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RESTRICTING THE AVAILABILITY OF FEDERAL HABEAS CORPUS: *LEHMAN v.* *LYCOMING COUNTY CHILDREN'S* *SERVICES*

I. INTRODUCTION

On June 30, 1982, the United States Supreme Court ended a six-year battle by Marjorie Lehman to regain custody of her sons following the termination of her parental rights by a Pennsylvania court in 1976. In *Lehman v. Lycoming County Children's Services Agency*,¹ the Court, for the first time in its history, erected a strict jurisdictional barrier to federal habeas corpus review of state proceedings that terminate parental rights.² The decision also quite probably establishes a barrier to federal habeas review of any state determination regarding placement of minors.³

The termination of Ms. Lehman's parental rights to her three sons by the Lycoming County orphan's court⁴ forms the basis of the *Lehman* case. However, this Note will not attempt to discern whether the termination was just. It remains important, however, to realize that the *Lehman* case arises in a factual setting naturally fraught with emotional and philosophical perils. These are dangers of which a court—particularly one of absolute finality—must beware when it accepts the responsibility of deciding an issue that almost assuredly will cause repercussions that reach far beyond the immediate disposition of the suit.

Unavoidably, there are value judgments lurking behind the Supreme Court's decision in *Lehman*. Among these is the extent of the right or duty of a state to intervene in a family on behalf of the children. Closely connected are the questions of what behavior amounts to good or bad parenting, the degree of poor parenting necessary to war-

1. 102 S. Ct. 3231 (1982) (6-3 decision).

2. Since at least 1846, the Court has managed to avoid squarely addressing the issue of whether parents whose parental rights have been terminated have a right to federal habeas corpus review of the state termination proceedings. See cases cited *infra* note 5.

3. See *infra* notes 73-76 and accompanying text.

4. *In re* William Lehman, Mark Lehman, Frank Lehman, Nos. 2986-88 (Ct. Com. Pleas, Lycoming County, Pa., June 3, 1976).

rant state intervention, and the right of a parent to raise her children without fear that a state agency will determine that she is a substandard parent, and should be deprived of her children. The Supreme Court's response to its value system and the facts of the case surely affected its decision. This is as it should be. Yet the Court seems to have left these values unexamined in *Lehman*, and to have hidden the potentially detrimental effect of its decision behind the negative aspects of the facts at hand, as well as behind the states' rights politics of the day.

There are value judgments which underlie this Note. Principal among these are the following: (1) There is no absolute right or wrong way to raise a child; (2) The idea of an unchecked government deciding who will raise children—and how they will be raised—has chilling implications. It is extremely difficult to identify situations which are genuinely appropriate for state intervention to the extent of removing children from their natural parents' home. One can look to an individual case and see that a particular parenting technique (e.g., excessive corporal punishment or emotional "abuse") has had a negative effect on a child. Yet the same behavior might have a completely different effect on a different child. Thus, because no absolutes exist, it seems very unwise to extinguish any method of correcting a state when it oversteps its bounds. By focusing too strongly on the individual facts before it in *Lehman*, the Supreme Court has unnecessarily foreclosed a procedure, federal habeas corpus, which might be entirely appropriate under other factual circumstances. The *Lehman* opinion is too brief, and too loosely reasoned, to undertake to decide an issue which the Court has avoided since at least 1846.⁵

After a brief general discussion of the facts of the case and the history and function of the writ of habeas corpus, this Note will attempt to deal with the Court's opinion in light of the *Lehman* facts and the historical backdrop of the habeas issue. Finally, the probable impact of the holding, in light of other avenues of federal review of state proceedings to terminate parental rights, will be explored.

5. See *Barry v. Mercein*, 46 U.S. (5 How.) 327 (1846) (habeas corpus, sought by father who was attempting to gain custody of his daughter from his estranged wife, denied on grounds that the matter in dispute did not exceed \$2,000, thus depriving federal court of "appellate" jurisdiction); see also *Matters v. Ryan*, 249 U.S. 375 (1919) (denial of habeas corpus to obtain custody of a child allegedly kidnapped and taken to Canada. The Court explicitly declined to determine "[w]hether a case might arise where a court of the United States could take jurisdiction of a petition for habeas corpus upon averment of diversity of citizenship and pecuniary interest, without the assertion of a federal right." *Id.* at 378.)

II. STATEMENT OF THE CASE

In 1971, Marjorie Lehman was pregnant, unmarried, unable to obtain day care for her three sons, and recognized that she was unable to care for them properly.⁶ She therefore gave custody of the boys, then aged one through seven years,⁷ to the Lycoming County Children's Service Agency, so that her sons could be placed in temporary foster care.⁸ She maintained contact with the boys⁹ and three years later sought to have them returned to her.¹⁰ At that time, the agency determined Ms. Lehman should not regain custody of her sons¹¹ and instituted proceedings to terminate her parental rights so that the boys could be adopted.¹²

Ms. Lehman's parental rights to her sons were terminated in 1976 by the Lycoming County Common Pleas Court.¹³ Ms. Lehman appealed the termination,¹⁴ and it was affirmed by the Pennsylvania

6. The facts of the case are taken primarily from *In re William L.*, 477 Pa. 322, —, 383 A.2d 1228, 1247-48, *cert. denied*, 439 U.S. 880 (1978) (concurring and dissenting opinion of Nix, J.), wherein the majority of the Pennsylvania Supreme Court affirmed the termination of Ms. Lehman's parental rights with respect to her three sons. *Id.* at 1247.

7. *Id.* at 1248 n.2. The boys, Frank, Mark and William, were born in 1963, 1965, and 1969. The oldest, Frank, was eighteen by the time *Lehman* was considered by the United States Supreme Court, so that the habeas issue was inapplicable as to him. *Lehman*, 102 S. Ct. at 3233-34, 3234 n.3. The boys' fathers, in earlier state court proceedings, had voluntarily relinquished parental rights to their sons. *Lehman*, 102 S. Ct. at 3233 n.1.

8. 383 A.2d at 1248.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The Supreme Court in *Lehman* explicitly described the situation as follows:

Although Ms. Lehman visited her sons monthly, she did not request their return until 1974. At that point, the Lycoming County Children's Services Agency initiated parental termination proceedings. In those proceedings, the Orphan's Court Division of the Lycoming County Court of Common Pleas heard testimony from Agency caseworkers, a psychologist, nutrition aides, petitioner, and the three sons. The judge concluded that "it is absolutely clear to the court that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied."

Lehman, 102 S. Ct. at 3234 (footnotes and citations omitted). The Court also noted that "[t]here was no evidence that any of the sons wanted to return to their mother." *Id.* at n.2.

