Federal Habeas Corpus Jurisdiction - Child Custody - State Procedures Terminating Parental Rights

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FEDERAL HABEAS CORPUS JURISDICTION—CHILD CUSTODY—STATE PROCEDURES TERMINATING PARENTAL RIGHTS—The United States Court of Appeals for the Third Circuit has held that federal habeas corpus is not available to challenge the constitutionality of Pennsylvania's parental rights termination statute.


In June, 1971, Marjorie Lehman voluntarily transferred temporary custody of her three minor sons to the Lycoming County Children's Services Agency (Agency) due to her poor living conditions and the imminent birth of another child. After the child's birth, the Agency remained actively involved with Ms. Lehman as her sons were still in foster care.

Ms. Lehman's request for the return of her sons in November, 1974, was refused by the Agency because she was unable to provide them with the necessary support and supervision. Subsequently, the Agency filed a petition with the Lycoming County Court of Common Pleas requesting the termination of Ms. Lehman's parental rights in order to make her sons eligible for adoption. The court, rejecting Ms. Lehman's void-for-vagueness challenge to section 311 of the Pennsylvania Adoption Act,
granted the petition. On appeal, the Pennsylvania Supreme Court held that the adoption statute was not violative of substantive due process or unconstitutionally vague and upheld the decision of the lower court. The United States Supreme Court denied Ms. Lehman's petition for a writ of certiorari. Thereafter, on behalf of her sons, Ms. Lehman filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, contending that section 311 was unconstitutional as applied to her and/or unconstitutional on its face. The district court dismissed the petition for lack of jurisdiction. The Third Circuit Court of Appeals, in a divided panel opinion, reversed and held that federal habeas corpus jurisdiction may be invoked to challenge the constitutionality of state parental termination statutes. On a rehearing en banc, the Third Circuit Court of Appeals reversed, holding that federal habeas corpus jurisdiction could not be invoked to challenge the constitutionality of Pennsylvania's statutory procedures for involuntarily terminating parental rights.

Writing for the plurality, Judge Garth emphasized that the 1980), reads in pertinent part:

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

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

Id. 6.


12. Judges Aldisert, Hunter, and Weis joined the plurality opinion.
habeas corpus writ, unlike other claims or constitutional challenges, is not subject to res judicata principles. Restraints of an individual's liberty are so contrary to important constitutional rights that the liberty interest will prevail over the finality of litigation interest embodied in the res judicata doctrine.  

Another extraordinary characteristic of habeas corpus, Judge Garth asserted, is the use of the writ across judicial systems. Representing what he termed an unparalleled assertion of jurisdiction by the federal courts, the habeas corpus writ authorizes a sole federal judge to overrule a state court's final decision on federal issues. In light of this unique power, the effect on comity between state and federal judiciaries, and the ability to override doctrines of res judicata, Judge Garth cautioned that the use of the writ should be confined to circumstances involving the preservation of personal liberty and the freedom from unlawful custody.  

Judge Garth observed that the writ's requirement that one be "in custody" was designed to limit its use as a remedy to those restraints of an immediate and severe nature. The plurality also noted the need to properly limit the reach of the writ, especially in light of the expanding scope of constitutional litigation.

The plurality then contended that the proper focus in the present case was whether the termination of parental rights presented the same, strong claim for overriding the finality interest as does the plea of a prisoner that his incarceration is in violation of the United States Constitution. The court concluded,

13. 648 F.2d at 139. Emphasizing the high value accorded personal liberty, the plurality quoted Justice Brennan's majority opinion in Fay v. Noia, 372 U.S. 391 (1963): "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." Id. at 424.

14. 648 F.2d at 139. The writ permits one in custody under a court order to be heard in a federal court on federal constitutional claims despite the full adjudication of the underlying claim in a state court.

15. Id. (citing Sumner v. Mata, 449 U.S. 539 (1981)).

16. 648 F.2d at 139.


18. 648 F.2d at 140.

19. Id.
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relying on the First Circuit's decision in *Sylvander v. New England Home for Little Wanderers*,\(^{20}\) that it did not because habeas corpus challenges unlawful custody, and unlawful custody is not an issue in parental rights termination cases.\(^{21}\) The plurality reasoned that the interest sought to be protected in these cases was not the children's liberty interest but the parent's right to raise the children.\(^{22}\)

In support of these conclusions, the plurality first maintained that although incarceration per se is not required for the habeas corpus writ to issue, custody involving restraint of a type not shared by the public generally\(^{23}\) or involving collateral consequences\(^{24}\) is required for relief under 28 U.S.C. § 2254,\(^{25}\) the fed-

\(^{20}\) 584 F.2d 1103 (1st Cir. 1978).

\(^{21}\) 648 F.2d at 141. The plurality contended that *Sylvander* was factually and procedurally similar to the present case. *Id.* Ms. Sylvander had given custody of her son to a privately run institution, the New England Home for Little Wanderers. The home had petitioned the Massachusetts Probate Court for authority to place the child as available for adoption, without requiring the mother's consent. The probate court's finding that it was in the child's best interest to be placed in an adoptive home was affirmed by the Supreme Judicial Court of Massachusetts. That court also rejected Ms. Sylvander's contention that the statute's standards were unconstitutional. Her petition for habeas corpus, joined with a 42 U.S.C. § 1983 complaint, was dismissed by the District Court for the District of Massachusetts. *Sylvander v. New England Home for Little Wanderers*, 444 F. Supp. 393 (D. Mass.), aff'd, 584 F.2d 1103 (1st Cir. 1978). Holding that the section 1983 complaint was barred by res judicata, the court of appeals also found that the custody required for habeas corpus was not present because the child was not being detained or under any type of state-imposed restraint. The *Sylvander* court determined, therefore, that the rights asserted by the action were those of the mother and not of one in custody. 584 F.2d at 1112.

\(^{22}\) 648 F.2d at 140.

\(^{23}\) See *Jones v. Cunningham*, 371 U.S. 236 (1963). An individual under the supervision of the Parole Board was in custody for habeas corpus purposes when such custody "involve[d] significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally." *Id.* at 242. See also Hensley v. Municipal Court, 411 U.S. at 351 (release on own recognizance prior to incarceration was a restraint not shared by the public generally).

