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## Habeas Corpus - Infants - Federal Habeas Corpus Jurisdiction Does Not Lie to Consider Collateral Challenges to State Court Judgements Involuntarily Terminating Parental Rights. (Lehman v. Lycoming County Children's Services Agency)

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## NOTES

**HABEAS CORPUS—Infants—Federal Habeas Corpus Jurisdiction Does Not Lie to Consider Collateral Challenges to State Court Judgments Involuntarily Terminating Parental Rights. *Lehman v. Lycoming County Children's Services Agency*, 102 S. Ct. 3231 (1982).**

In *Lehman v. Lycoming County Children's Services Agency*<sup>1</sup> the United States Supreme Court in a six to three decision<sup>2</sup> held that federal habeas corpus jurisdiction does not extend to consideration of collateral challenges to state court judgments involving the custody of children or the involuntary termination of parental rights.<sup>3</sup> Lehman had petitioned for a writ of habeas corpus asserting the unconstitutionality of the Pennsylvania statute under which her parental rights had been terminated.<sup>4</sup>

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

2. Justice Powell delivered the opinion of the Court in which Chief Justice Burger and Justices White, Rehnquist, Stevens and O'Connor joined. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined.

3. *Lehman*, 102 S. Ct. at 3240.

4. In June 1971, Ms. Lehman, then age 39, was living with her three sons, then ages seven, five and one. At that time she was pregnant with her youngest daughter, Tracie. Tracie lived with her mother after her birth. Ms. Lehman's eldest child, Carol, lived with Ms. Lehman's parents for many years and Ms. Lehman did not seek her return. In June 1971, while pregnant with Tracie, Ms. Lehman voluntarily surrendered custody of her three sons to the Lycoming County Children's Services Agency.

In November 1974, more than three years after she had surrendered custody of her sons, Ms. Lehman requested that the boys be returned to her. The Agency concluded that Ms. Lehman could not provide her sons with necessary support and supervision and declined to return them. The Agency then filed a petition seeking termination of Ms. Lehman's parental rights in her three sons. *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 136-37 (3d Cir. 1981).

Ms. Lehman was unmarried and had been supervised by the Agency for a number of years because of her mental incapacity and unsanitary living conditions. A caseworker testified that the Lehman home was roach infested and unfit for habitation by children. At one time school authorities would not allow Tracie to go to school because she had lice.

Ms. Lehman had an IQ of 43 and a mental age of six years, 11 months. Although she had completed the seventh grade in school, she did not know how to read. A psychologist testified that Ms. Lehman had limited communication skills and showed considerable difficulty in comprehending simple ideas concerning housework, cook-

I. THE *LEHMAN* DECISION

The *Lehman* decision was based in part upon the Court's analysis of the federal habeas corpus statute's<sup>5</sup> custody requirement.<sup>6</sup> The Court noted<sup>7</sup> that although the scope of federal habeas corpus has been extended beyond the strict requirement of actual physical custody, past decisions have limited the federal writ's availability to challenge state court judgments to situations where a petitioner, as a result of a state court criminal conviction, has suffered "substantial restraints not shared by the public generally."<sup>8</sup> The Court found that since the Lehman children were not prisoners and did not suffer any restrictions imposed by a state criminal justice system, they were not "in custody" within the meaning of the statutory requirement.<sup>9</sup> The Court reasoned that the children were in the custody of their foster parents in essentially the same way and to the same extent that other

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ing and childcare. The psychologist concluded in her psychological evaluation that Ms. Lehman lacked the social maturity and intellectual capability to cope with the continuing responsibilities of raising children. On the basis of these facts, the Pennsylvania court terminated Ms. Lehman's parental rights. *In re William L.*, 477 Pa. 322, \_\_\_, 383 A.2d 1228, 1239 (1978).

The Pennsylvania Supreme Court affirmed the termination order. *Id.* at \_\_\_, 383 A.2d at 1232. Ms. Lehman then sought the United States Supreme Court's review in a petition for certiorari. The petition was denied. *Lehman v. Lycoming County Children's Servs. Agency*, 439 U.S. 880 (1978). Ms. Lehman then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The district court dismissed the petition without a hearing, concluding that "the custody maintained by the respondent over the three Lehman children is not the type of custody to which the federal habeas corpus remedy may be addressed." *Lehman v. Lycoming County Children's Servs. Agency*, No. 79-65 (M.D. Pa. \_\_\_ 1979).

Sitting en banc, the Court of Appeals for the Third Circuit affirmed the district court's order of dismissal. Ms. Lehman sought Supreme Court review in a petition for certiorari. The petition was granted and the Supreme Court affirmed. *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231, 3240 (1982).

5. 28 U.S.C. § 2254 (1976).

6. *Id.* § 2254(a) provides:

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

7. *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231, 3236-37 (1982).

