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FEDERAL HABEAS CORPUS UNAVAILABLE TO PARENT SEEKING TO
CHALLENGE CONSTITUTIONALITY OF STATE COURT
CUSTODY JUDGMENT

Lehman v. Lycoming County Children's Services Agency, 102 S. Ct.
3231 (1982)

In *Lehman v. Lycoming County Children's Services Agency*,¹ the United States Supreme Court held that federal courts lack habeas corpus jurisdiction² to examine state court procedures³ which involuntarily terminate parental rights and place the children involved under state custodianship.

In 1971 Ms. Lehman voluntarily placed her children in the custody of Lycoming County Children's Services Agency which subsequently placed them in foster homes.⁴ Four years later, while the children were still in state custody,⁵ the Court of Common Pleas of Lycoming County, Pennsylvania, terminated the parental rights of Ms. Lehman on the basis of parental incapacity.⁶ The Pennsylvania Supreme Court

1. 102 S. Ct. 3231 (1982).

2. The federal habeas corpus statutes are codified at 28 U.S.C. §§ 2241-2255 (1976).

3. 28 U.S.C. § 2254(a) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

4. *In re William L.*, 477 Pa. 322, 341-42, 383 A.2d 1228, 1237-38, *cert. denied*, 439 U.S. 880 (1978). Ms. Lehman had five children. The eldest lived with Ms. Lehman's parents. The middle three children were aged 7, 5, and 1 when Ms. Lehman became pregnant for a fifth time. Ms. Lehman placed the three middle children with the Lycoming Agency because she had difficulty in obtaining day care assistance for them. When Ms. Lehman had her fifth child, she selected an apartment that would only accommodate her newborn child. Her three middle children therefore remained in foster care.

5. Three years after the children were placed with the agency, Ms. Lehman requested their return. The agency refused, instructing Ms. Lehman of her legal rights. With the aid of counsel Ms. Lehman petitioned for increased visitation rights. The court of common pleas increased her visitation rights to a bimonthly basis. *In re William L.*, 477 Pa. 322, 342, 383 A.2d 1228, 1238 (1978).

6. *In re William Lehman*, Nos. 2986, 2987, and 2988, (C.P., Lycoming County, Pa. June 3, 1976), *aff'd*, 477 Pa. 322, 383 A.2d 1228, *cert. denied*, 439 U.S. 880 (1978). The Pennsylvania parental incapacity statute provides:

The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied.

Act of July 24, 1970, P.L. 620, § 311(2), 1 P.S. § 311(2) (Supp. 1977). The Pennsylvania statute authorizes the termination of parental rights without a showing of parental misconduct. Ms. Leh-

affirmed.⁷ On further appeal the United States Supreme Court denied certiorari.⁸

Ms. Lehman then sought a writ of habeas corpus in federal district court for the release of her children from state custody. That court denied the writ.⁹ The Third Circuit Court of Appeals affirmed.¹⁰ The Supreme Court granted certiorari,¹¹ affirmed, and *held*: Section 2254 of the federal habeas corpus statutes is unavailable to a parent who challenges the constitutionality of a state statute under which the state obtained custody of the parent's children and involuntarily terminated the parent's rights.

For the last five centuries petitioners have used the writ of habeas corpus ad subjiciendum¹² to test the validity of a restraint or confine-

man challenged the statute on the basis that it was unconstitutionally vague and violative of her substantive due process right to freely associate with her children. After terminating Ms. Lehman's parental rights, the court determined that it was in the children's best interest to remain with the agency pending adoption.

7. *In re William L.*, 477 Pa. 322, 383 A.2d 1228, *cert. denied*, 439 U.S. 880 (1978).

8. *Lehman v. Lycoming County Children's Servs. Agency*, 439 U.S. 880 (1978).

9. *Lehman v. Lycoming County Children's Servs. Agency*, No. 79-65 (M.D. Pa. Sept. 4, 1979) (reprinted in Appendix to Petition for Certiorari at 135a), *aff'd*, 648 F.2d 135 (3d Cir.), *aff'd*, 102 S. Ct. 3231 (1982).

The district court dismissed the petition without a hearing. The court relied on *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103 (1st Cir. 1978). The district court stated that "the custody maintained by the respondent over the three Lehman children is not that type of custody to which the federal habeas corpus remedy may be addressed." Appendix to Petition for Certiorari at 147a. See *infra* notes 57-63 and accompanying text.

10. *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135 (3d Cir.), *aff'd*, 102 S. Ct. 3231 (1982).

This was an en banc rehearing. A panel of the Third Circuit initially had reversed the district court. *Lehman v. Lycoming County Children's Servs. Agency*, No. 79-2466 (3d Cir. July 23, 1980) (reprinted in Appendix to Petition for Certiorari at 91a). The panel that reversed the district court held that "federal habeas corpus jurisdiction may be invoked to challenge the constitutionality of a state statute by which the state has taken custody of children and has terminated without consent the rights of a natural parent to them." Appendix to Petition for Certiorari at 114a.

