moore and Jim Hunter were others in the party who knew about it. I told him I did not. He said Patton didn't know anything about it until he was hung, and if I didn't tell he would hang me. I told him I didn't know anything about it.⁸⁵

Rogers proceeded to describe how Burgen and his men took him into the woods and threatened to hang him, even going so far as to put the rope around his neck, “pull[ing] the rope until it was fetched tight and choked [him].”⁸⁶ After holding the rope for “about a minute and a half,” Burgen asked Rogers again if he “would tell.”⁸⁷ Rogers insisted he knew nothing, at which point Burgen threatened to shoot him if he “didn't tell.”⁸⁸ Rogers maintained his ignorance, and Burgen let the rope down.⁸⁹ On the way back, Rogers said Burgen told him, “‘I believe you are telling the truth,’ or something that way, and he [Burgen] would do all he could to release me.”⁹⁰ As noted above, Rogers swore to these events on two other occasions, and his testimony is generally consistent across accounts.⁹¹

Lucian H. Murray also testified at the Governor's trial about the same night. Unlike Rogers, his testimony at trial differs notably from the affidavit he submitted to the federal district court judge, Judge Brooks. In his affidavit, Murray describes how he was taken to Burgen's tent, where Burgen told him to “tell him all about the hanging of Wyatt Outlaw.”⁹² Murray, like

⁸⁵ *Id.*

⁸⁶ *Id.* at 703.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ He submitted an affidavit in Moore's federal district court case. See Affidavit of George S. Rogers, *In re Moore* (D.N.C. 1870), reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 85, reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 71. Rogers' testimony in the Governor's trial was more detailed than his affidavit, which is why the excerpted text that appears above was taken from his trial testimony, as opposed to the affidavit. Rogers was also examined by the United States Senate in relation to Klan activity in the southern states. Examination of George S. Rogers, in S. REP. NO. 42-1, at 306, 311–12 (1871).

⁹² Affidavit of Lucian H. Murray, *In re Moore* (D.N.C. 1870), reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 85, reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 67, 68.

Rogers, insisted he knew nothing about that.⁹³ Then Burgen said, “‘it is a damned lie, I know that you do,’ and [Burgen] proceeded to say, that there was an affidavit filed in his office against this affiant, stating that he, this affiant, had seen Outlaw hanged by one Adolphus Moore.”⁹⁴ Burgen then brought up Patton and Rogers, who, he said, “‘knew nothing about it till they were hung up, and they could then tell all about it, and you must do the same.’”⁹⁵ Like Rogers, Murray was then briefly hung on a tree and threatened with death.⁹⁶ He repeated his ignorance throughout the ordeal, and Burgen ultimately returned Murray to his tent.⁹⁷

Murray’s testimony at the Governor’s impeachment trial is different in several key respects.⁹⁸ His initial discussion with Burgen is much less confrontational, and he is more cooperative: Burgen “said that he had nothing against me [Murray] only as a witness, and he asked me in regard to the Kuklux being in town on the night Wyatt Outlaw was hung, and I told him all I knew about it.”⁹⁹ Instead of professing his ignorance of events, as he claimed to have done in his affidavit,¹⁰⁰ Murray said he described his recollections of the night in question to Burgen as requested.¹⁰¹ It was only then that Burgen grew angry, insisting he knew more.¹⁰² After this point in his testimony, Murray’s recollections line up more closely with his affidavit

⁹³ *Id.*

⁹⁴ *Id.* I attempted to find out the identity of the mysterious affiant, to no avail.

⁹⁵ *Id.* Based on Burgen’s alleged mentions of Patton and Rogers, it seems likely both had already been questioned by this point.

⁹⁶ *Id.* at 68–69.

⁹⁷ *Id.* at 69.

⁹⁸ One can speculate as to why this was the case. Maybe Murray remembered events differently by the time of the impeachment trial. Maybe the official, inquisitorial nature of the proceedings encouraged him to reveal an attempt at cooperation that he felt uncomfortable admitting to the conservative lawyers in his affidavit. It is impossible to know, but the important point for purposes of this paper remains the same across his accounts: Moore was the man that Burgen and his men believed responsible for Outlaw’s death.

⁹⁹ Testimony of Lucien H. Murray, *reprinted in* 1 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 660, 661.

¹⁰⁰ Affidavit of Lucian H. Murray, *supra* note 92, at 68.

¹⁰¹ Testimony of Lucien H. Murray, *supra* note 99, at 660–61.

¹⁰² *Id.* at 661.

statements,¹⁰³ although his denials of knowledge are slightly more specific in the trial testimony.¹⁰⁴ Murray's testimony before the Senate Committee generally comports with his affidavit statements and testimony at the Governor's trial, though it is closer to the latter than the former.¹⁰⁵

Patton, Rogers, and Murray were all called as witnesses for the Managers. The point of their testimony was, presumably, to highlight the brutality exercised by Colonel Kirk and his men during the period in which the writ was suspended. However, Rogers's and Murray's testimony serves an additional purpose; it demonstrates that Burgen and his men believed Moore was responsible for Outlaw's death.

It is possible, of course, that the three men's accounts were fabricated, as Burgen himself claimed.¹⁰⁶ The similarity of the accounts arguably decreases their credibility. If the accounts were fabricated, one might imagine they would all be predicated on a similar template, and all of the accounts have pivotal details in common. In each account, Burgen confronted each man. He asked them about Outlaw's murder. When each professed ignorance, he called each a "damned liar," or said his denial was a "damned lie." He then proceeded to hang each from a tree, stringing each up and then taking each down. These similarities could thus be seen as evidence of fabrication.

¹⁰³ Certain distinctive details are the same. For example, in both the affidavit, Affidavit of Lucian H. Murray, *supra* note 92, at 67–68, and the trial testimony, Testimony of Lucien H. Murray, *supra* note 99, at 661, Murray says that around one o'clock, Burgen came to his tent with a candle. In both the affidavit, Affidavit of Lucian H. Murray, *supra* note 92, at 68, and the trial testimony, Testimony of Lucien H. Murray, *supra* note 99, at 661, Murray asked if he could get his shoes, and Burgen replied that he would not need them for long.