\(^{24}\) See *Carafas v. LaValle*, 391 U.S. 234 (1968). Although the parole status of the petitioner in *Carafas* had ended through expiration of his sentence, the Court held that the case was not moot. The petitioner was found to be in custody for purposes of the habeas corpus statute because he was subject to "collateral consequences" and would continue to suffer "disabilities." *Id.* at 237, 239.

\(^{25}\) 28 U.S.C. § 2254(a) & (b) (1976) provide in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district
eral habeas corpus statute for state prisoners. When compared with these standards, the Leman sons' circumstances, Judge Garth concluded, were not different from other living arrangements, such as foster or parental care, and thus the restraint here was one shared by children generally.26

The plurality then reviewed the First Circuit's decision in Sylvander and agreed with its application of law.27 Moreover, they concluded that the Lehman boys were also not being detained, restrained, or held against their will.28 The plurality also agreed with the Sylvander court that the parent's rights were actually represented by the habeas corpus petition, not the children's. The plurality concluded that a parent's right against deprivation of his or her children did not involve the requisite custody for a habeas corpus action.29

Judge Garth rejected Ms. Lehman's attempt to distinguish the custody battle between natural parents from the termination of parental rights by the state. He noted that in both situations the judicial process is used to establish responsibility for the child's upbringing. Judge Garth reasoned that because the impact on 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.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. Id.

26. 648 F.2d at 141. Judge Garth stated also that no collateral consequences existed. He added there were no habeas corpus precedents dealing with the custody requirement which would cover the Lehman children's custody situation. Id.

27. See supra note 21 and accompanying text. Judge Garth characterized Sylvander as the only case which had analyzed whether the requisite custody existed in parental determination cases. 648 F.2d at 141. He noted that several cases have assumed that jurisdiction does exist. Id. at 141 n.8. The plurality noted the similarity of the factual settings, yet pointed out the difference in procedural approaches. Unlike Ms. Lehman, Ms. Sylvander did not file a petition for writ of certiorari; however, in neither case was an appeal taken directly to the Supreme Court. Id. at 141.

28. 648 F.2d at 142. Judge Garth noted that he was therefore not in the kind of custody which has prompted federal courts to assert jurisdiction. Id.

29. Id.
the status of the children is the same, if habeas corpus jurisdiction is present in parental termination proceedings, it is present in intra-family custody disputes. He concluded that the restraint on the child is indistinguishable in either situation from that placed on children in general, and is insufficient for habeas corpus purposes.30

Recognizing that an individual state may validly extend the writ's scope to child custody matters, Judge Garth maintained that different concerns emerge when federal courts subjugate the state's finality interest to the federal personal liberty interest. He stated that only those decisions granting federal habeas corpus relief to one petitioning from a state custody order could be considered as authoritative31 and that the authorities relied on by Ms. Lehman in attempt to extend the habeas corpus writ to child custody cases were not controlling.32

Examining relevant policy considerations, the plurality observed that although the child has an interest in finality of litigation to avoid continuing uncertainty of relationships,33 the parent does not and will probably continue to litigate until no forums are available. Judge Garth contended, therefore, that extending federal jurisdiction to child custody cases would probably not be in the child's best interest.34 The plurality explained that while the child custody present in parental terminations and other child custody determinations was not alone sufficient for invocation of

30. Id. at 142-43. Judge Garth also found no distinction, in terms of the custody requirement of severe restraints, between the case of the usual custody battle and that of the state termination proceeding. The plurality was concerned that if habeas corpus were made available in the state termination cases it would then be available in parental custody proceedings, thereby involving the federal courts in areas traditionally reserved to the states. Id. at 143 n.11.

31. Id. at 143.

32. Ms. Lehman cited as authority for granting habeas corpus: United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974) (father's petition for writ of habeas corpus properly granted); Application of Reed, 447 F.2d 814 (3d Cir. 1971) (federal district court had jurisdiction to grant writ); Wisconsin Potowatomis v. Welsey, 377 F. Supp. 1153 (M.D. Fla. 1974) (denied, pending a state court judgment); Young v. Minton, 344 F. Supp. 423 (W.D. Ky. 1972) (father's petition for habeas corpus granted). See Brief for Appellant at 18. Judge Garth stated that none of these cases would support the use of the writ in Lehman. 648 F.2d at 143.

33. By analogy to the prisoner who is able to put an end to his litigation, the plurality recognized the inability of a child to do likewise. 648 F.2d at 144. See Sylvander, 584 F.2d at 1112.

34. 648 F.2d at 144.
federal habeas corpus jurisdiction, all federal habeas corpus petitions on behalf of children are not precluded.55

The plurality rejected Ms. Lehman's argument that she was entitled to a federal forum for her federal claims, but stated that federal review had been available to Ms. Lehman had she chosen to pursue different procedures to obtain it.56 The plurality concluded its discussion by stating that because child custody disputes are no more than disputes over which party shall have responsibility for the child, the federal personal liberty interest is not sufficiently strong to extend federal habeas corpus relief.57

In his concurrence,58 Judge Adams conceded that the Lehman sons' situation did technically comply with the language of the habeas corpus statute.39 He stated that the writ's usage had never been constrained by formalistic application, but was guided

35. *Id.* If a case would present sufficient restraint or incarceration imposing on a child's liberty interest the writ would probably issue. *See Sylvander*, 584 F.2d at 1113.

36. 648 F.2d at 144. Judge Garth stated that there is no inherent right to have federal claims considered in a federal court. *Id.* *See* Allen v. McCurry, 445 U.S. 958 (1980) (inability to obtain federal habeas corpus relief does not render collateral estoppel inapplicable to a section 1983 action). He then observed that although one who loses a federal constitutional challenge to a state statute in a state court has a right of direct appeal to the United States Supreme Court, see 28 U.S.C. § 1257(2) (1976), Ms. Lehman instead chose to petition for a writ of certiorari, allegedly to avoid the res judicata effect of a possible summary affirmation by the Supreme Court. He also noted that federal review could be obtained by reserving federal claims during state court litigation and then pursuing the challenge of the state statute's constitutionality in a federal court through a section 1983 action. 648 F.2d at 144. *See* 42 U.S.C. § 1983 (1976) which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* The res judicata effect has been limited by the rule requiring section 1983 claims to have been actually litigated in state courts in order to invoke the res judicata bar. New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).