The Court does not explain why it felt compelled to emphasize the factual background of the case and state proceedings involved, including such a description of the evidence taken in those proceedings. In view of the Court's blanket holding that the federal habeas corpus statute, 28 U.S.C. § 2254(a) (1976), "does not confer jurisdiction on federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights," *id.* at 3233 (syllabus by the Court), it would seem that such factual descriptions were *irrelevant* to the issue at hand.

13. *In re William Lehman*, Mark Lehman, Frank Lehman, Nos. 2986-88 (Ct. Com. Pleas, Lycoming County, Pa., June 3, 1976).

14. Appeal of parental rights terminations directly to the Pennsylvania Supreme Court is provided for by 17 PA. CONS. STAT. ANN. § 211-202(3) (Purdon Supp. 1981-1982).

Supreme Court.¹⁵ Application for certiorari to the United States Supreme Court was denied.¹⁶ Ms. Lehman then made application, as next friend in behalf of her sons, to the federal district court for a writ of habeas corpus, challenging the constitutionality of the Pennsylvania statute under which her parental rights had been terminated¹⁷ and seeking a declaration that she was her sons' legal parent. The writ was denied.¹⁸ The Court of Appeals for the Third Circuit upheld the denial on the basis that the federal court lacked jurisdiction to issue the writ.¹⁹ The Supreme Court then granted certiorari.²⁰ Significantly, writers in each reported decision felt it necessary to comment on their perceptions of Ms. Lehman's parental capacity.²¹ In decisions concerning the fed-

15. *In re William L.*, 477 Pa. 322, 383 A.2d 1228 (1978).

16. 439 U.S. 880 (1978).

17. The relevant statute is 17 PA. CONS. STAT. ANN. § 2511(a) (Purdon Supp. 1981-1982), which provides in pertinent part:

The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(a) 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 and mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

Id.

18. *Lehman v. Lycoming County Children's Services Agency*, No. 79-65 (M.D. Pa. Sept. 4, 1979).

19. *Lehman v. Lycoming County Children's Services Agency*, 648 F.2d 135, 146 (3d Cir. 1981) (issue raised did not sufficiently implicate the federal interest in personal liberty to warrant extension of the writ).

20. 454 U.S. 813 (1981). The federal circuit courts of appeal had split on the issue of whether federal habeas corpus should be available in such circumstances. In addition to the Third Circuit in *Lehman*, the Court of Appeals for the First Circuit, in *Sylvander v. Home for Little Wanderers*, 584 F.2d 1103 (1978), had held that the writ should not be available. The Court of Appeals for the Fifth Circuit, on the other hand, had issued a writ of habeas corpus at the request of an indigent mother after her attempts to protest termination proceedings and thereafter regain custody of her child, without benefit of counsel, had failed. *Davis v. Page*, 640 F.2d 599 (1981). The appellate court in *Davis* held that the failure to provide counsel for the mother was a violation of due process. *Id.* at 602-04. Interestingly, the Supreme Court, two days after handing down its decision in *Lehman*, vacated and remanded the *Davis* grant of habeas corpus in a memorandum opinion, *sub nom.* *Chastain v. Davis*, 102 S. Ct. 3504 (1982).

21. For example, the plurality opinion of Judge Garth of the Third Circuit Court of Appeals cited "the deplorable living conditions that obtained in [Ms. Lehman's] apartment." 648 F.2d at 136. Judge Rosenn, dissenting in the same court, noted that when Ms. Lehman originally placed her sons in the care of the Lycoming County Children's Services Agency, it was done informally and the parties intended that the custody be only temporary. *Id.* at 156 (Rosenn, J., dissenting). Judge Rosenn also pointed out that later the agency "resisted Ms. Lehman's efforts to obtain the return of her sons." *Id.*

Ms. Lehman also was described variously as a mother who "by reason of her very limited social and intellectual development . . . is incapable of providing minimal care, control and supervision for the three children," *Lehman*, 102 S. Ct. at 3234 (quoting findings of Lycoming County Ct. Com. Pleas), and as a mother who had an "ability to appraise the needs of her family . . . and to successfully secure effective means to meet [those needs]." *In re William L.*, 447 Pa. at —, 383 A.2d at 1248 (Nix, J., concurring in part and dissenting in part).

eral courts' jurisdiction to grant the writ, it seems that these perceptions are irrelevant to determining the issue.

The Supreme Court broadly defined the sole issue in the case as "whether federal habeas corpus jurisdiction, under [28 U.S.C.] § 2254, may be invoked to challenge the constitutionality of a state statute under which a State has obtained custody of children and terminated involuntarily the parental rights of their natural parent."²² The Court affirmed the dismissal for lack of jurisdiction,²³ never reaching the merits of the case's constitutional challenge.

III. HISTORICAL DEVELOPMENT OF THE WRIT

The Supreme Court once described the federal writ of habeas corpus as a device "for protecting the individual liberty of persons . . . from illegal imprisonment under state authorization."²⁴ The writ has a long history,²⁵ and came to America as part of its common law inheritance from England.²⁶ Habeas corpus is explicitly provided for by the suspension clause of the Constitution,²⁷ and the dimensions of the federal writ have been the subject of congressional enactment.²⁸

Even at common law, however, the writ's use was not restricted to freeing incarcerated persons. For example, in 1722 it was held that the writ was available to free a woman from the custody of her guardians in order to allow her to return to her husband.²⁹ By the 19th century it had been held in England that the writ was available to remove a child from the control of one parent and give control to the other parent,

22. *Lehman*, 102 S. Ct. at 3235.

23. *Id.* at 3240.

24. *In re Burrus*, 136 U.S. 586, 590-91 (1980).

25. For a managably brief review of the history of the writ in England and America, see Miller and Shepherd, *New Looks At An Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49 (1974) (hereinafter cited as Miller & Shepherd). Proceedings parallel to early habeas corpus actions are known to have taken place in 1199 although the writ was not fully codified in England until 1679. *Id.* at 50-52. Although the writ originally was used as a means for courts to force a party's attendance so that a case could be tried, by the early 1600's the writ was being used as a process by which the legality of the government's detention of an individual could be reviewed. *Id.* at 51.

26. *Id.* at 52. Following American independence and until the Constitution was adopted, "habeas corpus was mentioned in the constitutions of less than half the states, probably because of the view that the common law writ was so well established as to render a constitutional provision unnecessary." *Id.* at 52-53.

27. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

28. 28 U.S.C. §§ 2241-2280 (1976). This Note is concerned with 28 U.S.C. § 2254, which deals with a federal court's grant of habeas corpus to state prisoners.

