The Continuing Diminished Availability of Federal Habeas Corpus Review to Challenge State Court Judgments: Lehman v. Lycoming County Children's Servies Agency

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TABLE OF CONTENTS

Introduction ............................................................................................................. 272

I. Lehman v. Lycoming County Children's Services Agency: A Decision in Search of a Holding ................................................................. 273
   A. Background .................................................................................................. 273
   B. Jurisdiction Under 28 U.S.C. § 2254(a) .................................................. 275
      1. Physical confinement as "custody" ......................................................... 276
      2. Criminal conviction as "custody" ............................................................ 278
      3. Restraints on liberty as "custody" ............................................................ 279
   D. Federalism and Finality ............................................................................. 282
      1. Federalism ............................................................................................... 283
      2. Finality ................................................................................................... 285

II. The Effect of Lehman on Federal Habeas Corpus Jurisdiction ............. 286
   A. Pre-Lehman Child Custody Cases in the Federal Courts ......... 286
   B. Pre-Lehman Jurisdiction Under Federal Habeas Corpus .......... 290
      1. Federalism as a factor in denying pretrial habeas corpus jurisdiction .......................................................................................................................... 290

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2. Federal courts' interpretation of the scope of habeas corpus relief under the "custody" requirement ........................................ 292
   a. The Hensley decision ........................................... 292
   b. The availability of habeas corpus depending on actual physical custody by the state or on severe restraints resulting from a criminal conviction ........................................ 293
   c. The availability of habeas corpus depending on restrictions on the petitioner's liberty of movement ........................................ 296
   d. The availability of habeas corpus depending on federal interest in liberty outweighing finality concerns ........................................ 298

III. The Effect of Lehman on the Availability of a Federal Forum to Challenge the Constitutionality of Child Custody Statutes ........................................ 300
   A. Petition for a Writ of Habeas Corpus ........................................ 300
   B. Other Means of Federal Review ........................................ 303
         a. State proceeding concluded ........................................ 303
         b. State proceeding pending ........................................ 304
         c. State proceeding not instituted ........................................ 305
      2. Appeal to the United States Supreme Court ........................................ 306

Conclusion ................................................................. 307

INTRODUCTION

The Supreme Court, in a series of recent decisions, has indicated that federal courts should rule conservatively on applications for writs of habeas corpus. In one of those decisions, Lehman v. Lycoming County Chil-

diminished federal habeas review

the court held that federal courts did not have jurisdiction to entertain a writ of habeas corpus that challenged the constitutionality of a state statute that authorized termination of parental rights. the rationale of the restrictive decision in Lehman could certainly have precedential value for limiting the use of habeas corpus, which is often the only means of obtaining federal review of a case brought by a state prisoner to protect his federal constitutional rights. the opinion in Lehman is broadly worded, and the court's rationale is evasive. although the majority held that federal habeas corpus jurisdiction was lacking, the basis for that holding is not readily discernible because the underlying facts provided a wide range of reasons for the court's refusal to grant the writ.

this article first examines the Lehman opinion to determine why the court held that the lower federal court lacked jurisdiction to entertain a writ of habeas corpus. next, the article considers the effect of the Lehman decision on habeas jurisdiction in terms of the federal courts' prior interpretation of the scope of their habeas jurisdiction. finally, the article examines the effect of Lehman on the availability of a federal forum to litigate federal rights in light of recent supreme court decisions that have invoked the abstention doctrine and have narrowed plenary review under 42 u.s.c. § 1983.

i. Lehman v. Lycoming County Children's Services Agency: A Decision in Search of a Holding

A. Background

in 1971 marjorie lehman, who had never been married, became pregnant with her fifth child. her income at that time consisted solely of a monthly supplemental security income allowance on which she supported herself and three of her four children. faced with the prospect of having a fourth child in her care, lehman voluntarily placed her three sons with the children's services agency. the agency, in turn,

2. 458 u.s. 502 (1982).
3. Id. at 516.
4. Indeed, the dissenting justices agreed that the district court should have denied habeas relief, but disagreed with the majority's reliance on the jurisdictional bar. the dissent would have held that the federal district court could have withheld relief as a matter of discretion. see id. at 516-26. justice Blackmun wrote the dissent, in which justices Brennan and Marshall joined.
placed the boys in foster homes. Three years later, Lehman's request that her sons be returned to her marked the beginning of more than seven years of litigation.

Because the evidence developed by caseworkers and the Pennsylvania judiciary painted a bleak picture of Lehman's ability to raise four children, the orphan's court terminated her parental rights, and the Pennsylvania Supreme Court affirmed the decision. Lehman then filed a third-party habeas corpus application in federal district court under 28 U.S.C. § 2254(a). She sought a declaration that the state termination statute was unconstitutional, and asked that her sons be returned to her custody. The district court dismissed the petition without a hearing, and the United States Court of Appeals for the Third Circuit affirmed the dismissal. The United States Supreme Court granted certiorari to decide whether federal habeas corpus jurisdiction under section 2254 may be invoked to challenge the constitutionality of a state termination statute like the one at issue in Lehman.

7. While her sons were living in foster homes, Lehman visited them monthly at the Children's Services office. Id. at 342, 383 A.2d at 1238.

8. Tests revealed that Lehman had an I.Q. of between 43 and 57 and a mental age of between 6 and 12 years. Id. at 344, 383 A.2d at 1239. She was unable to keep track of money and to perform simple tasks. Id. at 342 n.17, 344, 383 A.2d at 1238 n.17, 1239. Moreover, her three sons testified in chambers that they did not want to live with their mother. Id. at 343, 383 A.2d at 1239. On this point, both the majority and the dissent ignored the affirmative testimony of the children and simply noted that there was "no evidence that...the sons wanted to return to their mother." Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 504 n.2, 525 (1982).

9. In re William Lehman, Nos. 2986-88 (C.P. Lycoming County, Orphan's Ct. Div. June 3, 1976). On the basis of the evidence, the orphan's court concluded that, because of Lehman's very limited social and intellectual development and her five-year separation from the children, she was "incapable of providing minimal care, control and supervision for the three children." Id. at 4.

10. In re William L., 477 Pa. 322, 383 A.2d 1228, cert. denied, 439 U.S. 880 (1978). Lehman had appealed the decision of the orphan's court to the state supreme court on the ground that the termination statute was unconstitutional, both on its face and as applied. Id. at 329, 383 A.2d at 1231. The factual findings of the lower court were not contested. After reviewing the record from the orphan's court proceedings, the state supreme court rejected Lehman's contention and upheld the termination decision. Id. at 359, 383 A.2d at 1247.


13. The district court reasoned that the Lehman sons were not in custody within the meaning of § 2254(a), and therefore refused to grant habeas corpus relief. See Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 506 (1982).


15. Lehman v. Lycoming County Children's Servs. Agency, 451 U.S. 982 (1981) (decision granting certiorari). The statute at issue in Lehman authorizes, in pertinent part, termination of parental rights when: "[t]he repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care... necessary for his...well-being... and the causes of incapacity... cannot be remedied by the parent." PA. STAT. ANN. tit. 1, § 311(2) (Purdon 1977).
In reaching its decision to affirm the dismissal, the Supreme Court first examined the statutory requirements for habeas jurisdiction under section 2254(a), and held that those requirements had not been met. The Court then discussed the federalism and finality concerns that weighed against granting habeas jurisdiction in a case such as Lehman's. The Court indicated that these concerns, along with several aspects of the statutory language, supported a finding of lack of jurisdiction.

Because the majority opinion in Lehman did not isolate one factor as dispositive of the jurisdictional issue, the precise rationale underlying the Court's decision is unclear. The conclusion that the federal court had no jurisdiction to hear a petition for habeas corpus in a state parental rights termination proceeding could have resulted from the Court's consideration of several factors. These factors include whether habeas jurisdiction existed at all, and whether federalism and finality concerns made the exercise of habeas jurisdiction inadvisable.

An examination of these factors will aid in an understanding of the role that each played in the Court's deliberations, and will help to determine the precedential value that the Court's treatment of the factors will have for future habeas corpus proceedings. In addition, a review of previous law applicable to these factors will provide an analytical framework within which to assess the validity of the Court's reasoning.

B. Jurisdiction Under 28 U.S.C. § 2254(a)

In a federal habeas corpus proceeding, 28 U.S.C. § 2254 usually governs jurisdiction. That statute, in part, allows a federal court to entertain an application for habeas corpus only if the petitioner is in custody pursuant to a state court judgment, and only if that custody violates federal law. The petition for habeas corpus in the Lehman case was based on alleged violations of federal constitutional rights, which rights

17. Id. at 508-12; see infra notes 20 & 21 and accompanying text (discussing statutory requirements for habeas jurisdiction).
18. Id. at 512-14; see infra notes 62-85 and accompanying text (analyzing federalism and finality concerns addressed by Court).
19. 28 U.S.C. §§ 2241, 2254 (1976); see infra note 20 (discussing § 2254(a)) & 21 (text of § 2254(a)).
21. 28 U.S.C. § 2254(a) (1976) 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.
the Court did not address. The failure of jurisdiction rested solely on the conclusion that the petitioner was not in custody pursuant to a state court judgment. Indeed, the Court began its analysis by focusing on the statutory language concerning custody and its meaning.

1. Physical confinement as "custody"

First, the Court's holding in *Lehman* can be interpreted to mean that habeas corpus relief is available only when the petitioner is in the actual physical custody of the state after a criminal conviction. The language of section 2254(a), however, does not support this narrow interpretation. The Court's reading of the language requires a number of limiting phrases to be added to the statute: "a person in [the actual physical] custody [of the state] pursuant to the [criminal] judgment of a State court . . . ."

To support its narrow reading, the Court emphasized that the word "prisoner" appears in both sections 2241 and 2254(b) of title 28, which apply to habeas corpus proceedings. The Court implied that "prisoner" meant one who is in actual confinement upon a criminal action. The Court's narrow reading of the statute, however, is inconsistent with Congress' choice of the words "custody" instead of "confinement," and "judgment" instead of "conviction" in other sections of the statute. In addition, the narrow definition of "prisoner" is inconsistent with the Court's previous holdings that actual physical confinement is not absolutely necessary to satisfy the statutory custody requirement.

