

In Praise of *Parens Patriae*

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The individual is increasingly deprived of the moral decision as to how he should live his own life, and instead is ruled, fed, clothed and educated as a social unit... State policy decides what shall be taught and studied.

—Carl G. Jung, *The Undiscovered Self*

Likening public education to “the spiritual and moral darkness of State Absolutism,” Stephen Arons concludes his account of the culture of U.S. schooling with a provocative claim: “So long as individual dignity matters, the individual ought to control his own education; where the individual is too young to make an informed and voluntary choice, *his parents ought to control it*.” He then cites *Pierce v. Society of Sisters*,¹ noting that “the courts have reiterated time and again the general principle that government control of socialization through schooling cannot be used...to make the child ‘the mere creature of the state.’”²

Arons casts educational authority as an all-or-nothing rights contest between parents and the state, yet he provides no rationale for his view that parents ought to have exclusive control. If one substitutes “parental” for “state” in the excerpt at the beginning of this essay, it presents an equally chilling vision of stultified autonomy. After all, any school can become an agent of repression,³ whether by dictating religious orthodoxy (as in many home schools) or pernicious forms of patriotism (as in many public schools).⁴ An education designed merely to satisfy parental rights or merely to further state interests could reduce children to mere means — a profoundly illiberal prospect.⁵

In this essay, I begin with a simple point that often gets drowned out in the hubbub of rights talk⁶ in general and of parental rights talk in particular: children are creatures of state. I then argue that when children are concurrently subject to *parens patriae* educational authority (as creatures of state) and to *parens familiae* educational authority (as the progeny of particular individuals), their independent welfare interests are better protected. These independent interests include an autonomy-facilitating education, which children are far more likely to receive when educational authority is shared between parents and the state.

“The fundamental theory of liberty upon which all government in this Union reposes excluded any general power of the state to standardize its children by forcing them to accept instruction from public teachers *only*,” wrote Justice McReynolds in *Pierce*. “The child is not the *mere* creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.”⁷ These iconic pronouncements have often been interpreted as if the words “mere” and “only” did not matter, as if children were not subject to state authority, as if parents had an exclusive and unfettered right to direct the upbringing and education of their children. This is an untenable interpretation.

To say X is not merely Y is not to say that X is not Y. It is to say that X is, among other things, Y.

The *Pierce* court affirmed that children are no less creatures of state than they are the progeny of particular persons. The Supreme Court of Canada, which often refers to U.S. Supreme Court decisions when scrutinizing constitutional claims, observed that while the *Pierce*, *Meyer*,⁸ and *Yoder*⁹ decisions recognized the constitutionally protected status of family relations, neither the Fourteenth Amendment nor its Canadian counterpart, Section 7 of the *Canadian Charter of Rights and Freedoms*, gives parents a right to educate children any way they see fit. In *R v. Jones*,¹⁰ a fundamentalist preacher who had been teaching his children (and others) in the basement of his church was charged under the truancy provisions of the Alberta School Act. Although parents were permitted to tutor children at home or to organize private schools, Thomas Larry Jones believed that registering his home school would constitute an acknowledgment that the province, not God, had the final say in the education of his children.¹¹ Jones alleged violations of both his religious freedoms under s. 2(a) and of his liberties under s. 7 of the *Charter*.¹² The Canadian Supreme Court unanimously rejected Jones's s. 2(a) claims to religious freedom, noting that the permissiveness of the School Act served "to foster religious freedom rather than to curtail it": "[I]t should not be forgotten that the state, too, has an interest in the education of its citizens," wrote Justice La Forest for the majority.¹³ Quoting the lofty language of *Brown v. Board of Education*,¹⁴ he noted that the state interest in education is both self-evident¹⁵ and sufficiently compelling to justify the imposition of reasonable limits on the freedom of those who believe they should themselves attend to the education of their children in conformity with their religious convictions. Only Justice Wilson, in dissent, noted that while she recognized a parental liberty to educate children in accordance with conscientious beliefs under s. 7, Jones's claim that he had a right to educate his children as he saw fit went too far.¹⁶ Thus the Supreme Courts of both the United States and Canada have limited parental authority and affirmed a legitimate state interest in the education of children.

Children have independent liberty interests that few can invoke on their own behalf. The state can invoke and protect these interests when parents threaten them, and parents can invoke and protect these interests when they are threatened by the state. To the extent that public institutions, including schools, are not co-opted in a manner that unjustly tilts the balance in favor of one or the other, the independent interests of children are more likely to be protected.¹⁷ Put another way, to the extent that *parens patriae* remains robust, home schooling will continue to be restricted, and religious schools will continue to be closely regulated. "Public schooling," notes James S. Liebman, "makes children's autonomy possible: first, by expanding their range of exposure to different options and values in a forum somewhat but not completely independent of their parents; and second, by preparing the child for democratic citizenship."¹⁸ Children who attend diverse, well-funded public schools are more likely than children who stay home with benevolent parents like Jones to be presented with a variety of conceptions of what constitutes a good life. Children

who attend diverse, well-funded public schools are more likely than children who stay at home with malevolent parents like Banita Jacks not to be tortured or killed. Charged for the murder of her four daughters on January 10, 2008, Jacks claimed the girls had been possessed by demons. Experts suggested that a lack of public oversight of home schooling may have made it possible for Jacks to avoid the teachers, social workers, and other professionals — the eyes and ears of the state — who might otherwise have detected signs of abuse.¹⁹