29. *Rex v. Clarkson*, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722) (cited in *Jones v. Cunningham*, 371 U.S. 236, 239 n.4 (1962)).

despite the lack of government "imprisonment, restraint, or duress of any kind."³⁰

In the United States, federal habeas corpus also has been available to test state restrictions of liberty other than incarceration. In 1953, the United States Supreme Court approved the device to test the exclusion of resident aliens from this country, even though the individuals involved were free to go anywhere else in the world.³¹ In a 1962 decision, *Jones v. Cunningham*,³² the Court held that a parolee from a state prison was sufficiently in state custody to warrant federal habeas corpus.³³ In this connection, the *Jones* Court stated that "what matters is that [probationary restraints] significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do."³⁴ Six years later, in *Carafas v. LaValle*,³⁵ the Court held that a state prisoner, who had finished serving his sentence while action on his federal habeas corpus petition was pending, was "in custody" of the state, despite his physical freedom, for habeas purposes.³⁶ The Court noted: "[Carafas] is suffering, and will continue to suffer, serious disabilities . . . if his claim that he has been illegally convicted is meritorious."³⁷ Further, in *Strait v. Laird*,³⁸ a 1972 decision, the Court held that a currently unattached military officer was "in custody" even though the only real restraint on his freedom was a requirement of periodic reports to a superior officer.³⁹ Finally, in a 1973 opinion, *Hensley v. Municipal Court*,⁴⁰ a person convicted under state law but free on his own recog-

30. Earl of Westmeath v. Countess of Westmeath, as set out in a reporter's footnote in *Lyons v. Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 849 (Ch. 1821) (cited in *Jones v. Cunningham*, 371 U.S. 236, 239 (1962)).

31. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

32. 371 U.S. 236 (1962).

33. *Id.* at 239-44.

34. *Id.* at 243. The restraints included making monthly reports to a parole officer, obtaining the parole officer's permission to leave town or change residence, and being subject to the possibility of incarceration at any time for cause. *Id.* at 242.

35. 391 U.S. 234 (1968).

36. *Id.* at 242. *Carafas* overruled the Court's previous holding on this issue in *Parker v. Ellis*, 362 U.S. 547 (1960). *Carafas*, 391 U.S. at 240. Chief Justice Warren's dissent in *Parker* was specifically adopted by the *Carafas* majority. *Id.* at 238. However, neither the *Carafas* majority nor the *Parker* dissent seems willing to extend federal habeas corpus to a prisoner who did not file his application for habeas corpus prior to his unconditional release from prison. In this connection, the *Carafas* Court notes that a prisoner's ongoing disabilities would arise "because of the law's complexities, and not because of his fault." *Id.* at 239.

37. *Carafas*, 391 U.S. at 239. These disabilities included ongoing civil penalties, such as disenfranchisement, imposed by the state on convicts. *Id.* at 237.

38. 406 U.S. 341 (1972).

39. *Id.* at 345-46. Strait was attending law school in California. He filed for habeas corpus, seeking review of the military's denial of his request for conscientious objector status. *Id.* at 342.

40. 411 U.S. 345 (1973).

nizance pending execution of his sentence, was considered to be "in custody" for habeas corpus purposes.⁴¹

Thus, the Court has tended to broadly construe the "in custody" requirement of the habeas statute as applied to adults in order to provide a remedy for individuals whose liberty is wrongfully restricted, or who are made to suffer disabilities at the hands of a governmental entity. In the criminal setting in particular, federal habeas corpus has become a method whereby state criminal proceedings can be brought into line with federal constitutional thought.⁴² However, the United States Supreme Court's most recent trend has been to restrict the scope of federal habeas corpus review of state convictions.⁴³ This apparently is in deference to states' rights, and is consistent with Chief Justice Burger's advocacy of "new federalism."⁴⁴

It is possible to conceive of the Court's holding in *Lehman* as a facet of this recent limitation of habeas corpus in criminal cases. Yet it appears more accurate to recognize that, unhampered by any previous Supreme Court ruling allowing federal habeas corpus to a minor in-

41. *Id.* at 351-53. The *Lehman* majority also cited two state cases in which habeas corpus was used to test child "custody" (i.e., control). *Lehman*, 102 S. Ct. at 3239 (citing *Boardman v. Boardman*, 135 Conn. 124, 62 A.2d 521 (1948) and *In re Swall*, 36 Nev. 171, 134 P. 96 (1913)). Both of the state cases cited by the majority are distinguishable from the *Lehman* situation, however, in that each allowed the use of habeas corpus by a child's parent to gain control of the child from either the natural parent (*Boardman*) or another relative (*Swall*). In neither case did state action lead to the other person's control over the child.

42. Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). Under Chief Justice Warren, the Court was particularly active in expanding the range of constitutional protection provided by federal habeas corpus review of state convictions. *Id.* at 1037-44.

43. This development has prompted a great deal of comment. See, e.g., Michael, "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings, 64 IOWA L. REV. 233 (1979); Comment, *Habeas corpus: Still as Great as When it was Writ?* 43 BROOKLYN L. REV. 773 (1979).

An instructive juxtaposition is provided in the field of federal habeas review of state convictions arguably obtained in violation of the exclusionary rule, and thus of the fourth amendment. In *Kaufman v. United States*, 394 U.S. 217 (1969), the Court stated, "[o]ur decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." *Id.* at 225. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court held, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnotes omitted).

44. "The net effect of the Burger Court decisions has been to limit the accessibility of federal habeas corpus to prisoners convicted in state courts." Miller & Shepherd, *supra* note 25, at 70. In 1952, Justice Jackson may have described a central motivation for the current restriction of habeas corpus, when he wrote of the "progressive trivialization of the writ [causing] floods of stale, frivolous and repetitious petitions [to] inundate the dockets of the lower courts and swell our own," to the possible prejudice of meritorious cases. *Brown v. Allen*, 344 U.S. 443, 536-37 (1952) (Jackson, J., concurring).

volved in a custody fight, the Court took advantage of the opportunity to erect a jurisdictional barrier without having to rely on its analyses in criminal cases.

IV. HOLDING OF THE *LEHMAN* COURT

The United States Supreme Court, in a six-three decision, affirmed the circuit court's denial of federal habeas jurisdiction. The Court did not reach the merits of Ms. Lehman's constitutional claims, but instead stated that federal courts lack habeas corpus jurisdiction in such matters.⁴⁵ The majority opinion, written by Justice Powell, concluded, as had the Court of Appeals for the Third Circuit, that children of parents whose parental rights have been involuntarily terminated are not in state custody pursuant to a state court judgment.⁴⁶ The Court also held that "[f]ederalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition."⁴⁷

The dissenting opinion,⁴⁸ written by Justice Blackmun, contended that the custody requirement of the habeas corpus statute is "its most flexible element."⁴⁹ According to the dissent, comity concerns expressed by the majority were not "sufficient to erect a *jurisdictional*, as opposed to a prudential, bar to federal habeas relief."⁵⁰ The dissenting members of the Court therefore would have allowed federal habeas corpus collateral review of state proceedings involving involuntary termination of parental rights.⁵¹

45. *Lehman*, 102 S. Ct. at 3231, 3240. The Court left open the possibility that habeas corpus might be available to minors in custody of some state institution pursuant to state action. *Id.* at 3237 n.12. However, even this possibility is questionable given the rationale underlying the *Lehman* majority's holding, as discussed *infra* at notes 73-76 and accompanying text.