¹⁰⁴ See Testimony of Lucien H. Murray, *supra* note 99, at 662 ("[Burgen] asked me if I did not see Adolph Moore tie the rope around Wyatt's neck. I told him that I didn't see anybody I could recognize that night.").

¹⁰⁵ Examination of Lucien H. Murray, *in* S. REP. NO. 42-1, at 316, 320–21. Murray did admit that he was "partly" a member of the Constitutional Union Guards. Josiah Turner, Jr., in his testimony, claimed that Patton, Murray, and Rogers all confessed to him that they were members of the Klan. Examination of Josiah Turner, Jr., *in* S. REP. NO. 42-1, at 349, 367 (1871).

¹⁰⁶ Examination of George B. Bergen, *in* S. REP. NO. 42-1, at 150, 151 (1871).

If the point of the witnesses' testimony was to cast Governor Holden's men in a bad light, however, that was certainly achievable without reference to Moore; simply describing the hangings would suffice. There does not appear to be a logical reason to have the men name Moore in their testimony if it was fabricated.¹⁰⁷ Thus, it seems likely that Moore was considered a strong suspect for Outlaw's killer.

Moore managed to avoid being legally labeled as such. Being considered the man responsible for Outlaw's death, however, likely caused its own problems. Wyatt Outlaw was an important political figure in Alamance County.¹⁰⁸ He was the Town Commissioner of Graham, which is located within Alamance County, at the time of his death, and he was the organizer of the Alamance County Loyal Republican League.¹⁰⁹ As Town Commissioner, he participated in armed night patrols organized in response to Klan attacks within Graham.¹¹⁰ As organizer of the local League, he played an important role in local politics outside of his elected position.¹¹¹ The stated purpose of the League varied; it was said that it was created to build a church and a school in Graham, or to help voters have the courage to vote.¹¹² While its influence throughout the state was debatable, within Alamance County the League was apparently a powerful force.¹¹³

¹⁰⁷ The only possible reason for inclusion of Moore's name, it seems, would be to demonstrate that the Governor and his lieutenants already had a man in mind for the crime, i.e. they decided Moore was the guilty party without a proper investigation. If this were the point of the testimony, however, it seems likely that the Managers' lawyers, at least, would have raised this issue in the Governor's impeachment trial, which they did not.

¹⁰⁸ Outlaw's prominent political activities have been extensively catalogued in other sources, and this paper does not attempt an exhaustive study of such. The most careful study is found in Professor Troxler's article. Troxler, *supra* note 15.

¹⁰⁹ Troxler, *supra* note 15, at 416; *see also* NELSON, *supra* note 12, at 102 ("Outlaw first organized the Alamance chapter of the Loyal Republican League.").

¹¹⁰ Troxler, *supra* note 15, at 416.

¹¹¹ *Id.*

¹¹² *Id.* A detailed discussion of the League and its practices, which is beyond the scope of this Paper, can be found in NELSON, *supra* note 12, at 95–114.

¹¹³ *See* NELSON, *supra* note 12, at 103–05 (linking the League to the North Carolina Railroad, and noting that "[e]lsewhere, the activities of the Loyal Republican League might have received little notice from white southerners, but the workers on the NCRR in Alamance [who were League members] were both powerful and irreplaceable").

Although a detailed analysis of the popular perception of Outlaw and his murder is outside the scope of this paper, a short recitation of anecdotal evidence is illustrative. In Governor Holden’s trial, for example, one witness, after stating that Outlaw belonged to the Republican party, was asked whether Outlaw was looked to as a leader among them.¹¹⁴ The witness replied that he understood that Outlaw “was the president or leader.”¹¹⁵ “Of the republican party?” the lawyer asked.¹¹⁶ “Of the colored people,” the man replied.¹¹⁷

Outlaw’s murder was discussed so extensively during the Governor’s trial that one of the Managers’ lawyers actually protested.¹¹⁸ Mr. Boyden, one of the Governor’s lawyers, asked the witness, James E. Boyd—an admitted member of the Constitutional Union Guard, which was one of the local groups loosely associated with the Klan—if he had “any knowledge touching the death or murder of Outlaw.”¹¹⁹ Before the witness could answer, Mr. Merrimon, a lawyer for the Managers, interjected:

I beg to say, Mr. Chief Justice and senators, that the death of Outlaw has been gone over at least twenty times The parties charged with that murder are not upon trial here. What the other side want to show is that a particular offense has been committed. The effort has been to show that this man Outlaw was hanged by disguised men, and I think at least twenty witnesses have proved that fact.¹²⁰

Clearly, Outlaw was an important figure in Alamance County, and his death had significance. Yet as the next Part shows, he was almost entirely absent from the legal record, and as Part IV argues, that absence shaped the historical record in important ways.

¹¹⁴ Testimony of John R. Fonvielle, in 2 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 1184,

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ There does not appear to have been a specific legal objection. The lawyer simply stated, “I submit, therefore, whether it is worth while to consume the time of the court in going on with a matter that has been so fully testified to already.” Testimony of James E. Boyd, in 2 TRIAL OF WILLIAM W. HOLDEN, *supra* note 1, at 1580, 1590. The murder is more visible during the impeachment trial than the habeas cases because of the legal treatment afforded the issues. In *Ex parte Moore*, Chief Justice Pearson found that the judiciary was not entitled to question the Governor’s decision to declare Alamance County to be in a state of insurrection, while at the impeachment trial, the appropriateness of that declaration was a central issue. See *supra* notes 44–45 and accompanying text.

¹¹⁹ Testimony of James E. Boyd, *supra* note 118, at 1590.