On rehearing en banc, the Third Circuit affirmed the dismissal of the district court. Judge Garth held that the dispute involved the child's proper custody, not the child's liberty. Such an issue, Judge Garth asserted, was not cognizable under federal habeas corpus jurisdiction. A plurality of four judges held that Ms. Lehman lacked standing to litigate the children's interest. Another judge, Chief Judge Seitz, preferred to await congressional directive. Four judges dissented.

11. 451 U.S. 982 (1981).

12. Black's Law Dictionary defines habeas corpus ad subjiciendum as

[a] writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of habeas corpus writ, the purpose of which is to test the legality of the detention or imprisonment; not whether he is guilty or innocent. . . . This is the well-known remedy in England and the United States for deliverance from illegal confinement, called by Sir William

ment.¹³ Congress has conditioned federal habeas corpus jurisdiction on petitioner's being "in custody."¹⁴ Because the custody requirement is nowhere defined,¹⁵ courts have enjoyed great discretion in considering what the term "in custody" denotes.¹⁶

The Supreme Court initially adopted a literal construction of the term in *Wales v. Whitney*.¹⁷ In *Wales*, the Secretary of the Navy ordered the former Surgeon-General of the United States Navy, Dr. Philip S. Wales, to restrict his movements to Washington, D.C., pending court martial proceedings.¹⁸ On the basis of this restraint on his

Blackstone the most celebrated writ in the English law, and the great and efficacious writ in all manner of illegal confinement.

BLACK'S LAW DICTIONARY 638 (5th ed. 1979). When the words "habeas corpus" are used alone they generally refer to habeas corpus ad subjiciendum.

13. See generally W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS (1884) (asserting similarities between the writ and the Roman interdict *de libero homine exhibendo*); W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) (tracing the common law origin of the writ back to the 13th Century); R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES (1858) (tracing common law history); Jencks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64 (1902) (arguing that habeas was originally employed to place persons in prison).

14. Under 28 U.S.C. § 2241 (1976) the Supreme Court, district courts, and circuit judges can grant writs of habeas corpus in five situations. Custody is a condition for entertaining the writ except in subsection (c)(5) which is the writ of habeas corpus ad testificandum. Section 2241 provides:

- (c) The writ of habeas corpus shall not extend to a prisoner unless—
- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
 - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
 - (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law or nations; or
 - (5) It is necessary to bring him into court to testify or for trial.

Id. For the text of § 2254, see *supra* note 3.

15. W. DUKER, *supra* note 13, at 228; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1072 (1970) [hereinafter cited as *Developments*].

16. See Note, *Habeas Corpus—Custody and Release from Custody Requirements of Habeas Corpus—Viability of McNally v. Hill in the Modern Context*, 65 MICH. L. REV. 172 (1966); *Developments, supra* note 15; *Federal Habeas Corpus Relief Unavailable to Parent in Child Custody Dispute*, 14 SUFFOLK U.L. REV. 337 (1980) [hereinafter cited as *Federal Habeas Corpus*].

17. 114 U.S. 564 (1885).

18. *Id.* at 566. The Secretary of the Navy based the charges on certain "derelictions of duty"

movement Dr. Wales petitioned for his release.¹⁹ The Court, however, denied his petition because Dr. Wales was not “in custody” within the terms of the habeas corpus jurisdictional statute.²⁰ The Court held that a petitioner must show physical restraint or actual confinement to acquire federal habeas corpus relief.²¹ The Surgeon-General failed to make this showing.²²

Courts adhered to this literal construction for eighty years.²³ In *Jones v. Cunningham*²⁴ the Court changed the rule of actual confine-

while the petitioner Dr. Wales was Surgeon-General. At the time the Secretary ordered Dr. Wales to restrain his movements, Dr. Wales was functioning only as the Navy's medical director. *Id.* at 567.

19. *Id.*

20. Habeas Corpus Act, ch. 28, § 1, 14 Stat. 385 (1867). By this statute, Congress first codified the writ into federal law. The language of this statute has remained essentially unchanged and is currently codified at 28 U.S.C. § 2254(a) (1976). *See supra* note 3. The *Lehman* court interpreted this statute in its decision.

21. The Court began its analysis by noting that what constitutes “restraint” raises primarily a question of fact.

There is no very satisfactory definition to be found in the adjudged cases, of the character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

114 U.S. at 571. The order confining Dr. Wales, however, constituted only “moral restraint.” The Court stated that “something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it.” *Id.* at 571-72. The Court reasoned that because Dr. Wales had the power and ability to leave the city and disobey the order, only a moral obligation, not physical restraint, confined him. Only physical seizure by marines or a proper officer, or imprisonment, constituted a “real restraint on liberty” sufficient for the writ. *Id.* at 572.

22. The *Wales* Court stated: “It is obvious that petitioner is under no physical restraint. He walks the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him.” *Id.* at 570.

23. *See, e.g.*, *Parker v. Ellis*, 362 U.S. 574 (1960) (petitioner free after completing sentence not “in custody”); *Zimmerman v. Walker*, 319 U.S. 744 (1943) (petitioner free after unconditional release not “in custody”); *Tornello v. Hodspeth*, 318 U.S. 792 (1943) (petitioner free after pardon not “in custody”); *Weber v. Squier*, 315 U.S. 810 (1942) (petitioner free on parole not “in custody”); *Stallings v. Spain*, 253 U.S. 339 (1920) (petitioner free on bail not “in custody”); *Johnson v. Hoy*, 227 U.S. 245 (1913) (petitioner free on bond not “in custody”); *Ex parte Baez*, 177 U.S. 378 (1900) (petitioner whose restraint would end before return of the writ not “in custody”).