46. 102 S. Ct. at 3235-38. In this connection, the Court noted that "habeas corpus is a major exception to the doctrine of *res judicata*." *Id.* at 3238. The Court believed it particularly important to be solicitous toward states in federal judicial determinations involving child custody matters. *Id.* at 3238-40. The underlying assumption made by the Court that the state's interest is exactly the same as the child's interest is examined in more detail *infra* at notes 79-82 and accompanying text.

47. 102 S. Ct. at 3238.

48. *Id.* at 3240-45. Justice Blackmun's dissent was joined by Justices Brennan and Marshall.

49. *Id.* at 3241.

50. *Id.* at 3242 (emphasis in original).

51. It probably is symptomatic of the difficulty of coping with family dysfunction through the legal system that the Court, in *Santosky v. Kramer*, 102 S. Ct. 1388 (1982) (5-4 decision), mandated additional procedural safeguards at the state level for termination of parental rights. The Court held in *Santosky* that a preponderance of evidence is not a sufficient standard of proof of parental incapacity. *Id.* at 1402-03. Apparently, the Santoskys were indigent, and this formed the central reason for the state's termination of their parental rights. The *Santosky* Court stated, "In parental rights terminations, the private interest affected is commanding." *Id.* at 1396. Yet the

V. ANALYSIS

A. The "In-Custody" Requirement

The first substantive issue addressed by the Court was whether a state's termination of parental rights causes the children affected by the proceeding to be in "state custody" for habeas corpus purposes. The federal habeas corpus statute provides that a federal judge "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"⁵² As noted above, the *Lehman* majority considered federalism concerns, the avoidance of res judicata, and non-interference with the states' need for finality as essential to its denial of habeas jurisdiction. However, it is difficult to imagine how these concerns affect the definition of the word "custody." The Court seems unable to separate the elements of its analysis and deal with each element independently. This section will deal with custody qua custody, and save concerns of federalism and comity for later discussion.⁵³

There is a preliminary definitional difficulty in discussing the custody requirement in conjunction with *Lehman*: The word "custody" carries too many connotations to allow for precise thought. There is the "in custody" requirement of the habeas statute itself, and "custody" in terms of control or guardianship over a child. Finally, there is the "custody proceeding" or "custody battle," which, though closely tied to the guardianship aspect has an entirely different emotional impact. Neither the Court of Appeals for the Third Circuit nor the Supreme Court distinguishes these meanings. In order to avoid confusion, "custody" will be used here only in terms of the habeas corpus custody requirement, unless otherwise indicated. The terms "guardianship"

Court took a different attitude in *Lehman*: "Ms. Lehman simply seeks to relitigate . . . the interest in her own parental rights." *Lehman*, 102 S. Ct. at 3237. The Court appears to rationalize constitutional decisions of broad application, in a difficult field, on the basis of its sense of how deserving the parents are. In *Santosky*, the Court said "For the child, the consequences of termination of his natural parents' rights may well be far-reaching." *Santosky*, 102 S. Ct. at 1339 n.11. In *Lehman*, the Court says that children whose parents' rights are terminated "certainly suffer no restraint on liberty . . . and they suffer no [adequate] 'collateral consequences.'" *Lehman*, 102 S. Ct. at 3237.

52. 28 U.S.C. § 2254(a) (1976) (emphasis added). The next phrase of the statute, "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," *id.*, defines the substantive challenges to state custody which may be brought under federal habeas corpus. By its terms, it excludes substantive challenges of a court's application of state law or state constitution.

53. See *infra* notes 77-91 and accompanying text.

and “control” will be used to denote the parent’s or foster parent’s control over a child.

The task of applying the modern custody requirement to situations such as the one presented in *Lehman* is more complex than simply defining the requirement. The broadening of the “in custody” interpretation has occurred only in the framework of adult proceedings. Minors always are considered under the control of some adult or adults, and thus are never as free as adults. Indeed, a failure of the appropriate adult to maintain sufficient control over a minor may result in the state stepping in to provide control.⁵⁴ Many of the “collateral restraints”—restraints not shared by the general public—noted by the Court in its expansion of the custody requirement, are inapplicable to children.⁵⁵ In a pluralistic society that allows, and arguably encourages, a wide variety of parenting styles, there probably is no particular restraint on a child’s liberty which is shared by children generally. In the absence of a generally applicable definition of “freedom” for children, any attempt to apply a test such as whether a state action “significantly restrain[s] [a child’s] liberty to do those things which in this country free [children] are entitled to do”⁵⁶ would be fruitless. An examination of the custody question as applied to children must consider the unique legal and social situation of children in our society. Reliance on the meaning of custody as applied to adults can only be by analogy.

Thus, the primary question which the *Lehman* Court should have addressed in determining whether the Lehman boys were “in custody pursuant to the judgment of the State court”⁵⁷ was the effect that the termination of parental rights had on the children. The relevant portions of the Pennsylvania Adoption Act follow:

Effect of decree of termination

(b) Award of custody.—The decree shall award custody of the child to the agency or the person consenting to accept custody under Section 2501 (relating to relinquishment to agency) or Section 2502 (relating to relinquishment to adult

54. See, e.g., 42 PA. CONS. STAT. ANN. § 6302 (Purdon 1982) (definition of “dependent child” includes “one without proper parental care or control. . .”), and *id.* § 6351 (disposition of delinquent child).

55. Minors, since they cannot vote, cannot be disenfranchised. In addition, they normally are not free to change their residence or, frequently, to leave the locality without someone’s permission, usually that of a parent. If minors such as the Lehman boys are in state custody, their disabilities are not identical to those suffered by adults who are in state custody.

56. As revised by the author, this is the test formulated by the Court in *Jones v. Cunningham*, 371 U.S. 236, 243 (1962), for adults.

57. 28 U.S.C. § 2254(a) (1976).

intending to adopt child) or the petitioner in the case of a proceeding under Section 2512 (relating to petition for involuntary termination).

(c) Authority of agency or person receiving custody.—An agency or person receiving custody of a child shall . . . have the authority, inter alia, to consent to marriage, to enlistment in the armed forces and to major medical, psychiatric and surgical treatment and to exercise such other authority concerning the child as a natural parent could exercise.⁵⁸

The decree terminating Ms. Lehman's parental rights awarded control of her sons to their respective foster families, who were also the prospective adoptive parents.⁵⁹ Thus, although an involuntary termination of parental rights "is not a custody proceeding,"⁶⁰ there is clearly a "control" aspect to the judgment, in that the court is required to give control to some person or agency.