8. See *Hensley v. Municipal Ct.*, 411 U.S. 345, 351 (1973); *Carafas v. LaVallee*, 391 U.S. 234, 237, 239 (1968); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

9. *Lehman*, 102 S. Ct. at 3237.

children are in the custody of their natural or adoptive parents and, thus, suffered no restraints on liberty not shared by children in the general populace.<sup>10</sup> The Court concluded that under such circumstances extension of the federal writ to challenges to state child custody decisions would be an unprecedented expansion of the jurisdiction of lower federal courts.<sup>11</sup>

Next, the Court discussed prudential considerations militating against the extension of federal habeas corpus jurisdiction. Recognizing the writ as a major exception to the doctrine of *res judicata*,<sup>12</sup> the Court noted the comity and federalism concerns<sup>13</sup> raised by the "unparalleled assertion of federal authority over the state judicial system"<sup>14</sup> implicit in the assumption of habeas corpus jurisdiction by a federal court over challenges to state court judgments.<sup>15</sup> The Court found that the implication of these principles, when coupled with the exceptional need for finality in child custody disputes,<sup>16</sup> argues strongly against the extension of federal habeas corpus jurisdiction beyond its historic limits.<sup>17</sup>

Finally, the Court recognized that habeas corpus has been used in child custody cases in England and in many of the states<sup>18</sup> and that the federal habeas corpus statute authorizing federal court collateral review of federal decisions

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10. *Id.* The Court noted that Ms. Lehman was not really litigating the validity of the state's assumption of custody; she simply sought to relitigate through federal habeas corpus the interest in her own parental rights.

11. *Id.* at 3238. The Court, in making this determination, took into consideration the "special solicitude" traditionally shown by federal courts for state interests in the area of family law.

12. *Id.* See also *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 139 (3d Cir. 1981), *aff'd*, 102 S. Ct. 3231 (1982).

13. Whenever the federal habeas corpus remedy is used to challenge a state court judgment a single federal judge is given the power to overrule determinations of federal issues made by a state's highest court. *Lehman*, 102 S. Ct. at 3236 n.9.

14. *Id.* at 3238 n.17 (quoting *Lehman*, 648 F.2d at 139).

15. *Id.* at 3238 (quoting *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111-12 (1st Cir. 1978)).

16. The Court found the state's interest in finality to be unusually strong in child custody disputes because children require secure, long-term relationships that are free of unnecessary uncertainty. The extended duration of custody litigation resulting from a grant of federal habeas corpus would only prolong this detrimental insecurity. *Lehman*, 102 S. Ct. at 3238-39.

17. *Id.* at 3238.

18. *Id.* at 3239.

can be construed to include child custody cases.<sup>19</sup> However, the Court found reliance on what may be appropriate within the federal system or within the state system to be "of little force" in determining what is appropriate between the federal and state systems.<sup>20</sup> The federal writ should be reserved "for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns."<sup>21</sup>

In his dissenting opinion,<sup>22</sup> Justice Blackmun objected to the Court's finding of a jurisdictional, as opposed to a discretionary, bar to federal habeas corpus relief.<sup>23</sup> In his view, the literal statutory requirements for federal habeas jurisdiction had been satisfied.<sup>24</sup> In particular, Justice Blackmun noted the petitioner's fulfillment of the statutory custody requirement.<sup>25</sup> Emphasizing that the federal writ "is not now and never has been a static, narrow, formalistic remedy,"<sup>26</sup> Justice Blackmun pointed out that for centuries the English and American law courts have had the undisputed power or jurisdiction to issue habeas corpus writs in child custody cases.<sup>27</sup> He found it significant that the Court in *Jones v. Cunningham*,<sup>28</sup> a case involving a criminal conviction,<sup>29</sup> expressly relied on the use of habeas corpus in child custody cases at English common law for its expansion of the scope

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19. *Id.*

20. *Id.*

21. *Id.* at 3240. The Court did not consider the state's custody of a child assumed pursuant to state court termination of parental rights to be a severe enough restraint on individual liberty to outweigh federalism and finality concerns. *Id.* at 3240 n.19 (quoting *Hensley v. Municipal Ct.*, 411 U.S. 345, 351 (1973)).

22. See *infra* note 36 and accompanying text.

23. *Lehman*, 102 S. Ct. 3231, 3240-43 (Blackmun, J., dissenting). See *infra* note 35.

24. *Lehman*, 102 S. Ct. at 3240 (Blackmun, J., dissenting).

25. *Id.*

26. *Id.* (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

27. *Lehman*, 102 S. Ct. at 3240-41 (Blackmun, J., dissenting).

28. 371 U.S. 236 (1963).

29. Justice Blackmun found the majority's reading of *Jones v. Cunningham*, 371 U.S. 236 (1963), *Carafas v. LaVallee*, 391 U.S. 234 (1968) and *Hensley v. Municipal Ct.*, 411 U.S. 345 (1963) restrictive. None of these decisions drew any distinction between criminal and civil detention. Rather, they declared in broad and encompassing language that habeas corpus must be made widely available as a remedy for severe restraints on individual liberty. *Lehman*, 102 S. Ct. at 3242-43 (Blackmun, J., dissenting).

of federal habeas from a requirement of actual physical restraint to one of any significant restraint on liberty not imposed upon the public generally.<sup>30</sup>

Justice Blackmun went on to note that the petitioner's children did indeed suffer restraints not imposed on children in the public generally.<sup>31</sup> Although children generally are restricted by their natural or adoptive parents, they are not generally so restricted by the state.<sup>32</sup> Such restraint, therefore, constitutes "custody" within the meaning of the statutory requirement.<sup>33</sup>

Next, Justice Blackmun objected that, while concerns of federalism and the need for finality are present in child custody disputes, these concerns do not deprive federal courts of habeas corpus jurisdiction.<sup>34</sup> The real question, in his estimation, is not whether the Court has power to issue a writ of habeas corpus in state child custody cases but whether considerations of federalism and the exceptional need for finality render the exercise of habeas corpus power inappropriate in these cases.<sup>35</sup>

Justice Blackmun was of the opinion that the writ should have been denied to Ms. Lehman,<sup>36</sup> not on the basis of juris-

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30. *Lehman*, 102 S. Ct. at 3242-43 (Blackmun, J., dissenting).