¹²⁰ *Id.*

III. THE LEGAL PROCEEDINGS: *EX PARTE MOORE*.

Ex parte Moore opens with a description of events: it states that Moore and his three co-petitioners, all citizens of Alamance County, applied to Chief Justice Pearson for writs of habeas corpus on July 16, 1870.¹²¹ Pearson issued the writs, which were returned on July 18 with an affidavit describing the affiant's unsuccessful attempt to serve them on Colonel Kirk.¹²² According to the affiant, Kirk looked at the writs but dismissed them, stating that they were "played out."¹²³ He had orders from Governor Holden to ignore "such papers," and he would only surrender his prisoners upon the Governor's orders.¹²⁴

Pearson proceeded to contact the Governor, and the resulting correspondence, which is included in the opinion, adds critical context to the proceedings. Pearson himself considered it important enough to take legal notice of it,¹²⁵ a decision to which the petitioners' counsel objected.¹²⁶ In his letter to the Governor, Pearson asked him to confirm that Colonel Kirk made the arrests on his (Governor Holden's) orders.¹²⁷ The Chief Justice noted that he did "not feel at liberty to assume the fact that he [Kirk] acted under your orders, from the conversation set out in the affidavits," which he included in the letter along with the four writs of habeas corpus.¹²⁸

Governor Holden's reply did more than confirm the affidavits' allegations. It presented his view of the situation as it stood in Alamance County, and his justifications for declaring the

¹²¹ *Ex parte Moore*, 64 N.C. 802, 802 (1870).

¹²² *Id.*

¹²³ Affidavit of A.C. McAllister, *reprinted in Ex parte Moore*, 64 N.C. at 802, 802.

¹²⁴ *Id.*

¹²⁵ *See Ex parte Moore*, 64 N.C. at 806 ("In my opinion [the correspondence] forms a part of the proceeding to the extent of the avowal of the orders given to Col. Kirk, (that is in direct response to my inquiry,) and of the fact that in the exercise of the power conferred on him, he had declared the County of Alamance to be in a state of insurrection—taken military possession and ordered the arrest and detention of the petitioner, as a *military* prisoner; the action of his Excellency is relevant, for, if the privilege of the writ of *habeas corpus* be suspended, the writ now sued for ought not to be awarded.").

¹²⁶ *See id.* ("It was insisted by the counsel of the prisoner that the Governor's reply is no part of this proceeding, and cannot be noticed.").

¹²⁷ Letter from R.M. Pearson, Chief Justice, N.C. Supreme Court, to W.W. Holden, Governor, N.C. (July 18, 1870), *reprinted in Ex parte Moore*, 64 N.C. at 803, 803.

¹²⁸ *Id.*

county to be in a state of insurrection. He began by admitting that Kirk acted under his orders, both in detaining the arrestees and in refusing to deliver them to courts upon service of the writ.¹²⁹ He then explained the formation of “a dangerous secret insurrection” in the state, one formed “under the guidance of bad and disloyal men.”¹³⁰ Imposition of martial law was his response to that “secret insurrection,” and it was not a measure he appeared to undertake lightly. He told the Chief Justice, “I have invoked public opinion to aid me in suppressing this treason! I have issued proclamation after proclamation to the people of the State to break up these unlawful combinations! I have brought to bear every civil power to restore peace and order, but all in vain!”¹³¹ As the Governor stated, “civil government was crumbling around me. I determined to nip this new treason in the bud.”¹³²

Governor Holden was well aware of his audience, and he followed this impassioned argument with a more legalistic one. He explicitly mentioned the legal basis for his authority, stating that “[b]y virtue of the power vested in me by the [State] Constitution and laws, and by that inherent right of self-preservation which belongs to all governments, I have proclaimed the county of Alamance in a state of insurrection.”¹³³ The constitutional provision he cited stated that “[t]he Governor shall be Commander-in-Chief, and have power to call out the Militia to execute the law, suppress riots or insurrection, and to repel invasion.”¹³⁴ The “law” to which he referred expounded upon that constitutional principle:

The General Assembly of North Carolina do enact, That the governor is hereby authorized and empowered, whenever in his judgment the civil authorities in any county are unable to protect its citizens in the enjoyment of life and property, to declare such county to be in a state of insurrection, and to call into active service

¹²⁹ Letter from W.W. Holden, Governor, N.C., to Richmond M. Pearson, Chief Justice, N.C. Supreme Court (July 19, 1870), reprinted in *Ex parte Moore*, 64 N.C. at 804, 804.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ N.C. CONST. art. XII, § 3 (1870).

the militia of the state to such an extent as may become necessary to suppress such insurrection; and in such case the governor is further authorized to call upon the president for such assistance, if any, as in his judgment may be necessary to enforce the law.”¹³⁵

It was not only the laws upon which the Governor relied, however. He added that he was “satisfied that the public interest requires that these military prisoners shall not be delivered up to the civil power.”¹³⁶ In closing he expressed his hope that the situation in Alamance would improve, allowing him to restore the civil law.¹³⁷

The letters were read before the court, as were several relevant proclamations,¹³⁸ after which the court heard argument.¹³⁹ The petitioners’ counsel moved that the court issue a writ of attachment—which allowed for the legal seizure of persons in contempt¹⁴⁰—against Kirk “for failing to make return to the writs,” and it moved the court to issue a writ requiring delivery of the arrestees to the Chief Justice.¹⁴¹ The opinion says simply that “[t]hese motions were debated *pro* and *con*, by the counsel for the petitioners and for the Governor, above named.”¹⁴² The

¹³⁵ PUBLIC LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT ITS SESSION 1869-’70, at 64–65 (Raleigh, Jo. W. Holden 1870).

¹³⁶ *Ex parte Moore*, 64 N.C. at 804.

¹³⁷ *Id.* at 805.

¹³⁸ *Id.* The proclamations read were presumably those included in Battle’s *Habeas Corpus Proceedings*. See HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 12–26 (reprinting several proclamations). The proclamations included in the *Proceedings* are discussed in Part I, *supra*.

