# ON THE BOUNDED APPLICABILITY OF *LEHMAN v. LYCOMING COUNTY CHILDREN'S SERVICES AGENCY*, 458 U.S. 502 (1982) IN LIGHT OF SUBSEQUENT UNCAT RATIFICATION AND TREATY SUPREMACY PRINCIPLES

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**Institute for the Advancement of Justice & Human Rights**

**Advisory Opinion**

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## EXECUTIVE SUMMARY

This Advisory Opinion analyzes *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), which holds that 28 U.S.C. § 2254 does not provide federal habeas jurisdiction for the collateral challenge to a state child-custody determination adjudicated there. The Institute retains *Lehman* as binding domestic precedent within that statutory ratio and identifies the separate consequences of the United States' later ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

**Critical Threshold Finding:** The chronology is important but not dispositive by itself. UNCAT's later ratification did not amend § 2254, create statutory custody, or supply a freestanding domestic cause of action. It did create binding international obligations and confirmed an implementation architecture whose performance can be tested separately from *Lehman*'s domestic operation.

**Core Principle:** The two planes must remain simultaneously accurate. On Plane B, courts must apply jurisdiction, causes of action, immunity, finality, preclusion, and remedies as domestic law actually provides. On Plane A, those limitations neither diminish the obligation nor excuse failure of the domestic architecture represented as sufficient at ratification. A domestic barrier is recorded as an implementation failure where it prevents the required outcome; it is not treated as a qualification of the Institute's international determination.

**Applicability:** This Opinion distinguishes controlling constitutional law, jurisdiction-specific law, IAJ institutional determinations and standards, and proposed reforms. It does not convert every IAJ safeguard into a universal constitutional command. Its domestic conclusions are limited to authority that an adjudicator or other institution lawfully possesses; its international and institutional conclusions are stated separately.

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# I. INTRODUCTION: FRAMING THE QUESTION

## A. The Stakes of This Analysis

In 1982, the United States Supreme Court held in *Lehman v. Lycoming County Children's Services Agency* that federal *habeas corpus* jurisdiction under 28 U.S.C. § 2254 does not extend to challenges of state custody determinations in child welfare proceedings. Justice Powell, writing for the majority, concluded that the "custody" of children under state child welfare law does not constitute "custody" within the meaning of the federal *habeas* statute.

This Advisory Opinion addresses how *Lehman* should be applied by state courts, federal courts, practitioners, investigators, and policymakers after U.S. ratification of UNCAT. It distinguishes what *Lehman* decided from questions it did not decide: the content of later international obligations, the performance of the domestic architecture represented at ratification, and the Institute's independent Plane A assessment.

## B. The Nature of This Opinion: Bounded Applicability, Not Invalidity

The Institute does not instruct lower courts to overrule *Lehman*, invent § 2254 custody, or convert UNCAT into a directly enforceable cause of action. *Lehman* is bounded by its statutory ratio and the ordinary limits of precedent. Other constitutional or statutory claims must be adjudicated under their own sources, elements, jurisdictional vehicles, and defenses.

The distinction matters. A domestic jurisdictional limitation is not a finding that the underlying conduct complies with UNCAT, that the represented domestic architecture is equivalent in operation, or that international responsibility has disappeared. Conversely, an international or IAJ compliance finding does not itself create domestic jurisdiction or a remedy.

## C. The Analytical Framework

This Advisory Opinion proceeds through the following analytical steps:

1. Chronological sequence: identifying what *Lehman* could and could not have adjudicated before UNCAT ratification;
2. Treaty instrument: setting out Article VI and the deposited U.S. reservations, understandings, and declaration without converting them into an automatic cause of action;
3. Peremptory overlay: stating the controlling IAJ determination on the torture–CIDT continuum and separating Plane A from Plane B;
4. Treaty-consistent construction: confining *Charming Betsy* to genuinely open domestic text;

5. Domestic equivalence: testing the architecture represented at ratification, duty by duty and claimant by claimant;

6. State safeguards: distinguishing controlling constitutional law, jurisdiction-specific law, IAJ standards, and proposed reform;

7. Finality: distinguishing domestic operation from the Institute's Plane A legitimacy assessment;

8. *Forum nullus*: documenting when no practically effective mechanism supplies the required protection or remedy;

9. Federal routes: identifying only vehicles that independently exist under domestic law;

10. Blackmun dissent: stating the dissent accurately and without attributing words it did not contain.

### D. Nationwide Application

This Opinion addresses propositions relevant nationwide, but it does not assert that every safeguard discussed below is a freestanding constitutional requirement in every jurisdiction. Its nationwide sources include:

- The Fourteenth Amendment, which binds the states but requires claim-specific analysis of the right, elements, procedure, and remedy;
- Article VI, which names treaties as the "supreme Law of the Land," while domestic judicial enforceability remains subject to the treaty stipulation, ratification conditions, and governing doctrine;
- The deposited UNCAT instrument, including Understanding II(5)'s allocation of implementation responsibility through the federal system.

State laws vary in their procedures, evidence rules, remedies, and constitutional protections. Controlling federal requirements apply according to their own elements; stronger state protections remain available; IAJ standards and proposed reforms are identified as such.

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## II. THE CHRONOLOGICAL FRAMEWORK: LEHMAN PREDATES UNCAT BY TWELVE YEARS

### A. The Temporal Sequence

The chronology establishes what *Lehman* did not adjudicate; it does not itself alter the decision's statutory holding:

| Date | Event |
|---|---|
| June 30, 1982 | *Lehman v. Lycoming County* decided |

| Date | Event |
| --- | --- |
| December 10, 1984 | UN General Assembly adopts Convention Against Torture |
| October 27, 1990 | U.S. Senate provides advice and consent to UNCAT ratification |
| **October 21, 1994** | **United States deposits Instrument of Ratification with UN** |
| December 19, 2014 | UN Committee against Torture issues concluding observations on the United States |

The Lehman Court could not have considered UNCAT obligations because those obligations did not exist in 1982. The Convention had not yet been adopted by the General Assembly, let alone ratified by the United States.

### B. The Legal Significance of Post-Lehman Treaty Ratification

Article VI provides that treaties made under the authority of the United States are, together with the Constitution and federal laws made in pursuance of it, "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. UNCAT's ratification bound the United States internationally. The declaration of non-self-execution affects whether Articles 1–16 themselves furnish domestically enforceable federal law; it does not erase the international obligation.

*Lehman* was decided in a pre-UNCAT environment, but chronology alone does not qualify its construction of § 2254. The later treaty did not amend that statute. The post-ratification questions are instead whether an independently available domestic source applies, whether genuine interpretive space permits treaty-consistent construction, and whether the represented domestic architecture performs the obligation in practice.

### C. The Interpretive Implication

A 1982 decision interpreting federal habeas jurisdiction cannot adjudicate the international compliance of a 1994 ratification architecture. It nevertheless remains controlling on the § 2254 issue it decided. The two propositions coexist: *Lehman* governs the domestic habeas route, while the later obligation and any residual implementation gap are assessed separately.