24. 371 U.S. 236 (1963). For in depth discussions of *Jones*, see Note, *Custody Requirement for Habeas Corpus Relief in the Federal Courts*, 51 CALIF. L. REV. 228 (1963); Comment, *Jones v. Cunningham*, 17 RUT. L. REV. 808 (1963).

ment. Defendant Jones challenged his conviction, alleging that the state of Virginia improperly sentenced him under a state recidivist statute.²⁵ Although in jail when initially applying for the writ, Jones had been paroled by the time his case appeared before the Supreme Court.²⁶ Justice Black, writing for a unanimous Court, held that Jones, as a parolee, remained "in custody" and therefore was eligible for habeas corpus relief.²⁷ Black stated that because parolees were subject to restraints not shared by the public, a parolee met the custody requirement.²⁸

The Supreme Court further expanded the custody requirement in *Carafas v. LaValle*.²⁹ In *Carafas*, a defendant collaterally challenged his state conviction, alleging that the trial judge erroneously admitted illegally seized evidence.³⁰ Before the Supreme Court granted certiorari, the defendant completed his sentence and the state uncondition-

25. The state of Virginia convicted Jones three times for offenses requiring confinement in the state penitentiary. After Jones' third conviction for an offense requiring imprisonment, the state sentenced Jones to ten years in prison partially because of his prior record. In his writ Jones attacked his third-offender sentence, alleging that one of the convictions was invalid because the state denied Jones his constitutional right to counsel. 371 U.S. at 237.

26. Shortly before oral argument in front of the Court of Appeals for the Fourth Circuit the state paroled Jones. The court of appeals dismissed the case as moot as to the superintendent of the state prison because he no longer had custody of Jones. Counsel for Jones sought to add the members of the parole board as respondents, but the Fourth Circuit denied the motion and dismissed the appeal. *Id.*

27. To analyze the custody requirement Justice Black stated: "To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country." *Id.* at 238. Justice Black relied on both *McNally v. Hill*, 293 U.S. 131 (1934) and *Ex parte Parks*, 93 U.S. 18 (1876), for the above quoted proposition.

Justice Black noted, for example, that English courts permitted parents to use habeas corpus to obtain their children from the other parent, even though the child was not under restraint of any kind. 371 U.S. at 239.

28. Justice Black described the restraints imposed on Jones as confinement to a particular community, house, and job. Jones could not drive a car without permission. Jones had to permit the parole officer to visit his home and job at any time. Jones also was required to keep good company. 371 U.S. at 242.

29. 391 U.S. 234 (1968).

30. A New York state court convicted Carafas of burglary and grand larceny in 1960, and sentenced him to concurrent prison terms of three to five years. On direct appeal, Carafas claimed that the state had used illegally seized evidence against him at trial. (Subsequent to Carafas' trial, the Supreme Court adopted the exclusionary rule for illegally seized evidence in state court proceedings. See *Mapp v. Ohio*, 367 U.S. 643 (1961)). The state courts affirmed Carafas' conviction on appeal. *People v. Carafas*, 14 A.D.2d 886, 218 N.Y.S.2d 536 (1961), *aff'd*, 11 N.Y.2d 891, 182 N.E.2d 413 (1962).

ally released him from prison.³¹ Although he was no longer confined, the Supreme Court held that federal habeas corpus jurisdiction still existed³² because the defendant was “in custody” at the time he filed the writ in federal district court.³³ The Court held the case was not moot because certain “disabilities” survived the conviction.³⁴

Finally, in *Hensley v. Municipal Court*,³⁵ the Supreme Court held that a state retained custody, as defined by statute, over a defendant released on his own recognizance and awaiting execution of a criminal sentence.³⁶ The Court held that the petitioner met the custody requirement because the state-imposed restraints were “not shared by the public generally”³⁷ and petitioner remained free only through state court injunctive action.³⁸

Justice Rehnquist, dissenting, suggested that there was no “vestige

31. After losing his direct appeal, Carafas, while in state custody, sought habeas corpus relief in both state and federal courts. Numerous appeals ensued, and Carafas finished his prison term in March, 1967, months before the October, 1967, grant of certiorari by the Supreme Court. 391 U.S. at 235-36.

32. *Id.* at 240. This case specifically overruled *Parker v. Ellis*, 362 U.S. 574 (1960). The Court in *Parker* had held that a prisoner released after serving his sentence could not seek federal habeas corpus relief. Unlike *Parker*, the Supreme Court held in *Carafas* that habeas corpus relief is not defeated by a prisoner's release prior to the completion of the proceedings. 391 U.S. at 237. For a discussion of *Parker*, see 59 MICH. L. REV. 312 (1960); 45 MINN. L. REV. 453 (1961).

