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THE CHECKERED CAREER OF PARENS PATRIAE: 
THE STATE AS PARENT OR TYRANT?

George B. Curtis*

In this Article, Mr. Curtis discusses the development and use of the parens patriae doctrine from its early English origins to its modern American employment in cases involving juveniles, mental incompetents, and the protection of interests held by the general populace. He urges that the experience courts have gained over the years be wisely utilized in any future expansion of this doctrine, which has the potential to be either the cloak of much needed state protection or the sword of state abuse.

INTRODUCTION

The term parens patriae has enjoyed or, better, endured a varied history of both usage and interpretation. Historically, it has referred to the king as father and protector of his people. While American courts have accepted this aspect of the sovereign prerogative and incorporated it into their decisional jurisprudence, American case law has developed another aspect of the parens patriae power, the state’s action as “quasi-sovereign.” This theory permits the state to bring suit as a guardian of the well-being of its general populace and economy. The vague parameters of the parens patriae doctrine have accommodated this exercise of state power. However, this same lack of firm conceptual boundaries has been responsible for some abuses of state authority. Consequently, under the aegis of parens patriae, actions which may be sanctioned as parental in purpose are, in reality, less wholesome in effect. This Article will consider some of the past and current theories of the state as a protective guardian.

The concept of parens patriae has exhibited a remarkable staying power. Rebuked in one branch of the law, it makes its appearance in another; even when circumscribed, it remains actively viable within its new limits. Because it is uninhibited by a strict conceptual or precedential definition, this theory imparts an ex-

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tensive discretionary power to the court, agency, or government which is able to justify its usage.

**The King's Prerogative**

The royal prerogative formed one of the central tenets of the common law. Blackstone described the direct prerogatives as "such positive, substantial parts of the royal character and authority, as are rooted in and spring from the king's political person . . . ." By virtue of the *Prerogative Regis*, the king was understood to be personally sovereign and to have pre-eminence over all within the realm. Under this theory, the king could do no wrong; he could never die; he was the representative of the state in its dealings with foreign nations; he was part of the legislature, the head of the army, the fountain of justice, always present in all his courts, the fountain of honor, the arbiter of commerce, the head of the church.

*Parens patriae* was an expression of the king's prerogative. As explained by Chitty:

The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first nonage [children]: second, idiocy: or third, lunacy: to take proper care of themselves and their property.

Blackstone adds to the above duties the general superintendence of all charitable uses in the kingdom, which the king exercised through the keeper of his conscience, the chancellor.

1. W. Blackstone, *Commentaries* *239-40.
3. Description of the king's prerogative first gained mention in 17 Edw. 2, cc. 1-16 (1324).
5. W. Blackstone, *Commentaries* *427*. Supervision of charitable trusts as well as the usages mentioned by Chitty, see text accompanying notes 3-5 *supra*, have all found expression in American adjudication. See City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594 (1944) (Supreme Court of New York empowered by statute to act as *parens patriae* for state in caring for persons and estates of incompetents); Fontain v. Ravenel, 58 U.S. (17 How.) 369, 393 (1854) (prerogative powers belong to states); Baptist Ass'n v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1, 47-50 (1819) (disposition of all charitable donations
Initially, *parens patriae* established the king as a protector or supreme guardian of those classes threatened by forces beyond their control. This concept was brought into focus slightly by its appearance in early cases concerning infants. As first stated in *Falkland v. Bertie*:

In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, &c., afterwards such of them as were of profit and advantage to the King were removed to the *Court of Wards* by Statute . . . .

Later, in the famous case of *Eyre v. The Countess of Shaftsbury*, the Countess herself relied on this doctrine to keep the infant Earl within her care:

[T]he Crown, as *parens patriae*, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing, as to take away an infant under thirteen years of age, from so careful a mother as the Countess was . . . .

However, the extension of royal protection to all the children of the realm was an impossible task. In practice, the *parens patriae* theory was applied in cases of wardships of the children of the landed gentry—those children with estates profitable to the

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8. *Id.* at 343, 23 Eng. Rep. at 818. There is some doubt as to the authority for Lord Somers' use of the term *pater patriae*. Only 2 Vernon's reports has him using that term; other reports do not. This doubt is increased by the fact that William Peere Williams who edited 2 Vernon's also reported Eyre v. Shaftsbury which referred to the king as *pater patriae*. 2 P. Wms. 103, 24 Eng. Rep. 659 (Ch. 1722).

9. 2 P. Wms. 102, 24 Eng. Rep. 659 (Ch. 1722).