37. 648 F.2d at 146.

38. Judges Aldisert, Hunter, and Weis joined in this concurring opinion.

39. 648 F.2d at 146 (Adams, J., concurring). Using the language of the statute itself, Judge Adams stated the children were "in custody pursuant to the judgment of a State court . . . in violation of the Constitution" and the "applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(a) & (b) (1976). *See supra* note 25.
by common law and historic applications. Judge Adams observed, however, that common law alone does not provide sufficient guidance because there was no federal system at common law and parental termination proceedings were uncommon.

Although Ms. Lehman had agreed that federal habeas corpus jurisdiction should not be extended to the intra-family custody dispute, she had urged that the state termination proceedings are distinguishable by virtue of the state's involvement and, therefore, common law precedents remain available as support for habeas corpus relief. Judge Adams rejected this argument by pointing out that the common law precedents relied upon involved intra-family custody disputes.

Judge Adams then reviewed the statutory history of habeas corpus jurisdiction as interpreted by the United States Supreme Court and was persuaded that child custody issues had not been included in legislative or judicial extension of the custody requirement. He emphasized that the writ had been used largely to challenge criminal sanctions. Considering the impact of the termination proceedings on the Lehman children, Judge Adams determined that they did not have an interest which warranted

41. 648 F.2d at 147 (Adams, J., concurring).
42. Id. at 147 n.6 (Adams, J., concurring).
43. Id. at 148-49 (Adams, J., concurring). Judge Adams described the history of habeas corpus jurisdiction, specifically the federal courts' issuance of the writ on allegations of custody in violation of federal law, as "one of carefully controlled statutory expansion." Id. at 148 (Adams, J., concurring). But see infra note 90 and accompanying text. After noting that the scope of federal habeas power was originally defined in section 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (current version at 28 U.S.C. § 2241 (1976)), Judge Adams identified two significant Supreme Court interpretations of section 14: Ex parte Dorr, 44 U.S. (3 How.) 103 (1845) (federal courts lacked the power to issue habeas corpus writ to one in custody under order of state court, whether civil or criminal) and Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) (judicial authority to issue writ must be founded on statutory authorization).
44. 648 F.2d at 150 (Adams, J., concurring). Judge Adams noted that despite amendments, in terms of permissible usages, to the Judiciary Act of 1789, Congress did not indicate a desire to include child custody matters. He stated that review of the legislative history of section 2254's statutory predecessor "significantly fails to mention challenges to termination of parental rights as among the intended uses of habeas." 648 F.2d at 150 (Adams, J., concurring).
45. Id. Judge Adams pointed out that section 2254 speaks in terms of "the rights of the prisoner." See supra note 25.
extension of the habeas corpus writ. He concluded that if federal habeas corpus jurisdiction was desired in the child custody area, Congress, exercising its constitutional authority to establish the jurisdiction of the lower federal courts, should amend section 2254.

Judge Adams next stated that even if it were proper to extend jurisdiction under the federal habeas statute to the Lehman sons, it was necessary to examine the propriety of the parent bringing the habeas corpus action on behalf of the children after parental rights had been terminated. He acknowledged that the parent has the primary authority to provide for the care of a child and that the integrity of the family is protected from state interference. Judge Adams noted that while children and parents have reciprocal interests, children also have independent private interests not shared by parents. The state also has an interest in the child’s welfare, Judge Adams stated, and can set limits to insure a minimum level of physical and mental health.

He concluded that once the rights of the parent had been terminated, the presumption that the parent is representing the child’s interests is no longer valid and that their interests actually diverge. He maintained that because Ms. Lehman was attacking the state’s termination standard, which presumably represented the standard designed to protect the children’s well being, her action potentially undermined the interest of the children in a minimum parent-child relationship.

46. Id. at 150-51 (Adams, J., concurring). Judge Adams based his conclusion on the absence of demonstrative data that the state’s activities here were so unfair or inequitable as to seriously jeopardize the family unity and on the fact the record was devoid of “cavalier disregard of parental rights” by the state’s executive or judicial branches. Id.

47. Id. at 151 (Adams, J., concurring). See supra note 25.

48. Id. at 152 (Adams, J., concurring). See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (Supreme Court has emphasized the importance of the family).


51. 648 F.2d at 153-54 n.47 (Adams, J., concurring). See Stanley v. Illinois, 405 U.S. at 649, 652 (no question that neglected children may be removed from their parents).

52. 648 F.2d at 154 (Adams, J., concurring). Factors mentioned specifically by Judge Adams as indicating the possible conflict-of-interests between parent
The divergence of the parent-child interests was also apparent to Judge Adams when viewed from the perspective of finality. The interest of the parent in restoring the family unit by continuing litigation is diametrically opposed to the children's interest in acquiring a permanent parental-type relationship by ending litigation. Because the federal court was without jurisdiction and because Ms. Lehman lacked standing to assert a habeas corpus action on behalf of the children, Judge Adams would affirm the district court's judgment.

Chief Judge Seitz, also concurring, agreed with Judge Adams that the case did technically conform to the statutory requirements for federal habeas corpus jurisdiction. However, he reasoned that using the federal habeas corpus statute to challenge state child custody proceedings was a new development, without pertinent precedent, and therefore a significant departure from its traditional uses. He urged that because intrafamily custody disputes also would fall within the literal reading of the statute, the courts should refrain from this expansion of habeas corpus jurisdiction and permit Congress to decide whether such expansion was proper.

Judge Rosenn dissented, asserting that because the plurality incorrectly perceived the issue before the court as being merely who shall raise the children, they found the federal interest in personal liberty insufficiently implicated to give rise to federal habeas corpus jurisdiction. Judge Rosenn maintained that the issue was the narrower one of whether the district court was incorrect in dismissing Ms. Lehman's habeas corpus petition chal-

and child were the voluntary relinquishing of custody for ten years, the development of ties with persons in loco parentis, and the intervention by the state. Id. at 154-55 (Adams, J., concurring). He noted that Ms. Lehman may have standing to challenge the infringement of her rights by some direct action but he questioned the use of habeas corpus which must be brought on behalf of the children. Id. at 154 (Adams, J., concurring).