31. *Id.* at 3243.

32. *Id.* Because the Lehman children were wards of the state, Blackmun observed, it is the state that decides where they will live, reserves the right to move them to new physical settings, consents to their marriage, to their enlistment in the armed forces and to any major decisions regarding medical, psychiatric and surgical treatment.

33. *Id.* In light of the Supreme Court's extension of federal habeas corpus jurisdiction to cases where the person "in custody" was merely on unattached, inactive Army reserve duty, *Strait v. Laird*, 406 U.S. 341 (1972), or had been released on his own recognizance, *Hensley v. Municipal Ct.*, 411 U.S. 345 (1978), Blackmun had difficulty finding that minor children who, as wards of the state, are fully subject to state court custody orders, are not sufficiently restrained to be deemed "in custody" for federal habeas corpus purposes. *Lehman*, 102 S. Ct. at 3243 (Blackmun, J., dissenting).

34. *Lehman*, 102 S. Ct. at 3243 (Blackmun, J., dissenting).

35. *Id.* Justice Blackmun noted that although the Court's decisions involving federal habeas corpus review of state criminal convictions have recognized concerns of federalism and finality, the Court has expressly separated the question of jurisdiction to issue a writ of habeas corpus from the question of whether "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." *Id.* (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976)).

36. When a justice agrees with a majority's holding but disagrees with the reasoning upon which that holding was based, he writes a concurring opinion. Nevertheless, Justice Blackmun chose to label his concurring opinion a dissent.

diction, but as a discretionary matter because Ms. Lehman was not a proper "next friend"<sup>37</sup> to apply for the federal writ in behalf of her children.<sup>38</sup> Ms. Lehman lacked standing, according to Justice Blackmun,<sup>39</sup> because she acted not in the interest of her children, but in the interest of her own parental rights.<sup>40</sup> He concluded that discretion to withhold federal habeas corpus jurisdiction exists in all but the most extraordinary cases<sup>41</sup> and that a discretionary denial of review based on petitioner's lack of standing "would not have been inconsistent with the Court's decision . . . which expressly bases denial of habeas relief on a need to reserve the federal writ 'for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.'"<sup>42</sup>

## II. ANALYSIS AND CRITIQUE

### A. *The Jurisdictional Requirement of "Custody"*

The United States Constitution guarantees that 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."<sup>43</sup> This guarantee is implemented through the federal habeas corpus statutes<sup>44</sup> which set forth jurisdictional prerequisites that must be met before a federal court is empowered to entertain a petition for

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37. The term "next friend" is derived from case law construction of the statute which provides that "[a]pplication for a writ of habeas corpus shall be . . . verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242 (1976) (emphasis added).

38. *Lehman*, 102 S. Ct. at 3244 (Blackmun, J., dissenting).

39. *Id.* at 3245.

40. If Ms. Lehman brought the habeas corpus action to vindicate her own parental rights she could not be filing the petition in behalf of her child. *See supra* note 37.

41. An "extraordinary case" exists where there is a strong reason to believe that the conditions of the child's confinement unconstitutionally deprived that child of its liberty and that release of the child to its natural parent very likely would be in the child's best interest. *Lehman*, 102 S. Ct. 3245 (Blackmun, J., dissenting).

42. *Id.* (quoting Powell, J., *Id.* at 3240).

43. U.S. CONST. art. I, § 9, cl. 2.

44. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963); Note, *The Use of Federal Habeas Corpus in Child Custody Disputes*, 31 ME. L. REV. 265, 267-68 (1980).

habeas corpus.<sup>45</sup> Although the custody requirement is an important jurisdictional prerequisite,<sup>46</sup> it has never been defined either by the statutes or by the Constitution.<sup>47</sup> Consequently, federal courts have relied on traditional common-law usage of the writ in England<sup>48</sup> and in many of the states<sup>49</sup> for guidance in defining the requirement's scope.<sup>50</sup>

In both England and the United States "custody" in terms of actual physical restraint<sup>51</sup> has been required in the majority of cases.<sup>52</sup> English courts, however, have long recognized the use of habeas corpus where something less than

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45. Note, *Federal Habeas Corpus in Child Custody Cases*, 67 VA. L. REV. 1423, 1433 (1981). 28 U.S.C. § 2254 (1976) provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or 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 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 State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

46. See Note, *supra* note 45, at 1434. See also *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1072 (1970) [hereinafter cited as *Developments in the Law*].

47. See Note, *supra* note 44, at 268-69. See also *Developments in the Law, supra* note 46, at 1072.

48. See *Ex parte Parks*, 93 U.S. 18, 21 (1876). This case stated:

The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States.

See also Note, *supra* note 44 at 269-72. See generally Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 270-74 (1965).

49. See generally *Developments in the Law, supra* note 46.

50. *Jones v. Cunningham*, 371 U.S. 234, 238-40 & nn.8, 12-13 (1963); *McNally v. Hill*, 293 U.S. 131, 136 (1934); Note, *supra* note 44, at 269; Note, *Federal Habeas Corpus Relief Unavailable to Parent in Child Custody Dispute*, 14 SUFFOLK U.L. REV. 337, 343 (1981); Note, *supra* note 45, at 1434.