10. *Id.* at 104, 24 Eng. Rep. at 659. Through an interesting turn of both legal reasoning and testamentary rights, Justice Eyre won the case while the Countess, with the Justice's permission, retained custody. Her appeal to *parens patriae* received the approval both in this case and in a later one which dealt with the subsequent activities of the young earl. See 2 P. Wms. at 118, 24 Eng. Rep. at 664.
realm and subject to the concupiscence of their relatives. Wardship of his tenants' infant heirs assured the king income; sale of the wardship could produce needed revenues. As can be seen in *Falkland v. Bertie*, the profit motive was clearly at the forefront of the king's decision to offer his protection. This application of *parens patriae* to lucrative wardships served to narrow the ultimate limits of the concept.

While the actual origins of the term *parens patriae* remain unclear, both commentators and judges have agreed that it was founded in the *Prerogative Regis* and applied essentially to three groups: children, mental incompetents, and charities. Practical forces such as pecuniary interests served to focus the king's interest on these three classes. Unlike its modern American counterpart, the English common law forbade the sovereign or his chancery court to intrude into distinctly political areas or to claim jurisdiction over criminal matters. Although other areas of the king's prerogative might justify such intrusions, *parens patriae* was limited to a parental concern for dependent classes.

**Juvenile Reform and the King's Prerogative**

In their headlong rush to embrace the doctrine of *parens patriae* as the justification for the juvenile court movement, reformers both of the nineteenth and twentieth centuries overlooked two fundamental aspects of the chancery court's *parens patriae* jurisdiction. They failed to perceive the economic interests which underlay much of the king's activity as public protector. More significantly, the reformers seemed to miss completely

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11. The property nexus of the term was specifically alluded to by Lord Eldon in the 1827 case of Wellesley v. Duke of Beaufort, 2 Russ 1, 38 Eng. Rep. 236 (Ch. 1827). While he admitted that the court of chancery acting under the king's powers could consider all cases involving infants, this was a physical impossibility, "because the Court could not take on itself the maintenance of all the children in the kingdom." *Id.* at 21, 38 Eng. Rep. at 243. Rather, the operative criterion was property:

   With respect to the doctrine that this authority belongs to the King as *parens patriae*, exercising a jurisdiction by this Court, it has been observed at the Bar, that the Court has not exercised that jurisdiction unless there was property belonging to the infant to be taken care of by this Court.

   *Id.* at 20, 38 Eng. Rep. at 243.

the subtle, yet crucial, fact that the doctrine embraced the dependent and not the delinquent child.

English children who received royal protection had not violated the norms of society; rather, they had summoned the care of the realm because of their dependent and propertied status. The motivating reason to apply the parens patriae theory was the need to support and to care for children, not to reform or rehabilitate them. The chancery courts, in applying and developing the theory, did not have to grapple with the problems of deviant conduct. The theory was conceived to aid the child who stood as a source of hope for the kingdom, not as a threat to its stability.

The early reformers either failed to notice or chose to ignore the fundamental nature of the chancery court’s theory and practice under the concept of parens patriae. Instead, they saw its application to the delinquent as “merely a logical extension of the principle of chancery and of guardianship applied in the court of chancery.” The protests of the few reformers, who sensed the radical transformation underlying this movement and who believed the concept of parens patriae inadequate to support the concept of a juvenile court, were ignored. The reform movement was delighted to have a theory available which would treat the delinquent like a dependent child. The theory made it possible to mask any element of societal fear of the child and to concentrate on hopes of rehabilitation.

Such a wholesale disregard for the antinomies latent in this use of parens patriae had immediate results. The nineteenth century witnessed some of the earliest recorded efforts in this country to deal with the phenomenon of delinquency in a public, institutional manner. The thinking of the early 1800’s focused on an

14. See R. Pound, Interpretations of Legal History 135 (1923); E. Waite, The Origin and Development of the Minnesota Juvenile Court 12 (1921); Lindsay, The Juvenile-Court Movement from a Lawyer’s Standpoint, 52 Annals 143-45 (1914); Juvenile Courts 5-6 (1929).
15. The term “antinomy” is Kantian in origin. It refers to a necessary and inevitable conflict in the laws of reason, a paradox which must present itself as the ultimate resolution of each dialectical process. Here the term suggests an unrecognized, yet existing, contradiction. See generally I. Kant, Critique of Pure Reason 249-334 (Meiklejohn transl., Everyman’s Library ed. 1934).
awareness of childhood as a distinct phenomenon, a stage of growth in human development deserving of the care and attention its pliant nature demanded. At the same time, in the midst of developing urban areas such as New York, Philadelphia, and Boston, the negative aspects of juvenile behavior attracted public concern. The juvenile delinquent stood in sharp contrast to the celebrated innocence of childhood. Consequently, under the banner of parens patriae, reformers launched plans to save the delinquent, to relieve the circumstances of his development, and to set him once more on the path of righteousness.