In fact, the Court in *Lehman* recognized three cases in which it had held that custody does not require actual physical confinement. First, the Court discussed *Jones v. Cunningham*, in which it had held that a parolee is "in custody" for purposes of habeas corpus jurisdiction because "the custody and control of the Parole Board involve significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally." The Court then referred to *Carafas v. LaValle*, in which it had held that the case of a petitioner who had served his full term since he had filed a petition for writ of habeas corpus was not moot for purposes of habeas jurisdiction

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23. See *id.* at 508-12.
24. *Id.*
25. 28 U.S.C. § 2254(a) (1976); see *infra* note 21 (text of § 2254(a)).
27. See *id.* at 510.
28. For a discussion of these cases, see *infra* notes 29-35 and accompanying text.
30. *Id.* at 242.
because he was subject to "collateral consequences" as a result of his conviction.32 Finally, the Court cited *Hensley v. Municipal Court.* 33 In that case, the Court had reaffirmed the *Jones* standard for defining custody, and had held that the petitioner, who had been released on his own recognizance, was "in custody" because he was "subject to restraints 'not shared by the public generally.' "34 The Court found that these holdings, however, did not dictate a finding of "custody" in *Lehman,* and explained that the previous cases limited the availability of habeas corpus review to situations in which "as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally."35

A distinction based solely on the criminal nature of the judgment, however, is unwarranted: the Court had specifically held in two earlier cases that habeas challenges to noncriminal judgments were proper.36 Although it acknowledged these holdings, the Court attempted to distinguish them from *Lehman* by emphasizing that both earlier cases had involved custody under federal—not state—judgments.37 Challenges to a federal judgment, the Court reasoned, do not threaten interference with state proceedings and therefore do not involve federalism concerns.38 The Court thus implied that a more liberal construction of the term "in custody" is allowed in reviewing challenges to federal, as opposed to state, judgments.

Varying the meaning of the term "in custody" to accommodate federalism concerns, however, is not a legitimate technique of statutory construction. The "in custody" language that appears in the portions of section 224139 directed at federal petitioners also appears in section 2254(a)40 relating to state petitioners. The word "prisoner" appears in the introductory portion of subsection (c) of section 2241,41 which prefaced the statutory scheme for both federal and state petitioners. An honest attempt at statutory construction, therefore, requires that the terms "custody" and "prisoner" be interpreted identically in both contexts.42

32. *Id.* at 237; *see infra* notes 178-79 and accompanying text.
34. *Id.* at 351 (quoting *Jones v. Cunningham,* 371 U.S. 236, 240 (1963)).
38. *Id.*
40. *Id.* § 2254(a).
41. *Id.* § 2241(c).
42. Imaginative lawyers have argued without success that the definition of "custody" in the
2. Criminal conviction as “custody”

In further distinguishing the case in Lehman from previous decisions that would support a liberal reading of the availability of habeas relief, the Court implied that a criminal conviction might be a necessary pre-requisite for filing a writ of habeas corpus. The Court noted that the Lehman children, unlike prior state habeas petitioners, were not prisoners and did not challenge a criminal judgment. Next, the Court stated: "Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not [in custody]."

The Court’s language makes possible the interpretation that a state petitioner must be in actual or constructive custody pursuant to a criminal conviction before that petitioner could file a writ of habeas corpus. The Court stated that the children’s lack of prisoner status and the absence of a state criminal judgment alone distinguished Lehman from cases that have upheld federal habeas relief from state court judgments. In addition, the Court characterized the state court’s action in Lehman as “an order,” and avoided the use of the word “judgment.” The word “judgment” contained in the habeas phrase “judgment of a State court” could now conceivably be considered a term of art meaning “a criminal conviction.”

Despite the language that implies a requirement of a criminal conviction context should be applied to cases that involve the use of the word “custody” in other statutory contexts. The courts have refused to equate the terms in the context of a request for credit for time served while the prisoner was released on bail or bond. See, e.g., Cerrella v. Hanberry, 650 F.2d 606 (5th Cir.) (prisoner’s bail, although restricting his travel, did not constitute custody for which credit against sentence would be given), cert. denied, 454 U.S. 1034 (1981); United States v. Hoskow, 460 F. Supp. 929 (E.D. Mich. 1978) (time spent on release subject to bond conditions was not time spent in custody for purposes of sentence credit); Hogan v. United States, 383 F. Supp. 850 (D.S.C. 1974) (prisoner not entitled to sentence credit while free on bond pending appeal of conviction). A federal court was equally unpersuaded by a prisoner’s argument that he should receive credit against his ultimate sentence for time he spent incarcerated on a contempt citation. Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975). A defendant released on his own recognizance has been held not to be in “custody” for purposes of Miranda warnings. United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980).

One court, however, has used the Hensley definition of custody, see supra note 34 and accompanying text, to determine the point at which a person is in custody, and thereby to assess whether the defendant had been denied a speedy trial. United States v. McDonald, 531 F.2d 196 (4th Cir. 1976), rev’d on other grounds, 435 U.S. 850 (1978). In United States v. Bailey, 585 F.2d 1087 (D.C. Cir. 1978), rev’d on other grounds, 444 U.S. 394 (1980), the United States Court of Appeals for the District of Columbia Circuit also relied on Hensley to support its finding that the petitioner, although he had been transferred by the Attorney General pursuant to a writ of habeas corpus ad testificandum, was in custody in the hands of federal authorities and therefore could be charged with escape from custody in violation of 18 U.S.C. § 751(a) (1976). Similarly, Hensley was cited in a finding of custody for purposes of a charge under 18 U.S.C. § 3150 (1976) (failure to appear pursuant to court order), although the prisoner was on release on his own recognizance. United States v. Garner, 478 F. Supp. 1 (W.D. Tenn. 1979).

44. Id. (emphasis added).
45. Id.
46. See id. at 511 n.12, 514 (referring to state decision below as “an order”).
tion, however, the Court's remarks do not appear to rise to the level of a holding. The most forceful indication that the Court does not, by its decision in *Lehman*, limit habeas relief to criminal judgments is its reservation of the question of the availability of habeas when a child is in a state institution rather than a foster home.\textsuperscript{47} Moreover, the mere fact that the Court distinguished the facts in *Lehman* from those in prior state court habeas challenges on the basis of the children's nonprisoner, non-criminal status falls far short of a statement that federal habeas relief is *limited* to those instances.

3. *Restraints on liberty as "custody"*

Another element of the Court's analysis of "custody" was its discussion of restraints on liberty. The Court specified that the children were not in state custody. It did not address, however, the nature of the state's involvement with the children. Instead, the Court compared restrictions that the foster parents placed on the Lehman children with those restrictions that natural or adoptive parents impose on children.\textsuperscript{48}

Because the question is whether the children are in *state* custody, the Court should have used the test developed in *Jones* and *Hensley*—i.e., it should have compared the restraints imposed by the *state* on the Lehman children with the restraints imposed on children generally. Even more narrowly, the Court should have compared state restraints on foster children with state restraints on children generally,\textsuperscript{49} for the state has a continued significant presence in the lives of foster children that it does not have in other children's lives.\textsuperscript{50}

In *Lehman* the state was involved in the Lehman children's recognized constitutional liberty interests by virtue of the statute that permitted the termination of Lehman's parental rights.\textsuperscript{51} If the Court had compared state involvement with the Lehman children to all restrictions on children generally, it might have found that children generally have limited rights and that those who are entrusted with their care would exercise the same decisional power as the state did pursuant to the Pennsylvania statute. Parents generally decide, for example, where children will live,

\textsuperscript{47} Id. at 511 n.12.
\textsuperscript{48} Id. at 510-11.
\textsuperscript{49} For the Court's discussion of state restraints versus general restraints on children, see *id.*
\textsuperscript{50} This approach is consistent with that used by the Court in *Jones*: "the custody and control of the Parole Board involve . . . restraints . . . which are in addition to those imposed by the *State* upon the public generally." *Jones* v. Cunningham, 371 U.S. 236, 242 (1963) (emphasis added).
\textsuperscript{51} The dissent pointed out that foster children are wards of the state: "the State decides where they will live, reserves the right to move them to new physical settings at will, and consents to their marriage, their enlistment in the armed forces, as well as all major decisions regarding medical, psychiatric, and surgical treatment." *Lehman* v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 521 (1982) (Blackmun, J., dissenting).
and whether to move them to new physical settings. Although it is true that the state placed greater restrictions on the Lehman children than it places on children in general, the Lehman children did not suffer greater actual restraint by virtue of the state’s involvement. The state, in a sense, merely substituted for the parent.

In its examination of whether the restraints placed on the Lehman children constituted custody, however, the Court ignored the state’s involvement, and looked only to the restraints that had been imposed by the children’s actual physical custodians, the foster parents. In so doing, the Court implied that because physical custody is required for use of habeas, only restraints that the physical custodian imposes will be examined. It also implied that the Court will consider restraints imposed by the state only when the state is the actual physical custodian.

Another explanation for the majority’s approach is its apparent desire to reduce the number of federal habeas corpus cases. If the majority had compared the state’s restraints in the present case with restraints on children generally and had found that the state’s restraints were insufficient to find “custody,” the door would still be open to habeas review of child custody cases. Because state involvement with foster children varies from state to state, petitioners could continue to bring habeas cases in child custody matters by distinguishing between their state’s restraints and the state restraints imposed in Lehman.

But the Court in reaffirming the Hensley and Jones standard of “custody”—restraints on liberty in excess of those imposed by the state on others—actually narrowed the definition of liberty for purposes of that standard. The decision in Lehman supports the idea that a finding of “custody” is required only when a person’s freedom of movement is restricted or when he is confined.