51. Historically, a person "in custody" was able to obtain a writ of habeas corpus only if subject to tangible physical restraints. *Developments in the Law, supra* note 46, at 1073. Such a strict construction was necessary because of the procedural requirement that the petitioner's custodian "produce the body" of the petitioner before the court and show cause why the petitioner should not be released. Furthermore, the only habeas remedy available was immediate release. *Id.* at 1072, 1079; Note, *supra* note 45, at 1435.

52. Note, *supra* note 45, at 1435.



strict physical confinement is in issue.<sup>53</sup> Recently, the United States Supreme Court expanded the writ's scope to include "other restraints on a man's liberty, restraints not shared by the public generally."<sup>54</sup> The custody requirement has been met by persons on parole,<sup>55</sup> persons released on their own recognizance,<sup>56</sup> persons unconditionally released from prison after filing a habeas petition<sup>57</sup> and persons on unattached, inactive army reserve duty.<sup>58</sup>

Moreover, the writ has been widely used in child custody cases in England,<sup>59</sup> in many of the states<sup>60</sup> and in a number of federal courts.<sup>61</sup> Nevertheless, federal courts generally have refused to recognize habeas jurisdiction<sup>62</sup> where a state

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53. *Jones v. Cunningham*, 371 U.S. 236, 238-39 (1963).

54. *Id.* at 240.

55. *Id.*

56. *Hensley v. Municipal Ct.*, 411 U.S. 345 (1973).

57. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

58. *Strait v. Laird*, 406 U.S. 341 (1972).

59. *Jones v. Cunningham*, 371 U.S. 236, 239 (1963); Note, *supra* note 44, at 269-72.

60. See, e.g., *Walden v. Walden*, 355 So. 2d 372 (Ala. Ct. App. 1978); *Morales v. Glenn*, 114 Ariz. 327, 560 P.2d 1234 (1977); *Cappar v. Cappar*, 402 So. 2d 1284 (Fla. Dist. Ct. App. 1981); *Matter of Anderson*, 99 Idaho 805, 589 P.2d 957 (1978); *Mitchell v. Henderson*, 65 Ill. App. 3d 363, 382 N.E.2d 650 (1978); *Slidell v. Valentine*, 298 N.W.2d 599 (Iowa 1980); *Bryant v. Kentucky Dep't for Human Resources*, 548 S.W.2d 165 (Ky. Ct. App. 1977); *Buchanan v. Malone*, 415 So. 2d 259 (La. Ct. App. 1982); *Ex parte Ray*, 573 S.W.2d 152 (Mo. Ct. App. 1978); *Application of Bertelson*, \_\_\_ Mont. \_\_\_, 617 P.2d 121 (1980); *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979); *E.E.B. v. D.A.*, 89 N.J. 595, 446 A.2d 871 (1982); *Bartlett v. Hollenbeck*, 100 Misc. 2d 748, 420 N.Y.S.2d 140 (1979); *Angle v. Children's Serv. Div.*, 63 Ohio St. 2d 227, 407 N.E.2d 524 (1980); *State ex rel. Butler v. Morgan*, 34 Or. App. 393, 578 P.2d 814 (1978); *Commonwealth ex rel. Laws v. Laws*, 249 Pa. Super. 349, 378 A.2d 333 (1977); *State ex rel. Summers v. Wulffenstein*, 571 P.2d 1319 (Utah 1977); *Anderson v. Anderson*, 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

61. *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1110 (1st Cir. 1978).

62. Attempts to gain writs of federal habeas corpus to challenge state child custody determinations have not been made until recently. *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 155 (3d Cir. 1981) (concurring opinion), *aff'd*, 102 S. Ct. 3231 (1982). The most relied upon authority for federal court refusal to recognize federal habeas jurisdiction over state child custody judgments is Supreme Court dictum that the subject of domestic relations belongs to the states. See *Matters v. Ryan*, 249 U.S. 375 (1919); *Ex parte Burrus*, 136 U.S. 586 (1890). Nevertheless, the dictum underlying the judicially carved domestic relations exception to federal jurisdiction has been blindly accepted by the federal lower courts. Note, *supra* note 44, at 275. See *Lehman*, 648 F.2d at 146; *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1110 (1st Cir. 1978). See also *Doe v. Doe*, 660 F.2d 101 (4th Cir. 1981); *Syrovatka v. Erlich*, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935

child custody judgment is challenged.<sup>63</sup>

The *Lehman* Court, in line with a number of lower federal court decisions,<sup>64</sup> based its refusal to recognize federal habeas corpus jurisdiction in part upon a finding that children in the custody of foster parents are not in the custody of the state within the meaning of federal habeas corpus statutes because they do not suffer restraints not shared by children in the public generally.<sup>65</sup> The Court reasoned that children in the custody of foster parents are "in custody" in essentially the same way as other children are in the custody of their natural or adoptive parents.<sup>66</sup> Furthermore, the fact that children in the custody of foster or adoptive parents are considered to be "in custody" for purposes of habeas corpus jurisdiction within a single judicial system—that is, where the writ is issued by an English court to a person in English custody, by a state court to a person in state custody or by a federal court to a person in federal custody—is not, according to *Lehman*, authority for finding such children "in custody" for purposes of federal habeas jurisdiction over state court judgments<sup>67</sup> because federal jurisdiction over state child custody judgments "represents a profound interference with state judicial systems and the finality of state decisions."<sup>68</sup>

It is well established that custodial restraints on a minor child are a sufficient deprivation of liberty to be challenged by way of habeas corpus.<sup>69</sup> And, as previously noted, habeas

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(1980); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978); *Tree Top v. Smith*, 577 F.2d 519 (9th Cir. 1978). Cf. *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981).