This path proved to be difficult to find and often was obstructed by the anxieties of the reformers themselves. These reformers were convinced that the juvenile delinquent was not simply an innocent gone wrong; he was also the social deviant threatening public safety and order. Thus, the child was not only to be delivered but also restrained from activities which were contrary to the social norms of the reformers. As the managers of the New York House of Refuge viewed their task in the early 1800's:

These little vagrants, whose degradations provoke and call down upon them our indignation are yet but children who have gone astray for want of that very care and vigilance we exercise towards our own. They deserve our censure, and a regard for our property, and the good of society, requires that they should be stopped, reproved, and punished.

An emphasis on atonement and punishment was common to the regimen of most houses of refuge or juvenile asylums. The children were to be persuaded of the error of their ways and made to suffer for them. Expiation, in the form of punishment, provided both the most convenient method of conversion and, it

16. The nineteenth century can well be described as the century of the child. Little Eva and Pearl represented the child's entrance into the novel. Child nurture literature developed while advice to youth literature celebrated the idealism of youth and reflected the connection between youth and the revivals. See, e.g., PHILIPPE ARIES, CENTURIES OF CHILDAHOOD (1962); Banner, Religion and Reform in the Early Republic: The Role of Youth, 23 THE AM. Q. 677, #5 (1971); Kett, Adolescence and Youth in Nineteenth Century America, 2 JOURNAL OF INTERDISCIPLINARY HISTORY 283, #2 (1971).

seems, a suitable form of justification for the reformers. 18

These contrasting themes of hope and fear found easy reconciliation in a concept of parens patriae which had been detached from its historical moorings. One of the earliest judicial endorsements of this concept's role in the "reformation" of the deviant child was articulated in Ex parte Crouse 19 in which the father of Mary Ann Crouse brought a habeas corpus action against the Philadelphia House of Refuge. The child had been committed to the House of Refuge by her mother who alleged, "that the said infant by reason of vicious conduct, has rendered her control beyond the power of the said complainant, and made it manifestly requisite that from regard to the moral and future welfare of the said infant she should be placed under the guardianship of the managers of the House of Refuge." 20 The court denied the father's petition and endorsed the actions of the state and institution:

The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. 21

The concept of parens patriae, under the force of such judicial reasoning, evolved from theory to doctrine. 22 The state could in-

18. See Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 4
19. 4 Whart. 9 (Pa. 1838).
20. Id. at 10.
21. Id. at 11.
22. For examples of this evolution see In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1967)
(juveniles entitled to same standard of proof in criminal proceedings); Creighton v. Pope Co., 320 Ill. App. 256, 50 N.E.2d 984 (1943) (duty of government to care for those of its citizens who are unable to care for themselves); People v. Lyons, 374 Ill. 557, 30 N.E.2d 111 (1946) (support of paupers within the state police power); Lindsay v. Lindsay, 247 Ill. 328, 100 N.E. 892 (1913) (Juvenile Court Act upheld); County of McLean v. Humphreys, 104 Ill. 378 (1882) (state may provide for care of indigent infants); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925) (jurisdiction of state to regulate custody of its infants not
vade the home, replace the parents, and take custody of the child. However, the purpose of such action was not solely to foster the well being of the child, but to protect the security and well being of the state. Hopefully, the child would save the state as well as the state the child.

Both reformers and courts imagined the child to be subject totally to the influence of his environment. His mind was a blank slate on which the parent and society could write the demands of citizenship. This environmentalist psychology was an underlying tenet in the conceptual framework of the parens patriae theory as applied to juveniles. However, research at the turn of the century showed that environmental psychology could not provide all the answers to the complex problems of juvenile delinquency.23

Despite certain theoretical inconsistencies, parens patriae has evidenced remarkable staying power. It formed the basic rationale for the operation of the juvenile court system and, to a limited extent, still functions in that role today. Its popularity in juvenile reform largely stems from its parental nexus in which the state as parent is viewed as capable of achieving only good.