53. Id. See supra note 33 and accompanying text.
54. 648 F.2d at 155 (Adams, J., concurring).
55. Id. (Seitz, C.J., concurring). See supra note 25.
56. 648 F.2d at 155 (Adams, J., concurring). See Sylvander, 584 F.2d at 1109, 1113; supra, note 21.
57. 648 F.2d at 156 (Seitz, C.J., concurring).
58. Id. at 156 (Rosenn, J., dissenting). See 648 F.2d at 146. Judges Higginbotham and Sloviter joined in this dissent.
lenging the constitutionality of the Pennsylvania statute for lack of jurisdiction. 59

Judge Rosenn stated that he disagreed with the *Sylvander* decision 60 and the conclusions that the plurality drew from it. 61 Because *Sylvander* involved custody held by a private adoption agency, Judge Rosenn stated that it had limited relevance to the *Lehman* case which involved state action. 62

Judge Rosenn noted that jurisdiction consists of the abstract power to hear a case and should not depend on the disposition on the merits in the state court. He deemed the resolution of two questions necessary to decide this case: first, whether the federal habeas corpus statute conferred jurisdiction for federal review of state custody proceedings which terminated parental rights; and second, whether exercising such jurisdiction conformed with federal and state comity concerns and related policy considerations. 63

Judge Rosenn summarized the history of the writ's custody requirement for jurisdiction through the common law, the Constitution, and subsequent statutory extensions of habeas jurisdiction. 64 Examining the federal habeas corpus statute, Judge

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59. *Id.* at 156 (Rosenn, J., dissenting).
60. *Id.* at 158 (Rosenn, J., dissenting). *See supra* note 21 and accompanying text.
61. 648 F.2d at 158 (Rosenn, J., dissenting). Judge Rosenn found *Sylvander* distinguishable because Ms. Sylvander surrendered custody of her child shortly after birth to a private adoption agency. The private agency, not the state, petitioned to place the child without the mother's permission. *Id.* at 157 (Rosenn, J., dissenting). Judge Rosenn disagreed with the plurality's conclusion from *Sylvander*: first, that parental rights termination cases do not override the interest in finality; and second, that because the parent is seeking to protect his or her right to raise the child and not the child's liberty interest, habeas corpus custody is not present in termination cases. 648 F.2d at 158 (Rosenn, J., dissenting).
62. *Id.*
64. 648 F.2d at 158-59 (Rosenn, J., dissenting). *See McNally v. Hill*, 293 U.S. 131, 134 (1934) (tracing development of writ at common law). *See also* U.S. CONST. art. I, § 9, cl. 2. The Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73 (current version at 28 U.S.C. § 2241 (1976)) reads in pertinent part:

That all the before-mentioned courts of the United States, [District, Circuit, and Supreme] shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions [elsewhere defined], and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the
Rosenn discussed the four requirements for the exercise of jurisdiction. He observed that the first requirement, custody, had been expanded beyond physical confinement or restraint to include protection against wrongful restraints of an individual's liberty. Judge Rosenn asserted that the state's supervision of the children in the present case was sufficient to reach the level of custody required by the statute; therefore, the plurality's reliance on *Sylvander* was misplaced.

This dissenter noted that the second requirement under the federal habeas corpus act, custody in violation of a federal law or the Constitution, had been satisfied by Ms. Lehman's allegations that her children's custody violated the Constitution.

Judge Rosenn observed that the third requirement, custody granted pursuant to a judgment by a state court, had been met. By pursuing her constitutional arguments through to the Pennsylvania Supreme Court, Ms. Lehman had met the final require-

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district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.—Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.  

Id. at 81-82.  
65. 648 F.2d at 159 (Rosenn, J., dissenting). See supra note 21.  
66. 648 F.2d at 160 (Rosenn, J., dissenting). See Jones v. Cunningham, 371 U.S. at 243. See also Hensley v. Municipal Court, 411 U.S. at 349 (release on own recognizance constitutes habeas corpus custody); Westberry v. Keith, 434 F.2d 623, 624 (5th Cir. 1970) (per curiam) (actual physical restraint not required to obtain habeas corpus relief); Hammond v. Lenfest, 398 F.2d 705; 711 (2d Cir. 1968) (naval reservist called to active duty although not yet reported for service constitutes habeas corpus custody).  
67. 648 F.2d at 160 (Rosenn, J., dissenting). Ms. Lehman's petition was distinguishable from the *Sylvander* petition by the amount of state involvement, asserted Judge Rosenn. In *Lehman* the state was involved not only in the statutory judicial proceedings, but also by the fact a county agency had custody of the children. Id. Judge Rosenn asserted that the *Sylvander* court itself found this distinction important. Id. See *Sylvander*, 584 F.2d at 1112.  
68. 648 F.2d at 161 (Rosenn, J., dissenting). Ms. Lehman alleged that section 311(2) of the Pennsylvania Adoption Act of 1970 was unconstitutionally vague on its face and as applied to her; that parental rights termination violated the fourteenth amendment by failure to use less drastic measures; and that the state, absent of finding a failure to provide adequate care or exposure of children to substantial harm, had no compelling interest in the termination. Id. at 160-61 (Rosenn, J., dissenting).  
ment of federal habeas corpus jurisdiction, exhaustion of state remedies. Judge Rosenn therefore concluded that federal habeas corpus jurisdiction was available to Ms. Lehman unless overriding policy concerns present reasons for not asserting jurisdiction.

Judge Rosenn disagreed with the plurality's reasoning that even if jurisdiction were available under section 2254, the countervailing state interest in finality of judgments and the federal courts' deference to the state in matters of family law would override the federal interest in protecting personal liberty from unconstitutional deprivation. Judge Rosenn contended that rather than deferring to states in the area of family law, the plurality's holding would prevent the federal courts from reviewing state court rulings on federal constitutional claims like Ms. Lehman's. The plurality's decision that the present case did not impinge with sufficient harshness on any liberty interest was, according to Judge Rosenn, not supported by case law.