¹³⁹ Chief Justice Pearson formulated four questions for the lawyers preceding the argument, noting that “the object of argument is to aid me in forming an opinion on [these] four questions of law.” *Ex parte Moore*, 64 N.C. at 805. The first question asked whether Kirk had “reasonable excuse” for refusing to surrender his prisoners, “so as to release him from the powers and penalties of an attachment.” *Id.* Attachment is the process by which property or a person is legally seized. “Attachment,” BLACK’S LAW DICTIONARY (9th ed. 2009). The second question asked whether there were facts sufficient to support the Governor’s decision to declare Alamance County in a state of insurrection, “and a condition of things putting the lives and property of our citizens in such imminent peril as to suspend the writ of *habeas corpus* in the Counties subject to military occupation.” *Ex parte Moore*, 64 N.C. at 805. The third question asked whether, in light of the dire situation, the habeas acts should be construed as “subservient to that clause of the Constitution, which confers power on the Governor to call out the militia to suppress riots and insurrection.” *Id.* Assuming this was the case, the fourth question asked whether the writ should properly be directed at the *Governor*. *Id.*

¹⁴⁰ “Attachment,” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁴¹ *Ex parte Moore*, 64 N.C. at 805–06.

¹⁴² *Id.* at 806.

petitioners' arguments are partially preserved, however, in the *Habeas Corpus Proceedings*,¹⁴³ the most exhaustive collection of materials pertaining to the three habeas corpus cases. The *Proceedings* were prepared by the same William H. Battle who argued on behalf of the arrestees.¹⁴⁴ Although his arguments are included in the *Proceedings*, his opposing counsel's arguments are not.¹⁴⁵

Battle began by arguing that attachment against Kirk was warranted based on an 1869 statute requiring courts to issue writs of attachment against people or officers duly served with writs of habeas corpus.¹⁴⁶ Battle contended that Kirk had failed to show "sufficient excuse for his neglect and refusal" to bring the arrestees before the court as required by the statute.¹⁴⁷ It did not matter, Battle said, that Kirk was acting under the Governor's orders; Kirk "had the prisoner in his custody, and he is the proper person to whom the writ should have been directed, and he must

¹⁴³ HABEAS CORPUS PROCEEDINGS, *supra* note 2.

¹⁴⁴ As discussed below, it does not seem likely that Battle's arguments were reproduced verbatim from the speeches he gave in court. *See infra* note 177 and accompanying text. Nonetheless, their substance appears to match up with the discussion of the petitioners' positions in the opinion, and they are likely relatively accurate.

¹⁴⁵ It is impossible to know whether or not this was a calculated move on Battle's part. The Governor's counsel's arguments in *Moore* are not the only ones excluded; Battle similarly does not include some of the arguments of other lawyers on his side. He says at one point, following his reproduction of his argument before Chief Justice Pearson in *Ex parte Moore*, "Messrs. Graham, Merrimon and Moore followed on the same [the arrestees'] side. . . . The arguments of all these gentlemen were very elaborate and able, and the writer regrets that all his efforts to procure copies of them for publication have been made in vain." HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 30–31.

¹⁴⁶ The statutory text and Battle's preface to the argument are worth repeating:

The first of these motions is founded upon the Act of 1868-'69, ch. 116, sec. 15, which declares that "if the person or officer, on whom any writ of *habeas corpus* shall have been duly served, shall refuse or neglect to obey the same by producing the body of the party named, or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse be shown for such refusal or neglect, it shall be the duty of the Court or Judge, before whom the writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the Sheriff of any county within this State, and commanding him forthwith to apprehend such person or officer, and bring him immediately before such Court or Judge," &c.

HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 27. Battle's reproduction appears to be a faithful one. *See* PUBLIC LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION 1868-'69, at 296 (Raleigh, M.S. Littlefield 1869) (repeating identical text, minus one comma following "shall refuse or neglect to obey the same," with the same chapter and section numbers). Based on the statutory language, it seemed that issuance of the writ was mandatory once the prerequisites were met. The statute, as quoted by Battle, says that "it shall by the Duty of the Court of Judge, before whom the writ shall have been made returnable . . . to issue an attachment against such person or officer." HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 27 (emphasis added).

¹⁴⁷ HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 27.

obey it by making a proper return to it.”¹⁴⁸ Battle argued that for Kirk to take advantage of the “excuse” provision he needed to answer the court in writing, citing a habeas treatise, as opposed to the state acts, for the proposition.¹⁴⁹

Next, Battle directed the court’s attention to separate provisions of the 1869 acts giving courts discretion to force the delivery of the bodies by enlisting the aid of local officers.¹⁵⁰ These provisions, Battle claimed, demonstrated the importance of delivery of the body to the law.¹⁵¹ He cited the scope of courts’ jurisdiction in habeas cases to provide further support for his argument: “Without the presence of the prisoner, the Court or Judge has no power to do anything except to enquire into the reasons assigned for the non-production, and to take the necessary steps for enforcing the production of the body, where the reasons given for the non-production are unsatisfactory.”¹⁵² That was the extent of the court’s power: the ability to claim the body.¹⁵³ The court could not allow the Governor to intercede because the Governor was not before it, and it

¹⁴⁸ *Id.* at 27–28.

¹⁴⁹ *Id.* at 28. The habeas treatise cited was “*Hurd on Habeas Corpus*,” which stated that the proper means of return was a written statement *or* an excuse—specifically, “the reasons for not producing [the prisoner].” *See id.* It did not state that the excuse had to be made in writing. *See id.* Battle seemed to be implying that the first option for a return, the written statement, has a writing requirement that applies to the excuse provision as well.

¹⁵⁰ In Battle’s own words:

The second motion which we make, is based upon the 17th section of the Act to which I have already referred. It provides that [“]the Court or Judge, by whom any such attachment may be issued, may also at the same time, or afterwards, direct a precept to any Sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith, before such Court or Judge, the party, wherever to be found, for whose benefit the writ of *habeas corpus* shall have been granted.” The next section of the same act authorises the person to whom such precept shall be directed to call to his aid, if necessary, the *posse comitatus*, as in all other cases where the power of the county may be called out.