The section of the Pennsylvania Adoption Act challenged by Ms. Lehman⁶¹—the statute permitting termination of parental rights—does not provide for the disposition of a child after his parents' rights to raise him have been terminated. Therefore it is impossible to determine whether the state itself, merely by invoking the statute, places upon a child restraints "not shared by the public generally . . . sufficient . . . to support the issuance of habeas corpus."⁶²

There is no analysis by the *Lehman* majority of how the state becomes the champion of the minor's well-being in parental rights terminations, and thus should be free of federal interference. One can only surmise that basic value judgments underlie this outcome. However, the fact that values are not explained in the opinion suggests that the Court never explicitly considered its underlying value system in reaching its conclusion. It is thus entirely possible that the Court's own unexamined compassion for a vaguely imagined group of deprived children allowed it to couch its opinion in more absolute terms than were necessary or desirable.

Because the termination of parental rights is but a prelude to an

58. 23 PA. CONS. STAT. ANN. § 2521 (Purdon Supp. 1983-1984).

59. *In re William L.*, 477 Pa. 322, —, 383 A.2d 1228, 1239-40, cert. denied 439 U.S. 880 (1978).

60. *Lehman*, 102 S. Ct. at 3237, n.13 (quoting statement by Ms. Lehman's attorney in the original termination proceedings).

61. 23 PA. CONS. STAT. ANN. § 2511 (Purdon Supp. 1983-1984). See *supra* note 17 for the pertinent text of the statute.

62. *Jones v. Cunningham*, 371 U.S. 236, 240.

adoption proceeding, the law controlling adoptions might contain clues relevant to determining the effect of termination proceedings on the child. Pennsylvania law requires the court to determine, before decreeing adoption, whether the facts stated in the petition for adoption are true,⁶³ and whether "the needs and welfare of the person proposed to be adopted will be promoted."⁶⁴ The consent of a child under twelve years old is not necessary.⁶⁵ In addition, if the court dismisses the petition for adoption, it is required to "enter an appropriate order in regard to the custody of the child."⁶⁶ Presumably this could include placement in another foster home or with a state agency.⁶⁷ Granting that children generally will be under some entity's control, it seems that these incidents of a termination proceeding may amount to "severe restraints on individual liberty"⁶⁸ sufficient to warrant the grant of a habeas writ.

In this context, comparing the degree of control by the state over the affected childrens' disposition with the restraints involved in the conditions of parole in *Jones v. Cunningham*⁶⁹ is instructive. In *Jones*, the Court found the restraints placed on a parolee sufficient to constitute state custody: The parole could be revoked or modified at any time; the parolee could be returned to prison at any time for cause; a parole officer's permission was required to leave the community, change residence, or own or operate a motor vehicle; and the parolee was required to make monthly reports to the parole officer.⁷⁰ Admittedly, the incarceration provisions necessarily involved in the *Jones*' parolee's status find no corollaries in the Lehman boys' situation. However, the details of the guardianship over the boys are subject to change,⁷¹ paralleling the possibility of revocation or modification of parole in *Jones*. Moreover, while children are never free to change their residence without permission, the Lehman boys became subject to involuntarily having where they resided, and even with whom they re-

63. 23 PA. CONS. STAT. ANN. § 2902(a) (Purdon Supp. 1983-1984).

64. *Id.*

65. 23 PA. CONS. STAT. ANN. § 2711(a)(1) (Purdon Supp. 1983-1984).

66. *Id.* § 2902(b).

67. The child would be without a parent or guardian and thus would be a dependent child, under 42 PA. CONS. STAT. ANN. § 6302 (Purdon 1982). His disposition would be governed by *id.* § 6351, which permits placement with an individual, private agency, or public agency.

68. *Jones v. Cunningham*, 371 U.S. at 243.

69. 371 U.S. 236 (1962). The *Jones* facts are described *supra* in the text accompanying notes 32-34.

70. *Id.* at 237.

71. 23 PA. CONS. STAT. ANN. § 2902(b) (Purdon Supp. 1983-1984). *See also* discussion at *supra* note 67.

sided, changed at the will of the state by means of court proceedings.⁷² This would be their status until a petition for adoption was accepted and a decree of adoption issued, thus paralleling the need for a parole officer's permission to leave the community or change residence. Indeed, because the state could make these changes on its *own* initiative, the degree of control over the Lehman boys seems even greater than that exercised over the parolee in *Jones*. Comparing the constraints on a child after parental rights termination with the disabilities suffered by the parolee in *Jones* reveals that such children *are* under unusual constraints, which are controlled by the state. These constraints are sufficiently parallel to those in *Jones* that such children should be considered in state custody under modern custody analysis.

The *Lehman* Court reserved judgment on whether federal habeas corpus might be available to minors placed in a custodial facility pursuant to state action.⁷³ However, the logic of the Court's opinion seems to preclude habeas even in this situation. The problem, under the Court's reasoning, lies in the state custody requirement. The minor is placed pursuant to an adjudication addressed to him rather than to his parent, as in a parental rights termination. Instead of being adjudged "guilty," minors generally are adjudged "delinquent."⁷⁴ They are then placed in a facility, if the court deems this necessary. However, there usually are no time limits placed on the juvenile's stay in an institution, as in an adult's criminal sentencing.⁷⁵ Instead, the minor is institutionalized until he is rehabilitated or reaches majority.⁷⁶ Although superficially this looks like incarceration, any child's parents also could place him in a military school, or other institution, regardless of state involvement. Thus, a minor whose basic freedom is taken away by the state is not necessarily subject to any restraints not shared by minors generally.

Again, the bottom line is that minors always are subject to external control. Any minor could, at least theoretically, be subjected to restraints similar to those imposed by a state when it institutionalizes a

72. *Id.*

73. 102 S. Ct. at 3237 n.12.

74. See 47 AM. JUR. 2d *Juvenile Courts and Delinquent and Dependent Children* § 23 (1969) ("Juvenile delinquency has, in some decisions, been described as a child's conduct which would be considered a crime if he were an adult.")

75. See *id.* § 33 at 1011 ("[I]t has been held that a delinquent child is to be detained while under age until reformed. . . . [T]o commit a juvenile for a definite period would rest on an unwarranted preassumption that reformation could be attained within a definite time. . . .")

76. *Id.*

minor. Therefore, following the *Lehman* Court's logic, federal habeas corpus would not be available to a minor "incarcerated" pursuant to juvenile proceedings, no matter how egregious the violation of his federal rights.

From the foregoing, it appears that application of the custody requirement, in consonance with both the history of habeas corpus and recent American developments in the area, permits, and perhaps requires, a finding that the *Lehman* boys were "in custody" for habeas purposes.