Examining whether the exercise of habeas jurisdiction advanced federal-state comity, Judge Rosenn recognized the federal courts' hesitation to exercise jurisdiction in domestic relations suits, but distinguished the present case because Pennsylvania had deprived children of their liberty in violation of the fourteenth amendment. Because section 1983 complaints prevail over the federal deferral policy in such cases, Judge Rosenn asserted that when the same allegations are brought forth in a habeas corpus petition, they also should prevail.

Judge Rosenn did not view the dispute as a struggle over

70. 648 F.2d at 161 (Rosenn, J., dissenting).
71. Id.
72. Id. at 162 (Rosenn, J., dissenting). See supra note 36.
73. Id. at 162 (Rosenn, J., dissenting). See Hensley v. Municipal Court, 411 U.S. at 351; Hammond v. Lenfest, 398 F.2d at 711. See supra note 66.
74. Id. at 162 (Roseen, J., dissenting). Judge Rosenn noted that Sylvander had identified two principal factors that work against the exercise of federal habeas jurisdiction: (1) while furthering only a collateral federal interest, exercise of jurisdiction would interfere with significant state regulatory interests in family matters; and (2) other avenues of procedure provide adequate protection for federal constitutional rights. Id. See supra note 21. See also In re Burrus, 136 U.S. 586, 593-94 (1890) (matters of domestic relations belong to laws of the states); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975) (divorce decree of support remanded to state court due to federal policy and comity concerns).
75. 648 F.2d at 162 (Rosenn, J., dissenting).
76. Id.
which parent should raise the child, but as a constitutional attack against a state statute that authorized the termination of parental rights without consent.\textsuperscript{77} He regarded this action as one akin to criminal prosecution, finding the destruction of the family relationship by the state only one step short of imposing criminal sanctions to protect neglected children.\textsuperscript{78} Judge Rosenn therefore found it unrealistic to propose that jurisdiction extended in this case would necessarily lead to the exercise of jurisdiction in custody battles between natural parents.\textsuperscript{79}

Judge Rosenn urged that significant federal interests were involved in \textit{Lehman}. He observed that the right to family privacy includes the parent’s right to manage his or her children and the children’s right to be raised by their natural parents.\textsuperscript{80} Judge Rosenn stated that the relationship between parent and child has constitutional protection,\textsuperscript{81} and that the Supreme Court has held that natural parents have rights that the state may not infringe.\textsuperscript{82}

Examining whether federal-state comity considerations rendered the extension of habeas corpus jurisdiction inappropriate, Judge Roseen asserted that Ms. Lehman’s state court adjudication of her federal constitutional allegations, instead of being a bar to federal action as was urged by the Agency, fulfilled the federal habeas corpus statute requirement that state remedies be exhausted before seeking a federal forum.\textsuperscript{83}

Concluding that the commonwealth had terminated a constitu-

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 163 (Rosenn, J., dissenting). In Moore \textit{v}. Sims, 442 U.S. 415 (1979), the Supreme Court stated that “the temporary removal of a child in a child abuse context is . . . in aid of and is closely related to criminal statutes.” Id. at 423.
\textsuperscript{79} 648 F.2d at 163 (Rosenn, J., dissenting).
\textsuperscript{81} 648 F.2d at 164 (Rosenn, J., dissenting). Judge Rosenn noted that the Supreme Court has stated that an individual has the right to a family relationship free of unwarranted state intrusion. Id. at 164 n.11 (Rosenn, J., dissenting).
\textsuperscript{82} 648 F.2d at 164 (Rosenn, J., dissenting). \textit{See Stanley v. Illinois}, 405 U.S. at 652 (the interest in retaining custody of children one has sired and raised is substantial and cognizable).
\textsuperscript{83} 648 F.2d at 166-67 (Rosenn, J., dissenting). Judge Rosenn noted that exhaustion of state remedies, a requirement for federal jurisdiction under the habeas corpus statute, operated to preclude later federal action under section 1983. \textit{See supra} notes 25 & 36.
tionally protected relationship and had taken custody of the children, Judge Rosenn believed that federal habeas corpus was a remedy available to Ms. Lehman because: (1) unless compelling interests were present to urge its nonconferral, Congress had made federal habeas corpus available to cure unlawful restraint if the statutory requirements were met, and Ms. Lehman had satisfied those requirements;\(^4\) (2) this case involves the power of the state to terminate the mutual parent and child liberty interests, and there is a federal interest in insuring a constitutional proceeding;\(^6\) and (3) both state and federal interests are served by the exhaustion requirements which grant federal review of federal constitutional claims only after these claims are presented to the state court.\(^7\)

Judge Gibbons, also dissenting,\(^7\) disagreed with his fellow judges' treatment of habeas corpus as a ground for federal subject matter jurisdiction. He contended that habeas corpus here is a remedy, available to assist the court in exercising its jurisdiction. Custody, he stated, was pertinent only if Ms. Lehman were victorious in her constitutional challenge to the termination procedures. If she prevailed, then the state would not have custodial rights to the children, and the remedy of habeas corpus could be used to obtain their return.\(^8\) Finding subject matter jurisdiction under separate authority,\(^9\) Judge Gibbons asserted that the case

\(^4\) 648 F.2d at 167 (Rosenn, J., dissenting). See supra notes 65-70 and accompanying text.

\(^5\) 648 F.2d at 167 (Rosenn, J., dissenting). See supra notes 81 & 90 and accompanying text.

\(^6\) 648 F.2d at 168 (Rosenn, J., dissenting). See supra note 83 and accompanying text. Judge Rosenn stated that the question of the children's custody should still be resolved solely by the state court, but within federal constitutional guidelines. 648 F.2d at 168 (Rosenn, J., dissenting).

\(^7\) 648 F.2d at 168 (Gibbons, J., dissenting).

\(^8\) Id.