Roscoe Pound observed that "the powers of the [Star Chamber] were a trifle in comparison to those of our juvenile courts." It took a direct confrontation in the Supreme Court to pierce the veil of parental protection which had shielded juvenile court proceedings from the requirements of constitutional due process. In Kent v. United States25 and In re Gault26 the Court focused on

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23. See W. Healy, Mental Conflicts and Misconduct (1917); Healy & Bronner, Youthful Offenders: A Comparative Study of Two Groups, Each of 1000 Young Recidivists, 23 Am. J. Sociology §24 (1916); E. Ryerson, Between Justice and Compassion: The Rise and Fall of the Juvenile Court 144-68 (1970) (unpublished doctoral dissertation in the Yale University Library) for a discussion of the Freudian and behaviorist theories which similarly undermined the environmentalism of parens patriae.


the essential issue in any judicial proceeding—the liberty of the individual. In the face of this consideration, the juvenile justice system had failed miserably. As Mr. Justice Fortas stated in an oft-quoted phrase, "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court." 27

Although the Court in the Kent and Gault decisions did not eliminate the concept of parens patriae from American jurisprudence, it did attempt to reconcile its operation with the demands of due process. The work of reconciliation is by no means complete. The ultimate scope of due process rights available in juvenile court proceedings has not yet been determined. Issues such as the right to a jury trial, 28 the right to receive Miranda warnings, 29 and the procedure of waiver hearings 30 continue to emphasize the conflict.

The conflict between due process and parens patriae has not been limited to the juvenile courts. It has also reached into another area of the king's prerogative, the protection and care of the mentally ill. Perhaps the most innovative device developed by the judiciary in attempting to restrain the wide ranging discretion afforded by parens patriae is the right to treatment doctrine established by the United States Court of Appeals for the Seventh and Fifth Circuits. The decisions in which this right to treatment has been elaborated serve also to show the interchange between the rights of juveniles and the status of the mentally ill. 31

In Nelson v. Heyne, 32 the Seventh Circuit considered a class action seeking declaratory and injunctive relief with respect to the programs of the Indiana boys school, a medium security correctional institution for boys 12 to 18 years of age. The court held that juveniles confined in this institution have a right to

27. Id. at 28.
29. See, e.g., United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973).
30. See, e.g., Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968).
31. The Kent Supreme Court opinion, as well as its remand at 401 F.2d 408 (D.C. Cir. 1968), shows the interconnection between the areas of juvenile rights and the rights of the mentally ill. Kent was found by the district court to be suffering from a serious mental illness. Reviewing the remand case, the circuit court held the district court finding to be sufficient to render waiver “inappropriate.” Id. at 409.
32. 491 F.2d 352 (7th Cir. 1974).
rehabilitative treatment and found, further, that the system of behavioral classification employed at the school did not provide adequate rehabilitative treatment. Citing an earlier district court case, Martarella v. Kelley, the court described a trend in recent state and federal decisions grounded in a "concern—based on the parens patriae doctrine underlying the juvenile justice system—that rehabilitative treatment was not generally accorded in the juvenile reform process . . . ." thereby neatly praising and condemning parens patriae as established by these recent opinions in holding that juveniles have a constitutional right to treatment.

The Martarella decision had established a quid pro quo relationship between the state's custody of children classified as Persons in Need of Supervision (PINS) and its providing adequate treatment for them:

[H]owever benign the purposes for which members of plaintiff's class are held in custody, and whatever the sad necessities which prompt their detention, they are held in penal condition. Where the State, as parens patriae, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee.

Nelson and Martarella then served as precedent for the Fifth Circuit's decision in Donaldson v. O'Conner. In this case a former mental patient, who had been involuntarily restrained under civil commitment procedures, sued his attending physicians and others for deprivation of his constitutional right either to receive treatment or be released from the state hospital. Judge Wisdom found that the patient had a constitutional right to such treat-

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34. 491 F.2d at 359.
35. Id.
36. 349 F. Supp. at 585. The real difficulty, the district court pointed out, was that while treatment is the quid pro quo for exercise of the state's rights as parens patriae, the cases so holding offer little guidance as to standards for determining adequacy. Cf. O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring).
ment as would help him towards a cure or improve his mental condition. The court concluded:

[P]ersons committed under what we have termed a parens patriae ground for commitment must be given treatment lest the involuntary commitment amount to an arbitrary exercise of government power proscribed by the due process clause. 38

On appeal to the Supreme Court, Justice Stewart, speaking for a unanimous court, limited his opinion to the issue of the state’s right to confine a non-dangerous individual who is capable of surviving safely in freedom. The Court refused to consider the Fifth Circuit’s discussion of the right to treatment at this time, vacated the judgment of the lower court, and remanded the case for consideration of possible defenses to the action. 39 The Court’s refusal to discuss the right to treatment, however, does not lessen the impact of this right on the parens patriae power of the state. In the area of confinement of both the juvenile and the mental patient, the right to treatment will continue to function as the only logical elaboration of a quid pro quo responsibility placed on the state for the exercise of its parental power.