Id. Again, Battle’s reproduction of the statutory text appears correct based on review of the actual statutory compilation. PUBLIC LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION 1868-’69, *supra* note 146, at 297.

¹⁵¹ HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 28.

¹⁵² *Id.* at 29.

¹⁵³ *See id.* at 30 (“The only thing which your Honor can do, is to order the issuing of the precept to compel the production of the prisoner.”).

could not consider Kirk’s oral statements to the affiant because they were not an “excuse” in writing.¹⁵⁴

As noted, the arguments for the Governor’s side are not included in the *Habeas Corpus Proceedings*. However, they are mentioned in the court’s opinion.¹⁵⁵ Richard C. Badger, counsel for Governor Holden, argued that the Governor’s actions were in accordance with the State Constitution and the related statute.¹⁵⁶ First, Badger cited the provision of the State Constitution which stated that “[t]he Governor shall be Commander-in-Chief, and have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion.”¹⁵⁷ That provision, he argued, “empower[ed] the Governor to declare a County to be in a state of insurrection, whenever, in *his judgment*, the civil authorities are unable to protect its citizens in the enjoyment of life and property.”¹⁵⁸ This the Governor had done, Badger argued, and his decision was insulated from judicial review.¹⁵⁹

Second, Badger argued that the Constitution and the statute gave the Governor “all the powers ‘necessary’ to suppress the insurrection,” and that suspension of the writ of habeas corpus to detain Moore and his co-petitioners as military prisoners was, in fact, a necessity.¹⁶⁰ “[F]or unlike other insurrections, it is not open resistance, but a novel kind of insurrection, seeking to effect its purpose by a secret association spread over the country, by scourging, and by

¹⁵⁴ *Id.*

¹⁵⁵ While the newspapers, discussed *infra*, covered the trials, Badger’s argument was not reproduced. The *Daily Standard* stated, in reference to the habeas corpus cases, that “R.C. Badger, Esq., . . . made a most able argument, which will appear in our next. Both the court and the listeners regard it as a fine and impressive effort.” *The Habeas Corpus Cases Before His Honor Chief Justice Pearson*, THE DAILY STANDARD, July 21, 1870. However, Badger’s argument does not subsequently appear in the paper.

¹⁵⁶ The text of the statute is quoted above. See *supra* note 135 and accompanying text.

¹⁵⁷ *Ex parte Moore*, 64 N.C. 802, 807 (1870) (citing N.C. CONST. art. XII, § 3).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

other crimes committed in the dark, and evading the civil authorities, by masks and fraud, perjury and intimidation.”¹⁶¹

Having made their case, the lawyers retired and Chief Justice Pearson proceeded to give his opinion. He began by formulating the primary question as such: “Does the fact that the Governor has declared the County of Alamance to be in a state of insurrection, and has taken military possession, have the legal effect to suspend the writ of *habeas corpus* in that County?”¹⁶² If this was the case, “the prisoner takes nothing by either motion; if otherwise, it will become necessary to give them further consideration.”¹⁶³

Interestingly, the opinion responds directly to Badger’s arguments; Battle’s are hardly mentioned. Pearson agreed with Badger that “full faith and credit are due to the action of the Governor in this matter, because he is the competent authority, acting in pursuance of the constitution and the law.”¹⁶⁴ The judiciary’s role was limited to a determination of the extent of the Governor’s powers.¹⁶⁵ Pearson disagreed, however, with Badger’s second point. The means used to suppress the insurrection, he held, must be “*proper*, as well as necessary, and the *detention* of the petitioner as a military prisoner, is not a proper means.”¹⁶⁶ It was not proper because it violated the State Constitution, which stated that “[t]he privilege of the writ of *habeas corpus*, shall not be suspended.”¹⁶⁷

Moore thus held that Governor Holden was authorized to declare Alamance in a state of insurrection, but he lacked the authority to suspend the writ of *habeas corpus* under the State

¹⁶¹ *Id.*

¹⁶² *Id.* at 806.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 807–08 (citing N.C. CONST. art. I, § 21).

Constitution.¹⁶⁸ At first blush, this seems like a victory for the petitioners. However, the opinion continued. Though Pearson found that he possessed the power to declare the Governor's actions, along with those of the legislature in passing the act granting the Governor power to declare counties in a state of insurrection, void under the State Constitution, he declined to do so.¹⁶⁹ "Having conceded full faith and credit to the action of his Excellency, within the scope of the power conferred on him," Pearson stated, "I feel assured he will in like manner give due observance to the law as announced by the judiciary."¹⁷⁰

The opinion then dealt summarily with the petitioners' motion for Kirk's attachment. Pearson did not comment on the form of Kirk's reply, which Battle found so important. Instead, he took a practical approach: "So we have this case: Col. Kirk is commanded by the Chief Justice to produce the body. He is ordered by his commander-in-chief not to obey the writ. What was the man to do? He elected to obey his orders," and that was sufficient excuse under the law.¹⁷¹ The act cited by the petitioners, he explained, was not designed to punish those who refused to make return upon the writs, but to compel them to make the proper return.¹⁷² The petitioners' motion was denied.¹⁷³

Pearson finally considered whether the court should order a sheriff to bring the petitioners before him under the state habeas acts,¹⁷⁴ as Battle had argued.¹⁷⁵ The Chief Justice, noting the act's discretionary language, decided not to give the power to enforce the writs—to which, he held, the petitioners were entitled—to a sheriff, citing the potential for civil war. As Chief Justice Pearson explained,

¹⁶⁸ *Id.* at 808.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 809.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 810.

¹⁷⁵ *See supra* note 150 and accompanying text.