63. Note, *supra* note 45, at 1434 & n.86. See *infra* text accompanying note 68.

64. See *supra* note 62.

65. See *supra* text accompanying note 9.

66. See *supra* text accompanying note 10.

67. See *supra* text accompanying notes 18-20.

68. *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231, 3240 (1982). The Court held that the writ should be reserved for severe restraints where the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.

69. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 (9th Cir. 1975); Note, *supra* note 44, at 272 (the majority of American states accept the English view that a child's absence from the parent's legal custody is equivalent to illegal restraint on the child and that habeas corpus is the appropriate remedy for such restraint). The writ has the capacity to reach all manner of illegal detention. *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

has been widely used in child custody cases in England, in the majority of states and in a number of the federal courts.<sup>70</sup> The common law writ was clearly recognized as an appropriate remedy in child custody disputes.<sup>71</sup> The children involved in all of these cases unquestionably were considered to be "in custody" for purposes of habeas corpus. Although concerns of federalism and a state's interest in finality may be implicated when a federal court seeks to interfere with a state court's judicial determinations,<sup>72</sup> these considerations can have no bearing on whether the jurisdictional requirement of custody has been met.<sup>73</sup> These principles may support refusal to exercise habeas corpus power.<sup>74</sup> They do not, however, deprive federal courts of statutory jurisdiction.<sup>75</sup> The overwhelming weight of applicable precedent clearly indicates that federal habeas corpus jurisdiction exists to challenge state child custody judgments.<sup>76</sup> The question is whether federal-state comity considerations render inappropriate the exercise of federal habeas jurisdiction.<sup>77</sup>

The Court's finding that the Lehman children suffered no restraints not common to children in the public generally<sup>78</sup> is equally untenable. Admittedly, some form of control, parental or otherwise, exists over all children.<sup>79</sup> However, there is a sharp distinction between private parental control and the type of control exerted over children who have become wards of the state. For these children, personal, individual guidance is replaced by state power over even the

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70. See *supra* notes 59-61.

71. Note, *supra* note 50, at 341-42 & n.20. See *Fay v. Noia*, 372 U.S. 391, 406 (1963) ("[T]he Constitution invites, yet does not compel, . . . a generous construction of the power of federal courts to dispense the writ conformably with common law practice.").

72. See *supra* note 68 and accompanying text.

73. See *Lehman*, 102 S. Ct. at 3240 (Blackmun, J., dissenting).

74. See *infra* note 134 and accompanying text.

75. *Lehman*, 102 S. Ct. at 3240 (Blackmun, J., dissenting); See Note, *supra* note 45, at 1434 ("Because the writ operates as a significant federal intrusion into the state judicial system, concerns of federal-state comity have also influenced the interpretation of the custody requirement." (emphasis added)).

76. *Lehman*, 648 F.2d at 166, *aff'd*, 102 S. Ct. 3231 (1982).

77. *Id.*

78. See *supra* text accompanying note 10.

79. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

most mundane affairs of life. This is not the type of restraint suffered by children in the public generally.

### B. Prudential Considerations

The *Lehman* Court sought additional support for its finding that federal courts lack habeas corpus jurisdiction to consider collateral attacks on state child custody decisions from commonly relied upon prudential considerations.<sup>80</sup> The subjects of child custody, divorce and alimony or support obligations traditionally have been thought to be wholly within the province of the state courts.<sup>81</sup> Cases recognize the experience and expertise of state agencies and courts in resolving family disputes and the strong interest of the state in addressing without federal interference such peculiarly local matters.<sup>82</sup> Habeas corpus, as a major exception to res judicata,<sup>83</sup> significantly interferes with a state's interest in the finality of any of its judgments.<sup>84</sup> The exceptional need for finality in child custody disputes<sup>85</sup> magnifies the effect of this interference.<sup>86</sup> *Lehman* held that the federalism and finality concerns implicated by such an extraordinary interference with a state's judicial system outweigh the federal interest in liberty in all but cases of special urgency where restraints on liberty are immediate and severe.<sup>87</sup> Finding the requisite severity or special urgency lacking in child custody cases, the Court denied jurisdiction.<sup>88</sup>

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80. See *supra* text accompanying notes 12-17.

81. *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982); *Doe v. Doe*, 660 F.2d 101, 105 (4th Cir. 1981); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1109 n.9 (1st Cir. 1978); *Armstrong v. Armstrong*, 508 F.2d 348, 349 (1st Cir. 1974).

82. *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1109 n.9 (1st Cir. 1978); Note, *supra* note 44, at 280.

83. *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231, 3238-39 (1982).

84. *Id.* at 3238-39 (1982); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 139 (3d Cir. 1981), *aff'd*, 102 S. Ct. 3231 (1982); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111-12 (1st Cir. 1978).

85. See *supra* note 16.

86. *Lehman*, 102 S. Ct. 3231, 3240 (1982); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1112 (1st Cir. 1978).

87. *Id.* at 3240.