Other courts have utilized this line of reasoning in considering the procedural fairness of commitment hearings. 40 The burden of proof required in the proceeding furnished them with an opportunity to elaborate the quid pro quo theory, which has at its base the balancing of interests between the individual’s liberty and the state’s concern for the protection of both the individual and the society as a whole. 41

This delicate balance struck between the interests of the indi-

38. 493 F.2d at 521. As in Nelson v. Heyne, the Fifth Circuit cited Gault as justification for its quid pro quo theory. Id. at 524 n.33.
40. See, e.g., In re Ballay, 482 F.2d 648 (D.C. Cir. 1973) (“beyond a reasonable doubt” standard should be applied in commitment proceedings); Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971) (civil rights suit may be used to challenge constitutionality of competency hearings); United States v. Maroney, 355 F.2d 302 (3d Cir. 1966) (party in commitment proceedings has right to confront and cross-examine witnesses against him).
41. The court in In re Ballay, 482 F.2d 648 (D.C. Cir. 1973), pointed out that parens patriae had not until recently encountered the concept of treatment as part of the required care for the mentally ill: “It was not until the mid or late nineteenth century that therapy took its place beside detention in the American model.” Id. at 659. Cf. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).
individual and the concerns of the state forms the goal of the more recent parens patriae cases. It perhaps is illustrated best in the case of Wisconsin v. Yoder in which Amish respondents were convicted of violating Wisconsin's compulsory school attendance law by declining to send their children to public or private school after they had graduated from the eighth grade. The Court reversed the convictions and, citing Pierce v. Society of Sisters as the "charter of the rights of parents to direct the religious upbringing of their children," held that the first amendment required a balancing between the interests of the state in the education of its young and the parents' free exercise of their own religion. The Court noted, however, that the Pierce charter of rights would not be the decisive factor if the child's health or safety were jeopardized. In this manner the Court was able to distinguish Yoder from Prince v. Massachusetts which had formed the mainstay of the state's prosecution.

The state's powers under parens patriae are not unlimited. The Gault decision has initiated a critique long overdue in the area of juvenile rights; first amendment issues and the constant reconsiderations of the dictates of due process have resulted in a quid pro quo formula which has put the doctrine of parens patriae on the defensive. Increasingly, the proponents of parens patriae must prove that its exercise accords with due process, and the concept must today compete with other individual interests meriting judicial attention which frequently will outweigh the parental concern of the state.

Unfortunately, the lessons of Gault and subsequent decisions have not enjoyed universal application. In the area of parole board jurisdiction, for instance, the courts have placed an

42. 406 U.S. 205 (1972).
43. See also Stanley v. Illinois, 405 U.S. 645 (1972) (unwed fathers entitled to hearing on their fitness as parents before they can be deprived of custody of their children).
44. 268 U.S. 510 (1925).
45. 406 U.S. at 209, 230-31. The Yoder Court held that parents' free exercise rights, and not those of the children were at stake.
46. 321 U.S. 158 (1944) (holding that the state had a wide range of powers to limit parental authority in matters which could result in danger or injury to the child's welfare and could, on that basis, validly enforce an absolute prohibition against certain religious conduct).
47. See, e.g., Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297 (7th Cir. 1973); Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), on the obscenity issue and state laws relating to it.
unquestioning reliance on *parens patriae* which, in light of adjudication in other areas of the law, seems risky at best. In this regard the decision of *Hyser v. Reed*\(^4\) well illustrates the unfettered power of *parens patriae*:

[T]here is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. . . . Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege.\(^4\)

In a 1972 decision, the Supreme Court demanded that an informal hearing be held in any parole revocation proceeding and spelled out minimum requirements of due process.\(^5\) The Court, however, while limiting the absolute *parens patriae* discretion awarded below, maintained a large amount of discretion in the board on the ground that parole revocation is not a part of the criminal prosecution and, therefore, does not require the full panoply of procedural rights.\(^5\) Significantly, no mention of *Gault* appeared in the decision. Thus, the lessons of *Gault* and its exposition of the tension between *parens patriae* and individual liberty have not yet been appreciated fully.

**THE QUASI-SOVEREIGN TENET OF PARENS PATRIAE:**
**AN AMERICAN INNOVATION**

In addition to an elaboration of the prerogative powers of *parens patriae*, American courts have developed an interpretation and application of this concept which goes beyond and is separate from the powers originating with the king's prerogative.

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This development permits the state to act in a "quasi-sovereign" capacity for the purpose of protecting the well-being of its entire populace and its economy. As a quasi-sovereign, the state no longer seeks to protect a dependent class; rather, its interest lies in the protection of the entire patria.