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## III. TREATY SUPREMACY AND THE U.S. INSTRUMENT OF RATIFICATION

### A. The Deposited Instrument: The Authoritative Source

The U.S. Instrument of Ratification deposited with the United Nations on October 21, 1994, is the authoritative international instrument stating the United States' reservations, understandings, and declaration. The Senate report remains material ratification history; the deposited text governs the international commitment. Article VI domestic effect must be analyzed together with the non-self-execution declaration and governing domestic doctrine.[1]

### B. Critical Provisions of the Deposited Instrument

**Reservation I(1) — Constitutional Linkage:**

> "The United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

**Direction of operation:** Reservation I(1) runs from independently applicable domestic constitutional law to the scope of the Article 16 obligation accepted by the United States. When conduct independently satisfies the relevant Fifth, Eighth, or Fourteenth Amendment standard, the reservation does not prevent the corresponding Article 16 characterization within the accepted U.S. obligation. A broader international Article 16 finding is not, merely by operation of the reservation, an automatic domestic constitutional holding, jurisdictional grant, or cause of action.

**Understanding II(1)(c) — Object and Purpose Preservation:**

> "Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture."

**Operation:** Understanding II(1)(c) addresses the Article 1 exclusion for pain or suffering arising only from, inherent in, or incidental to lawful sanctions. The United States expressly stated that domestic sanctions cannot defeat the Convention's object and purpose. That statement is material to the implementation analysis, but it is not a general command independently rewriting every state procedural rule or *Lehman*'s § 2254 holding.

**Understanding II(5) — State Implementation Responsibility:**

> "The United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfilment of the Convention."

[1] United Nations Treaty Collection, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United States ratification action and deposited reservations, understandings, and declarations, deposited Oct. 21, 1994.

**Operation:** Understanding II(5) records the federal distribution of implementation responsibility. State courts may be competent authorities when domestic law assigns them a relevant adjudicative, preventive, protective, or remedial function. The understanding does not designate every state court as the competent authority for every Convention duty, create jurisdiction otherwise absent, or supply a private cause of action.

### C. The Supremacy Hierarchy

For domestic adjudication, the relevant hierarchy and allocation are more precise than a simple later-in-time formula:

1. The Constitution;
2. Federal statutes and domestically operative treaty provisions, subject to governing self-execution and later-in-time rules;
3. State constitutions and laws, subject to valid controlling federal law.

UNCAT ratification did not amend § 2254 and therefore did not displace *Lehman*'s statutory holding. Article VI remains essential to the status of the treaty and to lawful treaty-consistent construction, but it does not manufacture a domestic vehicle that the governing source withholds.

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## IV. TORTURE, CIDT, AND THE TWO PLANES

### A. The *Jus cogens* Framework

The prohibition against torture constitutes a peremptory norm of international law (*jus cogens*) from which no derogation is permitted. As the Ninth Circuit recognized in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992), "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."

The Second Circuit in *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), declared that "the torturer has become, like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind."

### B. *Jus cogens* as Interpretive Floor, Not Jurisdiction-Eraser

Plane A — the controlling IAJ determination. Torture is prohibited by an established peremptory norm. Torture and CIDT retain distinct classifications and element tests, but they form an integrated continuum of prohibited ill-treatment whose absolute and non-derogable character prevents artificial severance. At and above the gateway into torture or CIDT, immunity falls away absolutely and is never available, and no limitation period may foreclose the required consequences. For torture, the rule rests on the established jus cogens prohibition; for qualifying ill-treatment, the Institute's determination, grounded in the prohibition's absolute and non-derogable character, yields the identical consequence within the integrated continuum.[2]

The Institute records *Jurisdictional Immunities of the State* and *Jones v. United Kingdom*, and any comparable contrary immunity holding, as documented failures to give the norm operative effect—not as qualifications of its determination. ILC Conclusion 22 leaves consequences that specific peremptory norms may otherwise entail without prejudice; it does not itself establish or foreclose the Institute's immunity rule.

**Plane B — domestic enforcement reality.** Peremptory status does not by itself create § 2254 custody, federal jurisdiction, an offense, a private cause of action, a domestic immunity waiver, authority to disregard a controlling limitation rule, or authority for retroactive punishment. Domestic institutions must use lawful existing vehicles and identify rather than conceal any residual gap. A domestic barrier that prevents a required Plane A outcome is recorded as an implementation failure, not as permission for the prohibited conduct.

### C. The Practical Distinction

The practical distinction is between the content of the obligation and the domestic mechanism available to give it effect:

| Approach | Implication |
|---|---|
| Plane A: content and consequence | The integrated torture–CIDT continuum governs IAJ characterization and State responsibility; at and above the gateway, immunity falls away absolutely and no limitation period forecloses the required consequences. |
| Plane B: lawful domestic vehicle | Peremptory status alone does not create § 2254 custody, jurisdiction, an offense, a cause of action, an immunity waiver, or retroactive punishment. Any residual gap is documented. |

The two planes do not collapse into each other. Accurate Plane B adjudication and accurate Plane A characterization must occur together; the distance between them is the implementation gap this Opinion records.[3]

[2] The discussion reserved in the original release has since been supplied by the Institute's controlling thesis, UNCAT and jus cogens: A contemporary perspective, and applied through the Institute's Advisory Opinion on Medellín v. Texas. On Plane A, at and above the gateway into torture or CIDT, immunity falls away absolutely and is never available, and no limitation period may foreclose the required consequences. For torture, the rule rests on the established jus cogens prohibition; for qualifying ill-treatment, the Institute's determination, grounded in the prohibition's absolute and non-derogable character, yields the identical consequence within the integrated continuum. Plane B limits are recorded separately as implementation failures and do not qualify that determination.

[3] See note 1. The second reservation in the original release is discharged subject to the same integrated-continuum and Plane A/Plane B formulation.

## V. THE CHARMING BETSY CANON AND UNCAT-CONSISTENT INTERPRETATION

### A. The Two-Century-Old Canon

The Supreme Court's decision in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), established the enduring principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." This canon has been consistently applied for over two centuries.

### B. Application to Lehman

Under the *Charming Betsy* canon, genuinely open domestic text should be construed, where another permissible construction remains, to avoid conflict with international law. The canon does not authorize a court to rewrite clear statutory text, create custody under § 2254, invent a cause of action, enlarge criminal liability or punishment, defeat fair warning, or disregard binding precedent.

*Lehman*'s § 2254 holding therefore remains controlling within its ratio. The canon may matter when a different constitutional, statutory, procedural, or common-law source is genuinely susceptible to more than one lawful construction. The decision-maker must identify the domestic source, the ambiguity, and the permissible construction; invocation of UNCAT alone does not complete that analysis.

### C. The Medellín Clarification

*Medellín v. Texas*, 552 U.S. 491 (2008), confirms that a non-self-executing treaty stipulation is not directly enforceable as domestic law without implementing authority. It does not convert the absence of direct treaty enforcement into extinction of the international obligation, adjudicate independent domestic grounds never considered, or eliminate treaty-consistent construction within its ordinary limits.[4]

The Institute's Advisory Opinion on *Medellín* accepts that Plane B constraint and completes the analysis through its test of domestic equivalence. Failed equivalence does not authorize disregard of *Medellín* or *Lehman*. It requires adjudication of lawful domestic grounds actually available, transparent identification of the remaining gap, and separation of the domestic disposition from the Plane A compliance finding.

[4] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Medellín v. Texas, 552 U.S. 491, 504–06, 514–23 (2008); Institute for the Advancement of Justice & Human Rights, The Completion of the Non-Self-Execution Analysis: Medellín v. Texas, the Equivalence Representation, and the Test of Domestic Equivalence, especially §§ 7.02–7.04 and 8.01–8.09. The companion opinion remains forthcoming and is cited by title only.

## VI. THE EQUIVALENCE REPRESENTATION AND DOMESTIC PERFORMANCE

### A. The Verified Ratification Record

The Executive represented, and the Senate considered in giving advice and consent, that most Convention obligations were already covered by existing law and that additional implementing legislation was required only for a specifically identified jurisdictional gap.