B. *Federalism Concerns*

The second area of substantive concern addressed by the Court involves the effect that federal habeas corpus might have on federalism and comity between state and federal courts in *Lehman*-type situations. The majority took the position that the state's interest in the welfare of minors, and thus in parental rights terminations, outweighs the federal interest in the individual liberty of the minors involved.⁷⁷ Because of this supremacy of state interests, the Court held that federal habeas corpus could not be available as a means of review of state termination proceedings: "The federal writ of habeas corpus . . . should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns."⁷⁸

Although the Supreme Court's deference to states because of federalism concerns is not new,⁷⁹ the balancing approach used by the Court in this instance to accommodate federalism interests is too simplistic. The state's interest is identified as an "exceptional need for finality,"⁸⁰ while "[t]he sole federal interest is in constitutional issues collateral to such disputes."⁸¹ The state's finality interest is then equated with the children's need for "secure, stable, long-term, contin-

77. 102 S. Ct. at 3239-40.

78. *Id.* at 3240. This is the only explicit statement made by the Court revealing that it considers a balancing approach to be appropriate. The opinion discusses the state interest in finality and federalism, *id.* at 3238-39, then veers into a discussion of historical cases cited by Ms. Lehman in support of her habeas corpus petition, *id.* at 3239-40. Finally, the Court mentions the federal interests in individual liberty, *id.* Thus, the Court begins balancing, then attempts to explain why it is balancing by distinguishing the *Lehman* case from prior federal habeas cases, and then cursorily finishes balancing. This may indicate confusion by the majority as to exactly what it is doing.

79. See *supra* notes 42-44 and accompanying text.

80. 102 S. Ct. at 3238.

81. *Id.* at 3239 (quoting *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111 (1st Cir. 1978)). These "collateral constitutional issues" are equated, via the Court's language, to the federal interest in individual liberty, which the Court finds outweighed by the

uous relationships" with a parent figure.⁸² Thus, according to the Court, the state's interest is the same as the child's interest.

In cutting off a possible federal forum for litigating individual liberty issues involved in a state's termination of parental rights, the Court almost certainly has contributed to a quicker adoption process, in cases in which the natural parent objects, by reducing pre-adoption litigation time. This, in turn, should increase the stability of the child's relationship with his immediate parent figures. He will know he is going to stay in one family. However, stability is not the only interest of the child which is involved and which needs protection in termination proceedings. The child's liberty interest, and whatever interest he may have in a continuing relationship with his natural parent,⁸³ are completely ignored. In a pluralistic society, the legitimate state interest in what it perceives to be the child's welfare must be balanced against the parent's interest in raising a child as he sees fit—that is, against the parent's perception of the child's welfare.⁸⁴

The *Lehman* Court's balancing approach ties the state's interest with the emotion-laden interest in children's welfare and discounts the individual liberty interests involved. The Court held that state determinations deserve such great deference in parental rights terminations that federal habeas corpus might never be available to test violations of federal rights in such proceedings.

As noted in Mr. Justice Blackmun's dissent in *Lehman*, habeas corpus proceedings contain built-in mechanisms to protect federalism concerns, making a jurisdictional bar to habeas corpus unnecessary.⁸⁵ The dissent focuses on federal courts' discretion to refuse to issue the writ.⁸⁶ In addition, the exhaustion requirement of the federal habeas corpus statute⁸⁷ affords some protection of state's rights.

The exhaustion requirement of 28 U.S.C. § 2254 mandates that

need for finality, see 102 S. Ct. at 3239-40. This view relegates individual liberty interests to a collateral position in American constitutional law. Surely, this is a novel approach.

82. 102 S. Ct. at 3238-39.

83. See *Davis v. Page*, 640 F.2d 599, 603 (5th Cir. 1981), *vacated mem.*, *sub. nom.* *Chastain v. Davis*, 102 S. Ct. 3504 (1982). The *Davis* case, which the Supreme Court vacated and remanded "for further consideration in light of" the *Lehman* decision, is discussed *supra* note 20.

84. See *Santosky v. Kramer*, 102 S. Ct. 1388 (1982), which makes clear the Court's position that it is a violation of a parent's constitutional rights for the state to terminate parental rights because others are perceived to be more fit to raise the child. *Santosky* is discussed further *supra* note 51.

85. See 102 S. Ct. at 3240-45 (Blackmun, J., dissenting).

86. *Id.*

87. See 28 U.S.C. § 2254(b) (1976).

persons seeking federal habeas relief fully exhaust every state remedy,⁸⁸ thus, the statute itself provides, to a large extent, the protection of states' interests which the *Lehman* Court sought. The state is given a full opportunity to explore the facts and issues, and to address any constitutional or other federal claims. If resort to the state supreme court is available, that court must have an opportunity to deal with the case. Then, if there is a genuine federal question involved, a federal court may grant a writ of habeas corpus.⁸⁹ The state has the first chance to attempt to adequately protect the affected individual, but if the state's efforts fail or are defective, there is a potential federal remedy. The requirement of exhaustion helps to assure that the state's own processes will not be subverted by federal action.

An additional protection afforded to federalism concerns is the substantial degree of discretion on the part of federal courts: They may decline to assert their habeas jurisdiction if they deem it proper.⁹⁰ The federal interest in allowing states the freedom to embark or not to embark on both experiments may come into play. The *Lehman* Court could have used its balancing approach and determined that habeas corpus should not be extended in this case as a matter of discretion. This would have allowed the Court to reach the same conclusion in barring habeas corpus for the Lehman children without erecting a jurisdictional bar to future petitions.⁹¹ Perhaps the Court simply overstepped itself in holding that federal habeas is *never* appropriate following a state's involuntary termination of a parent's rights.

C. *Standing*

A final substantive concern, not addressed by the majority but dis-

88. *Id.* § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . ."

89. *Id.* § 2254(a) allows the grant of habeas corpus to a person in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

90. *See Francis v. Henderson*, 425 U.S. 536, 539 (1976), wherein the Court stated: "[I]n some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power."