This expansion of the traditional parens patriae concept developed through a series of cases involving the Supreme Court's original jurisdiction to decide controversies between states or between a state and a citizen of another state. In deciding these suits, the Supreme Court acts as an arbiter between quasi-sovereign interests.

In Georgia v. Tennessee Copper Co., Justice Holmes described the state's quasi-sovereign interests as being "independent of and behind the titles of its citizens, in all the earth and air within its domain." In this case the Court enjoined Tennessee manufacturing companies from discharging noxious gas over Georgia's territory. The Court's analysis in Tennessee Copper followed that of an earlier decision, Missouri v. Illinois, wherein the State of Missouri had been granted leave to file a bill seeking to enjoin the discharge of sewage into the Mississippi River. There the Court had observed that "if the health and comfort of the inhabitants of a state are threatened, the state is


54. As Charles Wright has noted, without this judicial mechanism the probable resolution of such disputes would involve lengthy diplomatic negotiations and perhaps force. C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS §109, at 500 (2d ed. 1970).

55. 206 U.S. 230 (1901).

56. Id. at 237.

57. The common law action for abatement of a public nuisance often forms the basis for a court's recognition of the state's quasi-sovereign standing. See, e.g., Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 505 (1971) (dissenting opinion); In re Debs, 158 U.S. 564 (1895).

58. 180 U.S. 208 (1901).
the proper party to represent and defend them." By the time Missouri v. Illinois arose, the rationale behind the recognition of a state's standing to sue under the original jurisdiction of the Supreme Court already had been elaborated in the case of Kansas v. Colorado in which Kansas sought an order to restrain the diversion of water from the Arkansas River, an interstate stream. The Court, in upholding the right of Kansas to maintain the suit, stated:

It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint.

Building upon these early cases, the Court, in time, was called upon to expand the parental jurisdiction of the states to cases concerning the protection of interests not cognizable under the traditional limited concept of nuisance. Perhaps the most remarkable exercise of the Court's original jurisdiction in this regard occurred in the case of Georgia v. Pennsylvania R.R., in which the state of Georgia sought leave to file in its quasi-sovereign capacity to protect her people, as parens patriae, against a continuing economic wrong. The wrong in this instance was an alleged antitrust violation arising from a conspiracy among the defendants to restrain trade and commerce among the states. The Court granted leave to file and based its decision solely on the parens patriae standing of the state to bring the antitrust suit. The Court stated:

60. 206 U.S. 46 (1907).
61. Id. at 99. See also Colorado v. Kansas, 320 U.S. 383 (1943); North Dakota v. Minnesota, 263 U.S. 365 (1923); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

There are few problems with this usage insofar as it allows the state to protect the interests of the entire state through injunctive relief. This was the purpose of cases such as Tennessee Copper and Missouri v. Illinois where the state instituted suit to protect against pollution or Kansas v. Colorado where the state sought to prevent diversion of the state's natural resources. In each of the above cases the state sought injunctive relief and in so doing properly fulfilled its role as parens patriae.

Georgia as representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia’s interest is not remote, it is immediate. If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of that [sic] gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.63

The Georgia case would serve as precedent years later in the discussion of the propriety of awarding damages in parens patriae antitrust suits.64 This question, however, was not presented to the Georgia Court.65 Rather, the Court was anxious to answer the charge that their decision ran counter to the holding in Massachusetts v. Mellon66 where the Court refused to allow a state, acting in its parens patriae capacity, to challenge a federal statute. There the Court, in effect, held that the federal government functioned as the ultimate parens patriae authority when it exerted its legislative authority.67 The Georgia Court distinguished Mellon on the ground that the present suit did not challenge a federal statute.68 But Justice Douglas, on other occasions,

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64. See text accompanying notes 73-82 infra.

65. Damages were denied in the Georgia case, but not due to the parens patriae nature of the action. Rather, the Court refused damages on the ground that the rates charged had been approved by the Interstate Commerce Commission (ICC). See Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

66. 262 U.S. 447 (1923).

67. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (citations omitted), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as parens patriae, when such representation becomes appropriate; and to the former and not to the latter, they must look for such protective measures as flow from that status.