The Court’s reliance on Hensley and Jones for the proposition that habeas relief is available only when liberty of movement is restricted is misplaced. In neither case did the Court limit habeas relief to the particular restraints before it. The decision in Hensley, in fact, contains language that refutes such a narrow reading. The term “liberty,” as used in that case, encompassed rights in a broad constitutional sense. In Hensley

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53. See supra note 1 and accompanying text (discussing Court’s recent efforts to limit habeas review).
54. See, e.g., N.Y. SOC. SERV. LAW § 392.8 (McKinney 1983) (court may order protection by setting forth reasonable conditions of behavior that person or agency before court must observe for specified time); CAL. WELF. & INST. § 16501 (West 1983) (child protective services program can act to protect child whose welfare is endangered by providing alternate care outside home, such as foster care); TEX. HUM. RES. CODE ANN. § 41.021 (Vernon 1980) (payments for protective care of foster children must equal payments made for similar care of child eligible for department’s aid to families with dependent children).
the Court held that the fact that the petitioner had to keep a stay in
force to remain out of prison was in itself an impairment of his liberty
significant enough to constitute custody.\footnote{56}

The Court in \textit{Lehman} identified physical confinement, criminal con-
\v{c}\v{t}ion, and restraints on liberty as the elements of custody necessary to
\v{e}stablish jurisdiction for federal courts to entertain a writ of habeas
corpus from a state proceeding. Because it did not hold that these three
elements are always required for any finding of custody in habeas cases,
however, the exact nature of "custody" that is required to satisfy section
2254(a), therefore, still is unclear.\footnote{57}

\section*{C. Jurisdiction Under 28 U.S.C. § 2242}

The habeas petition in the \textit{Lehman} case was a third-party application
filed pursuant to 28 U.S.C. § 2242.\footnote{58} Such petitions may be made only
when the signator acts on behalf of the one for whom relief is intended.\footnote{59}
As such, the application in the \textit{Lehman} case raised two questions. First,
on whose behalf did Lehman act? Second, for whom did she seek relief?
If Lehman was acting in her own behalf and sought relief for her own
constitutional deprivations, the Court clearly lacked jurisdiction to hear
her claims under federal habeas corpus because she was not, and, of
course, never claimed to be, in custody as the statute requires.\footnote{60}

In answering these questions the majority characterized the dispute as
\v{b}eing one between Lehman and the state, and found that Lehman
\v{e}ought relief for herself rather than for her sons.\footnote{61} Based on this charac-

\footnotesize
\begin{itemize}
\item[56.] Hensley v. Municipal Court, 411 U.S. 345, 352 (1973).
\item[57.] \textit{See} 28 U.S.C. § 2254(a) (1976). For the text of § 2254(a), see \textit{supra} note 21.
\item[58.] 28 U.S.C. § 2242 (1976). Section 2242 provides in pertinent part: "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." \textit{Id.}
\item[59.] \textit{See} \textit{id.}
\item[60.] \textit{See} \textit{id.} § 2254(a). For the text of this provision, see \textit{supra} note 21.
\text{\v{c}ourt, in a footnote, noted that Lehman's lawyer had stated that the hearing before the Penn-
\v{s}ylvania trial court was not a custody proceeding. \textit{Id.} at 511 n.13. Although the Court did not
\v{e}xplain the significance of this statement, an inference arises that the Court believed that Lehman
was attempting to vindicate her own constitutional rights rather than to relieve her sons from the
custody of their foster parents. The dissent analyzed the question of the real party in interest under
the third-party application as calling for a discretionary determination of whether Lehman was the
"next friend" of her children. \textit{See} Hackin v. Arizona, 389 U.S. 143, 149 n.8 (1967) (per curiam)
(Douglas, J., dissenting) (in habeas corpus proceedings "the practice of a next friend applying for a
writ is ancient and fully accepted") (quoting United States \textit{ex rel. Bryant v. Houston}, 273 F. 915,
916 (2d Cir. 1921)). It submitted that ample evidence existed for the district court, in its discretion,
to find that the petitioner had made an insufficient showing that she was acting in her children's
interest and therefore to refuse to grant relief. \textit{Lehman}, 458 U.S. at 525 (Blackmun, J., dissenting).
Although the dissent's analysis is correct, its application of that analysis to the facts in \textit{Lehman}
is incorrect because sufficient evidence existed to hold that Lehman not only did not represent the
interests of her children, but also that she sought, as the majority stated, to litigate her own interests
before the Court.
\end{itemize}
terization, the Court could have found that because Lehman was before it on a habeas petition without being “in custody,” it could not, as a matter of law, entertain the writ. There is nothing in the opinion, however, to suggest that the majority held that jurisdiction was lacking on the ground that the third-party applicant was not in custody. A plausible explanation is that the majority included its discussion of Lehman’s petition as seeking relief from her own constitutional deprivations because some members of the majority would have denied jurisdiction on that ground. Thus, the Court may have addressed the third-party application in the opinion in order to win the votes necessary to deny jurisdiction.

D. Federalism and Finality

In addition to the jurisdictional questions under the habeas statutes, the Court in Lehman addressed the issues of federalism and finality that child custody cases, in particular, raise. On the issue of federalism the Court noted that the writ of habeas corpus represents “profound interference” with state judicial systems, and thus must be reserved for cases in which the federal interest is exceptionally great. The Court then pointed out that the state’s interest in finality is unusually strong in child custody cases because of the child’s need for a stable, secure environment. The Court’s analysis in each of these areas does not rise to the level of a holding that these concerns bar jurisdiction, but does indicate that they should play a prominent role in any federal review of a state proceeding under habeas corpus.

The Court’s emphasis on federalism also suggests that it is proper to apply a higher standard in determining “custody” when a state, rather than a federal, petitioner seeks federal collateral review. The apparent standard set by the Court for state petitioners seeking federal habeas corpus relief is to balance the federal interest in individual liberty against federalism and finality concerns. This standard purportedly gives the federal courts wide latitude in denying federal habeas relief to state petitioners simply by finding countervailing interests in federalism and finality.

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I. Federalism

The Lehman Court emphasized that habeas corpus interferes with notions of federalism by giving a single federal judge the power to overrule a state supreme court decision.64 This interference weighed heavily against the grant of habeas relief. According to the Court, the federal interest in individual liberty in child custody cases is insufficient to warrant federal habeas intervention.65 Furthermore, the parents' constitutional rights of due process and equal protection do not warrant federal habeas relief in child custody cases because these issues are only collateral to child custody disputes.66 The Court implied that these constitutional issues did not require federal habeas review because the rights involved can be protected through the usual channels of appeal, certiorari, and litigation under the civil rights statute.67

The Court's analysis of federalism in Lehman is faulty. First, the Court overlooked the fact that Congress, by enacting 28 U.S.C. § 2254,68 had decided that a federal district court judge should have the power to nullify a state decision. Congress had demonstrated its sensitivity to the demands of federalism by the requirements that it imposed on habeas petitions from state judgments, including the requirements of exhaustion of state remedies,69 deference to state findings of fact,70 and certificates of probable cause to appeal.71 If Congress felt that the power granted to a single federal district court judge was destructive to federalism, it could have designated the federal appellate court rather than the lower district court as the initial arbiter of habeas corpus writs. The Court's emphasis on federalism concerns implies that preservation of the dignity of a state's judicial system is more important than correcting the constitutional errors that result from wrongfully holding a person in custody. Despite such federalism concerns, however, federal courts, at both the trial and the appellate levels, retain the ultimate authority to resolve federal constitutional issues, and should not have to defer to state courts in matters involving constitutional deprivations.

65. Id at 515-16.
66. Id at 515. In stating that the constitutional issues in child custody cases are collateral to the custody disputes, the Court cited Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978). Sylvander had emphasized that states have a long history of predominance in family law matters and strong substantive interests in the welfare of the children residing in the state. Id. at 1111. The federal government, on the other hand, has no equivalent substantive interest in child custody matters, and therefore its interest is collateral to custody disputes. Id.
69. Id. § 2254(b)-(c).
70. Id. § 2254(d).
71. Id. § 2253.
Next, the Court's statement that the constitutional issues in these cases are "collateral to" the custody decision is difficult to justify. The petitioner in *Lehman* had challenged the constitutionality of the very statute on which the state claimed its power to terminate parental rights. It is difficult to imagine an issue more central to the state court's ultimate decision than the constitutionality of the statute that gives rise to the cause of action. The Court's conclusion that the federal interests in *Lehman* were collateral to the child custody dispute is understandable only because the Court viewed the constitutional issues in the case as relating primarily to Lehman's rights rather than to her children's rights.\(^7\)

After presenting its federalism concerns, the Court stated that the procedures of appeal, certiorari, and litigation under the civil rights statute are more appropriate than habeas corpus for challenging state court decisions in child custody cases.\(^7\) The third method of challenging state decisions that the Court suggested—resort to the civil rights statutes—presents problems. The use of a federal statute such as 42 U.S.C. § 1983\(^7\) was probably have a more detrimental effect on federalism than does habeas corpus, because the exhaustion of state remedies that is required for habeas review is not necessary under section 1983.\(^7\) The express purpose for requiring exhaustion of state remedies under habeas is to give the states the ability to correct their own errors\(^7\) and to lessen...

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73. *Id.* at 515 (quoting Sylver v. New England Home for Little Wanderers, 584 F.2d 1103, 1111 (1st Cir. 1978)).


75. *See,* e.g., Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (per curiam) (according to legislative history, exhaustion of state administrative remedies not prerequisite to § 1983 action); Wolff v. McDonnell, 418 U.S. 539, 554 (1974) (state prisoners may sue for damages under § 1983 based on due process violation prior to exhaustion of state remedies); Willwording v. Swensen, 404 U.S. 249, 251 (1971) (per curiam) (state prisoners not required to exhaust state remedies prior to making § 1983 claim); Houghton v. Shafer, 392 U.S. 639, 640 (1968) (petitioner not required to resort to state remedies before bringing § 1983 claim); Damico v. California, 389 U.S. 416, 417 (1967) (one underlying purpose of Civil Rights Act is to supplement state remedies); McNeese v. Board of Educ., 373 U.S. 669, 671-72 (1963) ("relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy"); Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). *But cf.* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (when prisoners challenge duration rather than conditions of confinement and request immediate or speedier release, sole federal remedy is writ of habeas corpus). In a scathing dissent in *Preiser*, Justice Brennan highlighted the anomalous result that the majority had created. *See id.* at 502-07 (Brennan, J., dissenting). He found it difficult to distinguish between prisoners who challenge the duration of their confinement and those who challenge the conditions of confinement by bringing a § 1983 action as a means of circumventing the exhaustion requirement in habeas corpus.

76. *See* Anderson v. Harless, 103 S. Ct. 276, 277 (1982) (per curiam) (exhaustion requirement not satisfied unless substance of claim fairly presented to state court); Picard v. Connor, 404 U.S. 270, 275 (1971) (exhaustion requirement designed to give states initial opportunity to correct violation of prisoner's federal rights). Courts consistently have adhered to the policy that "it would be unseemly in our dual system of government for a federal district court to upset a state court convic-
the effect of habeas on federalism. It is an anomaly, therefore, to speak in terms of federalism and at the same time to note a preference for section 1983 claims over federal habeas. Indeed, a section 1983 action may be brought in federal court before the state courts have an opportunity to act on the issue, thus usurping the state's power to pass on federal constitutional questions.