\(^9\) Id. See 28 U.S.C. § 1331(a) (1976); 28 U.S.C. § 1343(a) (1976) (Supp. III 1979). Section 1331(a) reads as follows: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . ." Section 1343(a) reads, in pertinent part:

(a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity
should be remanded to determine the res judicata effect of the state's decision to terminate parental rights.  

Discussing habeas corpus as a remedy and not as a basis for extending jurisdiction, Judge Gibbons observed that section 14 of the Judiciary Act of 1789 was a grant of power to the courts to issue certain writs necessary to jurisdiction, while jurisdiction was defined elsewhere. The power to issue writs of habeas corpus, as interpreted by Judge Gibbons, is limited only in those circumstances where a single judge is reviewing a jail commitment. In civil cases, the court is not so limited. Therefore, Judge Gibbons disagreed with Judge Adams' view that federal habeas corpus jurisdiction has had a history of carefully controlled statutory development and maintained that instead, the power of courts to issue habeas corpus writs is grounded in common law. Thus, defining the key issue in the present case as whether obtaining custody of children through habeas corpus was permissible at common law, Judge Gibbons found that it clearly was permissible.  

Examining whether Ms. Lehman had stated facts under which she could prove a claim within the district court's jurisdiction, Judge Gibbons stated that a basis in federal law and a jurisdictional statute are the requisites for establishing a claim within the jurisdiction of the district court. He found both present in

secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Id.

90. 648 F.2d at 168 (Gibbons, J., dissenting).
91. Id. at 169 (Gibbons, J., dissenting).
92. Id. Judge Gibbons suggested that because the use of writs in civil litigation was common at the time the Judiciary Act of 1789 was passed, the phrase "inquiry into cause of commitment" implied application to civil commitments also. Id.
93. Id. at 170 (Gibbons, J., dissenting). See 648 F.2d at 148 (Adams, J., concurring).
94. 648 F.2d at 170 (Gibbons, J., dissenting).
95. Id. at 171 (Gibbons, J., dissenting). See Jones v. Cunningham, 371 U.S. at 238-39 (use of habeas corpus at common law in family custody situations). See also supra note 23 and infra note 115 and accompanying text.
96. 648 F.2d at 172 (Gibbons, J., dissenting). Judge Gibbons disagreed with Judge Garth's suggestion that this question involves the inherent right to have a federal claim heard by a federal court. See supra note 36 and accompanying text.
Ms. Lehman's due process complaint. Judges Adams and Garth had dealt with res judicata and standing, defenses going to the merits which, Judge Gibbons pointed out, do not deal with subject matter jurisdiction. He observed that several statutory bases for subject matter jurisdiction were available to provide Ms. Lehman with a federal forum.

Questioning the standing arguments discussed by Judge Adams, Judge Gibbons stated again that the treatment of habeas corpus as a jurisdictional matter had caused the erroneous conclusions; Ms. Lehman was not suing for custody per se, but challenging the termination proceedings. He stated that Ms. Lehman had standing to assert her own rights, and that custody would be awarded as a remedy only if she succeeded.

Judge Gibbons asserted that the only true issue in this case was whether dismissal by the district court was required under the doctrine of res judicata. He stated, however, that even if Pennsylvania considers parental termination decrees final for res judicata purposes such a decree against Ms. Lehman could not be given preclusive effect if her claims of unconstitutionality were valid.

Although the origin of the habeas corpus writ is uncertain, it

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98. 648 F.2d at 173 (Gibbons, J., dissenting).
100. 648 F.2d at 174 (Gibbons, J., dissenting).
101. Id.
102. Id.
103. Judge Gibbons stated that the statutory requirement of full faith and credit has the effect of binding the federal district court to the extent a rendering state would be bound by a judgment of its own courts. Id. at 175 (Gibbons, J., dissenting). See 28 U.S.C. § 1738 (1976) which provides in pertinent part: "Such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."
Judge Gibbons noted that Pennsylvania case law suggests that parental termination proceedings can be reopened and modified. 648 F.2d at 175 (Gibbons, J., dissenting). See In re adoption of R. H., 485 Pa. 157, 401 A.2d 341 (1979) (involuntary decree might have been reversed if mother had met her burden of proving decree's invalidity).
104. 648 F.2d at 177 (Gibbons, J., dissenting).
was in general use in England by 1150. The writ entered American jurisprudence through English common law and the Constitution preserved its use. The Judiciary Act of 1789, a forerunner of the current habeas corpus statute, authorized the writ's use by the federal judiciary. While the 1789 Act is found substantially unchanged in the current habeas corpus statute, the statute has undergone additions by Congress and extension by the courts.

Federal habeas corpus was originally available only to individuals in federal custody. In 1867, an amendment to the Judiciary Act gave the federal courts the authority to extend the writ to individuals held in custody by a state, if held in violation of a federal law, treaty, or the Constitution. Although the usual application of habeas corpus has been to challenge the lawfulness of an individual's custody under criminal convictions, the courts have extended the interpretation of the "custody" element beyond the criminal realm.

In a 1963 decision, Jones v. Cunningham, the United States

105. R. Sokol, Federal Habeas Corpus (2d ed. 1969). By the early thirteenth century, the writ was used by the King's Court in their attempt to assert control over local courts. Id. at 4 (citing Cohen, Some Considerations of the Origins of Habeas Corpus, 16 Canadian Bar Rev. 92, 115 (1938)).


107. See U.S. Const. art. I, § 9, cl. 2 which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."

108. See supra note 64.


111. See Jones v. Cunningham, 371 U.S. 236 (1963). The Court reviewed the English common law scope of the habeas corpus writ and also the history of the writ in the United States. On the basis of this review, the court determined the "custody" requirement of the habeas corpus statute did not mean actual physical restraint in a prison. Id. at 238-40.

112. See supra note 64.


114. See Jones v. Cunningham, 371 U.S. at 236-40 (citing precedents for habeas corpus writ availability in variety of noncriminal cases); Ex parte McCordle, 73 U.S. (6 Wall.) 816 (1867) (every deprivation of liberty in violation of federal law is within jurisdiction of every judge or court).