> The report states that "the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law"; that additional implementing legislation would be needed "only with respect to article 5"; that "[e]xisting law is therefore sufficient to implement Article 4, except to reach torture occurring outside U.S. jurisdiction"; and that existing private rights of suit were "sufficient to implement Article 14." It also recorded that any domestic prosecution or civil action would proceed under existing or subsequently enacted federal or state law.[5]

S. Exec. Rep. No. 101-30, at 10, 19, 24, 41 (1990). Congress enacted the identified extraterritorial legislation before deposit. The sequence was Executive representation, Senate advice and consent, congressional gap-filling, and Executive deposit—not a unitary "promise by Congress."

The same ratification history described the Article 16 reservation as making the accepted obligation "coextensive with" constitutional guarantees against cruel, unusual, and inhumane treatment. In its 2014 observations, the Committee recorded the United States' position that its constitutional protections satisfy Article 16 and then evaluated U.S. performance under the Convention. The pairing makes operational divergence material: both direct treaty enforcement and international individual communications were restricted on assurances concerning the domestic architecture.

### B. Legal Character of the Representation

The equivalence representation is the stated premise and allocation structure accompanying non-self-execution. It is material evidence of how the United States proposed to perform the Convention. It is not, standing alone, a privately enforceable promise, cause of action, jurisdictional grant, or authority to rewrite clear domestic law.

The Institute tests that representation on Plane A by asking whether the identified domestic mechanisms are present, applied, and systemically possible, and whether they deliver the relevant duties of prevention, protection, investigation, punishment, remedy, and relief. On

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[5] S. Exec. Rep. No. 101-30, at 10, 19, 24, 25–26, 41 (1990). Page 10 states the majority/existing-law premise and the word "only" concerning Article 5; page 19 addresses Article 4; page 24 identifies represented civil-redress routes; pages 25–26 state the "coextensive" Article 16 rationale; page 41 records the existing-or-subsequently-enacted federal-or-state-law route.

Plane B, a court or prosecutor must still identify a lawful domestic vehicle and satisfy its elements and limitations.

### C. Nationwide Performance, Duty by Duty

The representation concerned combined federal and state law, but a failure in one state or one vehicle does not automatically establish failure everywhere. Equivalence must be tested duty by duty, claimant by claimant, and mechanism by mechanism. Where no lawful vehicle supplies a required result, authority may not be manufactured; the residual gap must be recorded, assigned to the institution competent to cure it, and preserved for international accountability.

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## VII. PROPORTIONALITY AS EVIDENCE, NOT A SUBSTITUTE FOR ELEMENTS

Proportionality may be important evidence in assessing necessity, purpose, severity, arbitrariness, discrimination, cumulative harm, and whether an asserted protective rationale is genuine. It is not a universal substitute for the elements of torture, CIDT, or a domestic constitutional claim.

### A. The Core Principle of Proportionality

In international human-rights analysis, proportionality examines the relationship between a measure, its legitimate aim, the harm imposed, and available alternatives. In family proceedings, a disparity between documented risk and the breadth, intensity, duration, or permanence of intervention may be probative.

The legal consequence remains source-specific. Disproportionality may support an international finding or an inference concerning purpose or arbitrariness. A domestic consequence follows only when the independently governing constitutional, statutory, or state-law test makes that consideration material.

### B. Proportionality Under UNCAT Article 1: The Torture Definition

UNCAT Article 1 defines torture as "severe pain or suffering, whether physical or mental" inflicted intentionally by or with the acquiescence of public officials for specific **purposes**, including:

- Obtaining information or confession
- **Punishment** for an act committed or suspected
- Intimidation or coercion
- **Discrimination of any kind**

**Element-by-element implication:** Gross disproportionality may support an inference that an asserted protective measure was punitive, coercive, discriminatory, or knowingly indifferent to severe harm. It does not automatically establish severe pain or suffering, intent, prohibited purpose, official involvement or acquiescence, causation, or the lawful-sanctions boundary.

**Applied example:** A permanent family-wide response to a bounded incident may require close examination of purpose, individualized risk, less harmful alternatives, discriminatory effect, and cumulative mental suffering. Classification as torture, CIDT, or a domestic constitutional violation nevertheless requires proof of the applicable elements and source-specific standard.

### C. Proportionality Under UNCAT Article 16: The CIDT Threshold

UNCAT Article 16 requires prevention of cruel, inhuman or degrading treatment or punishment that does not amount to torture as defined in Article 1 and that has the required official nexus. Proportionality may inform the assessment of arbitrariness, severity, necessity, discrimination, and cumulative effect, but it is not the single defining boundary between lawful action and CIDT.

| Category | Potentially proportionate indicator | Potentially disproportionate indicator |
|---|---|---|
| **Removal** | Temporary removal of endangered child with reunification services | Permanent termination when temporary measures would protect the child |
| **Services** | Targeted interventions addressing identified risk | Sweeping requirements unrelated to actual risk factors |
| **Scope** | Separation of allegedly abused child from alleged abuser | Termination of non-abusive parent's rights to non-abused children |
| **Duration** | Time-limited intervention with clear reunification path | Open-ended separation with no realistic reunification pathway |
| **Intensity** | Response scaled to severity of documented risk | Maximum intervention regardless of actual threat level |

The comparison below is an evidentiary aid. Its entries do not classify conduct automatically; they identify circumstances requiring further element-specific inquiry.

### D. The UN Committee Against Torture's Authoritative Interpretation

The Committee against Torture's authentic materials support prevention, element-specific analysis, effective remedies, and the inseparability of the duties concerning torture and other ill-treatment. They do not contain the three proportionality quotations attributed to them in the original release.[6]

General Comment No. 2, ¶ 3 (2008):

[6] Committee against Torture, General Comment No. 2, CAT/C/GC/2, ¶ 3 (Jan. 24, 2008); General Comment No. 3, CAT/C/GC/3, ¶ 6 (Dec. 13, 2012); Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States, CAT/C/USA/CO/3-5, ¶¶ 10, 26, 31 (Dec. 19, 2014). The fabricated or composite quotations in the original release have been removed.

> The Committee states that the Article 2 and Article 16 prevention obligations "are indivisible, interdependent and interrelated." It further explains that prevention overlaps in practice, that conditions giving rise to ill-treatment frequently facilitate torture, and that measures required to prevent torture therefore must also be applied to prevent ill-treatment.
>
> That authentic passage supports the integrated protective continuum. It does not establish that disproportionality alone conclusively proves torture, CIDT, or a domestic constitutional claim.

CAT/C/USA/CO/3-5 (Dec. 19, 2014):

> The Committee documented concrete implementation failures, including the absence of a conforming general federal torture offense, the Jon Burge cases in which limitation periods contributed to impunity and victims lacked adequate compensation, and the continuing absence of U.S. acceptance of Article 22 individual communications. Those findings are evidence of gaps in operation, not a quotation imposing proportionality on all state action.

General Comment No. 3, ¶ 6 (2012):

> The Committee treats redress as a comprehensive concept encompassing restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. That remedial framework is relevant to Plane A equivalence; it does not itself create a domestic cause of action after the U.S. non-self-execution declaration.

The correct rule is therefore disciplined: proportionality is relevant evidence, not a substitute for the Convention elements or for the independently governing domestic test.