2. Finality

The Lehman Court found that an exceptional need for finality exists in child custody cases due to the state's interest in promoting a secure and stable environment for the children who are involved in such disputes. The Court's rationale for this finding, however, is unpersuasive. First, the Court stated that habeas prolongs the uncertainty of whether the child will remain in the care of his foster parents. In fact, habeas has no such prolonging effect: until adoption, there is no certainty that any child will remain in his foster home. Second, the Court noted that the potential costs of continuing habeas litigation may deter states from placing children in foster homes against the will of their natural parents. But this reasoning makes little sense in light of the Court's discussion emphasizing that states have an overpowering substantive interest in these cases.

77. See Nelson v. George, 399 U.S. 224, 229 (1970) (respondent had not presented California courts with constitutional question and thus had not exhausted state remedies as required by habeas doctrine); Fay v. Noia, 372 U.S. 391, 419-20 (1963) (exhaustion requirement reflects policy of federal-state comity); Irvin v. Dowd, 359 U.S. 394, 404-05 (1959) (exhaustion doctrine evolved as means of avoiding potential conflict between federal and state courts); Ex parte Hawk, 321 U.S. 114, 116-17 (1944) (denial of relief to petitioner grounded on principle that federal courts will interfere in administration of justice in state courts only in rare cases); Bowen v. Johnston, 306 U.S. 19, 27 (1939) ("the rule [of exhaustion] is not one defining power but one which relates to the appropriate exercise of power"); Ex parte Royall, 117 U.S. 241, 251 (1886) (purpose of exhaustion is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution").

78. See Wolff v. McDonnell, 418 U.S. 539, 554 (1974) (state prisoners may bring § 1983 action for damages based on due process violation prior to exhaustion of state remedies); Monroe v. Pape, 365 U.S. 167, 183 (1961) (federal remedy is supplementary to state remedy; state remedy need not be sought and refused before federal remedy is invoked); supra note 75 and accompanying text.


80. Id. at 513-14.

81. See id. at 521 (Blackmun, J., dissenting). Moreover, these concerns have already been voiced in the analogous situation of convicts. Congress has expressed its concern for prisoners' prolonged uncertainty regarding their incarceration by passing the Interstate Agreement on Detainers Act. 18 U.S.C. app. §§ 1-8 (1982). The Act is designed to remove uncertainty by determining whether a person will face additional time in prison or jail. Removal of the uncertainty, Congress believed, would increase the effectiveness of rehabilitative programs. See S. REP. NO. 1356, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4864, 4866.


83. See id. at 513. In Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978), the court noted that states have a strong substantive interest in a child's welfare and
Despite its emphasis on finality and federalism, the Court stated only that federalism and finality concerns "argue strongly" against granting a writ of habeas. This language represents at most a discretionary, or prudential, bar, and is not the equivalent of an express holding that finality and federalism interests are a complete jurisdictional bar to the use of habeas in child custody cases.85

II. THE EFFECT OF LEHMAN ON FEDERAL HABEAS CORPUS JURISDICTION

The effect on federal habeas jurisdiction of the Supreme Court’s decision in Lehman will depend on the interpretation that federal courts give to the decision. Under the decision, a federal court could deny habeas corpus jurisdiction because the petitioner is not in the actual physical custody of the state pursuant to a criminal judgment or because finality and federalism concerns raise a jurisdictional bar. To determine which interpretation federal courts will most likely give to Lehman and the subsequent effect that the decision will have on federal habeas jurisdiction, an analysis of the federal circuits’ previous treatment of each concern is helpful.

A. Pre-Lehman Child Custody Cases in the Federal Courts

Prior to the Supreme Court’s decision in Lehman, seven of the United States courts of appeals had heard habeas corpus cases relating to child custody matters.86 Only two of the circuits had held that federal habeas

85. In addressing the dissent’s objection to the attention that the majority gave to finality and federalism, the majority noted: “The dissent suggests that comity and federalism concerns cannot inform a court’s construction of a statute in determining a question of jurisdiction over certain kinds of cases.” Id. at 512 n.16 (emphasis added). This, along with the statement that federalism and finality concerns “argue strongly” against granting the writ, id. at 512, suggests that the bar to habeas relief was discretionary. The Court viewed the finality and federalism issues as factors that raised prudential, rather than strictly jurisdictional, questions.
review was proper, but no circuit had held that the federal courts were without jurisdiction in all child custody cases. For example, in the Third Circuit decision in Lehman both plurality opinions indicated that the third-party application by the parent whose parental rights had been terminated was improper. The first plurality opinion would have denied the writ because Lehman was attempting to use habeas to litigate her own right to raise the children. The second plurality would have denied the writ because Lehman was not a proper party to file the application on the children's behalf.

Decisions of other courts of appeals that had refused habeas jurisdiction in child custody cases reflect similar concerns. Both the Sixth and Ninth Circuits, for example, have indicated that federal courts should not grant habeas jurisdiction in child custody cases on the grounds that a petition brought by a parent is an improper third-party application.

Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) (class action by "bablylifted" Vietnamese children asserting detention in United States in custody of persons other than their parents violated their constitutional rights).
or that it appears inadvisable to the court to grant jurisdiction. The position taken by the Eighth Circuit in a recent child custody case also appears to indicate that the third-party application by the natural parent was improper. Similarly, both the First and Fourth Circuits have refused habeas jurisdiction when the child's interests would not be served by granting the relief that the natural parent sought. The First Circuit, however, has noted that habeas review of child custody cases would still be available under "proper circumstances," such as in situations in which a child is in a state home or is involved in a struggle for his liberty.

This survey of cases from the United States courts of appeals illustrates that a child custody issue in and of itself does not present an absolute jurisdictional bar to habeas review. In fact, those courts that have addressed the "custody" issue seem to agree that the jurisdictional ele-

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92. See Huynh Thi Anh v. Levi, 586 F.2d 625, 633-34 (6th Cir. 1978) (pending state adoption proceedings and federalism are good reasons to defer to state proceedings and decline federal jurisdiction); see also Castorr v. Brundage, 674 F.2d 531, 535-36 (6th Cir. 1982) (as discretionary matter federal courts generally reluctant to entertain jurisdiction over "whole subject of domestic relations") (quoting Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930)).

93. See Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979), cert. denied, 446 U.S. 935, reh'g denied, 448 U.S. 910 (1980). The court focused on whether habeas served the child's interests, noting that this remained the paramount concern. See id. at 310. The two children in Syrovatka had been adopted 11 years before the proceedings and were 15 and 17 years old at the time of federal appellate review. Id. at 311. The court found that removing the children from their adoptive parents would not serve the children's best interests, and therefore denied habeas. Id. at 310. The parents alleged that they had inadequate notice of the state proceedings and the court agreed that the notice did not appear to meet due process standards. The state statute, however, provided a conclusive presumption that the termination proceedings were valid if they were not challenged within two years. The court held, alternatively, that the opportunity to challenge the proceedings was no longer available on the basis of the state statute, which was designed to further the legitimate state interest of ensuring a stable environment for the children. Id. at 310.


95. See Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1113 (1st Cir. 1978). The child involved in the Sylvander case was in a child's home and not in foster care, but the home was a private, rather than a state, institution. The district court denied habeas relief based on this distinction, and specifically found that, although the child was "in custody," there was no state involvement because of the private nature of the institution. See Sylvander v. New England Home for Little Wanderers, 444 F. Supp. 393, 398 (D. Mass.), aff'd, 584 F.2d 1103 (1st Cir. 1978).

96. The courts have reserved the question of jurisdiction for a case that presents a special need for habeas review. See, e.g., Doe v. Doe, 660 F.2d 101, 104 (4th Cir. 1981) (federal habeas corpus may be available in presence of special circumstances); Sylvander v. New England Home for Little
The Supreme Court’s nebulous holding in *Lehman*, however, did little to clarify the issue. If the Court in *Lehman* held that children placed in foster homes are not “in custody,” then there can be no jurisdiction to entertain a writ of habeas corpus. This would be true even if a third party acting on behalf of the child sought habeas and if it was in the child’s best interest to reverse the state judgment that terminated parental rights. On the other hand, *Lehman* could be read to have held that there was no jurisdiction because the interests raised were chiefly those of the mother, who was not “in custody” as required for habeas jurisdiction. Under this interpretation, jurisdiction would fail whenever the interest of the state and the child in a federal court’s declining to review a case under habeas outweighed the federal interest in the child’s liberty. Although these interpretations lead to different lines of reasoning, the result—denial of jurisdiction—would be the same in both cases.

It is extremely unlikely, however, that the distinction matters in practice. It would be only in the “unique” case that a state would terminate parental rights when the child’s interest indicated that they should not be terminated. If the underlying facts of the initial state decision did not support the decision, it is unlikely that the situation would reach the stage at which habeas review is needed. Absent a “powerful countervailing [state] interest,” a parent’s constitutional right to the custody

97. See *Davis v. Page*, 640 F.2d 599, 602 (5th Cir. 1981) (en banc) (habeas jurisdiction sustained on ground that child involved was held pursuant to state court judgment), vacated and remanded sub nom. *Chastain v. Davis*, 458 U.S. 1118 (1982); *Rowell v. Oesterle*, 626 F.2d 437, 438 (5th Cir. 1980) (jurisdiction to entertain habeas petition claiming children detained by constitutionally defective procedures); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202 (9th Cir. 1975) (federal habeas jurisdiction available where federal government was involved in child custody issue). But see *Castor v. Brundage*, 674 F.2d 531, 536 (6th Cir. 1982) (habeas may be proper remedy for parents to regain custody of children, but, due to comity principles, it is limited to cases involving severe restraints on individual liberty); *Doe v. Doe*, 660 F.2d 101, 105 (4th Cir. 1981) (federal habeas jurisdiction unavailable in suit between private parties over custody of child); *Westerville v. Kalamazoo County Dep’t of Social Servs.*, 534 F. Supp. 1088, 1097 (W.D. Mich.) (although habeas jurisdiction may arguably exist under statute, child’s best interest warranted adherence to strong federal policy of deferral to state courts on custody matters), *afld*, 708 F.2d 731 (6th Cir. 1982); *Sylvander v. New England Home for Little Wanderers*, 444 F. Supp. 393, 398 (D. Mass.) (child’s adoption without petitioner-mother’s consent does not place child in state custody for purposes of habeas jurisdiction), *afld*, 584 F.2d 1103 (1st Cir. 1978).

98. See, e.g., *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) (habeas available to Vietnamese children erroneously believed to be orphans and therefore mistakenly brought to United States). For a discussion of *Nguyen Da Yen*, see supra note 91.

of his child remains protected. A state decision that falls short of this "countervailing interest" standard surely would be corrected either within the state system, or by appeal or certiorari to the United States Supreme Court.