115. 371 U.S. 236 (1963). Jones had been convicted by a Virginia state court and sentenced to a state penitentiary. His petition to the United States District
Supreme Court addressed the meaning of "custody" to determine whether the statutory jurisdictional requisites for habeas corpus had been met. In light of the writ’s purpose to protect against unlawful restraints on an individual’s personal liberty, the Court held that physical restraint was not the test, but rather whether the type of restraint in question was a sort "not shared by the public generally." As Congress had not attempted to place parameters on the term "custody," the Jones Court determined that both English and American common law and historical uses may be used to determine whether habeas corpus was the appropriate vehicle for examining a particular restraint on liberty. Interestingly, several of the common law cases cited as support by the Jones Court specifically involved the custody of children.

Although the United States Supreme Court has yet to rule on whether federal habeas corpus can be used to challenge parental termination cases, federal habeas corpus jurisdiction has been invoked in a variety of contexts as a means of challenging the state’s custody of a child pre-trial detention and post-adjudic-
ative placements of juvenile delinquents, institutional commitments of mentally retarded youths, and various other civil commitments by state courts.

Lehman is one of three recent courts of appeals decisions using federal habeas corpus to challenge the constitutionality of state proceedings for terminating the parent-child relationship. Sylvander v. New England Home for Little Wanderers was the first case to decide that federal habeas corpus was not available because the statutory requisite of "custody" simply was not present in child custody cases involving parental termination. Despite Jones' expansive interpretation of custody, the Sylvander court reasoned that common law usages were inappropriate as a means for ascertaining the scope of the writ in child custody cases because of the state's reserved jurisdiction in the area. Because the only federal interest in such a case would be a constitutional challenge, the Sylvander court stated that federal intrusion into the realm of reserved state jurisdiction requires that the intrusion be necessary and appropriate.

Questioning whether the child's interest would truly be served by conferring federal habeas corpus status on the parent, the Sylvander court pointed out that other avenues for federal review are available without resort to federal habeas corpus. The court expressed a concern that if habeas corpus were made available in this type of case, federal courts would be involved in a vast new area of judicial review. Deciding that the true issue in the case was who would raise the child, the Sylvander court

124. See, e.g., United States ex rel. Diggs v. Pennsylvania, 457 F.2d 933 (3d Cir. 1972) (habeas corpus petition denied for lack of final state adjudication on delinquency); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969) (release of juvenile from receiving home was proper under habeas corpus petition); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967) (habeas corpus petition claiming lack of psychiatric care vitiates rationale for confinement).
125. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (absence of counsel at hearing for involuntary commitment of mentally retarded youth).
126. See supra note 120.
127. 584 F.2d 1103 (1st Cir. 1978). See supra note 21 and accompanying text.
128. 584 F.2d at 1111.
130. 584 F.2d at 1111.
131. Id.
133. 584 F.2d at 1113.
Recent Decisions

held that the mother could not litigate further her right to raise
the child by using habeas corpus. 134

After Sylvander, the Fifth Circuit reached a different result in
Davis v. Page. 135 Ms. Davis's child was removed from her custody
by a state agency, adjudicated dependent, and made a ward of
the State of Florida. 136 The District Court for the Southern
District of Florida 137 granted summary judgment for Ms. Davis
on her habeas corpus petition seeking return of her child, and a
panel of the Fifth Circuit affirmed. 138 On rehearing en banc, 139 the

134. Id.
135. 640 F.2d 599 (5th Cir. 1981). Ms. Davis's child had been removed from
her custody by the Florida Department of Health and Rehabilitative Services
(DHRS) which had also filed for a dependency hearing. Ms. Davis was advised
to have counsel present at that hearing. She was unable to locate counsel, prob-
ably due to her indigency, and the child was adjudicated dependent and custody
was awarded to the DHRS. The 30-day appeal period expired, Ms. Davis retained
counsel and the habeas corpus petition was filed with the Florida Supreme
Court. Upon denial of the writ, an action for habeas corpus was filed with the
United States District Court for the Southern District of Florida on the grounds
that the hearing was unconstitutional because indigent parents are not
represented by counsel. Id. at 601.
136. Id.
a class action suit challenging the constitutionality of the state's dependency
proceedings for failure to provide indigent parents with the assistance of
counsel. In granting the summary judgment, the court held that requirements
of due process and equal protection were not satisfied unless indigent parents
were advised of their right to counsel. Id. at 263-65.
138. Davis v. Page, 618 F.2d 374 (5th Cir. 1980), vacated and reh'g en banc
granted. The Lehman court characterized this decision as one which assumed,
rather than discussed, jurisdiction. See 648 F.2d at 141 n.8.
139. 640 F.2d 599 (5th Cir. 1981). See supra note 135 and accompanying text.
The court held that in formal dependency proceedings which threaten to
deprive the parent of even temporary custody, an indigent parent must be of-
fered counsel. Having found federal habeas corpus jurisdiction, the Fifth Circuit
went on to decide the constitutional due process issue involved. During the
course of the analysis of the due process issue, the interest of the parent was
found to be a fundamental and absolute liberty interest and the interest in family
integrity was likened to the individual interest in freedom from restraint. 640
F.2d at 604. The Davis decision was issued over a strong dissent which agreed
in many respects with the Sylvander analysis, particularly as to concerns of
federalism, comity, and res judicata. The dissent, agreeing with the result of
the Sylvander court, was concerned with the sort of "custody" represented by
parental rights cases and with whose interest in truly represented in a habeas
petition. Availability of litigation in both state and federal courts and its affect
on the interests of the family and child were discussed and resolved in accord
with Sylvander. This was true also of the dissent's concern with the difficulty in
limiting the child custody cases brought before federal courts via habeas cor-
pus. 640 F.2d at 607 (Brown, J., dissenting).
Davis court had no difficulty finding the requisite "custody" by using the Jones analysis of restraints.\(^{140}\) Even recognizing the deference owed state courts in family law matters, Davis found no authority that would require denying the habeas corpus petition simply because the issue involved child custody.\(^{141}\) In fact, the court rejected outright the state's contention that habeas corpus was inappropriate in child custody cases.\(^{142}\) The Davis court limited its holding to those situations where the state's involvement affected the family's integrity, and stated that it did not include those situations concerned with purely private parties.\(^{143}\)