68. Id. at 485-86.

69. 324 U.S. 439, 446-47 (1945).
has taken care to point out that the *Mellon* holding never established a per se rule that any *parens patriae* challenge to a federal statute is invalid. 69 Moreover, recent cases have argued that the *Mellon* decision should be construed narrowly so as not to prejudice the role of the state as protector of its citizens. 70 Nevertheless, it has been the states, rather than the federal government, which in the course of American adjudication have shown the stronger tendency to sue in the *parens patriae* capacity. 71

In recent years the Supreme Court has shown reluctance to utilize its original jurisdiction in *parens patriae* suits, preferring instead to channel the suits through the federal courts below. 72 This reluctance has not, however, removed the Court from discussion which has recently embroiled the federal judiciary concerning the question of damages in *parens patriae* antitrust suits. In

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69. See Massachusetts v. Laird, 400 U.S. 886 (1970) (dissenting opinion). Douglas asserted that the *Mellon* opinion did not establish a per se rule to bar all suits against the Federal Government as *parens patriae*. The language of *Mellon* supports his interpretation: "We need not go so far as to say that a State may never intervene by suit to protect its citizens from any form of enforcement of unconstitutional acts of Congress. . . ." 262 U.S. 447, 485 (1923). Douglas cited South Carolina v. Katzenbach, 383 U.S. 301 (1966) as support. There a state sought to restrain the Attorney General from enforcing portions of the Voting Rights Act of 1965. The Court held that the state lacked standing to challenge the statute under the due process clause of the fifth amendment or the bill of attainder clause of article I, citing *Massachusetts v. Mellon*. But the Court did consider and reject the state's claim that the statute violated the fifteenth amendment. For this proposition it cited Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). The Court's failure to explain why the state has standing to raise the fifteenth amendment claim but not the others is troubling.


71. *But see In re* Debs, 158 U.S. 564 (1895); United States v. United Steelworkers, 271 F.2d 676 (3d Cir. 1959). F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960), shows the United States acting as *parens patriae* for the Indians in a particularly heavy-handed manner. There the Court construed the relevant portions of the Federal Power Act to invest the federal government with the power to vacate any disposition of Indian land by the Indians without their consent. The federal government, as *parens patriae*, was to "prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them . . . ." In other words, the federal government was to save the Indians from themselves, 362 U.S. 99, 119 (1960).

Hawaii v. Standard Oil Co. of California, the Supreme Court held that section 4 of the Clayton Act does not authorize a state to sue for treble damages for an injury to its economy allegedly attributable to a violation of the antitrust laws. While the Court recognized the state's standing to sue in its parens patriae capacity as protector of the economy of the state, it distinguished between the state’s proprietary capacity, for which it would allow the state standing to sue for treble damages under section 4, and the state's parens patriae quasi-sovereign capacity, for which the Court would allow injunctive relief but not damages. The Court based its reading of section 4, in part, by analogy to 15 U.S.C. § 15(a), the provision authorizing recovery in damages by the United States and also limiting recovery to business or property damages. Furthermore, the opinion focused attention on the difficulty of assessing damages to a state's economy and the danger of duplicative recoveries. These two factors brought the majority to a method of fashioning federal remedies which Justice Douglas described as "miserly."

In refusing standing to sue for treble damages, the Hawaii Court noted that such damage actions could be conducted better through class actions under Rule 23 of the Federal Rules of Civil Procedure. The state, presumably in its proprietary capacity since its quasi-sovereign jurisdiction was deemed inadequate to the task, could bring the class action as a proper representative

73. 405 U.S. 251 (1972).
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
75. 405 U.S. at 258-59.
76. Section 15a states:
   Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

For comparison with 15 U.S.C. § 15, see note 74 supra.
77. For a critique of this analysis see 18 Vill. L. Rev. 79, 92 (1972).
78. 405 U.S. at 266.
of the injured members of the class. Considerable academic research has supported the Court's opinion. In light of the history of quasi-sovereign standing under the parens patriae doctrine, the Court's opinion seems well justified.

The state's argument in favor of treble damages in cases brought by the state in its parens patriae capacity ignores the development of the quasi-sovereign doctrine and confuses the prerogative with the quasi-sovereign basis of parens patriae actions. Justice Holmes' dictum in Tennessee Copper that quasi-sovereign interests are "independent of and behind the titles of its citizens . . ." had gained recognition as the central premise of the quasi-sovereign suit. In that capacity the state sues not on behalf of its own proprietary interests which might be injured, but on behalf of the entire state, as Holmes described it, "[A]ll the earth and air within its domain." The hallmark of the quasi-sovereign suit has been the injunction to stop injury to the totality of the state's commonwealth. Damages are not only unsuited to this theory of state relief, they also defy measurement. No common law precedent exists to support payment of damages sustained by a particular group of persons to whatever body chooses to sue. Those who would allow the state that power commit the error of confusing the American precedent of quasi-sovereign interests with the common law precedent of the sovereign's prerogative responsibility of caring for the dependent classes of the realm. The result of this confusion amounts to what two noted authors have described as a "Robin Hood" theory of justice through which the state takes from the corporate malefactors to give to the dependent consumer. While romantic

79. See Pfizer v. Judge Lord, 522 F.2d 612, 616-18 (8th Cir. 1975). The fourth count of the complaint in the Georgia case sought damages on behalf of private parties—shippers who had incurred overcharges resulting from the alleged conspiracy. The Court only ruled on two other counts and did not award damages. See note 65 supra.