B. Pre-Lehman Jurisdiction Under Federal Habeas Corpus

I. Federalism as a factor in denying pretrial habeas corpus jurisdiction

Although the Supreme Court has upheld the use of habeas corpus prior to trial,101 notions of comity and federalism have led federal courts to decline to entertain pretrial habeas applications when, even though the jurisdictional elements of the habeas statutes are present, "special circumstances" that would require pretrial review are not.102 The United States Court of Appeals for the Seventh Circuit, for example, has refused to entertain a pretrial application even though the petitioner had alleged that a trial would result in a violation of his fifth amendment right to be free from double jeopardy.103 Although some circuits have granted the writ before trial under a claim of double jeopardy, at least where the alleged unconstitutional proceeding would be a second trial,104 the Seventh Circuit found that the principles of federalism reflected in Younger v. Harris105 were weightier than a double jeopardy violation in this case: the petitioner had not been subjected to a trial in the first instance but had only pleaded guilty.106 Other courts also have

promoting welfare of child and administrative interest in reducing cost and burden of such proceedings).

102. In Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973), the Supreme Court established that, absent special circumstances, "[f]ederal habeas corpus does not lie ... to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." Id. at 489.
103. See United States ex rel. Stevens v. Circuit Court, 675 F.2d 946 (7th Cir. 1982) (petitioner convicted without trial on guilty pleas to misdemeanor charges faced trial on felony charges for same offense).
104. See, e.g., Gully v. Kunzman, 592 F.2d 283 (6th Cir.) (retrial on murder charge that could expose petitioner to sentence under newly enacted death penalty statute), cert. denied, 442 U.S. 924 (1979); Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979) (retrial in which judicial misconduct led defendant to move for mistrial).
105. 401 U.S. 37 (1971). The Court in Younger cited federalism as the primary source of the policy against federal interference in state court proceedings. Id. at 44. The concept of federalism represents "a system in which there is sensitivity to the legitimate interests of both the State and National Governments, and in which the National Government, [although] anxious ... to vindicate and protect federal rights and ... interests, always endeavors to do so [without] unduly [interfering] with the legitimate activities of the States." Id.
106. United States ex rel. Stevens v. Circuit Court, 675 F.2d 946, 948-49 (7th Cir. 1982). The court reasoned that, because the petitioner had pleaded guilty on the first charges, the relief he sought, in effect, was not release from custody but the injunction of his state criminal trial. Although the relief was "within the broad remedial powers granted federal judges by [habeas]," the
cited Younger as authority for denying pretrial habeas relief.107

The application of the abstention doctrine of Younger, a case that involved a cause of action brought under 42 U.S.C. § 1983,108 is inappropriate in many federal habeas cases. The Court abstained in Younger because a proceeding was pending in which the claim could be raised at trial or could be appealed within the state system.109 Because state courts have concurrent jurisdiction with federal courts to determine federal constitutional questions, the Younger abstention doctrine demands deference to the state system in which the claim has arisen when the federal plaintiff already has a forum in which to raise his claims.110

Application of this deference in cases brought under 28 U.S.C. § 1983, however, cannot be extended to federal habeas cases because the legislative concerns underlying section 1983 differ significantly from those supporting the federal habeas statutes. Congress has distinguished habeas from other actions, and has made it clear that holding a person in custody in violation of federal law is intolerable. For example, although a federal court has express authority to stay state court proceedings in a pending habeas action,111 in other civil or criminal proceedings federal courts, with few exceptions, are expressly prohibited from enjoining pending state proceedings.112 Federal courts, therefore, should not readily abstain in pretrial habeas cases in reliance on a section 1983 decision. If their willingness to defer to the state courts and deny pretrial habeas on the authority of Younger is any indication, however, federal courts after Lehman are likely to expand their denials of habeas to situations other than pretrial habeas.
2. Federal courts' interpretation of the scope of habeas corpus relief under the "custody" requirement

a. The Hensley decision

Prior to the decision in Lehman, the Supreme Court in Hensley v. Municipal Court had found that the use of federal habeas corpus "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." Under this seemingly high standard, the Court concluded that a petitioner released on his own recognizance was "in custody" for purposes of habeas relief, because he was "subject to restraints 'not shared by the public generally.'" The petitioner in Hensley was required, under a statute applicable to his postconviction release, to appear when ordered at any time and place, and to keep in force a stay on the execution of his sentence in order to avoid incarceration. The Court found these obligations to be a substantial impairment of the petitioner's liberty.

The Court, however, did not limit its analysis to a discussion of restraints alone. Also of importance to the Court was the petitioner's actual conviction and the previous exhaustion of his state appellate and collateral remedies. Unless the federal court overturned the petitioner's conviction pursuant to his habeas action, the petitioner would be placed behind bars. The Court's action, therefore, did not clearly affect federalism interests because the petitioner had already proceeded through the state system.

The Hensley Court's discussion of the nonspeculative nature of the future incarceration, coupled with its statement that a contrary decision would merely have postponed relief, could be read as indicating that these were the decisive factors that caused the Court to find the restraints "severe and immediate" and convinced it to grant relief. Because of the Court's emphasis on the petitioner's proximity to actual

114. Id. at 351. The extraordinary nature of the writ, the Court noted, has limited its use to cases of special urgency where the prisoner, for example, is subject to restraints not shared by the general public, see Jones v. Cunningham, 371 U.S. 236, 240 (1963), or where his freedom of movement rests in the hands of state judicial officers. See Strait v. Laird, 406 U.S. 341 (1972).
116. Id. (citing CAL. PENAL CODE § 1318.4(a), (c)).
117. Id. at 352.
118. Id.
119. Id. at 346.
120. Id. at 351-52.
121. Id. at 352-53.
122. See United States v. Consiglio, 391 F. Supp. 564 (D. Conn. 1975). Following Hensley, the court held that "the imminence of incarceration is a sufficient basis for the exercise of habeas corpus jurisdiction." Id. at 566 n.2.
imprisonment, the absence of imminent incarceration arguably could distinguish any future case from Hensley.

The holding in Hensley could also be limited in application because of the physical restraints that the petitioner suffered. The Court emphasized that the particular restraints in the case affected the petitioner's "freedom of movement" and his ability to "come and go" as he chose. Thus restraints that affect liberty interests other than freedom of movement could be distinguished, as could a statute, for example, that required the defendant's appearance at a given place and at a specified time.

Finally, the Court's statement as to when habeas is appropriate purports to set a high standard, limiting habeas relief to "cases of special urgency." Recitation of that standard, without guidance from the Court's finding of "custody" under the facts of Hensley, could allow lower courts to withhold habeas relief relatively easily by finding that the petitioner is not "in custody."

Although the decision in Hensley contains language that supports a liberal interpretation of the "custody" requirement, its holding may be read as a narrow one. A review of the reading that lower federal courts have given Hensley will give insight into the validity of the Court's attempts in Lehman to limit the application of the Hensley decision.

b. The availability of habeas corpus depending on actual physical custody by the state or on severe restraints resulting from a criminal conviction

Federal courts could construe the Court's decision in Lehman to require actual custody or physical restraints after a criminal conviction. Although the lower federal courts have followed the Supreme Court's decisions in Jones and Hensley, some lower court decisions contain

124. See supra notes 48-57 and accompanying text (discussing restraints on liberty as basis for finding custody).
125. But see Hensley v. Municipal Court, 411 U.S. 345, 354 (1973) (Rehnquist, J., dissenting). The dissent in Hensley argued that, to the contrary, Hensley was "under no greater restriction than one who had been subpoenaed to testify in court as a witness." Id.
126. See supra text accompanying note 114.
127. See Hensley v. Municipal Court, 411 U.S. 345, 348 (1973) ("The question presented for our decision is a narrow one . . . ."); see also Hanson v. Circuit Court, 591 F.2d 404, 406 (7th Cir.) ("Despite the broad sweeping language of the Supreme Court's opinions, each decision's holding is narrow."); cert. denied, 444 U.S. 907 (1979).
128. See supra notes 16-57 and accompanying text (discussing possible interpretations of custody requirement in Lehman).
language that the Court in *Lehman* could have cited to support its limitation of the applicability of *Hensley* and *Jones* to cases involving actual physical restraints.\(^{131}\) Pre-*Lehman* "custody" cases, however, also show that the lack of physical custody or of a criminal conviction has not played a limiting role in habeas relief.

Although the vast majority of the cases that cited *Hensley* involved criminal proceedings, courts have relied on *Hensley* in noncriminal cases as well. "Custody" has been found, for example, where the petitioner had been detained for military court-martial,\(^ {132}\) and where the petitioner had been detained or ordered deported as an illegal alien.\(^ {133}\) Such cases, of course, would be unaltered even if *Lehman* had held that a criminal conviction was necessary for federal habeas review of a state petitioner's application: the petitioners in those cases were subject to federal rather than state judgments.

Habeas corpus has been granted, however, in cases that involved state noncriminal judgments. In one case, a petitioner who had been adjudged in need of supervision and had been confined to a state training school was held to be "in custody" for purposes of habeas jurisdiction.\(^ {134}\) In another case, a petitioner who was free on bond pursuant to a material witness statute was found to be "in custody" even though there was neither physical custody nor a criminal proceeding.\(^ {135}\)


\(^ {131} \) *See Westerville v. Kalamazoo County Dep't of Social Servs.*, 534 F. Supp. 1088, 1097 (W.D. Mich.) ("Hensley . . . and Jones . . . concerned extensions of the writ to persons criminally accused who had an obvious claim to be treated for federal jurisdictional purposes in the same manner as those individuals who were incarcerated.").


\(^ {134} \) *Mercado v. Rockefeller*, 363 F. Supp. 489 (S.D.N.Y. 1973), aff'd, 502 F.2d 666 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975). The petitioner had challenged the constitutionality of a statute that authorized detention at the training school, and had been released on parole at the time of habeas review. *Id.* at 490.

In the criminal area, courts have often granted habeas relief pending a conviction under the challenged action. Habeas has been granted when a petitioner who was under indictment but had been released on bond raised a speedy trial claim; when a petitioner challenged the ability of state officials to remove him from a hospital pursuant to a bench warrant; when a parole violator detainer had been lodged; when a petitioner was released on bond pending extradition proceedings; and when petitioners were released on bail or on their own recognizance pending retrial.

Federal courts have also granted relief after a conviction when no restraint of any kind had been imposed at the time the petition was filed. An order to surrender after conviction, for example, has been held sufficient for a finding of "custody" although the petitioner had not yet surrendered. Similarly, the filing of the petition before a postconviction warrant had issued was found not to be fatal to the court's jurisdiction.