88. *Id.*

The federal courts essentially have created an exception to federal habeas corpus jurisdiction in child custody cases<sup>89</sup> on the basis of Supreme Court dictum that the entire subject of domestic relations belongs to the laws of the states.<sup>90</sup> Interestingly, the holding of the decision in which this blindly accepted dictum is found provides anything but support for the judicially carved exception.<sup>91</sup> In *Ex parte Burrus*<sup>92</sup> the Court dismissed a habeas petition in a private custody dispute for want of a federal question. The Court did not hold that federal courts lack habeas jurisdiction in all child custody cases. It held, rather, that federal jurisdiction is lacking where the child's custody is not alleged to be in violation of federal law.<sup>93</sup> The obvious implication is that federal habeas jurisdiction would indeed lie where a petitioner's claim is grounded in terms of a violation of constitutional or other federal law. Significantly, the Court expressly left open the question of whether federal courts would have habeas corpus jurisdiction over a state child custody judgment in the absence of a federal question where the citizenship of the parties contesting the custody is diverse.<sup>94</sup>

The decision upon which the child custody or domestic relations exception is based supports a finding of federal habeas jurisdiction where the constitutional validity of a state statute terminating parental rights is challenged.<sup>95</sup> Thus, while prudential considerations of federal-state comity generally dictate federal abstention in the domestic law area,<sup>96</sup> it seems clear that these considerations do not provide a jurisdictional barrier to habeas corpus.<sup>97</sup>

Ultimately, federal court reliance on traditional federal

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89. *Solomon v. Solomon*, 516 F.2d 1018, 1021 (3d Cir. 1975); *In re Freiberg*, 262 F. Supp. 482, 484 (E.D. La. 1967); Note, *supra* note 44, at 275.

90. *Ex parte Burrus*, 136 U.S. 586, 591 (1890).

91. See also *Matters v. Ryan*, 249 U.S. 375, 377 (1919) (court did not have federal habeas jurisdiction over child custody dispute because "the case made involved no Federal question adequate to sustain the jurisdiction").

92. 136 U.S. 586, 591-95 (1890).

93. *Id.* at 591; Note, *supra* note 50, at 347.

94. *Burrus*, 136 U.S. at 596. See also *Matters v. Ryan*, 249 U.S. 375, 378 (1919).

95. Note, *supra* note 50, at 352.

96. See *supra* note 82 and accompanying text.

97. *Davis v. Page*, 640 F.2d 599, 602 & n.4 (5th Cir. 1981); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202-03 & n.15 (9th Cir. 1975); *In re Freiberg*, 262 F. Supp. 482, 484 (E.D. La. 1967).

abstention in domestic relations cases to justify denial of federal habeas corpus jurisdiction over constitutional challenges to state child custody judgments is misplaced. The question in these cases only incidentally involves domestic relations. The issue in cases such as *Lehman* is not who shall have custody<sup>98</sup> of the child or even whether the petitioner-parent's rights should have been terminated,<sup>99</sup> but rather the constitutional sufficiency of the state court proceedings.<sup>100</sup> The federal court need not decide the issues of custody or termination of parental rights. After establishing the minimum standards required for constitutionality, the state court can decide, in accordance with the constitutional standards mandated by the federal court, in whose custody the child shall be placed and whether the parent's rights should be terminated. The questions raised in these habeas corpus proceedings are not questions of domestic law. They are constitutional questions.<sup>101</sup> The Court has often dealt with

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98. Note, *supra* note 44, at 279. Cf. Note, *supra* note 45, at 1436. The question of who will win custody of the child is not the issue in habeas corpus proceedings. See *Pukas v. Pukas*, 129 W. Va. 765, —, 42 S.E.2d 11, 13 (1947) ("Speaking strictly, the writ of habeas corpus involves only the question of whether the detention of the body of an individual is lawful or unlawful and the writ, if made permanent, simply restores freedom to the individual whose restraint is involved."); See *Oaks*, *supra* note 48, at 273 n.157 ("If one of two parties unlawfully restrain and imprison the person about whom the contest arises, the writ steps in and relieves from restraint, but leaves the contest, as to possession, to be decided in another mode.") (quoting *State v. Cheeseman*, 5 N.J.L. 522, 525 (1819)); Note, *supra* note 44, at 272 ("Unless a statute grants the state courts power to change custody in the habeas proceeding, the states follow English practice in limiting the scope of the common law hearing to the question of whether a child is in unlawful custody with reference to a preexisting custody right." (footnotes omitted)).

99. *Lehman*, 648 F.2d at 154 (concurring opinion), 156 (dissenting opinion), *aff'd*, 102 S. Ct. 3231 (1982). Cf. Note, *supra* note 45, at 1436.

100. In 1981 the United States Supreme Court maintained that "notwithstanding the limited application of federal law in the field of domestic relations generally . . . this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law." *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981).

101. *Lehman*, 648 F.2d at 154 (concurring opinion), 156 (dissenting opinion), *aff'd*, 102 S. Ct. 3231 (1982). See *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (insulation from federal judicial review not present when state power used to circumvent a federally protected right); *Davis v. Page*, 640 F.2d 599, 602 & n.4 (5th Cir. 1981) ("[T]he usual deference to state courts in domestic law questions will not bar federal review of constitutional issues." (emphasis added)); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111 (1st Cir. 1978) ("The sole federal interest is in the constitutional issues collateral to [the question of custody]."); *Nguyen Da Yen*

child custody or termination of parental rights in the context of constitutional challenges.<sup>102</sup> This precariously contrived domestic relations exception to federal habeas corpus jurisdiction cannot validly be relied upon to deny federal review of important constitutional issues.