91. The majority seems implicitly concerned about abuse of judicial discretion by judges who might feel that the federal liberty interest would always outweigh the state's interest in finality. *See* 102 S. Ct. at 3238 & n.15. Social consciousness seems historically to ebb and flow, and the Court appears to believe that there recently has been too much flow among federal judges. There may be empirical reasons for such concern, but this seems an insubstantial reason for the Court to stem the tide completely. Establishing a clear precedent against allowing habeas corpus to minors, in order to cut off potential abuses of discretion, also robs the judicial system of the flexibility which may be necessary to its survival.

cussed by the dissent⁹² and several of the opinions below,⁹³ is whether Ms. Lehman had standing to assert a habeas corpus claim as next friend on behalf of her sons. Although in some circumstances a petition for habeas corpus may be filed by a next friend,⁹⁴ courts have been relatively reluctant to allow next friend application. This reluctance has been explained on the ground that the writ of habeas corpus was not intended to "be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends."⁹⁵

In *Weber v. Garza*⁹⁶ the Court of Appeals for the Ninth Circuit set out three guidelines for testing whether a next friend application should be heard:

First . . . (1) why the detained person did not sign and verify the petition and (2) the relationship and interest of the would-be "next friend." Second, individuals not licensed to practice law by the state may not use the "next friend" device as an artifice for the unauthorized practice of law. . . . Third, when the application for habeas corpus filed by a would be "next friend" does not set forth an adequate reason or explanation of the necessity for resort to the "next friend" device, the court is without jurisdiction to consider the petition.⁹⁷

"Adequate reason" for filing by a next friend has been found where, for example, the detainee is inaccessible, cannot understand the English language, or is mentally incompetent.⁹⁸ Infancy also has been recognized as a sufficient incapacity to allow for a next friend habeas petition.⁹⁹

A simple finding of incapacity, coupled with some reasonable relationship between the would-be next friend and the detainee is not sufficient to support a next friend petition.¹⁰⁰ Instead, a higher standard has been established, permitting next friend status to be "conferred on those who act for another as that other would do but for an intervening

92. 102 S. Ct. at 3244 (Blackmun, J., dissenting).

93. *Lehman v. Lycoming County Children's Services Agency*, 648 F.2d 135, 151 (3d Cir. 1981) (opinion of Adams, J.); 648 F.2d at 173 (Gibbons, J., dissenting).

94. "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" 28 U.S.C. § 2242 (1976) (emphasis added).

95. *Wilson v. Dixon*, 256 F.2d 536, 538 (9th Cir. 1958).

96. 570 F.2d 511 (5th Cir. 1978).

97. *Id.* at 513-14.

98. These instances of "next friend" applicability are cited in *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921).

99. *United States ex rel. Funaro v. Watchorn*, 164 F. 152, 153 (2d Cir. 1908).

100. *Evans v. Bennett*, 467 F. Supp. 1108, 1111 (S.D. Ala. 1979).

incapacity."¹⁰¹ A particularly striking example of this kind of problem was found in *Gilmore v. Utah*,¹⁰² in which the Court terminated a stay of execution for convicted murderer Gary Gilmore. Chief Justice Burger, concurring, noted that Gilmore had never wanted the stay of execution. For this reason, he felt that Gilmore's mother could not act as a next friend in applying for the stay.¹⁰³

It becomes more difficult to discern whether a next friend application is acceptable when the individual being detained is a minor. Minors generally are considered legally incompetent, so it is arguable that no statement by a minor as to his own wishes should be given any weight. This, of course, goes against both common sense and actual practice. It is clear that the Pennsylvania orphan's court carefully considered testimony in chambers by Ms. Lehman's sons to the effect that they did not wish to return to live with their mother.¹⁰⁴ However, it is possible to imagine situations in which a court should ignore, or accord less weight to, the statements of a minor as to his preferred disposition of a situation.¹⁰⁵ Justice Brennan's characterization of this in *Lehman* as a "difficult discretionary question"¹⁰⁶ seems particularly apt. There seems to be no hard and fast rule which would adequately cover the vast field of possible factual situations, and a court would have to weigh carefully all relevant factors. It seems unlikely that next friend status should be accorded to a parent of a relatively old child who clearly expresses a desire that the habeas corpus proceedings be discontinued.¹⁰⁷

VI. THE INFLUENCE OF *LEHMAN*

Generally, a state's action in terminating parental rights or making other disposition of a minor probably is in the minor's best interest and is not an undue imposition on parental rights. States generally accord great deference to parents' decisions concerning how to raise their children, both as a policy matter and pursuant to constitutional restric-

101. *Id.*

102. 429 U.S. 1012 (1976).

103. *Id.* at 1013-14 (Burger, C.J., concurring).

104. See *In re William L.*, 477 Pa. 322, —, 383 A.2d 1228, 1239 (1978).

105. For example, a very young child might be considered incapable of making an enlightened decision. Also, a child whose behavior problems are causing temporary friction with a parent might say that he wished never to return home, just to avoid dealing with the conflict.

106. 102 S. Ct. at 3244.

107. Even so, it does not seem necessary to completely foreclose next friend status to such a parent. The broad range of fact patterns which might arise dictates against rashly formulating any absolute rule in this area.

tions.¹⁰⁸ The basic question thus becomes whether the holding in *Lehman* will prevent appropriate action, and possibly prevent ultimate justice, in those rare cases where a parent and child have been deprived of their legal relationship in violation of their rights.

Clearly, the *Lehman* majority believes adequate remedies exist outside the habeas corpus route. The Court adopted the following statement by the Court of Appeals for the First Circuit in *Sylvander v. New England Home for Little Wanderers*:¹⁰⁹ "At bottom the question is whether these constitutional issues can be adequately raised through the usual channels—appeal, certiorari and the civil rights statutes—or whether the vehicle of federal habeas, with its unique features, is required."¹¹⁰

Direct appeal from a decision of the highest court in a state to the United States Supreme Court is possible where the validity of a statute of any state is challenged as being repugnant to the Constitution, treaties, or laws of the United States, and the state court's decision upholds the statute's validity.¹¹¹ Thus, in a constitutional challenge to a state statute, such as Ms. Lehman's challenge¹¹² of the Pennsylvania Adoption Act, there is a right of direct appeal to the United States Supreme Court. However, the Court need not grant plenary review, and may summarily affirm.¹¹³ In addition, on appeal the Supreme Court generally is bound by the state court's findings of fact.¹¹⁴ On a writ of habeas corpus, however, it is possible in limited circumstances for fact questions to be reopened.¹¹⁵ This is a potentially invaluable tool for doing justice in an appropriate case. Because reconsideration of findings of fact is foreclosed on direct appeal to the Supreme Court, direct appeal may be inferior to habeas corpus as a way to undo an unjust

108. Most, if not all states have a statutory goal to "preserve family unity whenever possible," such as that found in 42 PA. CONS. STAT. ANN. § 6301(b) (Purdon Supp. 1983-1984). In addition, the United States Supreme Court, in decisions such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), has placed constitutional limits on state interference with parent-child relationships.

109. 584 F.2d 1103 (1st Cir. 1978).

110. 102 S. Ct. at 3239-40 (quoting *Sylvander*, 584 F.2d at 1111).

111. See 28 U.S.C. § 1257(2) (1976).

112. See *supra* note 17 and accompanying text.

113. *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975).

114. See *Watts v. Indiana*, 338 U.S. 49, 50 (1949); *Wolfe v. North Carolina*, 364 U.S. 177, 196, *reh'g denied*, 364 U.S. 856 (1960).

115. See 28 U.S.C. § 2254(d) (1976). The statute provides that a state court's "determination . . . of a factual issue . . . shall be presumed to be correct" unless the habeas applicant can establish (or the respondent in the action admits) any of the following set of circumstances:

termination of parental rights, if the state court has made inappropriate findings based on the evidence presented.