### E. The Constitutional Bridge: Reservation I(1)

Reservation I(1) creates a linkage between independently applicable constitutional prohibitions and the Article 16 obligation accepted by the United States; it does not make the linkage bidirectional:

> "The United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' **only insofar as** the term 'cruel, inhuman or degrading treatment or punishment' **means** the cruel, unusual and inhumane treatment or punishment **prohibited by the Fifth, Eighth, and/or Fourteenth Amendments** to the Constitution of the United States."

The direction of analysis is:

Governing Fifth, Eighth, or Fourteenth Amendment standard → independent satisfaction of its elements → corresponding Article 16 characterization within the accepted U.S. obligation.

The resulting implications are limited but important:

1. A broader international Article 16 finding is not automatically a domestic constitutional holding.
2. A claimant who independently satisfies a constitutional standard invokes domestic constitutional law rather than asking the treaty text alone to create a cause of action.
3. The domestic court must separately determine jurisdiction, right, vehicle, immunity, proof, and remedy.
4. On Plane A, the Institute may apply the broader international standard and its controlling continuum analysis while labeling that determination accurately.
5. State law may provide greater protection; neither the reservation nor the equivalence representation automatically imports a single strict-scrutiny formula into every claim.

### F. Domestic Analogues Are Claim-Specific

Domestic doctrines sometimes employ proportionality-like concepts, including reasonableness, arbitrariness review, means–ends scrutiny, excessiveness, and consideration of less restrictive alternatives. These doctrines are not interchangeable with each other or with Article 1 or Article 16.

| International consideration | Possible domestic-law relationship |
|---|---|
| Proportionality may inform severity, purpose, arbitrariness, discrimination, and cumulative harm. | Narrow tailoring applies only when the independently governing domestic test requires it. |
| Necessity may be relevant to whether an intervention was arbitrary or punitive. | A least-restrictive-means inquiry is not universal; availability depends on the claim and governing authority. |
| Evidence-based, non-arbitrary action bears on the Article 1 or Article 16 assessment. | Due-process consequences require satisfaction of the applicable domestic elements. |
| Punitive or discriminatory purpose may be relevant under Article 1. | Domestic constitutional consequences remain source- and claim-specific. |

The Governing Domestic Framework:

Parental rights receive substantial constitutional protection, but the applicable standard depends on the precise governmental act and claim. *Santosky v. Kramer*, 455 U.S. 745 (1982), establishes a clear-and-convincing evidence requirement for termination; *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), rejects an automatic federal right to appointed counsel in every termination case and requires the governing due-process analysis; jurisdiction-specific law may provide more.

1. Apply strict scrutiny only when the independently governing source requires it;

2. Apply least-restrictive-means or narrow-tailoring analysis only where the controlling test includes it.

The equivalence inquiry compares performance on Plane A. It does not convert every international consideration into an identically named domestic constitutional rule.

### G. Disproportionality Is Evidence, Not a Per Se Rule

Gross disproportionality may be powerful evidence of arbitrariness, punitive purpose, discrimination, absence of individualized risk assessment, or severe cumulative harm. It is not, without the remaining elements and governing domestic source, a per se constitutional violation.

Potential indicators requiring close review include:

- Permanent termination where adequately supported, less harmful measures could protect the child;
- Action against a parent based solely on another person's conduct without the required individualized findings;
- Action affecting children or relationships beyond the documented source of risk;
- Failure to consider alternatives where controlling law requires that consideration;
- Response intensity bearing no rational or legally sufficient relationship to the established risk.

These indicators trigger further analysis. Whether they establish Article 1 torture, Article 16 CIDT, substantive or procedural due process, or a state-law violation must be decided under the elements of that particular source.

### H. Proportionality Cannot Be Waived by Lehman

*Lehman*'s foreclosure of the particular § 2254 route does not adjudicate proportionality under another lawful source. Proportionality may enter through:

1. The Convention element analysis on Plane A, where relevant to purpose, arbitrariness, severity, discrimination, or cumulative harm;
2. An independently applicable domestic constitutional test;
3. A statute, rule, or state constitutional provision that requires individualized necessity, reasonableness, or consideration of alternatives;
4. An IAJ investigative or professional standard, accurately identified as such.

*Lehman* decides the habeas vehicle. It does not eliminate standards arising from other sources, and it does not create them merely by closing habeas.

## VIII. THE FEDERAL CONSTITUTIONAL FLOOR: SOURCE-CLASSIFIED SAFEGUARDS

**Source classification.** This Part distinguishes: (1) safeguards required by controlling federal constitutional law; (2) safeguards created by federal or state statute, rule, or constitution; (3) IAJ investigative or professional standards probative of reliability and prevention; and (4) reforms the Institute recommends. Categories (3) and (4) are not described as universal constitutional commands unless controlling authority independently establishes that result.[7]

### A. The Constitutional Foundation

The controlling domestic framework includes:

1. **Parental rights are fundamental.** "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

2. **Termination requires heightened procedural protection.** "The Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

3. **Due process requires procedures commensurate with the stakes.** The *Mathews v. Eldridge* test, 424 U.S. 319, 335 (1976), requires courts to balance: (a) the private interest affected; (b) the risk of erroneous deprivation and value of additional safeguards; and (c) the government's interest.

4. Termination has exceptionally grave and often permanent consequences. The severity of the interest informs the governing due-process analysis; it does not dispense with source-specific elements.

### B. The Federal Minimum Requirements

The following safeguards are classified by source. The constitutional minimum is stated separately from stronger state law, IAJ standards, and proposed reforms:

#### *1. Evidentiary Reliability*

**Requirement:** Evidence used to support termination must be obtained through procedures adequate to ensure reliability.

**Federal Constitutional Basis:** Due Process Clause; *Santosky v. Kramer* (heightened evidentiary standard); *Mathews v. Eldridge* (risk of erroneous deprivation).

**UNCAT/IAJ Basis:** Article 16 prohibits qualifying cruel, inhuman or degrading treatment or punishment. Evidentiary unreliability and arbitrariness may be probative within that

[7] Santosky v. Kramer, 455 U.S. 745, 753, 758–70 (1982); Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Lassiter v. Department of Social Services, 452 U.S. 18, 31–32 (1981).

assessment but are not sufficient by themselves. Reservation I(1) supplies the constitutional linkage accepted by the United States.

**IAJ reliability standards and evidentiary considerations:** non-coercive methods; procedures that reduce suggestion and contamination; complete preservation of critical interviews where practicable; and transparent documentation permitting the court and parties to assess reliability. Continuous recording and use of a recognized protocol are IAJ standards unless controlling jurisdiction-specific law independently requires them.

**Domestic-law limit:** Due process requires a meaningful opportunity to test material evidence under the governing procedure. It does not federalize one interview protocol or impose an identical recording rule in every jurisdiction without an independent source.

### *2. Meaningful Parental Participation*

**Requirement:** Parents must have meaningful opportunity to participate in proceedings affecting their fundamental rights.

**Federal Constitutional Basis:** Due Process Clause; *Goldberg v. Kelly*, 397 U.S. 254 (1970) (opportunity to be heard); *Mathews v. Eldridge* (value of additional safeguards).

**UNCAT/IAJ Basis:** Article 14 and the Committee's redress framework inform the Plane A equivalence assessment. Denial of meaningful participation may also be probative under Article 16 where it contributes to conduct satisfying the applicable CIDT elements; deficient or arbitrary process is not sufficient by itself.

**Minimum considerations:** adequate notice; a meaningful opportunity to know and answer material allegations; sufficient attorney–client preparation where counsel is provided; and application of the governing counsel rule. *Lassiter* does not establish an automatic federal right to appointed counsel in every parental-termination case; stronger state statutes or constitutions may do so.