### C. *Standing and The "Next Friend" Petition*

Although the majority opinion in *Lehman* did not address the question of Ms. Lehman's standing<sup>103</sup> to act as "next friend" petitioner<sup>104</sup> in behalf of her children, serious doubts have been raised by courts and commentators about the propriety of the assertion of a federal habeas corpus claim by a parent in behalf of his or her child when the parent's parental rights have been terminated.<sup>105</sup> The "next friend" petition is a common law tradition permitting habeas corpus petitions by a third party where the person in custody is unable to assert his own claims.<sup>106</sup> The statute provides that an application for habeas corpus must be signed and verified by the person in custody or by someone "acting in his behalf."<sup>107</sup>

In the majority of cases where a parent has acted as a child's next friend petitioner, the parent's standing to act in

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v. Kissinger, 528 F.2d 1194, 1202-03 & n.15 (9th Cir. 1975) ("While most private detentions (and child custody conflicts) do not rise to the level of constitutional violations, the governmental involvement . . . exercised . . . does present that possibility here, and habeas jurisdiction is proper."); Oaks, *supra* note 48, at 273 n.157; Note, *supra* note 44, at 267 ("[L]imiting the writ to its traditional purpose — to free children from illegal custody rather than to determine their best interest — would infringe upon no valid state prerogatives in child custody matters.").

Federal courts generally have refused to hear cases relating to child custody or "domestic relations" because they involve merely private matters historically handled by the states. However, where the questions arise out of a state court judgment, there is sufficient state action to bring these cases within the civil rights statutes enacted pursuant to the fourteen amendment. See *Shelley v. Kraemer*, 334 U.S. 1, 11-12, 14-18 (1948).

102. Note, *supra* note 50, at 353. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

103. But see *Lehman v. Lycoming County Children's Servs. Agency*, 102 S. Ct. 3231, 3244 (1982) (Blackmun, J., dissenting).

104. See *supra* note 37.

105. Note, *supra* note 45, at 1439.

106. *Id.* at 1438.

107. 28 U.S.C. § 2242 (1976).

behalf of his or her child has not been questioned.<sup>108</sup> Parents traditionally have been considered to have standing to act in behalf of their children.<sup>109</sup> Nevertheless, habeas corpus petitions filed by parents in behalf of their children have been denied where the parent's parental rights have been terminated.<sup>110</sup>

Although generally it is presumed that a parent acts in his or her child's best interest,<sup>111</sup> the courts have abandoned this presumption in cases involving a termination of parental rights.<sup>112</sup> The reasoning behind such a determination is that the state court has based its decision to terminate the parent's rights on a finding that it is no longer in the child's best interest to be in the custody of that parent.<sup>113</sup> Thus, a parent whose rights have been terminated presumably is not acting in the child's best interest and not, therefore, in the child's behalf, when he or she seeks through habeas corpus to regain custody of the child.<sup>114</sup>

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108. Note, *supra* note 45, at 1438.

109. Oaks, *supra* note 48, at 270; Note, *supra* note 50, at 354 & nn.96, 97. For examples of cases where parents have filed habeas petitions on behalf of their children, see *Walden v. Walden*, 355 So. 2d 372 (Ala. Civ. App. 1978); *McNeal v. Mahoney*, 117 Ariz. 543, 574 P.2d 31 (1977); *Tilden v. Locke*, 383 So. 2d 976 (Fla. Dist. Ct. App. 1980); *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979); *People ex rel. Elmore v. Elmore*, 46 Ill. App. 3d 504, 361 N.E.2d 615 (1977); *Jolly v. Avery*, 220 Kan. 694, 556 P.2d 449 (1976); *Stelly v. Montgomery*, 347 So. 2d 1145 (La. 1977); *Garza v. Shoffner*, 386 So. 2d 397 (Miss. 1980); *M.P.M. v. Williams*, 611 S.W.2d 274 (Mo. Ct. App. 1980); *People ex rel. Kourland v. Kourland*, 54 A.D.2d 638, 387 N.Y.S.2d 620 (1976); *Mansukhani v. Pailing*, 300 N.W.2d 847 (N.D. 1980), *cert. denied*, 102 S. Ct. 98 (1981), *appeal after remand*, 318 N.W.2d 748 (N.D. 1982), *Gerald G. v. Theresa G.*, 284 Pa. Super. 498, 426 A.2d 157 (1981); *Strobel v. Thurman*, 565 S.W.2d 238 (Tex. 1978); *In re Becker's Welfare*, 87 Wash. 2d 470, 553 P.2d 1339 (1976); *Anderson v. Anderson*, 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

110. Generally, these cases emphasize the petitioner's lack of concern with the legality of the state statute pursuant to which the child has been placed in state custody. The petitioner is said to be interested only in her parental rights to custody and not in any liberty interest of the child. See e.g., *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111 (1st Cir. 1978).

111. Note, *supra* note 45, at 1438.

112. *Stanley v. Illinois*, 405 U.S. 645, 649-52 (1972); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1111 (1st Cir. 1978). The cases "emphasize that [the next friend petition] is not intended as a vehicle for the next friend to assert his own rights under the fiction of vindicating the rights of the person in custody." Note, *supra* note 45, at 1438.

113. *Lehman*, 648 F.2d at 138 n.2.