The *Lehman* majority also pointed to civil rights statutes as another means of protecting parents' and children's rights in termination proceedings.¹¹⁶ There is a potential right of action under 42 U.S.C. § 1983¹¹⁷ for a "deprivation of any rights, privileges or immunities secured by the Constitution"¹¹⁸ if it occurs "under color of any statute, ordinance, regulation, custom, or usage of any State."¹¹⁹ This right, however, also is inferior in some respects to federal habeas as a means of protecting federal rights. Federal appeals courts have construed the doctrine of res judicata to cut off civil rights claims on federal statutes following a state supreme court's judgment based on the same basic facts, and reaching the same issues, as the action filed in federal court.¹²⁰ These decisions would give full credit to the state court's

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- (1) that the merits of the factual dispute were not resolved in the State court hearing;
 - (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
 - (3) that the material facts were not adequately developed at the State court hearing;
 - (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
 - (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
 - (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
 - (7) that the applicant was otherwise denied due process of law in the State court proceeding;
 - (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

Id.

116. See 102 S. Ct. at 3239-40 (quoting *Sylvander*, 584 F.2d at 1111).

117. 42 U.S.C. § 1983 (1976).

118. *Id.*

119. *Id.*

120. See, e.g., *Red Fox v. Red Fox*, 564 F.2d 361, 363-64 (9th Cir. 1977) (American Indian's allegations, pursuant to 25 U.S.C. § 1302(8), of violation of his civil rights in divorce action held foreclosed by the res judicata effect of the state courts determination); *Spence v. Latting*, 512 F.2d 93, 97-99 (10th Cir.), cert. denied, 423 U.S. 896 (1975) (police officer's claim under 42 U.S.C. § 1983, of lack of due process in his firing held foreclosed by res judicata effect of state supreme court determination that state law did not require an additional hearing); *Roy v. Jones*, 484 F.2d 96, 98-99 (3d Cir. 1973) (suspended city councilmen's claim under 42 U.S.C. § 1983, of lack of due process held foreclosed by res judicata effect of the suspension proceedings and determinations of their appeal).

judgment,¹²¹ holding the federal suit to be tantamount to relitigation of the same issues between the same parties and therefore precluded.¹²² Thus, contrary to the assumption of the *Lehman* Court, a civil rights action might be unavailable to a parent in Ms. Lehman's position if the action was deemed a mere "relitigation" of the same issues which were presented, or which might have been presented, at the state level.

A federal court also might give a more limited, collateral-estoppel effect to state judgments,¹²³ holding that only issues which were actually raised and fully and fairly pressed before the state courts are binding upon the federal courts.¹²⁴ The litigant may, however, be required to expressly reserve his federal questions in order to preserve his right of action.¹²⁵ It also has been held that the litigant must have attempted previously to bring the action before a federal court that declined jurisdiction on grounds that questions more properly raised before a state court possibly were dispositive of the case.¹²⁶ Thus, a civil rights action could present a slippery procedural situation, and even be impossible in some situations. In addition, the action could prolong proceedings by requiring full litigation of state questions in the state court, followed by litigation of reserved federal questions in the federal court system. It is exactly this kind of interminable proceeding which the *Lehman* Court supposedly was trying to eliminate by denying federal habeas to nonincarcerated minors.¹²⁷

Finally, the writ of certiorari directly to the Supreme Court is an inadequate remedy. The Court simply lacks the time and personnel to consider every case which might have merit. Federal habeas, on the

121. 28 U.S.C. § 1738 (1976) provides in pertinent part that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in such State . . . from which they are taken."

122. See *Spence*, 512 F.2d at 98, wherein the Court states: "Where a second suit between the same parties or their privies is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated, as well as those which could have been litigated."

123. See, e.g., *New Jersey Educ. Ass'n v. Burke*, 579 F.2d 769, 772-76 (3d Cir. 1978) (remanding action for stay of a board of education order, to determine whether due process and equal protection claims were fully litigated before the state court); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 594-95 (7th Cir. 1977) (section 1983 claims based on violations of civil rights allowed despite adverse state determination, based on other issues, arising under the same facts).

124. This interpretation is illustrated by the following statement from *Burke*: "[A] state court judgment forecloses a [civil rights] litigant from raising grievances in federal court only if such claims have been pressed before, and decided by, a state tribunal." 579 F.2d at 774.

125. See *Lovely v. Laliberte*, 498 F.2d 1261, 1263-64 (1st Cir.), cert. denied, 419 U.S. 1038 (1974).

126. See *Roy v. Jones*, 484 F.2d 96, 101 (3d Cir. 1973).

127. See *Lehman*, 102 S. Ct. at 3239.

other hand, could be granted by a district court¹²⁸ with right of appeal only to a circuit court.¹²⁹ The result would be that the Supreme Court could not be bogged down with such cases, and an adequate remedy would remain available to parents or minors affected by state termination proceedings.

Thus, contrary to the rationalizations of the *Lehman* Court, federal habeas is sometimes superior to any other possible remedy in the federal courts. In addition, allowing federal habeas for minors who are in custody pursuant to a state court judgment would be more consistent with the historically broad construction of circumstances under which the writ has been deemed available.¹³⁰

VII. CONCLUSION

The Supreme Court's decision in *Lehman* is to some extent consistent with its recent tendency to restrict the availability of habeas corpus for state prisoners. It is perhaps in this light that the decision is most readily understood and explained.

However, it also seems that the relatively clear and compelling fact situation involved in *Lehman* buffered the potentially expansive nature of the Court's holding. The Court appears to have completely cut off federal habeas for minors, with the possible exception of minors incarcerated pursuant to state judgments. Of course, it is possible that the holding will be construed restrictively as applicable only to the facts presented in the case, i.e., that federal habeas corpus is not available to challenge a state's involuntary termination of parental rights where the children appear to be competent to decide that they do not wish to return to the parent seeking the habeas action. Yet the Court's language does not imply such a restrictive view, and as long as the holding stands unrestricted it is unlikely that a habeas petition for an incarcerated minor will be permitted by the federal courts, no matter how compelling the facts. The Court would have been wiser to have disposed of the petition on a narrow ground, such as Ms. Lehman's standing to sue on behalf of her sons. This would certainly have been more historically consistent. It also would have, perhaps, been more consistent with the Court's view that habeas corpus is the sole federal remedy available to

128. See 28 U.S.C. § 2241(a) (1976).

129. See *id.* § 2253.

130. See *infra* notes 24-44 and accompanying text.

challenge either the fact, or duration, of state custody.¹³¹

James Andreasen

131. See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (“[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment and the relief he seeks is a determination that he is entitled to immediate release . . . his sole federal remedy is a writ of habeas corpus.”)