Lehman is the most recent decision on termination of parental rights and federal habeas corpus. The power of the writ to overcome the res judicata principle of finality of litigation was the ever-present factor throughout the plurality's analysis. Such power, to be exercised between federal and state judicial systems, is without comparison in our federal system.\(^{144}\) Relying extensively on the Sylvander analysis, the Lehman plurality viewed the issue before it as an ordinary child custody dispute, analogous to a dispute between the father and mother.\(^{145}\) The Lehman court found the facts to be insufficient to meet the unconstitutionally incarcerated prisoner standard,\(^{146}\) and therefore to overcome the compelling interest in finality, because viewed from the aspect of an ordinary child custody dispute, the Lehman children were not in custody sufficient to meet the requisites established through prior cases.\(^{147}\) The restraints imposed on the Lehman children were seen to be no different than those imposed on any other child subjected to some type of parental-like authority. Despite authority suggesting that resort to common law usages is proper,\(^{148}\) the Lehman plurality stated that it would limit its ex-

\(^{140}\) 640 F.2d at 602. Because the child was returned home, some of the mother's "restraints" not shared by the public generally were: The Department's continuing supervision of the child; the mother's required visits with the social worker; the inspections of her home by the social worker; and the general supervision over the mother's decisions regarding the child. \textit{Id.}  
\(^{141}\) \textit{Id.} at 603.  
\(^{142}\) \textit{Id.} at 605.  
\(^{143}\) \textit{Id.} at 603.  
\(^{144}\) 648 F.2d at 138-39.  
\(^{145}\) \textit{Id.} at 143.  
\(^{146}\) \textit{Id.} at 140.  
\(^{147}\) \textit{Id.} at 141.  
\(^{148}\) \textit{See supra} note 119 and accompanying text.
amination of authority to those cases where the federal courts extended the writ to children in “custody” pursuant to a termination proceeding. This limitation, in conjunction with the court’s treatment of the case as an ordinary child custody dispute, led the court to what it deemed to be only available precedent, Sylvander. But Sylvander can be distinguished from Lehman because the Sylvander child was in the custody of a private institution and not the state. Indeed, the Sylvander court had emphasized the lack of state involvement as an important element in arriving at its decision.

This element of state involvement is prevalent in the Lehman case; however, the Lehman plurality shifted the focus of its analysis from the degree of state involvement to the status of the child, and claimed that such status would not be affected even if further litigation were available. This shift allowed the plurality to reach the same conclusion as the Sylvander court, that the only issue to be relitigated in the habeas corpus action would be the parent’s right to raise the children, an issue that federal courts have traditionally deferred to the states. Also, according to Lehman, if it is a parent’s right that is being pressed, habeas corpus is certainly not the appropriate vehicle to relitigate his or her claim because the writ protects against unlawful restraint and the parent is not under any state-imposed detention or restraint. Therefore, the Lehman plurality, like the Sylvander court, found the mother to be asserting her own rights and not bringing suit on behalf of the children.

149. 648 F.2d at 136, 142.
150. Id. at 141. The court’s only reference to the panel decision in Davis was in a footnote. Id. at 141 n.8. The Lehman court found the panel decision in Davis to be unhelpful and unpersuasive because the court assumed without much discussion that habeas corpus jurisdiction was present. Id.
151. 584 F.2d at 1109. The court stated that “[t]he district court found that Michael, although living with foster parents, remained under the supervision and control of the Home, a private non-profit agency engaged in child care, and that this was sufficient to constitute ‘custody’ in the Home.” 444 F. Supp. at 398. But it concluded that the necessary element of state involvement was lacking. Id.
152. 648 F.2d at 142.
153. Id. at 140.
154. 584 F.2d at 1112.
155. 648 F.2d at 140. See supra note 29 and accompanying text.
156. 648 F.2d at 140. See 584 F.2d at 1111; supra note 22 and accompanying text.
Policy considerations in a child custody situation also persuaded the Lehman plurality to affirm the dismissal of the writ. Discussed in Sylvander and reiterated in Lehman was the child's inability, unlike the incarcerated prisoner, to end the litigation if a federal forum via habeas corpus were made available. In light of this, the Lehman plurality was unable to find how the family or child's welfare would benefit by providing yet another forum.\(^{157}\)

In light of the nearly exclusive reliance on Sylvander and the lack of any references of the Davis discussion, it must be assumed that the Lehman plurality was unaware of Davis, decided only one week previously.\(^{158}\) The three cases viewed together reveal a strong division about the availability and scope of federal habeas corpus when the issue involves a child custody dispute between parents and the state.\(^{159}\)

The Sylvander-Lehman opinions are similar to the Davis dissent in outlining the issue as an ordinary child custody case, with their concern about whether the required "custody" exists, and about the impact on federalism if habeas corpus were available.\(^{160}\) All three cases were concerned with the difficulty in limiting the application of the writ if it were granted in the present cases. The Davis majority and the Lehman dissents agree that the situation complies with the jurisdictional requirements, in particular that of custody, and that principles evidenced by federalism-concerns are not harmed by granting the habeas corpus action.\(^{161}\)

The United States Supreme Court has granted certiorari\(^ {162}\) in Lehman to examine whether habeas corpus can be utilized by a parent to obtain federal constitutional review of fully exhausted state parental rights termination proceedings on behalf of children who as a result of the proceedings are in state custody.

Perhaps the key to the divergence of opinion in the circuits,
and what will be determinative in the Supreme Court's consideration, is the initial characterization of the case. If characterized as an ordinary child custody case, the rights being urged will be viewed as those involving who shall raise the child to majority. Certainly no severe restraint can be found by being placed in temporary foster custody, and thus all traditional and common law authority will demand deference by the federal courts to the state's resolution. However, if characterized as a case in which a state agency has custody, meaning that the control, supervision and care is in the state itself, the results are diametrically different. The state has then interfered with the right to the integrity of the family and severed the fundamental parental right in one's children by allegedly unconstitutional means. When a state's highest court has upheld the federal constitutionality of such proceedings, then such a characterization easily falls within the broad scope of habeas corpus. 163

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163. See supra notes 25 & 39 and accompanying text.