Confidentiality, child protection, redaction, protective orders, and disclosure rules vary. Due process concerns meaningful participation, not an automatic universal right to direct, unredacted possession of an entire agency file. Whether the access actually afforded was adequate must be evaluated in the particular proceeding.

### *3. Proportionality*

**Requirement:** Apply whatever individualized necessity, reasonableness, means–ends, or proportionality inquiry the governing constitutional, statutory, or state-law source actually requires.

**Federal Constitutional Basis:** claim-specific substantive and procedural due process; no single strict-scrutiny formula is declared universal here.

**UNCAT/IAJ Basis:** proportionality may inform the Article 1 or Article 16 analysis on Plane A; Reservation I(1) operates only in the direction stated in Part III.

**IAJ standard and proposed reform:** document individualized risk, the relationship between the measure and that risk, considered alternatives, expected harm, disability and discrimination effects, and the reasons a less harmful measure would be inadequate.

This classification preserves the importance of proportionality without converting an IAJ standard or an international consideration into a categorical federal holding.

### *4. Effective Remedy*

**Requirement:** Apply the appellate, reconsideration, preservation, access-to-court, and remedial protections furnished by the governing domestic law; identify separately any Plane A redress shortfall.

**Federal Constitutional Basis:** the particular due-process and access-to-court doctrines applicable to the proceeding and requested relief.

**UNCAT Basis:** Article 14 and the Committee's redress framework inform the Plane A equivalence assessment. In light of the non-self-execution declaration, Article 14 does not by itself supply a directly enforceable domestic cause of action.

**IAJ standards and proposed reforms:** review capable of preventing or curing avoidable harm; preservation of evidence; reasons for denial; prejudice-curing continuances; and access arrangements that remain usable for people with disabilities.

A nominal procedure may still fail the Plane A equivalence test in operation. That failure must not be misstated as domestic jurisdiction or remedy that a court does not possess.

## C. State Variation vs. Federal Floor

**Critical Distinction:** This Advisory Opinion does not assert that every state has identical procedural deficiencies. States vary significantly in:

- Recording requirements for forensic interviews
- Parental access to child welfare records
- Hearsay exceptions for child statements
- Appellate review procedures
- Statutory timelines

Controlling federal rules apply uniformly according to their own elements. Stronger state protections, IAJ standards, and recommended reforms may differ by jurisdiction and must retain their source labels.

The inquiry is therefore source- and case-specific: What law governs this safeguard, what does it require, and did the procedure actually satisfy it? A separate Plane A inquiry asks whether the combined architecture delivered the Convention outcome.

### D. Identification of Deficient State Practices

Appendix A preserves bounded findings from identified Texas matters and classifies the legal source of the relevant safeguards. It does not infer nationwide prevalence from those matters.

Other states may present different records. The constitutional, statutory, institutional, and proposed-reform categories provide the framework for comparison without assuming identical defects.

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## IX. LEHMAN STRENGTHENS THE CASE FOR STATE SAFEGUARDS

### A. The Core Insight: Closure Requires Robustness

*Lehman*'s closure of federal habeas review does not reduce the importance of accurate and reliable state procedures.

As an IAJ structural analysis, closure of one review route increases the practical consequences of error in the remaining routes and therefore strengthens the policy and institutional case for prevention, preservation, reliable fact-finding, accessible participation, and effective review.

This proposition is not stated as a Supreme Court holding that *Lehman* itself raises the constitutional standard. Constitutional requirements remain governed by *Mathews*, *Santosky*, *Lassiter*, and other claim-specific authority; the additional robustness proposition is the Institute's analysis and reform position.

### B. The Constitutional Logic

The Due Process Clause requires procedures appropriate to the interests and risks identified under the governing test. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Santosky v. Kramer*, 455 U.S. 745, 758–70 (1982).

The absence of federal habeas is relevant to institutional design and to the practical risk that an error will remain unremedied. It does not, standing alone, create a new constitutional safeguard or alter *Lehman*'s jurisdictional ratio.

### C. Lehman as Leverage for Reform

Advocates and policymakers may therefore use *Lehman* as evidence of the practical need for reliable state procedures, while grounding every legal demand in the constitutional, statutory, state-law, professional, or reform source that actually supports it. The Institute's reform argument is:

> "Because federal habeas is unavailable under *Lehman*, errors may escape that form of collateral review. State institutions should therefore strengthen prevention, preservation, participation, reliability, and review within their lawful authority, and legislatures should complete genuine gaps."

This framing treats *Lehman* as a structural reason for reform, not as a doctrine that itself supplies the reforms or creates a federal remedy.

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## X. FINALITY: DOMESTIC OPERATION AND PLANE A EVALUATION

### A. Finality Presupposes Minimum Reliability

**Plane B.** *Lehman*'s jurisdictional holding, and otherwise applicable rules of finality, preclusion, abstention, and immunity, remain governed by domestic law. A claimed constitutional or international-law defect does not by itself cause those doctrines to disappear. Relief requires an available domestic vehicle and satisfaction of its elements and limitations.

Domestic law recognizes particular exceptions and avenues concerning fraud, jurisdiction, due process, direct review, reconsideration, and collateral attack. Their availability depends on the governing doctrine and record; this Opinion does not collapse them into a general exception to finality.

### B. Application to Child Custody Determinations

*Lehman* does not make the validity of § 2254 jurisdiction depend on whether the underlying state proceeding met an IAJ reliability threshold. A separate domestic claim may challenge constitutional adequacy if a lawful vehicle exists. The § 2254 holding itself remains operative unless competent domestic authority changes it.

**Plane A.** The Institute may nevertheless determine that reliance on finality contributes to non-equivalence where the system does not deliver effective prevention, investigation, protection, adjudication, remedy, relief, or punishment. That is an IAJ compliance finding, not a domestic jurisdictional exception already adopted by courts.

### C. The Reliability Threshold

The Institute's reliability assessment asks, without converting the answers into automatic domestic exceptions:

1. Evidentiary reliability: Were material facts obtained, preserved, disclosed, and tested through adequate procedures?
2. Participatory reliability: Did the affected person have a meaningful and accessible opportunity to know and answer the case?

3. Remedial and proportionality reliability: Did governing law provide a usable route to prevent or correct the proved violation, and was the measure justified under the applicable source?

Failure on those questions may support an independent domestic claim where one exists and a Plane A implementation finding whether or not domestic relief remains available.

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## XI. FORUM NULLUS: WHEN NO DOMESTIC FORUM PROVIDES MEANINGFUL ACCESS

### A. The *Forum nullus* Doctrine

*Forum nullus* is the Institute's descriptive and investigative classification for a demonstrated condition in which no practically effective domestic forum or mechanism supplies the required protection or remedy. It may support a Plane A equivalence finding, international reporting, and proposals for institutional reform.

### B. Application to Child Welfare Proceedings

Where federal habeas is foreclosed by *Lehman*, the state process has failed to deliver an identified duty, and no independently available alternative mechanism supplies it, the Institute may classify the resulting condition as *forum nullus*.

The finding requires an evidence-specific record of:

1. The precise route foreclosed by *Lehman*;
2. The state procedure or remedy tested and the proved defect in its availability or operation;
3. The appellate, reconsideration, administrative, criminal, civil, or protective alternatives examined;
4. The jurisdictional, procedural, practical, evidentiary, disability-related, or immunity barrier affecting each route.