33. The court reasoned that because the federal habeas corpus statutes provide that the court “shall . . . dispose of the matter as law and justice require,” 28 U.S.C. § 2243 (1976), the Court could provide relief other than freedom from restraint. The relief this court intended freed the petitioner from disabilities which survived his conviction. 391 U.S. at 238-39. *See infra* note 34.

34. The Court's list of disabilities suffered by Carafas as a result of his conviction included the inability to engage in certain businesses, to serve as an official of a labor union, to vote in New York, and to serve as a juror.

35. 411 U.S. 345 (1973).

36. A California municipal court convicted Hensley of a misdemeanor. Hensley obtained his freedom when the state stayed execution of his sentence so that Hensley could pursue post conviction relief in the federal courts. *Id.* at 346-47.

37. *Id.* at 351 (quoting *Jones v. Cunningham*, 371 U.S. at 240). The restrictions the state imposed on Hensley included the obligation to appear as ordered by the state court under penalty of rearrest or additional prosecution for failure to appear. *Id.* at 348.

The issue before the Court was whether these restrictions constituted custody. The Court's language enunciated a rigorous standard to establish the custody requirement:

[Since] habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Id. at 351. Because the general public did not share the restraints imposed on Hensley, the Court found they met the custody requirement. *Id.*

38. *Id.* at 351-52. The Court noted that the defendant remained free only because a state trial court judge and two justices of the Supreme Court had stayed the execution of sentence.

left” of the obvious meaning of custody.³⁹ Justice Blackmun, though concurring in the result, noted that the Court had greatly expanded the traditional notion of habeas corpus.⁴⁰

Habeas corpus relief existed at common law for child custody cases.⁴¹ Common law courts used a legal fiction⁴² to meet the statutory custody requirement⁴³ in child custody cases,⁴⁴ and held that the actual custodian of a child restrained the child if that custodian was not the legal custodian.⁴⁵ Some federal courts have adhered to that common-law fiction and assumed federal habeas corpus jurisdiction over child

39. “Strong dissent” is perhaps an understatement. Justice Rehnquist likened the majority to Faust, “that it has in its previous opinions already made its bargain with the devil, and it does not shy from this final step in the rewriting of the statute.” *Id.* at 355.

40. *Id.* at 354. For a discussion of the *Hensley* decision, see Note, *Hensley v. Municipal Court*, *Update on Habeas Corpus*, 6 COLUM. HUM. RTS. L. REV. 249 (1974).

For cases that followed the lead of *Carafas*, *Jones*, and *Hensley*, see *Strait v. Laird*, 406 U.S. 341 (1972) (petitioner member of armed forces seeking discharge as conscientious objector may seek relief under federal habeas powers of court); *Peyton v. Rowe*, 391 U.S. 54 (1968) (prisoner serving consecutive sentences is “in custody” under any of his convictions and may attack validity of such, including one to be served in the future); *Brownell v. Tom We Shung*, 352 U.S. 180 (1963) (excluded aliens may test order of their exclusion if they are in “technical” custody); *Donigan v. Laird*, 308 F. Supp. 449 (D. Md. 1969) (retention of reservist in the Armed Forces is sufficient restraint of liberty to constitute custody).

41. See *infra* note 44 and accompanying text.

42. A legal fiction is an “[a]ssumption of fact made by court as basis for deciding a legal question. A situation contrived by the law to permit a court to dispose of a matter. . . .” BLACK’S LAW DICTIONARY 804 (5th ed. 1979).

43. For an example of one of the early English Acts, see Habeas Corpus Act, 1679, 31 Car. 2, ch. 2.2 §§ 11(2), 111(6)(7).

The first United States statute codifying the requirements for the writ stated “that writs of habeas corpus shall in no case extend to prisoners in goal, unless where they are in custody, under or by colour of the authority of the United States. . . .” 1 Stat. 82 (1789) (currently at 28 U.S.C. § 2241(c)(1) (1976)).

44. There were some early cases in which the Supreme Court declined petitions because it lacked original jurisdiction over child custody disputes. See, e.g., *Barry v. Mercein*, 46 U.S. 103 (1847); *Ex parte Barry*, 43 U.S. 65 (1844).

In *In re Burrus*, 136 U.S. 586 (1890), the Supreme Court refused a writ of habeas corpus because there was no pretense that the child’s liberty was restrained by the authority of the laws or Constitution of the United States, that is, no federal question existed. In *Burrus*, a father sought habeas corpus relief in a federal district court to recover his child from the child’s grandparents. The court granted the writ and the father assumed custody. The grandfather then kidnapped the child. Because this action violated the writ, the court subsequently held the grandfather in contempt of court and had him jailed. In his own writ, the grandfather alleged that the original writ concerning the child’s custody was beyond the jurisdiction of the federal court, and therefore his violation of the court order was not punishable. The Supreme Court upheld the grandfather’s position and released him under a writ of habeas corpus. *Id.* at 597.