114. Note, *supra* note 45, at 1438. See *Gilmore v. Utah*, 429 U.S. 1012, 1013-14 (1976) (next friend status denied to Gary Gilmore's mother because Gilmore had



Denial of a parent's standing to file a petition for writ of habeas corpus to regain custody of a child is indefensible for a number of reasons. The very question in issue in these habeas corpus proceedings is whether a petitioner's child has been illegally placed in the state's custody, that is, whether the custody is in violation of federal law<sup>115</sup> because the state proceedings resulting in the state's custody of the child — and resulting in the termination of the petitioner's parental rights — failed to meet minimum constitutional standards. To deny a petitioner's right to bring an action in habeas corpus in behalf of a child because his or her parental rights have been terminated assumes the legal validity of the very judgment being attacked. Such circular reasoning defies the fundamental distinction between standing and the merits of a case.<sup>116</sup>

Moreover, the fact that a person's parental rights have been terminated simply does not deprive that person of standing to sue as "next friend" on behalf of his or her children. Parents in child custody disputes historically have had standing to petition for the writ to obtain custody of their children,<sup>117</sup> even where the petitioners sought the habeas petition at least partially in their own behalf.<sup>118</sup> Anyone who has an interest in the welfare of an infant — anyone who may have a grievance or a cause of action — qualifies as that infant's "next friend."<sup>119</sup> The petitioner need only be "some person who has a legally justified interest in [the child's] freedom, such as father, son, brother, or aunt . . . ."<sup>120</sup>

The United States Supreme Court frequently has empha-

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knowingly and intelligently waived his rights and desired execution); *King v. McLean Asylum of the Mass. Gen. Hosp.*, 64 F. 331, 356 (1894) ("When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show that he really acts for the benefit of the infants, and not to promote purposes of his own." (quoting Lord Langdale)); *Evans v. Bennett*, 467 F. Supp. 1108, 1111 (S.D. Ala. 1979) (next friend status denied where prisoner desired execution).

115. See *supra* note 101 and accompanying text.

116. See *Davis v. Passman*, 442 U.S. 228, 239 & n.18 (1979); *Data Processing Serv. v. Camp*, 397 U.S. 150, 153 (1970).

117. Note, *supra* note 50, at 354.

118. *Oaks*, *supra* note 48, at 270.

119. *Child v. Beame*, 412 F. Supp. 593, 599 (S.D.N.Y. 1976).

120. *Pukas v. Pukas*, 129 W. Va. 765, —, 42 S.E.2d 11, 13 (1947).

sized the importance of the family.<sup>121</sup> The right to raise one's own children has been deemed "essential,"<sup>122</sup> a "basic civil right of man,"<sup>123</sup> and a "[r]ight far more precious . . . than property rights."<sup>124</sup> The natural family unit has found protection in the due process clause of the fourteenth amendment,<sup>125</sup> the equal protection clause of the fourteenth amendment<sup>126</sup> and the ninth amendment.<sup>127</sup> Unquestionably, a parent whose parental rights have been terminated in a state court proceeding shares with his or her child a vital interest in preventing erroneous termination of the natural parent-child relationship.<sup>128</sup> Indeed, the deprivation of parental rights constitutes a significant restraint on the liberty of the parent<sup>129</sup> as well as on the liberty of the child, such that a person whose parental rights have been terminated has standing to file a petition on his or her own behalf to challenge the constitutionality of that infringement upon the parent's liberty interest in the care, custody and control of the child.

### III. CONCLUSION

The *Lehman* decision is not surprising in light of the present Court's retrenchment in the area of federal constitutional safeguards<sup>130</sup> and in particular, its recent trend to restrict the constitutional right to habeas corpus.<sup>131</sup> Nevertheless, the Court's denial of federal habeas jurisdic-

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121. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

122. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

123. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

124. *May v. Anderson*, 345 U.S. 528, 533 (1953).

125. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

126. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

127. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

128. *Santosky v. Kramer*, 455 U.S. 745, 760 & n.11, 765 (1982).

129. *Id.* at 753.

130. See O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 802 (1981). See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). It is interesting to note, however, the Court's "historic willingness to overturn or modify its earlier views of the scope of the writ." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). This tendency seems to primarily turn on policy considerations. Note, *supra* note 45, at 1440.

131. O'Connor, *supra* note 130, at 803; Note, *supra* note 50, at 344.

tion over state child custody cases is unfounded. The jurisdictional prerequisite of "custody" clearly is met.<sup>132</sup> Federalism concerns and traditional federal abstention in domestic relations cases do not serve to bar federal habeas jurisdiction.<sup>133</sup> These issues go "rather to the appropriate exercise of that power."<sup>134</sup> The Supreme Court has long recognized that considerations of comity may sometimes require a federal court to forego the exercise of habeas corpus jurisdiction.<sup>135</sup> The question to be decided in all cases is whether the circumstances are sufficient to invoke the discretionary refusal to exercise this federal power.<sup>136</sup> Where the sole issue to be decided, however, is a federal constitutional question concerning the validity of a state statute or the enforcement of a state court order, discretionary refusal to exercise federal jurisdiction on the basis of federalism concerns is unjustified.

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132. *See supra* text accompanying notes 43-79.

133. *See supra* text accompanying notes 80-102.

134. *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976).

135. *Fay v. Noia*, 372 U.S. 391, 425-26 (1963).

136. *Francis v. Henderson*, 425 U.S. 536, 539 (1976). *See also* *Stone v. Powell*, 428 U.S. 465, 478 n.11, 495 n.37 (1976).