**Link to the equivalence representation:** Where every identified lawful route fails to deliver a required outcome, the represented domestic architecture has failed that duty on Plane A. The finding must identify the duty, claimant, mechanism, and evidence; it is not inferred merely from an unfavorable judgment.

- The federal habeas route may be closed under *Lehman*;
- A state route may be present in form but unavailable or ineffective on the facts;
- Other domestic routes must be tested before a systemic absence is found.

*Forum nullus* is not a freestanding doctrine of United States jurisdiction, a cause of action, an exception to Rooker–Feldman or abstention, a displacement of immunity or preclusion, or an automatic route to alternative domestic relief. The obligation remains on Plane A even when Plane B supplies no usable vehicle.

### C. The Domestic Equivalence Failure and Its Consequences

The consequences must be separated by plane:

**Domestic analysis:** Each proposed proceeding must rest on independently recognized jurisdiction, a cognizable right and vehicle, and satisfaction of procedural and remedial limits.

**Treaty analysis:** Failure of the represented architecture is measured against the duty and outcome the United States undertook; internal law does not extinguish the international obligation.

**Institutional consequence:** A properly supported record of structural foreclosure may:

1. Support state or federal legislative and administrative reform;
2. Inform lawful domestic adjudication without manufacturing authority;
3. Support international reporting and an Article 20 submission where the applicable threshold and evidentiary requirements are met.

The record must distinguish an individual failure, a repeated pattern, and a systemic condition. Prevalence is not inferred beyond the defined evidence universe.

### D. International Mechanisms as Last Resort

UNCAT Article 20 permits the Committee, subject to its terms, to respond to reliable information indicating that torture is being systematically practiced. The United States has not accepted Article 22 individual communications.[8]

That architecture creates two separate international consequences:

1. Article 20 may remain available for reliable information concerning a systematic practice;
2. Article 22 supplies no individual communications route against the United States because the required declaration has not been made;
3. The absence of Article 22 deepens a proved foreclosure record but does not create domestic jurisdiction or retroactively accept that procedure.

International accountability is therefore neither a substitute for untested domestic routes nor extinguished by their failure. It follows the Convention's own procedures and the evidence-specific Plane A record.

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[8] The United States has recognized the Committee's Article 20 competence but has not made the declaration required to accept Article 22 individual communications. The absence of Article 22 is part of the access-to-remedy record; it does not create domestic jurisdiction.

## XII. HOW LEHMAN SURVIVES ATTACK: ADDRESSING COUNTERARGUMENTS

This Advisory Opinion anticipates and addresses the principal counterarguments that defenders of unrestricted Lehman application will advance. Acknowledging these arguments—and demonstrating why they do not defeat the bounded applicability framework—strengthens the analysis and prepares advocates for opposition.

### A. The Federalism and Comity Objection

**The Counterargument:** Domestic family relations have traditionally been the exclusive province of state law. Federal intrusion into state custody proceedings threatens the balance of power the Constitution establishes between federal and state governments. Lehman properly respects this federalism principle, and expanding federal oversight would "prolong uncertainty for children" while disrupting settled state systems.

**The Response:** This Opinion does not argue for federal displacement of state authority over family law. State primacy remains subject to independently applicable federal law; *Lehman* remains controlling on § 2254; and the Institute separately records any Plane A implementation gap.

The bounded applicability framework:

1. Respects federalism by requiring each institution to remain within its lawful competence;
2. Requires application of independently controlling constitutional and statutory law;
3. Preserves *Lehman*'s core holding without making state-proceeding adequacy a new jurisdictional condition.

Federalism does not excuse national nonperformance on Plane A, but neither UNCAT nor Understanding II(5) assigns every Convention duty to every state court. Competence and domestic authority must be identified precisely.

### B. The Non-Self-Execution Objection

**The Counterargument:** The United States declared UNCAT Articles 1-16 "non-self-executing," meaning they do not create privately enforceable rights in federal court without implementing legislation. Since Congress has not enacted such legislation, UNCAT cannot be invoked to modify Lehman or create new causes of action.

**The Response:** The objection is correct that Articles 1–16 do not themselves create privately enforceable domestic law after the U.S. declaration. The analysis nevertheless continues because non-self-execution does not extinguish the international obligation or adjudicate independent domestic grounds.

The bounded applicability framework rests on different grounds:

1. *Charming Betsy* may guide construction only where domestic text is genuinely open and another permissible construction remains; it cannot rewrite § 2254 or create a cause of action.

2. Reservation I(1) makes independently satisfied constitutional rights relevant to the accepted Article 16 obligation; it does not make every Article 16 finding a constitutional holding.

3. The equivalence representation supplies the Plane A standard for testing the represented domestic architecture; it is not itself a judicial cause of action or command to enlarge domestic authority.

Non-self-execution therefore channels domestic performance through existing and specifically supplemented law. A remaining shortfall is recorded as nonperformance, not treated as authority to invent a remedy.

### C. The Stare Decisis Objection

**The Counterargument:** Lehman is binding Supreme Court precedent. Lower courts are bound by *stare decisis* to follow it. This Advisory Opinion improperly invites lower courts to ignore or circumvent valid precedent.

**The Response:** This Opinion preserves *Lehman* as binding precedent within its ratio. It does not make the holding conditional on a later factual assessment of state-proceeding adequacy.

The framework does not ask courts to:

- Overrule or disregard *Lehman*;
- Create § 2254 custody that the statute and precedent withhold;
- Treat a Plane A compliance finding as a domestic exception to binding precedent.

Rather, it asks courts to:

- Apply *Lehman* accurately to the habeas question it decided;
- Adjudicate independently pleaded domestic grounds through lawful vehicles;
- Apply treaty-consistent construction only within genuine lawful interpretive space;
- State separately any residual implementation gap the domestic disposition leaves.

This is a bounded treatment of precedent and source. Later international obligations do not silently amend the statute; earlier domestic precedent does not silently extinguish the later international obligation.

*Lehman* remains good law on Plane B. Its existence and operation may form part of the evidence tested on Plane A.

### D. The Floodgates Objection

**The Counterargument:** Recognizing bounded applicability will open floodgates of federal litigation challenging state custody determinations. Every dissatisfied parent will claim constitutional violations to invoke federal review, overwhelming federal courts and destabilizing settled custody arrangements.

**The Response:** The conformed framework does not create federal jurisdiction. Ordinary thresholds remain applicable:

1. Jurisdiction and a cognizable domestic claim must independently exist;
2. Standing, causation, pleading, preclusion, abstention, immunity, limitations, proof, and remedy rules remain applicable;
3. State-level prevention and reform remain central because the habeas route is closed;
4. International documentation does not itself open a federal courtroom.

The framework therefore records the gap without converting the gravity of the underlying allegation into automatic domestic jurisdiction.

### E. The Judicial Overreach Objection

**The Counterargument:** This Advisory Opinion asks courts to engage in judicial overreach by subordinating American law to international standards, usurping legislative prerogatives, and substituting judicial policy preferences for democratic choices.

**The Response:** Courts apply domestic law within their authority; legislatures complete genuine gaps; prosecutors and administrators use lawful existing powers; the Institute separately evaluates Plane A performance.

**On international standards:** The Convention and deposited RUDs are authoritative international materials. Their direct domestic enforceability, interpretive use, and evidentiary significance are classified rather than conflated.

**On legislative prerogatives:** Nothing here authorizes a court to create an offense, cause of action, jurisdictional grant, or retroactive liability. Genuine gaps requiring legislation are assigned to legislatures.