45. See, e.g., *In re Mitchell*, Charl. R.M. 489 (E.D. Ga. 1836); *Mercein v. People*, 25 Wend. 64 (N.Y. 1840); *Ex Parte M’Clellan*, 1 Dowl. 81, 82 (K.B. 1831); *Regina v. Clark*, 119 Eng. Rep.

custody disputes.⁴⁶ In *Davis v. Page*,⁴⁷ a woman sought a writ of habeas corpus alleging that the state violated her federal constitutional rights because it failed to provide her with counsel at a state child custody proceeding.⁴⁸ Noting that common-law courts used the writ of habeas corpus in child custody cases, the Fifth Circuit allowed the writ.⁴⁹ The circuit court acknowledged that domestic relations are normally the business of state courts.⁵⁰ The court, however, held that the

1217, 1220 (K.B. 1857); W. CHURCH, *supra* note 13, at 662; R. HURD, *supra* note 13, at 453; Hand, *Habeas Corpus Proceedings for the Release of Infants*, 56 CENT. L.J. 385, 388 (1903).

46. See *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981); Rowell v. Oesterle, 626 F.2d 437 (5th Cir. 1980); Syrovntka v. Erlich, 608 F.2d 307 (8th Cir. 1979); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (1975); *In re Reed*, 447 F.2d 814 (3d Cir. 1971); Bell v. Leonard, 251 F.2d 890 (D.C. Cir. 1958); Lanagan v. Lanagan, 150 F.2d 979 (D.C. Cir. 1945). Cf. *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (interpreting 25 U.S.C. § 1303 (1976) which grants habeas corpus jurisdiction to federal courts to inquire into judgments of Indian tribunals).

47. 640 F.2d 599 (5th Cir. 1981).

48. *Id.* at 600. The suit was a class action brought on behalf of indigent parents. Florida had refused to provide such parents with counsel in child custody proceedings.

Ms. Davis urged that her interest in raising her children was a fundamental liberty interest, and that to deprive her of her child without assistance of counsel violated her due process rights as secured by the fourteenth amendment. *Id.* at 602.

49. *Id.* at 604. In *Davis* the state stipulated that the child was in custody pursuant to a state court judgment. The state's concession of this point seems rather puzzling. In this case, however, the Florida Department of Health and Rehabilitative Services, rather than a private agency, had custody of the child. This fact may have undercut the lack of custody defense, and prompted the state's action.

The state mainly argued that because the state court had returned the child to its mother before the district court rendered its judgment, the case was moot. *Id.* at 602. Relying on *Carafas*, see *supra* notes 29-34 and accompanying text, the court of appeals found no merit to that contention. The court noted that the state continued to impose authority over the child by requiring Ms. Davis to report to a social worker and open her home for inspections by the social worker. Such restraints constituted "custody." *Id.*

50. *Id.* The federal courts have long held that domestic relations are principally the province of the states. See *United States v. Yazell*, 382 U.S. 341, 352 (1966); *In re Burrus*, 136 U.S. 586, 594 (1890); *Barber v. Barber*, 62 U.S. 582, 584 (1859); *Phillips v. Rosenstiel*, 490 F.2d 509, 514 (2d Cir. 1973); *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972); *Buechold v. Ortiz*, 401 F.2d 371, 373 (9th Cir. 1968); *Carqueville v. Woodruff*, 153 F.2d 1011, 1012 (6th Cir. 1946); *Bates v. Bushey*, 407 F. Supp. 163, 164 (D. Me. 1976). See also *Caban v. Mohammed*, 441 U.S. 380, 391 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978). But see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *May v. Anderson*, 345 U.S. 528 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Contra Spindel v. Spindel*, 283 F. Supp. 797, 804 (E.D.N.Y. 1968). See generally Note, *The Use of Federal Habeas Corpus in Child Custody Disputes*, 31 ME. L. REV. 265 (1980) (discussion of domestic relations as an exception to federal

federal constitutional rights of the petitioner made deference to the state court's interest inappropriate.⁵¹

In *Nguyen Da Yen v. Kissinger*⁵² the Ninth Circuit held that "victims" of the Vietnam "baby lift"⁵³ could challenge their presence in this country by federal writ.⁵⁴ The court reasoned that a showing of illegal custody by the infants allowed employment of a presumption of detention sufficient for relief.⁵⁵

Two federal circuit courts refused to exercise habeas corpus jurisdiction in child custody disputes.⁵⁶ In *Sylvander v. New England Home for Little Wanderers*,⁵⁷ a Massachusetts probate court upheld the right of the New England home to place Ms. Sylvander's child up for adoption without her consent.⁵⁸ After losing on direct appeal,⁵⁹ Ms. Sylvander filed a petition for habeas corpus relief in federal district court. The petitioner alleged that the state court violated her fourteenth amendment rights to due process and equal protection by terminating her parental rights without any finding of parental unfitness.⁶⁰ The district

subject matter jurisdiction); Note, *Federal Habeas Corpus in Child Custody Cases*, 67 VA. L. REV. 1423 (1981) (discussion of the domestic relations exception).

51. 640 F.2d at 602 n.4.

52. 528 F.2d 1194 (9th Cir. 1975).

53. The suit was a class action brought on behalf of Vietnamese children detained in the United States. During the final evacuation of Vietnam, the United States government airlifted thousands of children to America. Although most were at some stage in formal adoption proceedings, the government had erroneously airlifted 2700 children not the subjects of adoption proceedings. These children comprised the class in the suit.