[i]n the present condition of things, the counties of Alamance and Caswell being declared in a state of insurrection, and occupied by military forces, and the public mind feverishly excited; it is highly probable, nay, in my opinion, certain, that a writ in the hands of a sheriff (with authority to call out the power of the county,) by which he is commanded, with force if necessary, to take the petitioner out of the hands of the military authorities, will plunge the whole State into civil war.¹⁷⁶

An unnamed lawyer for the petitioners responded to this concern in colorful language: “‘if in the assertion of civil liberty, war comes, let it come! The blood will not be on your hands, or on ours; it will be on all who disregard the sacred writ of habeas corpus. Let justice be done if the heavens fall.’”¹⁷⁷ Apparently, the unnamed lawyer was rather young, and the Chief Justice was unimpressed. He responded to the lawyer’s plea as follows:

It would be to act with the impetuosity of youth, and not with the calmness of age, to listen to such counsels. “Let justice be done if the heaven falls,” is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the Judiciary be exhausted; but I would forfeit all claim to prudence tempered with firmness, should I, without absolute necessity, add fuel to the flame, and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates, if justice can be done, “let heaven stand.”¹⁷⁸

Chief Justice Pearson likewise declined to give the power to collect the petitioners to men summoned from the counties currently in a state of insurrection for the same reasons.¹⁷⁹ Instead

¹⁷⁶ *Ex parte Moore*, 64 N.C. at 810.

¹⁷⁷ *Id.* Quotation of this passage has additional value. The Chief Justice noted that the phrase was “quoted by every one of the five learned counsel.” *Id.* (emphasis added). Presumably, Pearson meant the petitioner’s counsel, yet this phrase does not appear in Battle’s reproduction of his argument. This likely confirms the commonsense conclusion that Battle’s argument was not reproduced verbatim in the *Habeas Corpus Proceedings*, but written after the fact for posterity.

¹⁷⁸ *Id.* at 811.

¹⁷⁹ The legal arguments on this point are complex, and a full discussion is outside the scope of this paper. Battle and his co-counsel argued that Pearson should invoke the *posse comitatus* power. *Id.* at 811. That power “refers to the common law power of a county sheriff to summon a ‘posse’—consisting of any able-bodied person over the age of fifteen years—to assist him in keeping the peace, pursuing and arresting felons, and suppressing riots.” Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 389 (2003). As Pearson explained, “[t]he power of the county, or ‘posse comitatus,’ means the men of the county in which the writ is to be executed.” *Ex parte Moore*, 64 N.C. at 811. In this case, that meant Caswell County, which was currently in a state of insurrection. All men summoned to the posse must come from Caswell, “the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ?” *Id.* The Chief Justice considered it impractical to summon men from Caswell to do the job, as “that county is declared to be in a state of insurrection. Shall *insurgents* be called out by the person who is to execute the writ, to join in conflict with the military forces of the State?” *Id.* He also

of invoking his powers to enforce return on the writ, he relied on Governor Holden's discretion, sending copies of the writ to the Governor.¹⁸⁰ "I have discharged my duty," Pearson said.¹⁸¹ "[T]he power of the Judiciary is exhausted, and the responsibility must rest on the Executive."¹⁸²

Governor Holden's response to the chief justice's entreaty is included in the opinion. The Governor reiterated his concerns about Klan activities, his unsuccessful attempts to thwart those activities using peaceable means, and his determination that the continued imposition of martial law was required by the severity of the situation.¹⁸³ The petitioners then moved for an attachment against the Governor—or if not against him, against Kirk—and execution of the writs, by their delivery to Colonel Kirk.¹⁸⁴ Chief Justice Pearson held that he lacked the power under the habeas corpus acts to arrest the Governor, and that he had already adjudicated the issues surrounding the proposed attachment of Kirk.¹⁸⁵ He further concluded it would be pointless to serve the writs on Kirk, as he was still acting under the Governor's orders.¹⁸⁶ The petitioners' only recourse, Pearson suggested, was to apply to the Chief Justice of the United States Supreme Court.¹⁸⁷

The petitioners chose a different route. Moore and his co-petitioners, along with the Caswell County petitioners in the companion case, *Ex parte Kerr*, brought their claims before the federal district court.¹⁸⁸ The change of forum, from state court to federal, raised a host of issues outside the scope of this paper. The outcome, nonetheless, is worth noting. The federal court found it had jurisdiction to hear the case, and after considering the issues it released the

considered the issue in light of separation of powers: "[T]he whole physical power of the State is by the Constitution under the control of the Governor. The Judiciary has only a moral power. By the theory of the Constitution there can be no conflict between these two branches of the government." *Id.*

¹⁸⁰ *Ex parte Moore*, 64 N.C. at 811.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Letter from W.W. Holden, Governor, N.C., to R.M. Pearson, Chief Justice, N.C. Supreme Court, *supra* note 12, at 812–15.

¹⁸⁴ *Ex parte Moore*, 64 N.C. at 815.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *In re Moore* (D.N.C. 1870), reprinted in *HABEAS CORPUS PROCEEDINGS*, *supra* note 2, at 85, 85.

petitioners in late August,¹⁸⁹ having determined that the Fourteenth Amendment applied and prohibited their arrests.¹⁹⁰ Outlaw's alleged killers and likely Klan members roamed the streets again.

IV. *EX PARTE MOORE* AND WYATT OUTLAW'S ROLE IN HISTORY.

As noted in Part III, Wyatt Outlaw's name does not appear in *Ex parte Moore*, even though that was the closest his alleged killers came to a criminal trial. Part of that was due to the structure of the legal proceedings. Moore came before the court on petition for a writ of habeas corpus, not as a criminal defendant, and his supposed crimes did not enter the record. As an initial matter, this says something about the Klan's hold on North Carolina. Despite Governor Holden's attempts to secure the lawful arrest of Moore and his co-petitioners based on probable cause, he was forced to suspend the writ of habeas corpus to effect their arrests. This was likely due, in part, to the Klan's harsh reprisals against those who broke ranks.¹⁹¹

But the form of the proceedings is relevant in other respects, too. The nature of the cases does more than inform our understanding of the Klan's role in Reconstruction North Carolina. This paper argues that it shaped the public debate in ways that redirected its focus, turning it from the actual crimes underlying the habeas petitions to more abstract concepts of federalism separation of powers, and personal liberty. The coverage of the cases in the local newspapers demonstrates as much. This paper examines the coverage of Outlaw's trial in three newspapers: the conservative *Daily Sentinel*,¹⁹² the Republican (liberal) *Daily Standard*,¹⁹³ and the more moderate, but still conservative-leaning, *Old North State*.