**On policy and institutional judgment:** IAJ standards and reforms are stated as the Institute's positions. They may inform analysis and reform without being misreported as existing Supreme Court holdings.

### F. Summary: Why Lehman Survives as Bounded Precedent

Lehman survives precisely **because** it is bounded:

| Objection | Conformed response |
|---|---|
| Federalism | State primacy remains subject to independently applicable federal law; no new jurisdiction is manufactured. |
| Non-self-execution | Direct treaty enforcement remains distinct from lawful construction, domestic-equivalence analysis, and Plane A responsibility. |
| Stare decisis | Lehman remains controlling within its § 2254 ratio; other claims stand or fall under their own authority. |
| Floodgates | Standing, jurisdiction, cause of action, immunity, abstention, preclusion, proof, and remedy rules remain applicable. |
| Judicial overreach | Courts apply existing law; legislatures complete genuine gaps; IAJ separately records Plane A nonperformance. |

The conformed framework preserves *Lehman*'s domestic operation, requires accurate use of existing law, and makes the residual implementation gap visible on Plane A.

## XIII. REALISTIC FEDERAL PATHWAYS AFTER LEHMAN

### A. Acknowledging Doctrinal Constraints

IAJ acknowledges that federal court intervention in state child custody proceedings faces significant doctrinal constraints beyond Lehman:

**Rooker-Feldman Doctrine:** Federal district courts lack jurisdiction to review state court judgments; only the Supreme Court may review state court decisions through certiorari.

**Younger Abstention:** Federal courts generally abstain from interfering with ongoing state proceedings involving important state interests, including child welfare matters.

***Res judicata*/Preclusion:** Final state judgments are generally entitled to preclusive effect in subsequent proceedings.

**Eleventh Amendment:** States and state agencies enjoy sovereign immunity from suits for damages in federal court.

These doctrines do not disappear simply because UNCAT has been ratified. Any realistic assessment of federal pathways must account for them.

### B. Available Federal Pathways

Several federal pathways may remain available, but only where their independent requirements are satisfied:

**1. Prospective Injunctive Relief Under Ex Parte Young:**

*Ex parte Young*, 209 U.S. 123 (1908), permits prospective relief against a proper state officer for an ongoing violation of enforceable federal law; it does not directly enforce a non-self-executing UNCAT stipulation.

**Application:** A claimant must establish standing, an ongoing violation, a proper defendant, a cognizable federal right, and relief within the doctrine's prospective scope. Abstention, preclusion, and the Anti-Injunction Act may remain material.

**2. Section 1983 Damages Against Individual Officials:**

42 U.S.C. § 1983 supplies a cause of action for deprivation, under color of state law, of a right enforceable under domestic federal law. It does not directly enforce Articles 1–16 of UNCAT after the non-self-execution declaration.

**Application:** The claimant must establish the particular federal right, personal responsibility and causation, and overcome any applicable absolute or qualified immunity, limitations, preclusion, and pleading barriers.

**3. Federal Question Jurisdiction Under 28 U.S.C. § 1331:**

Section 1331 supplies subject-matter jurisdiction for a cognizable federal claim; it is not itself a cause of action.

**Application:** A challenge must rest on an independently enforceable federal source and must not seek impermissible district-court appellate review of a state judgment.

**4. Writ of Certiorari to the Supreme Court:**

Direct Supreme Court review may be sought by petition for certiorari after the governing prerequisites are met. Certiorari is discretionary, and denial expresses no view on the merits.[9]

### C. Realistic Assessment

These routes are limited and fact-dependent. Their failure may contribute to a Plane A equivalence or *forum nullus* finding only after the particular route and barrier are documented; failure does not expand the route itself.

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[9] See Sup. Ct. R. 10. Review on certiorari is not a matter of right but of judicial discretion; denial expresses no view on the merits.

## XIV. JUSTICE BLACKMUN'S DISSENT: THE JURISDICTIONAL WARNING

### A. The Dissenting Voice

Justice Blackmun, joined by Justices Brennan and Marshall, disputed the majority's jurisdictional conclusion:

Although I can sympathize with what the Court seeks to accomplish in this case today, I cannot reconcile myself to its holding that "§ 2254 does not confer federal-court jurisdiction," ante, this page, to consider collateral challenges to state-court judgments involuntarily terminating parental rights. In my view, the literal statutory requisites for the exercise of § 2254 federal habeas corpus jurisdiction are satisfied here—in particular, the requirement that petitioner's children must be "in custody." Because I believe the Court could have achieved much the same practical result in this area without decreeing a complete withdrawal of federal jurisdiction, I respectfully dissent.[10]

> The dissent also addressed a separate discretionary question—whether the mother remained a proper next friend to seek relief for the children. It therefore supports a historically broader view of habeas power, but it does not establish that every parent possesses an available federal remedy or that federal oversight is required in every termination case.

458 U.S. at 516–17, 520–25 (Blackmun, J., dissenting).

### B. The Prophetic Dimension

The dissent identified the gravity of withdrawing a federal forum in this class of cases. Subsequent evidence of unreliable procedures or unremedied harm may make that warning institutionally significant; it does not transform the dissent into the Court's holding.

UNCAT ratification adds a separate Plane A question the dissent did not address: whether the remaining domestic architecture performs the later obligation. That question is tested through the equivalence protocol, not attributed retroactively to Justice Blackmun.

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## XV. CONCLUSION: THE CONFORMED HOLDING

### A. Summary of Analysis

This Advisory Opinion reaches the following conformed conclusions:

1. **Domestic holding:** *Lehman* remains binding on Plane B as to the § 2254 jurisdictional question it decided.

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[10] Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502, 516–25 (1982) (Blackmun, J., dissenting). The decision was issued June 30, 1982; the quoted phrase appears at page 516, and the next-friend discussion continues in the dissent.

2. **Later ratification:** UNCAT's ratification did not amend § 2254, create statutory custody, or supply a freestanding domestic cause of action.

3. **Two planes:** Non-self-execution channels domestic performance; it does not reduce the international obligation or authorize nonperformance on Plane A.

4. **Deposited RUDs:** Reservation I(1), Understanding II(1)(c), and Understanding II(5) operate in the directions and within the limits stated in Parts III and V.

5. **Equivalence representation:** The ratification record supplies a testable Plane A premise concerning the represented domestic architecture, not an automatic judicial remedy.

6. **Treaty-consistent construction:** *Charming Betsy* applies within genuine lawful interpretive space and cannot manufacture jurisdiction, liability, punishment, or a cause of action.

7. **Continuum and consequences:** Torture and CIDT form an integrated continuum of absolutely prohibited ill-treatment. At and above the gateway, immunity falls away absolutely and is never available, and no limitation period may foreclose the required Plane A consequences; domestic barriers are recorded as implementation failures, not qualifications.

8. **Proportionality:** Proportionality may be powerful evidence, but torture, CIDT, and domestic constitutional claims require their own element- and source-specific analysis.

9. **Safeguards:** Controlling law, jurisdiction-specific law, IAJ standards, professional practice, evidentiary considerations, and proposed reforms must remain separately labeled.

10. ***Forum nullus* and finality:** Domestic doctrines remain operative according to domestic law; the Institute separately records proven structural foreclosure and non-equivalence on Plane A.

11. **Institutional completion:** Courts, prosecutors, administrators, and legislatures must use the lawful authority each possesses; international reporting remains available according to the Convention when domestic performance fails.

### B. The Operational Framework

For State Courts:

Apply controlling constitutional and state law, adjudicate properly presented claims, preserve genuine treaty-consistent interpretive questions, and distinguish the domestic disposition from any residual Plane A gap.