This discussion of standing does not by any means exhaust the parens patriae cases on the topic. For instance, on the subject of standing and trusts, see Evans v. Abney, 396 U.S. 435, 457 (1970); City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594, 597 (1945); Mount Vernon Mortgage Co. v. United States, 236 F.2d 724, 725 (D.C. Cir. 1956), cert. denied, 352 U.S. 988 (1957).


in concept, this theory is both legally and practically impossible to achieve.

Nevertheless, like the concept of parens patriae, the theory of a treble damages action, brought by the state in its quasi-sovereign capacity, has exhibited a strong staying power. Legislation has been before Congress since early 1976 which would allow the states' attorneys-general to sue for treble damages based upon the states' quasi-sovereign authority. While the likelihood of passage of either the House or Senate versions appears slight, the vague aura that surrounds the central concept of parens patriae continues to sustain the adherents of the bills.\textsuperscript{83}

CONCLUSION

The crisis of the Hawaii decision was inevitable. The breadth of action encouraged under the king's prerogative was bound to influence quasi-sovereign actions and to produce the resulting confusion. It has taken more than seventy years to domesticate parens patriae to the demands of due process in the area of juvenile rights, and that contest continues. Ripped from its historical context and applied to the delinquent as well as the dependent, this concept has shown a tendency to inspire absolute discretionary power.

A similar danger exists in the area of quasi-sovereign interests. The power of parens patriae tends to be expansive. This results, in part, from the fact that the concept is not foreign to either our heritage or our philosophy of government. We have seen the king's role as protector of the weak and dependent classes under his prerogative. The state has assumed this mantle.\textsuperscript{84} Unchecked,

\textsuperscript{83} At this writing, the Senate antitrust reform package, S. 1284, 94th Cong., 2d Sess. (1976), of which the parens patriae bill is a part, was tied up in the Senate Judiciary Committee with a filibuster threatened. The bill's co-sponsors, Senators Hart and Scott, have agreed to amendments which would alter the parens patriae portion by not allowing the state attorneys general to sue for damages to the "general economy" of the state as measured by loss of tax revenues. Amendments would also limit such actions to violations of §1 of the Sherman Act, allow the court to set the amount of attorney fees to be awarded plaintiff attorneys, and assure that parens patriae provisions would not apply to civil actions pending at the time the law was passed. 752 ATTR A-5. The House version of the bill, H.R. 8532, 94th Cong., 2d Sess. (1976), recently passed the House Rules Committee and is now awaiting floor debate. 751 ATTR A-3.

\textsuperscript{84} See Fontaine v. Ravenel, 58 U.S. (17 How.) 369, 391-96 (1854) (Taney, C.J., concurring); Baptist Ass'n v. Hart's Ex'rs., 17 U.S. (4 Wheat.) 1, 47-50 (1819) (Marshall, C.J.);
however, this power will lead to total intrusion by the state into the personal lives of its members. The task of preserving the state as a protective agent while acknowledging the rights of the individual citizen dictates the establishment of a delicate balance such as appeared in Wisconsin v. Yoder.\textsuperscript{5} Hawaii now sounds this call in the area of the quasi-sovereign potential of parens patriae. Future judicial or legislative attempts to ameliorate the situation will have to keep in mind the need for balance and the factors involved.

Perhaps foremost in their considerations should be the fact that parens patriae is essentially an absorptive doctrine. Just as it easily accommodated the prejudices of the progressive reformers of the late nineteenth and early twentieth centuries, so will it assimilate the obvious and latent prejudices of those who employ it in their cause today. In view of such concerns as due process, both substantive and procedural, employment of the concept parens patriae as a central element in any reform campaign is too dangerous, its potential costs too great, when the likelihood of abusive discretionary power is the probable result. Closely supervised in a well-established procedural framework it may add to any cause, just as it provides an alternative to the criminal justice system in the juvenile court and just as it aided the original jurisdiction of the Supreme Court to arbitrate potentially explosive disputes between the states. Even in those two areas, however, its expansive quality and the dangers it entails have been felt. Employing the doctrine of parens patriae without the cautions offered by its evolution, the state as parent could easily become the state as tyrant.

\textsuperscript{5} See notes 42-45 supra.