54. *Id.* at 1202. Relying on dicta in *Jones* as support, the court stated that, "custodial restraints on a minor child, . . . have long been held a sufficient deprivation of the child's liberty to be tested by way of habeas corpus." *Id.*

55. *Id.* In support of this position the court cited various state court decisions. *See, e.g., Ex parte Swall*, 36 Nev. 171, 134 P. 96 (1913).

56. *See Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135 (3d Cir.), *aff'd*, 102 S. Ct. 3231 (1982); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103 (1st Cir. 1978). *See supra* note 10; *infra* notes 57-84 and accompanying text.

57. 584 F.2d 1103 (1st Cir. 1978). For a discussion of *Sylvander*, *see Federal Habeas Corpus, supra* note 17, at 337.

58. Ms. Sylvander, an expectant, unmarried mother, had arranged to place her child with the New England Home for Little Wanderers. When the child was born she left it with the Home. A month later she sought the return of her child. The Home refused to return the child because Ms. Sylvander's plans for the care of the child were unrealistic. A Massachusetts statute provided that if a child was in the custody or care of a licensed child care agency, the agency could apply to the probate court for a decree that parental consent to the child's adoption is unnecessary if it is in the best interests of the child. 584 F.2d at 1106.

59. 367 Mass. 631, 328 N.E.2d 854 (1975).

60. Ms. Sylvander's claim was identical to Ms. Lehman's claim in *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135 (3d Cir.), *aff'd*, 102 S. Ct. 3231 (1982). The claim-

court found that the custody requirement had been met, but held that there was insufficient state involvement for the petitioner to seek habeas corpus relief.⁶¹

The First Circuit Court of Appeals affirmed the result on different grounds. The court held that the child was not in custody in the sense required for federal habeas corpus jurisdiction.⁶² The court found that federalism and comity concerns also weighed heavily against granting the writ.⁶³

In *Lehman v. Lycoming County Children's Services Agency*⁶⁴ the Supreme Court resolved the split in the circuits⁶⁵ and diminished the scope of the federal habeas corpus custody requirement.⁶⁶ Justice Powell, writing for a six-member majority,⁶⁷ reviewed past case history and stated that the Court has found that custody exists only when a petitioner suffers restraints not imposed on the public generally.⁶⁸ Penn-

ants' were both concerned that the state might terminate their parental rights with a finding that the parent lacks the ability to handle the child, rather than a showing that the parent actually committed some wrong against the child.

61. The district court held that the probate court judgment authorizing adoption of the child was not state custody. 444 F. Supp. 393, 398-99 (D. Mass. 1978).

62. The *Sylvander* court refused to apply the legal fiction of the common law. See *supra* notes 43-45 and accompanying text. The Court asserted: "It cannot meaningfully be said that the person in custody—Michael—is being held against his will." 584 F.2d at 1111.

The court recognized that various courts had extended the writ to child custody cases. See *id.* at 1110. The court also noted the sweeping language of *Jones and Hensley*. *Id.* See also *supra* notes 24-28 & 35-40 and accompanying text. The court, however, stated that the rights Ms. Sylvander asserted on Michael's behalf are chiefly her rights as a mother not to be deprived of her child. Only speculatively are they the rights of the person "in custody." 584 F.2d at 1111.

63. 584 F.2d at 1111-12. The court weighed the federal and the state interest. The sole federal interest, the court said, is in the constitutional issues that are collateral to the actual dispute. *Id.* The court asserted that unlike the state, the federal government had no substantive interest in child custody disputes. *Id.*

The court then considered the effect that allowing collateral relief would have on the child and subsequent adoption procedures:

He remains in limbo pending a final decision perhaps unable to find adoptive parents since his availability for adoption is clouded. Moreover, if litigation expenses mount, social workers and charitable organizations may well become less willing to seek placements for children over their parent's objections, whether rational or irrational—even though in their honest judgment the child's best interests demand it.

Id. at 1112.

64. 102 S. Ct. 3231 (1982).

65. See *supra* notes 46 & 57 and accompanying text.

66. The *Lehman* Court utilized reasoning similar to the *Sylvander* court. See *supra* notes 62-63.

67. Justice Powell wrote on behalf of Chief Justice Burger and Justices White, Rehnquist, Stevens and O'Connor.

68. 102 S. Ct. at 3237.

sylvania did not impose any such additional restraints on the Lehman children.⁶⁹ Justice Powell further found the children were not "in custody" in the sense traditionally challenged by a federal writ.⁷⁰ The special solicitude for state interests in the realm of domestic relations also supported a denial of writ.⁷¹

According to Justice Powell, federalism concerns and the protection of state judgments also weighed against expanding federal habeas corpus jurisdiction to include child custody disputes. Because the writ changes the federal-state balance, the Court should reluctantly extend federal habeas corpus jurisdiction.⁷² Justice Powell further noted that the state has an especially strong interest in protecting the finality of child custody disputes.⁷³ The relitigation of child custody disputes in federal court through use of the writ, Powell reasoned, only delays adoption of the child, prolongs uncertainty for the children, and increases the burden on the state.⁷⁴

69. *Id.* The Court stated that Ms. Lehman's children were not prisoners, and did not suffer any restrictions imposed by a criminal justice system. The Court further noted that while in the custody of foster or adoptive parents, the Lehman children suffered no restraints not imposed on children generally. *Id.*

70. *Id.* at 3238.