¹⁸⁹ The date of the prisoners' release is subject to some uncertainty. See *supra* note 27 and accompanying text.

¹⁹⁰ See *In re Moore*, reprinted in HABEAS CORPUS PROCEEDINGS, *supra* note 2, at 103–05.

¹⁹¹ See *supra* note 33 and accompanying text.

¹⁹² The *Daily Sentinel* has quite the reputation. See Stephen E. Massengill, *The Detectives of William W. Holden, 1869–1870*, 62 N.C HIST. REV. 448, 459 (1985) (“Disorders, such as those in Alamance County, were fueled by the inflammatory editorials of the Raleigh *Sentinel*, the leading Conservative organ in the state. The editor of the

The *Daily Standard* devoted the most time to Outlaw's murder. It published the letter sent to Governor Holden informing him of the murder,¹⁹⁴ and expressed outrage at the attack: "How long is this state of things to continue? How long are inoffensive citizens to be butchered in cold blood? Do the murderers think that they can always pursue their bloody career unmolested?"¹⁹⁵ The *Standard* demanded protection for the people, and "urge[d] the Legislature to take some action which will put a stop to these murders and avert the threatened carnival of crime."¹⁹⁶ Yet after the announcement of his murder, the *Standard* largely avoided any mention of Outlaw. Instead, it shifted to a discussion of the militia,¹⁹⁷ and then the habeas corpus cases.

The *Standard's* analysis of the habeas corpus cases avoided mention of Outlaw. This is, perhaps, unsurprising given the legal structure of the cases. In one article, the paper charged the petitioners' lawyers with "endeavor[ing] to precipitate a conflict, as is well known, between coordinate branches of the government, and a conflict which they expected would lead to arms and further commotion."¹⁹⁸ In another article, the *Standard* performed a relatively close reading of Chief Justice Pearson's opinion in *Ex parte Moore*, praising it as "bold, able and learned, and fully sustain[ing] the high reputation of the distinguished Judge in his palmiest days."¹⁹⁹

The *Standard* did refer obliquely to Outlaw's murder on two occasions after its initial announcement of his death. The first time was in an article published after the federal district court took the habeas cases, when the *Standard* asked, "What has Judge Brooks to do with

Sentinel, Josiah Turner, Jr., played a key role in promoting the KKK conspiracy in North Carolina at the same time he attacked the Republican administration.").

¹⁹³ See *id.* ("[The *Sentinel*] often made bitter allegations against Holden's Republican newspaper, the *North Carolina Standard* (Raleigh), which retaliated in kind.").

¹⁹⁴ Excerpts from the letter are quoted in the Introduction. See *supra* note 1 and accompanying text.

¹⁹⁵ *Another Ku Klux Murder in Alamance*, THE DAILY STANDARD, Mar. 3, 1870.

¹⁹⁶ *Id.*

¹⁹⁷ See *The Militia*, THE DAILY STANDARD, July 7, 1870 ("The necessity of a militia force, armed and equipped, at this time, is apparent to every man who hopes for a speedy dissolution of the murderous Kuklux organization and a secure restoration of perfect peace, quiet and safety to persons and property.").

¹⁹⁸ *Ex-Gov. Bragg and Ex-Judge Battle*, THE DAILY STANDARD, July 23, 1870.

¹⁹⁹ *The Opinion of Judge Pearson*, THE DAILY STANDARD, July 25, 1870.

*murder cases in North Carolina?*²⁰⁰ The second was in an article published following Judge Brooks's release of the habeas prisoners: "WITHOUT HEARING ONE WORD OF TESTIMONY, WITHOUT WAITING ONE MOMENT FOR CONSIDERATION OR INVESTIGATION HE TURNS LOOSE UPON THE STATE A BODY OF MEN CHARGED WITH CRIMES WHICH WOULD PUT TO BLUSH THE DARKEST PAGES OF CRIMINAL HISTORY."²⁰¹ Both instances arguably refer to Outlaw's murder, but neither mentions him by name; thus, even when present, he is obscured from history. In contrast to these two fleeting mentions of Outlaw, the *Standard* covered the federal habeas corpus cases—the ones before Judge Brooks, who inspired such outrage—in excruciating detail.²⁰²

Unsurprisingly, the *Daily Sentinel's* coverage was the sparsest. In lieu of discussing Outlaw's murder, the *Sentinel* lambasted Governor Holden, criticizing his decision to impose martial law:

The first man to resist the law and legal process since the close of the war, is Governor Holden. He has, without the shadow of authority, organized an army of *rioters*, of which he is the head, at a cost to the State of tens of thousands of dollars. The Chief Justice of the State issues a writ of *habeas corpus*, and Holden disobeys and defies this writ by *armed force*, by an army organized for this as well as other unlawful purposes. *This is treason to the State.*²⁰³

Josiah Turner, Jr., the paper's editor, was no fool. He began by painting Holden as the instigator, neatly avoiding any mention of the Klan violence that prompted the Governor's actions. He then cited Governor Holden's lack of authority, characterized his army as "*rioters*," and suggested the

²⁰⁰ *Untitled*, THE DAILY STANDARD, Aug. 8, 1870.

²⁰¹ *Judge Brooks*, THE DAILY STANDARD, Aug. 20, 1870.