- Identify the governing source for each requested safeguard;
- Provide the notice, participation, evidence testing, and review that source requires;

- Use protective orders, redaction, accommodation, preservation, and continuances where authorized and necessary;
- Do not treat *Lehman*'s habeas holding as adjudicating independent claims or as proof of international compliance.

For Federal Courts:

Apply *Lehman* and all other domestic jurisdictional and remedial limits accurately. Where a different domestic source is properly presented, adjudicate it on its own terms; do not convert UNCAT's non-self-execution into a terminal answer to every independent ground.

For Practitioners and Investigators:

Separate Plane A characterization from Plane B enforceability; identify the exact vehicle, elements, barriers, and evidence; and document rather than conceal any residual gap.

For Legislatures, Executive Institutions, and International Bodies:

Complete genuine jurisdictional, remedial, investigative, and accountability gaps prospectively; preserve lawful accountability under existing law; and evaluate properly supported records through the Convention's available international procedures.

### C. Final Declaration

**The Institute for the Advancement of Justice & Human Rights declares that:**

1. *Lehman v. Lycoming County* remains binding precedent regarding the § 2254 habeas question it decided;

2. The decision does not adjudicate the United States' later Plane A obligations or prove that the represented implementation architecture performs them;

3. Domestic institutions must remain within lawful competence while applying every existing source actually available;

4. The Institute's continuum, immunity, prescription, equivalence, and *forum nullus* determinations are stated as IAJ Plane A positions and do not manufacture Plane B jurisdiction;

5. Proven domestic barriers that prevent required outcomes are recorded as implementation failures, not as qualifications of the prohibition;

6. This Opinion governs the Institute's conformed treatment of Lehman, subject to the Institute's controlling thesis, *UNCAT and jus cogens: A contemporary perspective*, and the Institute's Advisory Opinion on *Medellín*..

## APPENDIX A: DOCUMENTED TEXAS MATERIALS AND SOURCE CLASSIFICATION[11]

**Method and scope:** This Appendix preserves bounded observations arising from Texas matters identified in the Institute's amicus publication and related reviewed records. It does not quantify statewide prevalence, infer findings beyond the reviewed matters, or convert an IAJ standard into controlling law. Each proposition below identifies whether it concerns statute, evidence, IAJ analysis, or proposed reform.

### A. IAJ Investigation Findings: Texas

In the Texas matters reviewed by the Institute, the records raised recurring questions concerning access to investigative material, preservation and reliability of child-interview evidence, individualized findings, and the relationship between the scope of intervention and the documented risk. The cited IAJ amicus publication contains the matter-specific record and proposed safeguards.

#### *1. Attorney-Only Evidence Access*

Texas Family Code § 261.201 establishes confidentiality. Subsection (k) requires an investigating agency other than DFPS or the Texas Juvenile Justice Department, on request, to provide specified information to a parent, managing conservator, or other legal representative, subject to the alleged-perpetrator restriction; subsection (l) requires withholding and redaction of specified identifying and confidential information. Other subsections, protective orders, and case-specific rulings may also govern access.[12]

**Source classification and finding:** The statute does not categorically permit attorney access while excluding every form of direct parental access. The IAJ record instead concerns whether the access actually provided in the reviewed matters permitted meaningful and safe participation after lawful redaction and protection. That is a case-specific evidentiary and due-process inquiry.

#### *2. Forensic Interview Procedures*

The reviewed materials identified child-interview evidence for which completeness of recording, question structure, preservation, disclosure, and adherence to recognized reliability practices required examination. Continuous recording and NICHD-type protocols are stated here as IAJ reliability standards and proposed safeguards unless a controlling Texas source independently requires them.

[11] Institute for the Advancement of Justice & Human Rights, IAJ Amicus to the Supreme Court of Texas. The companion publication is cited by title only; see Appendix B.

[12] Tex. Fam. Code § 261.201(k)–(l). The applicable statutory version, agency, disclosure provisions, redactions, protective measures, and case-specific orders must be checked for each investigated matter.

**Bounded finding:** Missing or incomplete recordings and suggestive methods may materially impair reliability assessment. Whether a particular statement is admissible or constitutionally sufficient remains governed by Texas evidence law, due process, and the actual record.

### *3. Disproportionate State Responses*

The reviewed matters also presented allegations that the scope of proposed or imposed intervention extended beyond the conduct, parent, child, or risk identified in the record, without adequately documented consideration of less harmful alternatives.

**Bounded finding and source classification:** Those facts, if proved, are probative under the applicable statutory, constitutional, Article 1 or Article 16 analysis. They are not declared per se federal violations. The IAJ recommends express individualized findings connecting each measure to the documented risk and explaining why authorized less harmful alternatives are inadequate.

### B. Texas Constitutional Provisions

Texas Constitution article I, § 37 recognizes parental rights and directs protection of those rights according to its text and governing Texas law. In *In the Interest of K.N., K.L., K.L., and K.L., Children*, No. 24-0881 (Tex. June 5, 2026), the Supreme Court of Texas declined to chart the new provision's full parameters while applying the standards governing the case before it. This Opinion therefore does not cite that decision as adopting universal strict scrutiny for every parent–child dispute.[13]

Other states have different constitutional provisions. State constitutional protections may exceed federal requirements, but their content and remedy must be established under the controlling state sources.

### C. Limitation of Texas Findings

The findings above are confined to the identified reviewed matters and source record. They do not establish identical statewide or nationwide failures. Aggregation beyond those matters requires a defined case universe, source inventory, inclusion method, verification status, contrary evidence, and stated basis for inference.

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## APPENDIX B: SELECTED AUTHORITIES AND COMPANION PUBLICATIONS

### Key Legal and Institutional Sources

**Constitutional provisions:** U.S. Const. art. VI, cl. 2; amends. V, VIII, XIV.

[13] In the Interest of K.N., K.L., K.L., and K.L., Children, No. 24-0881, Supreme Court of Texas, opinion and judgment (June 5, 2026).

**Treaty and institutional materials:** UNCAT; U.S. Instrument of Ratification; S. Exec. Rep. No. 101-30; General Comments Nos. 2 and 3; CAT/C/USA/CO/3-5.

**Supreme Court decisions:** *Lehman*; *Charming Betsy*; *Medellín*; *Ex parte Young*; *Santosky*; *Lassiter*; *Mathews*; *Troxel*.

**Other judicial authorities:** *Filártiga*; *Siderman de Blake*; *Jurisdictional Immunities of the State*; *Jones v. United Kingdom*; *In the Interest of K.N., K.L., K.L., and K.L., Children*.

**Companion publications of the Institute** cited in this Opinion are cited by title only, in the body, the footnotes, and this appendix. Document control numbers are not used for companion publications because those instruments are revised without notice; each is identified authoritatively by its title as published by the Institute.

• UNCAT and jus cogens: A contemporary perspective

• A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States

• IAJ Amicus to the Supreme Court of Texas

• The Completion of the Non-Self-Execution Analysis: Medellín v. Texas, the Equivalence Representation, and the Test of Domestic Equivalence (forthcoming)

IAJ ADVISORY OPINION: ON THE BOUNDED APPLICABILITY OF LEHMAN v. LYCOMING COUNTY CHILDREN'S SERVICES AGENCY, 458 U.S. 502 (1982) IN LIGHT OF SUBSEQUENT UNCAT RATIFICATION AND TREATY SUPREMACY PRINCIPLES

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