The same liberal construction underlay the grant of relief when the petitioner was released on his own recognizance, apparently

136. See infra notes 137-41 and accompanying text (discussing criminal cases granting pretrial habeas relief). But see supra notes 101-12 and accompanying text (discussing denial of pretrial habeas).

137. See United States ex rel. Scranton v. New York, 532 F.2d 292, 293 (2d Cir. 1976) (petitioner released prior to trial on bail and later on parole was subject to burdensome restraints constituting custody).

138. See Roba v. United States, 604 F.2d 215 (2d Cir. 1979). In Roba the petitioner's presentation before a magistrate was interrupted when his medical condition required that he be taken to a hospital for emergency treatment. A removal warrant was executed and the petitioner sought a writ of habeas corpus, claiming that he had a right not to be transported forcibly by government officials while he was in a life-threatening condition. Id. at 217-18. The court held that, if the removal warrant was executed petitioner would be in custody, and therefore he was in custody for habeas purposes even while he was in the hospital. Id. at 219.


142. See, e.g., Harrison v. Indiana, 597 F.2d 115, 117 (7th Cir. 1979) (where habeas corpus filed while petitioner was confined, jurisdiction not defeated by subsequent release); Capetta v. Winwright, 406 F.2d 1238, 1239 (5th Cir. 1969) (habeas petition not moot merely because petitioner was no longer in custody, as long as custody existed when petition was filed); Gowen v. Willerson, 364 F. Supp. 1043, 1044 (W.D. Va. 1973) (petitioner out on bond pending outcome of habeas application to court considered theoretically in custody).


without the usual parole restrictions, after having served a substantial part of the sentence that he was appealing. In addition, "custody" was found where a petitioner’s probation, the result of a suspended sentence, had been stayed pending appeal. Finally, a petitioner on furlough from prison has been held to be "in custody."

Despite these liberal interpretations of "custody," however, attempts to extend Hensley to allow habeas review where there were no present or imminent restraints have failed. The courts have held that a petitioner may not challenge a conviction on the sole basis of the collateral consequences flowing from a conviction.

These cases demonstrate that the lower federal courts have not read Hensley in the narrow way that the Supreme Court suggested in Lehman. The courts have not found that their jurisdiction is limited to criminal cases or to habeas cases brought only after conviction, and physical custody has not been required. Indeed, cases have been heard in which neither physical custody nor criminal processes were involved. If Lehman is interpreted to require one or both of these elements, a drastic, but probably not unintended, change in the law will result.

c. The availability of habeas corpus depending on restrictions on the petitioner’s liberty of movement

The Supreme Court’s opinion in Lehman appears to limit the "in custody" requirement of habeas jurisdiction to cases in which restrictions have been placed on the petitioner’s freedom of movement. The Court distinguished Hensley because of the type of liberty—freedom of movement—that was restrained in that case. An examination of lower court cases in which liberty interests other than freedom of movement were affected by the challenged judgment will help to determine how courts have treated the nature of the liberty interests in granting or denying the writ.

148. See, e.g., Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir. 1976) (petitioner’s inability to pursue profession of choice and possess firearms not custody within meaning of habeas); Welch v. Falke, 507 F. Supp. 264, 266 (S.D. Ohio 1980) (conviction that renders petitioner ineligible for record expungement does not satisfy custody requirement for habeas relief); Brewster v. Secretary of United States Army, 489 F. Supp. 85, 88 (E.D.N.Y. 1980) (possible damage to reputation arising from conviction and lack of physical confinement not sufficient to constitute custody). But see Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979) (although service on challenged conviction was completed, postponement of second sentence until first sentence was completed held to prolong custody for habeas purposes); Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969) (collateral consequences sufficient for finding of custody for habeas jurisdiction).
149. See supra notes 49-56 and accompanying text (discussing Court’s treatment of restraints on liberty in Lehman).
Imposition of a fine is a recognized restraint on personal liberty interests. Nonetheless, without incarceration or probation the courts generally agree that the petitioner who is subject to the imposition of a fine is not “in custody” for purposes of habeas jurisdiction. Once the imposition of a fine contains some element of physical restraint, however, the courts have recognized that the “in custody” requirement may be met. Jurisdiction lies, therefore, when a warrant has been issued for the petitioner’s arrest due to his failure to pay the fine. Similarly, when payment of the fine is the “price of freedom” courts have held that the jurisdictional prerequisites for habeas have been satisfied.

Although the courts seem to acknowledge that the consequences that flow from a past conviction do infringe on personal liberty, the lack of physical confinement or of continuing supervisory control renders the past conviction an “[i]nsufficient disability to constitute ‘custody.’” Supervision alone, however, without actual restriction of the petitioner’s freedom of movement, has been held in some cases to be sufficient to

150. In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Court stated that deprivation of property is a significant restraint on personal liberty. Id. at 552. Imposition of a fine, then, like any other deprivation of property, represents a restraint on liberty.

151. See, e.g., Waste Management of Wis., Inc. v. Fokakis, 614 F.2d 138, 140 (7th Cir.) (corporation, which could not be incarcerated, was not in custody despite imposition of fine), cert. denied, 449 U.S. 1060 (1980); Hanson v. Circuit Court, 591 F.2d 404, 407 (7th Cir.) (fine-only conviction was not sufficient restraint on individual liberty), cert. denied, 444 U.S. 907 (1979); Wright v. Bailey, 544 F.2d 737, 739 (4th Cir. 1976) (fine alone without provision for incarceration in event of nonpayment was not “in custody”), cert. denied, 434 U.S. 825 (1977); Russell v. City of Pierre, 530 F.2d 791, 792 (8th Cir.) (fine alone without significant restraint and thus custody requirement not met), cert. denied, 429 U.S. 855 (1976); Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (9th Cir.) (Congress did not intend federal intervention in fine-only sentences), cert. denied, 423 U.S. 825 (1975); Westberry v. Keith, 354 F.2d 623, 624 (5th Cir. 1970) (imposition of fine and revocation of driver’s license do not constitute “in custody”); Furey v. Hyland, 395 F. Supp. 1356, 1360 (D.N.J. 1975) (absent incarceration or other recognized restraint, one is not in custody), aff’d mem., 532 F.2d 746 (3d Cir. 1976). But see Thistlethwaite v. City of New York, 497 F.2d 339, 343 (2d Cir.) (dicta stating that relief can be granted if plaintiff meets burden of proof), cert. denied, 419 U.S. 1093 (1974).

152. See Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (9th Cir.) (habeas appropriate when fine is “price of freedom” and confinement is imminent), cert. denied, 423 U.S. 825 (1975); Harris v. Superior Court, 500 F.2d 1124, 1126 n.2 (9th Cir. 1974) (probation conditioned on payment of fine constitutes custody), cert. denied, 420 U.S. 973 (1975); United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970) (no discussion of fulfillment of custody requirement when refusal to pay fine resulted in actual incarceration), cert. denied, 402 U.S. 983 (1971). But see Spring v. Caldwell, 692 F.2d 994, 999 (5th Cir. 1982), rev’g 516 F. Supp. 1223 (S.D. Tex. 1981) (arrest warrant issued for willful refusal to pay fine does not amount to custody).

153. Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (9th Cir.) (noting that habeas may be justified when fine ultimately proves to be “price of freedom”), cert. denied, 423 U.S. 825 (1975).

154. See, e.g., Carafas v. LaVallee, 391 U.S. 234, 237 (1967) (collateral consequences of past conviction include restraints on petitioner’s rights to engage in business, vote in state election, serve as juror, and serve as official in labor union); Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir.) (petitioner unable to pursue certain professions and possess firearms because of conviction), cert. denied, 426 U.S. 911 (1976); Welch v. Falke, 507 F. Supp. 264, 265 (S.D. Ohio 1980) (restraints on liberty flowing from prior conviction preclude petitioner’s ability to choose occupation).

constitute "custody."\textsuperscript{156}

Other "liberty" interests affected by a judgment also have been held to be outside the "custody" requirement. The potential harm to the practice of a particular career,\textsuperscript{157} as well as the loss of pension benefits and employment,\textsuperscript{158} does not constitute "custody." Nor is the petitioner "in custody" when he may not drive on state highways for ten years.\textsuperscript{159}

These cases initially appear to indicate that the Court in \textit{Lehman} gave a restrictive reading of "liberty" that would not constitute a major change in the law. Such a reading, however, does threaten a major change because it would result in an absolute jurisdictional bar if the petitioner's freedom of movement was not restricted. This result would deny courts the discretion and flexibility to consider under habeas corpus the validity of judgments whose resulting restraints might severely infringe on other liberty interests, but which do not directly limit the petitioner's freedom to "come and go."\textsuperscript{160} Such a requirement might resurrect procedural barriers and consequently could undercut the courts' ability to use the habeas writ with the "initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."\textsuperscript{161}

d. \textit{The availability of habeas corpus depending on federal interest in liberty outweighing finality concerns}

The Court in \textit{Lehman} purported to state a "custody" standard that requires that the federal interest in individual liberty outweigh federalism and finality concerns.\textsuperscript{162} Whether and in what manner that test will be applied outside the child custody area remains to be seen. The facts

\textsuperscript{156} See, e.g., Drollinger v. Milligan, 552 F.2d 1220, 1224 (7th Cir. 1977) (petitioner under probation conditions requiring approval to change job, to change living arrangements, to receive gifts, and requiring him to make restitution from wages, held to be in custody); United States v. McDonald, 531 F.2d 196, 203-04 (4th Cir. 1976) (petitioner who was relieved of duties, placed under surveillance, and escorted when outside quarters, and whose telephone calls were logged by policeman, held to be in custody), rev'd on other grounds, 435 U.S. 850 (1978).


\textsuperscript{160} Hensley v. Municipal Court, 411 U.S. 345, 351 (1973); see supra notes 113-26 and accompanying text (discussing \textit{Hensley} decision).

\textsuperscript{161} Hensley v. Municipal Court, 411 U.S. 345, 349-50 (1973) (quoting Harris v. Nelson, 394 U.S. 286, 291 (1969)). The Court in \textit{Hensley} emphasized that it has always recognized the importance of the flexibility of habeas corpus as a remedy to ensure justice. Id. at 350.

presented in some lower federal cases inspire conjecture that the Lehman standard could potentially support the denial of habeas jurisdiction.