71. *Id.* See *supra* note 50.

72. *Id.* The *Lehman* Court stated:

The writ of habeas corpus is a major exception to the doctrine of *res judicata*, as it allows relitigation of a final state-court judgment disposing of precisely the same claims. Because of this tension between the state's interest in finality and the asserted federal interest, federal courts properly have been reluctant to extend their writ beyond its historic purpose.

Id. at 3240.

73. *Id.*

74. See *supra* note 55. Because habeas corpus claims would not be time-barred, *Fay v. Noia*, 372 U.S. 391, 422-24 (1963), theoretically, a parent could seek federal habeas corpus relief many years after an unsuccessful custody suit. The sole impediment would be the issue that Justice Blackmun discussed in his dissent in *Lehman*, namely, whether a parent who had waited so long would have standing to petition on behalf of the child as his next friend. See *infra* notes 83 & 84 and accompanying text.

Citing the *Sylvander* court's federalism concerns, Powell argued that the state's interest in finality is unusually strong. The state has an interest in disposing of these issues within a reasonable time. The federal government's interest is in the constitutional issue collateral to the actual dispute. 102 S. Ct. at 3239.

The parties disagreed over the effect of extending federal habeas corpus relief to adoption proceedings. Petitioner argued in her brief that because of the lengthy delay between termination and adoption, a habeas corpus proceeding would not likely delay the adoption. Indeed, Ms. Lehman argued that federal habeas relief may speed adoption procedures because after adoption the habeas case would be moot. Brief for Petitioner at 84-87, *Lehman v. Lycoming County Children Servs. Agency*, 102 S. Ct. 3231 (1982).

Respondent argued that an agency or individual "could not freely and in good conscience, and

Justice Powell acknowledged that state and common-law courts had used habeas corpus proceedings to resolve child custody disputes.⁷⁵ He distinguished those cases on the basis that, although appropriate within a unitary state or federal system, a collateral challenge to a state court custody decision in a federal court constitutes an inappropriate use of the writ.⁷⁶ Because of the “profound interference” that federal habeas corpus involves with regard to a state court system,⁷⁷ Justice Powell concluded that the Court should reserve use of the writ for instances when the federal interest in individual liberty is much stronger than in this case.⁷⁸

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. He argued that the majority too restrictively read the opinions in *Jones*, *Carafas*, and *Hensley*.⁷⁹ Indicating that for centuries common-law courts have had the power to issue writs of habeas corpus to free children from unlawful custody,⁸⁰ Blackmun noted that the state imposed various restraints on unadopted children.⁸¹ Justice Blackmun

under proper sequence of law go forward with such adoption proceedings.” Respondent thought petitioner’s argument reflected disrespect for a litigant’s right of appeal prior to final action by the courts. *Id.* at 31-32.

75. Justice Powell cited the following cases: *Ford v. Ford*, 371 U.S. 187 (1963); *Boardman v. Boardman*, 133 Conn. 124, 62 A.2d 521 (1948); *In re Swall*, 36 Nev. 171, 134 P. 96 (1913); *Ex parte M’Clellan*, 1 Dowl. 81 (K.B. 1831); *Earl of Westmeath v. Countess of Westmeath*, noted in *Lyons v. Blenkin*, 37 Eng. Rep. 842 (1821). See 102 S. Ct. at 3239.

76. 102 S. Ct. at 3239.

77. *Id.* See *supra* note 63.

78. 102 S. Ct. at 3238 n.17. Quoting the Third Circuit Court of Appeals, Justice Powell asserted that “[t]he awesome power of the writ to avoid res judicata, and its implications for our federalism, demand that its use be confined to its proper role: the preservation of individual liberty and the relief from unlawful custody.” *Id.* (quoting 648 F.2d 135, 139 (1981)).

Justice Powell commented on the limited circumstances under which habeas relief should be granted:

The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for *severe restraints on individual liberty*. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of *special urgency*, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Id. at 3240 n.19 (emphasis added) (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973)). See also *supra* notes 35-39 and accompanying text.

79. 102 S. Ct. at 3242. For a discussion of the Supreme Court decisions in *Jones*, *Carafas*, and *Hensley*, see *supra* notes 24-40 and accompanying text. Justice Blackmun thought “the unusually broad and expansive language” of those opinions should have guided the Court. 102 S. Ct. at 3242.