²⁰² *The Habeas Corpus Cases Before Judge Brooks*, THE DAILY STANDARD, Aug. 25, 1870; *The Habeas Corpus Cases Before Judge Brooks*, THE DAILY STANDARD, Aug. 26, 1870; *Motions for Bench Warrants Before Judge Brooks*, THE DAILY STANDARD, Aug. 27, 1870.

²⁰³ *Who Resists the Law?*, THE DAILY SENTINEL, July 19, 1870.

entire endeavor would cost the state “tens of thousands of dollars.”²⁰⁴ He concluded by highlighting Holden’s disobedience of the writ of habeas corpus “by *armed force*” and labeling the entire thing treason.

The *Old North State*, the most neutral of the three,²⁰⁵ also has some of the most interesting coverage. In addressing the habeas corpus proceedings, it said: “We have not a word to say in justification of the murderers of Outlaw and Stephens, whoever they may be, nor of any secret political organization whatever. But none of these things at all affect the great principles of civil liberty involved in the recent proceedings.”²⁰⁶ Most interesting, though, was the lengthy article published in the same issue discussing the Fourteenth Amendment:

Many able and patriotic men, whose ideas of government had been formed in the old State Rights school of politics, were prepared, upon the adoption of the 14th Amendment, to bid a final and everlasting adieu to civil liberty in this country.

But a great change has come over the spirit of their dreams. They have lived to learn that the most galling despotism to which a people can be subjected may be inflicted by a State government. They have lived to invoke the very Federal power they so much dreaded to deliver them from oppressions which they little dreamed they would ever encounter at the hands of any State governments.²⁰⁷

The inclusion of this lengthy article alongside coverage of the habeas corpus cases aptly demonstrates how far the focus had shifted from the underlying Klan violence to larger, more abstract issues of federalism, separation of powers, and personal liberty.

²⁰⁴ Or more. In a separate article published in the same issue, the *Sentinel* claimed that Holden’s army “will cost the State more than \$250,000; probably \$500,000. It is said that \$60,000 have already been paid out of the Treasury.” *Make Them Responsible*, THE DAILY SENTINEL, July 19, 1870.

²⁰⁵ Qualifying the *Old North State* as the most neutral of the three is not saying as much as one might expect. One article led with the headline, “THE CIVIL LAW TRIUMPHANT—MILITARY DESPOTISM OVERTHROWN.” *The Civil Law Triumphant—Military Despotism Overthrown*, THE OLD NORTH STATE, Aug. 26, 1870.

²⁰⁶ *The Habeas Corpus Cases—Release of the Prisoners*, THE OLD NORTH STATE, Aug. 26, 1870.

²⁰⁷ “*The Stone Which the Builders Refused, Is Become the Head Stone of the Corner*,” THE OLD NORTH STATE, Aug. 26, 1870.

Finally, the form in which the habeas corpus cases were preserved says much about their lasting impact and the propositions for which they stood. In the preface to the *Habeas Corpus Proceedings*, William H. Battle, the conservative lawyer, stated that:

A full, complete and accurate report of the proceedings in the cases of *habeas corpus* . . . must be interesting to every citizen, not only of this State, but of the whole Union. The principles of personal liberty which the cases involved, are dear to the heart of every free man, and a history of the manner in which they were alleged to have been attached, and of the mode by which they were sought to be vindicated, and of their ultimate establishment upon a firm foundation, must commend itself to the attention of every reader.²⁰⁸

Battle overstates it, perhaps, for obvious reasons—it was his compilation, and he had a vested interest in the cases as counsel for the conservative side. Regardless of his motivations, however, this was the primary form in which the cases were preserved. More importantly, this is how they are most likely to be remembered: as cases about “personal liberty,” not the senseless murder of a local political leader.

CONCLUSION

A murder occurs. Evidence is collected and the guilty party, once identified, is charged with the crime and tried in a court of law before a jury of his peers, who must find him guilty beyond a reasonable doubt. This is how criminal cases are tried; this is the format in which we, as the public, expect to see the legal issues resolved. It was not how Wyatt Outlaw’s murder was resolved, and in fact, Outlaw received no resolution. His likely murderers went unpunished, freed by a court on petitions for writs of habeas corpus. Yet these habeas corpus cases, which resulted in the release of Outlaw’s alleged killers, are the only fully litigated legal response to his murder. In that respect they are a poor substitute for a criminal trial, as the legal structure of the cases preempted any mention of the petitioners’ alleged crimes. Instead, the cases focused on issues of federalism, separation of powers, and personal liberty. In the process, the “outrage” that

²⁰⁸ William H. Battle, *Preface to HABEAS CORPUS PROCEEDINGS*, *supra* note 2, at i.

started it all—Outlaw’s murder—faded from view, permanently affecting the public’s impression of the offenses and the historical record as captured in the local newspapers.

Consequently, the personal liberty of the petitioners was vindicated at the expense of justice for Wyatt Outlaw, the man whose liberty was most dramatically affected. Death, after all, is the ultimate removal of liberty. The results of the habeas corpus cases should give us pause, and force us to think about whether, and to what extent, the law vindicates rights and metes out justice. While personal liberty is indeed important, should it be placed on a pedestal? Should it be set above the rights of men like Outlaw, whose deaths were largely forgotten until they became legally relevant? His murder was not mentioned in the habeas corpus cases. However, his death was critically important for the Governor’s impeachment trial, as it was relevant to whether or not the Governor properly declared Alamance County to be in a state of insurrection, and it was mentioned numerous times in that context.²⁰⁹

The relationship between law and justice is a complex one, and a full examination of its contours is outside the scope of this paper. Nonetheless, it is worth recognizing that the legal response to an incident may not always yield a fair, or just, outcome for all involved. Is it *fair* to elevate the rights of individuals like Moore above the lives of men like Outlaw, at the expense of justice? There are no easy answers, but the questions should be asked, as Outlaw’s murder reminds us.

²⁰⁹ See *supra* note 118 and accompanying text.