In Hensley the Court held that a petitioner who had been released pending execution of his sentence was "in custody" for habeas purposes. That holding might be different under the Lehman standard if, for example, the petitioner's sentence had been that he spend four hours in jail. Similarly, in Jones the Court held that a parolee is "in custody." The result, again, might be different under the Lehman standard if the petitioner had filed his application on the last day of his parole. It is conceivable in both situations that the "federal interest in individual liberty" would not be sufficient under the Court's test to warrant habeas relief. Line drawing when the federal interest in individual liberty would be sufficient under such a standard surely would lead to confusion among the lower courts.

Consideration might differ, too, if the petitioner received a suspended sentence instead of probation. Even under the standards set by Hensley and Jones, courts do not appear to be assured that the "custody" requirement is met. In the absence of restrictions usually associated with parole or probation, there might be no federal interest in the petitioner's liberty.

Indeed, an analysis under a strict construction of the custody requirement stated in Lehman raises significant questions about the presence of a federal interest in liberty in several circumstances. For example, is a federal interest in liberty implicated in the case of a petitioner who, although he was on parole, had been determined to be subject to deportation and had, in fact, been ordered to report to the Immigration Service; in the case of a petitioner whose sentence had been commuted or who had been pardoned prior to habeas review; in the case of a petitioner who was on parole under both a challenged and an

164. See Iglesias-Delgado v. Rivera-Rivera, 430 F. Supp. 309 (D.P.R. 1976) (custody implicitly existed when sentence was four hours in jail).
166. See United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976) (custody found when habeas petition was filed on last day of parole).
168. Huante v. Graven, 500 F.2d 1004 (9th Cir. 1974) (relief denied because ties with state were too attenuated after petitioner had been delivered for deportation).
169. United States ex rel. Grundset v. Franzen, 675 F.2d 870, 872 (7th Cir. 1982) (habeas jurisdiction not defeated by commutation of sentence where collateral consequences of conviction are subject to district court relief).
170. Robson v. United States, 526 F.2d 1145, 1147 (1st Cir. 1975) (termination of petitioner's custody by pardon did not moot action to review constitutional validity of criminal conviction).
unchallenged conviction;\textsuperscript{171} or in the case of a petitioner who, while serving in the military, absented himself repeatedly without permission?\textsuperscript{172}

Whether these kinds of cases would be resolved differently under the \textit{Lehman} test is not known. The Court's suggestion that courts "weigh" the federal interest in liberty, however, is dangerous: it requires the placement of a quantitative value on personal liberty. This concept contradicts the underlying purposes of federal habeas review. If the writ is to survive at all, review must be had once a restraint is found to be "severe and immediate."\textsuperscript{173}

\section*{III. The Effect of \textit{Lehman} on the Availability of a Federal Forum to Challenge the Constitutionality of Child Custody Statutes}

\textit{A. Petition for a Writ of Habeas Corpus}

The availability of habeas review in child custody circumstances that differ from the \textit{Lehman} case will depend on the grounds that are relied on for the jurisdictional bar. If the Court determined only that the parent was an improper third-party applicant, the defect could easily be remedied. Similarly, if the child's interests were seriously threatened, perhaps the federal interest in individual liberty would be strong enough that notions of finality and federalism, which essentially look to the child's interests anyway, would be overcome. It is unlikely, however, that parental rights would be terminated if the child's interests did lie on the other side—that is, with his parents. If the Court had found that restraints placed on children after termination of parental rights, whether imposed by the state, by a private home, or by foster parents, simply did not exceed those placed on other children or that they were not restraints on the proper kind of "liberty," habeas jurisdiction in these child custody cases would appear not to exist. The Court in \textit{Lehman}, however, held that a child in a private foster home was not "in custody" for purposes of habeas jurisdiction, and the Court left open the possibility of granting habeas relief if, instead, the child were in a state home.

If the child were in a state home, a writ of habeas corpus arguably could be used to test the constitutionality of the termination statute. On the other hand, if the state placed the child in a private foster home

\begin{itemize}
\item \textsuperscript{171} Clonce v. Presley, 640 F.2d 271, 273 (10th Cir. 1981) (parole considered custody for purposes of federal habeas corpus jurisdiction).
\item \textsuperscript{172} United States \textit{ex rel.} Bailey v. United States Commanding Officer, 496 F.2d 324 (1st Cir. 1974) (custody found but relief denied on theory analogous to clean hands doctrine).
\item \textsuperscript{173} Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).
\end{itemize}
before a petition was filed Lehman would apply, and the Court would not have jurisdiction. Presumably, in every termination case the child is a physical ward of the state for the period between his removal from his parent’s home and his placement in a private foster home. To avoid the strictures of Lehman the petition must be filed within that period, because only then would the child be in custody.

The first obvious problem is that the state may place the child in a foster home prior to the institution of termination proceedings. A delay in filing the petition, therefore, would foreclose federal habeas review. On the other hand, filing immediately presents problems of its own. First, the challenge would not be to the termination statute because the child would not be “in custody” pursuant to that statute. The challenge instead would rest on the constitutionality of any judicial decision that initially removed the child from the parental home. In a case like Lehman, such a challenge would be a futile gesture: Lehman had placed her children with the Agency voluntarily and the children were in foster homes before termination proceedings began.

Second, state remedies usually must be exhausted before a party can resort to habeas relief. If the court demands exhaustion of state remedies before it will entertain the writ, the petitioner should request that the court retain jurisdiction while the petitioner pursues the state remedies. 175

174. See Santosky v. Kramer, 455 U.S. 745, 768 (1982) (state court termination of parental rights held constitutional as supported by clear and convincing evidence); Ruffalo v. Civiletti, 702 F.2d 710, 715 (8th Cir. 1983) (custody rights of parents not absolute and terminable by court if justified by compelling public necessity); Rivera v. Marcus, 696 F.2d 1016, 1017 (2d Cir. 1982) (court recognized instances of parental neglect or physical abuse mandating state intervention to protect child’s best interest); In re J.A., 283 N.W.2d 83, 92 (N.D. 1979) (juvenile court decision to terminate parental rights upheld as supported by clear and convincing evidence).

175. In spite of the congressional requirement of exhaustion of state remedies, courts do not consider it a jurisdictional prerequisite. The doctrine “is not one defining power but one which relates to the appropriate exercise of power.” Bowen v. Johnston, 306 U.S. 19, 27 (1939); see Picard v. Connor, 404 U.S. 270, 275 (1971); Fay v. Noia, 372 U.S. 391, 419-20 (1963); Darr v. Burford, 339 U.S. 200, 204 (1950); Ex parte Royall, 117 U.S. 241, 251 (1886). Thus, courts may excuse the failure to exhaust in some situations, such as when state remedies are unavailable, see, e.g., Noia, 372 U.S. at 399, or ineffective. See, e.g., Bartone v. United States, 375 U.S. 52, 54 (1963); Marino v. Ragen, 332 U.S. 561, 569-70 (1947) (Rutledge, J., concurring). A current controversy that is likely to have some important bearing on the question of the jurisdictional nature of the exhaustion requirement concerns whether the state can waive or concede exhaustion. Compare, e.g., McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984) (en banc) (permitting state to waive); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) (permitting state to waive); and Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971) (permitting state to waive) with Bowen v. Tennessee, 698 F.2d 241 (6th Cir. 1983) (en banc) (denying waiver); United States ex rel. Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977) (denying waiver), cert. denied, 435 U.S. 928 (1978); and Needel v. Scafati, 412 F.2d 761 (1st Cir. 1969) (denying waiver), cert. denied, 396 U.S. 861 (1969).

176. See Juidice v. Vail, 430 U.S. 327, 348 (1977) (Stewart, J., dissenting) (jurisdiction should be retained pending construction of state statute to avoid foreclosing access to federal courts to assert federal rights); Railroad Comm’n v. Pullman Co., 312 U.S. 496, 501-02 (1941) (ordering federal court to abstain but to “retain the bill pending a determination of proceedings . . . in the state court”). In Kravitz v. Pennsylvania, 546 F.2d 1100 (3d Cir. 1977), the court denied habeas relief and dismissed petitioner’s case because he had failed to pursue his state remedies fully. By the time the petitioner returned to federal court after exhaustion of his state remedies, however, he had
remedies in case the state places the child in a foster home during that period. The petition then would have been filed while the children were “in custody” and thus the private placement would not defeat federal jurisdiction. The same tactic could be used if termination proceedings were begun while the child remained under state control; the petition should be filed immediately. Although the federal court would decline to grant relief until the termination proceeding ended, it might retain jurisdiction over the petition during that time.

If the court retained jurisdiction, another obstacle to habeas review arises under the decision in Lehman. If the state placed the child in foster care after the writ was filed, so that the child was no longer “in custody,” the case might be moot. The Court in Carafas v. LaValle held that, although the petitioner was no longer “in custody” at the time of habeas review, his case was not moot because he suffered “collateral consequences” as a result of his conviction sufficient to give the court jurisdiction. This argument, however, may be foreclosed in child custody cases. The Lehman Court tersely addressed this issue, and noted that the children suffered “no ‘collateral consequences’—like those in Carafas—sufficient to outweigh the need for finality.” The Court’s statement, although arguably only dicta, could nevertheless present substantial problems for a habeas petitioner. Finally, another mootness problem arises in child custody cases. Even if the federal court retains jurisdiction pending the outcome of the termination proceedings and exhaus-

been released from parole and the court, therefore, denied habeas a second time because he was no longer “in custody.” The court attempted to justify the harsh result by noting that the petitioner had not attempted to have the federal court retain jurisdiction pending further state proceedings, id. at 1102-03, thus implying that such a request would have been appropriate and cognizable. Id. at 1102-03.

177. The petitioner could seek to enjoin the state from placing the child in a foster home, but a court acting in equity is not likely to issue the injunction if the placement seems to be in the child’s best interest.


179. Id. at 237-38.

180. Lehman v. Lycoming County Children’s Servs. Agency, 458 U.S. 502, 511 (1982). The United States Court of Appeals for the Fifth Circuit held in Davis v. Page, 640 F.2d 599 (5th Cir. 1981) (en banc), vacated and remanded sub nom. Chastain v. Davis, 458 U.S. 1118 (1982), that a child custody dispute was not moot even when the agency had returned the child to the parent at the time of review. Id. at 600. The court reasoned that the child remained under the agency’s supervision because agency personnel visited the home regularly, the home had to be kept open to inspection by the agency, and the agency exercised some authority over parental decisions. Id. at 602. The decision was remanded, however, to be reconsidered in light of Lehman. Id. at 605.