80. See *supra* notes 41-46 and accompanying text.

81. Blackmun asserted that children who are wards of the state are subject to restraints in

concluded that federalism and comity concerns should not bar a federal court from asserting jurisdiction. Those interests, he stated, should only influence a court's decision on whether to grant the writ and free the petitioner after jurisdiction attaches.⁸²

The dissenters asserted that the Court could have reached the same conclusion on sounder reasoning. Justice Blackmun would not deny federal courts the power to issue writs of habeas corpus in child custody disputes.⁸³ According to Justice Blackmun, however, Ms. Lehman failed to sufficiently show that she acted in the best interests of her children. She thus lacked standing to litigate the children's interests as next friend.⁸⁴

Lehman raises the issue of the proper construction of the term "custody" as used in the federal habeas corpus jurisdiction statutes.⁸⁵ While the Court must consider several factors in interpreting the term, resolution of the conflicting interests of state and federal governments is very important.⁸⁶ The federal interest is in whether a state judicial proceeding, while exercising authority over a delegated subject matter,⁸⁷ comports with the due process and equal protection requirements of the fourteenth amendment.⁸⁸ The state interest is in providing children of "non-salvagable families" the opportunity to experience adop-

that the state decides where they will live, whether they can marry, or enlist in the armed forces. The state also makes all major decisions regarding the childrens' medical treatment. 102 S. Ct. at 3243.

82. *Id.*

83. Blackmun agreed that Ms. Lehman was not entitled to relief, but thought the court had jurisdiction to hear the case on its merits. *Id.*

84. The standing issue was not certified by the Supreme Court in its grant of certiorari. Brief for Respondent at 14, *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231 (1982).

85. *See supra* note 3. The issue is whether the term "custody" embraces the legal fiction employed by the state and common-law courts, or in the alternative, whether the children suffer severe enough restraints to be truly "in custody."

The basic difference between the approaches of the majority and the dissent is where one ought to look to interpret the habeas corpus statutes. Justice Blackmun looks to the common law and asserts that common-law courts had jurisdiction over such cases. *See supra* notes 41-46. Justice Powell considers policy and the effects of conferring federal habeas corpus jurisdiction more important than the common-law practice. *See supra* notes 66-68.

86. *See, e.g., United States v. Yazell*, 382 U.S. 341, 352 (1966). The policy considerations which are necessary to properly resolve issues of statutory interpretation are raised through the weighing of the federal and state interests. Rehnquist's method of statutory analysis is consistent with that proposed by Professor Kernochan. *See Kernochan, Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333 (1976).

87. *See supra* note 50.

88. *See supra* notes 48 & 60.

tive family life.⁸⁹

Federal relitigation of child custody disputes would drastically affect the state's interest in the adoption of displaced children. The prohibition against a time-bar for habeas corpus claims inhibits a state from initiating adoption proceedings.⁹⁰ Thus, protection of the federal interest may preclude the state interest.⁹¹ At the very least, the state's burden of supporting the child would increase. Justice Powell, by thoroughly considering these state and federal interests in *Lehman*,⁹² produces a sound opinion.⁹³

The majority opinion does not foreclose federal habeas corpus relief in all child custody disputes. According to the majority, federal habeas corpus relief remains available for child custody disputes when a petitioner establishes a stronger federal interest.⁹⁴ For example, confinement of a child in a state institution might sufficiently implicate the federal "liberty" interest, warranting use of the federal writ.⁹⁵

Furthermore, the *Lehman* holding applies only to writs concerning state action.⁹⁶ The reasoning of the majority becomes inapplicable if a

89. Brief for Respondent at 34.

90. The argument that adoption agencies may rush adoption procedures in the hope that they could erect the jurisdictional bar of mootness is unacceptable. The respondent's argument is correct. No adoption agency could in good faith initiate time-consuming adoption procedures before a court had finally terminated parental rights.

91. Unless a parent agreed to waive any claim of parental rights, the threat of a federal habeas suit would remain until the children reached majority age.

92. See *supra* notes 72-78.

93. Justice Blackmun's dissenting opinion is not as persuasive. First, as some commentators argue, looking to the common law constitutes "an abuse of the historical method." See, e.g., *Developments, supra* note 15, at 1072. These commentators assert that because habeas corpus was not available at common law for post judgment relief, courts cannot interpret section 2254 by looking at the common law. For the language of section 2254, see *supra* note 3.

Second, Justice Blackmun misplaces his dependence on the broad and expansive language of *Jones, Carafas, and Hensley*. Language in those opinions support both positions. See *supra* note 78.

Third, proper statutory interpretation includes a consideration of policy factors. See *supra* note 86.

Fourth, although Justice Blackmun asserts that the availability of habeas corpus for centuries to parents in child custody cases, "for at least 100 years after passage of the statute in 1867, the [federal] writ was not used in child custody cases." *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231 (1982).

94. See *supra* note 78.

95. The majority in *Lehman*, however, specifically expressed no view on this question. 102 S. Ct. at 3237 n.12.

96. 28 U.S.C. § 2254(a), under which Ms. Lehman sought jurisdiction, applies only to state actions. See *supra* notes 3, 72-74, 76 & 78.

child seeks release from federal confinement.⁹⁷

Thus, although the decision is sound, it produces an anomaly in the federal habeas corpus statutes. If the majority's interpretation of "custody" is predicated on federalism concerns,⁹⁸ the "custody" requirement for relief from federal restraint is more easily attained than the "custody" requirement for relief from state restraint.

S.C.N.

97. *See, e.g.,* Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975). *See supra* notes 52-55 and accompanying text.

98. *See supra* notes 76-78 & 86-97 and accompanying text.