181. Among the “collateral consequences” cited by the Court in Carafas were the petitioner’s inability to engage in business, his inability to vote, and the disabilities or burdens that might flow from his conviction. See Carafas v. LaVallee, 391 U.S. 234, 237 (1968); see also supra note 154 (discussing cases that deal with collateral consequences). The Court in Lehman noted that, unlike the petitioner in Carafas, the petitioner in Lehman suffered no collateral consequences, but the Court did not articulate exactly how the petitioner in Lehman fell short of the Carafas standard. See Lehman v. Lycoming County Children’s Servs. Agency, 458 U.S. 502, 511 (1982). Future habeas petitioners, therefore, might encounter more ambiguous, and potentially more severe, criteria in attempting to satisfy the collateral consequences that are necessary for habeas corpus relief.
tion of the state remedies, and even if it is convinced that Carafas applies in spite of Supreme Court dicta to the contrary, the case may be moot if the child has reached the age of majority.182

The Lehman decision thus raises formidable obstacles to habeas corpus relief. The state may be able to moot a case under a timely habeas petition merely by placing a child in a private or foster home. An extensive delay in the exhaustion of state remedies or in federal appellate proceedings on habeas review could itself moot the case if the child is older.

B. Other Means of Federal Review


The constitutionality of a state statute may be challenged in federal court under 42 U.S.C. § 1983.183 The state action that removes a child from the parental home or terminates parental rights can be challenged in the first instance, at least in principle, by suit in a federal court under section 1983. Bringing such a suit, however, has its problems. Whether the federal court will exercise plenary review of the issues will depend on the posture of the state's actions at the time the section 1983 suit is brought—i.e., whether the state proceeding had concluded, was still pending, or had not been instituted.

a. State proceeding concluded

Institution of a section 1983 suit or action after state proceedings have been concluded may be fatal to the federal suit. If the constitutional challenge to the state statute on which the decision rests was litigated in the state court, the federal plaintiff may be collaterally estopped from relitigating the issue in federal court.184 If, on the other hand, the state court action was defended only on the facts and if the petitioner alleges that the statute is unconstitutional as applied, the federal plaintiff may litigate the issue in federal court. In that situation no estoppel exists, because the constitutionality of the state court's application has not been litigated. The federal plaintiff, of course, must not have appealed the court's determination within the state court system on that

182. The Court in Lehman stated that the case was moot with respect to the oldest son, who was 18, because he was free to seek adoption by anyone, including his natural mother. See Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 504 n.3 (1982). The Court's reasoning, however, is weak. Obviously, the child would not have to seek adoption by his natural mother if the judgment terminating her parental rights was set aside.

183. 42 U.S.C. § 1983 (Supp. V 1981) provides in pertinent part: "Every person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any right . . . secured by the Constitution . . . shall be liable to the party injured . . . ."

Failure to raise the constitutional issues in the state proceeding presents three problems. First, the party is forced into dual litigation, state and federal, with all its concomitant delays and costs. Second, if the party alleges that the statute is unconstitutional on its face, and had failed to raise that issue in the state court, the state is certain to raise a waiver argument to defeat the party's federal suit. Finally, the state court may raise and decide constitutional issues on its own motion. If the court does raise the constitutional issues sua sponte, it remains unclear whether a party's involuntary litigation of those issues in the state court estops him from litigating those issues anew in the federal court.

b. State proceeding pending

Institution of the section 1983 suit after the state proceeding has begun will not provide relief from the state proceeding, and the federal plaintiff will not receive plenary review until the state proceeding ends. The federal court will abstain and dismiss the federal action until resolution of the pending state proceeding. If state proceedings are instituted after federal suit has been filed but before proceedings of substance on the merits have been undertaken by the federal court, the federal court again will abstain. Before returning to federal court the plain-

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186. See infra note 191 and accompanying text.

187. The Supreme Court has held that, when a federal court abstinens pending a determination by a state court, the federal plaintiff may relitigate federal questions already decided by the state court "unless it clearly appears that he voluntarily . . . litigated his federal claims in the state courts." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 (1964) (emphasis added). Whether the same would hold true if a plaintiff sought a federal forum only after the state decision had been rendered is unclear.

188. See Younger v. Harris, 401 U.S. 37, 43-54 (1971). As a general rule, a federal court may not enjoin a pending state proceeding except under limited circumstances. See 28 U.S.C. § 2283 (1976) (court may not grant injunction to stay state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"). Although § 1983 has been expressly recognized as an exception to § 2283, see Mitchum v. Foster, 407 U.S. 225, 242 (1972), the equitable doctrine that the Court employed in Younger has substantially the same prohibitory effect as § 2283. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (Younger precludes federal interference with pending state child custody actions); Trainor v. Hernandez, 431 U.S. 434 (1977) (Younger precludes federal interference with state action to recover wrongfully received welfare payments).

189. See Younger v. Harris, 401 U.S. 37 (1971) (state criminal proceeding may not be enjoined); see also Moore v. Sims, 442 U.S. 415 (1979) (Younger applicable in pending child custody action); Huynh Thi Anh v. Levi, 586 F.2d 625, 633 (6th Cir. 1978) (fact that adoption proceedings were pending in state courts was factor where court abstained in child custody case).

190. See, e.g., Hicks v. Miranda, 422 U.S. 332, 349 (1975) (denial of injunctive relief by federal court not sufficient substantive action by federal court to outweigh abstention once state action was begun).
tiff must conclude the state proceedings.

If federal jurisdiction is retained, the petitioner must inform the state court of his federal claims so that the state court may act with those claims in mind, but he may explicitly reserve his federal issues for adjudication in the federal court. Voluntary litigation of the federal issues in state court after federal abstention, however, would preclude federal review.

c. State proceeding not instituted

Filing a section 1983 suit or action before the proceedings begin raises problems that do not appear when the state action is still pending or has concluded. First, the statute may be challenged only on its face. Because the state proceeding would not have begun, the statute could not be challenged "as applied": no application of the statute would have been made to the facts of the case. Second, the federal plaintiff must satisfy a host of jurisdictional prerequisites.

Initially, the plaintiff must have standing—a sufficient stake in the outcome of the case. Because the challenged statute operates directly on the parents, this element is met. The next, and more difficult, jurisdictional problem to overcome is the demonstration that a case and controversy exist, making the suit ripe for adjudication. To overcome

191. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 420 (1964) (party must notify state court, but need not litigate issues there).
192. Id. at 422 n.13. In Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978), the court expressly noted that the petitioner could have reserved her federal claims while in the state courts but that, because she had failed to do so, her § 1983 suit was barred. Id. at 1108 n.8.
194. There are two jurisdictional prerequisites for asserting a claim under § 1983 of the Civil Rights Act. See 42 U.S.C. § 1983 (Supp. V 1981). First, the plaintiff must demonstrate that he has been deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States. See Martinez v. California, 444 U.S. 277, 284 (1980). Second, the deprivation must have occurred "under color of state law." See Adickes v. Kress & Co., 398 U.S. 144, 150 (1970) (involvement of policeman, regardless of whether actions were authorized, provided necessary state action for § 1983 claim); Monroe v. Pape, 365 U.S. 167, 184, 187 (1961) (misuse of power, made possible only because wrongdoer was clothed with authority of state law, is action "under color of state law" pursuant to § 1983), overruled in part on other grounds, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).
this hurdle, the plaintiff must show that his fears that the statute will be applied to him are not “imaginary or speculative.”197 There must be some showing, therefore, that the state is likely to institute parental termination proceedings. If suit is filed to challenge the termination statute after the children have been removed from the parental home, the plaintiff has a strong argument that state termination proceedings are no longer merely a “speculative” possibility.

2. Appeal to the United States Supreme Court

A parent may challenge the constitutionality of state termination statutes by direct appeal to the United States Supreme Court after full litigation of the question through the state court system.198 Appellate review may be had even if the petitioner questions the constitutionality of the statute as applied rather than on its face.199 Unlike review on a petition for certiorari, review on appeal is obligatory.200 The Court need not, however, grant plenary review. It may dismiss for want of a substantial federal question201 or for failure to state a claim upon which relief can be granted.202 Both courses of action are tantamount to summary disposition of the claim. Moreover, due to principles of res judicata the decision by the Court on appeal forecloses habeas review.203

Despite the procedural limitations on the obtainment of Supreme Court review, however, parents may still challenge state termination decisions by direct appeal to the Supreme Court.204 In Santosky v. Kramer,205 for example, decided just three months prior to Lehman, the Court reviewed the question of the burden of proof that the state must meet in a proceeding to declare a child permanently neglected.206 The Court’s language in that decision clearly indicates its position that review is favored in this area as long as it is sought by proper means.207

199. See, e.g., United States v. Knox, 396 U.S. 77, 79 n.2 (1969) (appeal authorized where statute is alleged to be unconstitutional as applied to particular class of cases); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) (review allowed when statute not claimed invalid in entirety, but as applied to particular set of facts).
201. See, e.g., Zucht v. King, 260 U.S. 174 (1922) (dismissal due to lack of substantial federal question at time writ filed).
206. See id. at 761-66 (preponderance standard does not allocate risk of error fairly between state and natural parents).
207. The Court in Santosky stated that “persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention
CONCLUSION

The decision in *Lehman v. Lycoming County Children's Services Agency* has no direct effect on the availability of a federal forum to litigate the constitutionality of child custody statutes by means of a section 1983 suit or action, or by direct Supreme Court review. Despite the Court's strong indication that the suit in *Lehman* was improper, the Court's concerns do not appear to extend directly beyond the habeas corpus context.

With respect to the issue of habeas jurisdiction, on the other hand, *Lehman* may represent a significant change in the law. The effect of the decision will depend on how the lower federal courts interpret the Supreme Court's opinion. Although the Court found that the language of the habeas statutes in combination with federalism and finality concerns supported a finding of lack of jurisdiction, it did not expressly hold that any single factor was dispositive of the jurisdictional issue. In discussing the custody requirement under the habeas statutes, the Court identified physical confinement, criminal conviction, and restraints on liberty as elements that might constitute custody, but it did not specify which combination of these elements might be required to establish custody under the statutes. Because notions of federalism and finality also contributed significantly to the Court's decision to decline habeas jurisdiction, it is difficult to identify exactly what agreement the Justices did reach. The Supreme Court's decision in *Lehman*, therefore, is a decision in search of a holding. Its only unifying theme is the continued diminution, if not evisceration, of access to the federal courts on habeas corpus by persons who are adversely affected by state court judgments.

*Id.* at 753-54.

into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."