If, to paraphrase John Stuart Mill, causing the existence of a human being is one of the most responsible actions in the range of human life, and bestowing life on someone without providing at least the chance of a desirable existence is a crime against that being,²⁰ then perhaps a parental licensing scheme would be a reasonable means to ensuring no child is born into an abusive home environment. Compelling moral arguments for parental licensing have been advanced by contemporary philosophers.²¹ While it is at least conceivable that unstable persons with a history of violence might be precluded from having children through some sort of licensing program, it is difficult to imagine how persons who would provide all the necessities of life while denying access to ideas might be identified in advance. Instead of regulating reproduction, the state protects its interests and the independent interests of children by making parents subject to compulsory education laws, and by exercising *parens patriae* authority when the well-being of children (including, to some extent at least, their prospective autonomy) is threatened by irrational parental decisions. In exercising *parens patriae* educational authority, the state is not intervening — a term that implies a violation of an exclusive domain. Rather, the state is supervening — a term that implies governance. To supervene is to provide concurrent oversight in order to counter harm.²² The reason for *parens patriae* educational authority, as a Pennsylvania court put it in 1838, is “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.” Accordingly, “[t]he right of parental control is a natural, but not an inalienable one.”²³

“For those who would have the State use its power and resources to improve the lives of children,” cautions James Dwyer, “parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices.”²⁴ Fortunately, the doctrine of *parens patriae* is alive and well in North America, notwithstanding its murky origins²⁵ or the stunning blow it received in the *Yoder* decision.²⁶ A parent may have a “negative claim right” against other persons, who generally have a duty not to interfere with parental actions — the breach of that duty of noninterference being actionable and subject to state enforcement.²⁷ But parents cannot raise a negative claim right against the state itself, particularly when the welfare interests of children are threatened by irrational parental decisions. The availability of state enforcement is the lifeblood of any putative legal right, and while “[p]arents may be free to become martyrs themselves,” to quote Justice Rutledge in *Prince*, “it does not follow they are free...to make martyrs of their children.”²⁸ Unless and until children have made an autonomous decision to accept it, their parents’ faith cannot be ascribed to them.

When parents fail to recognize that the children in their care are persons in their own right, there is a substantial risk of a particular kind of harm defined by Joel Feinberg as “setbacks to interest.”²⁹ Children are harmed not only when parents abuse or neglect them but also when parents foreclose opportunities to flourish — whether by denying consent to medical treatment or access to diverse conceptions of what constitutes a good life.³⁰ For the average layperson, *parens patriae* is more familiar in the former context than the latter. Children whose parents refuse to consent to emergency medical treatments are routinely made wards of the state, which then provides consent on their behalf. In a 1983 Canadian case, the parents of a severely disabled boy refused consent to a shunt removal operation, believing he should be allowed to die. Invoking *parens patriae*, Justice McKenzie wrote, “I am satisfied that the laws of our society are structured to preserve, protect, and maintain human life... The presumption must be in favour of life.”³¹ In a similar 1974 New York case, Justice Asch described the exercise of *parens patriae* authority with great eloquence: “Assuredly, one test of civilization is its concern with the survival of the ‘unfittest’... In this case, the court must decide what its ward would choose, if he were in a position to make a sound judgment.”³²

Judge Asch’s reasoning comports well with the Rawlsian primary good standard for the exercise of paternalistic authority. “Paternalistic decisions are to be guided by the individual’s own settled preferences and interests insofar as they are not irrational, or failing knowledge of these, by the theory of primary goods,” said Rawls. “As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position.”³³ Certainly, as Amy Gutmann has noted, there may be controversy within some religious communities over

the most obvious primary goods we as rational persons would want provided to us as children...adequate nutrition, health care, housing, familial affection, and an education adequate to choosing among available economic and social opportunities and to becoming informed, democratic citizens.³⁴

In exercising *parens patriae* authority, courts do not consider parental wishes. Rather, they ask what the particular child would do if s/he were a competent adult, explicitly giving legal effect to her/his prospective autonomy interests. When a child’s life hangs in the balance, the most neutral standards among competing conceptions of primary goods need not be identified. Considerations of the “best kind of life” are reduced to “life” itself. Thus the exercise of *parens patriae* authority most familiar to laypersons is also its most anemic.

Parens patriae jurisdiction is much broader in a liberal democratic state. The purpose of such a state is not merely to keep people from killing each other. In Aristotle’s immortal words, “if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims, and in a greater degree than any other, at the highest good.”³⁵ In Benedict de Spinoza’s view, the object of government is “to enable [people] to develop their minds and bodies in security and to employ their reason unshackled... In fact, the true aim of government is liberty.”³⁶

“For almost all normal persons in our society, anything that promotes their ‘welfare interests’ in health, economic sufficiency, emotional stability, political liberty, and so on, by that very fact improves the prospects for their various ulterior interests,” says Feinberg. “Indeed, the most important generalized means will be effective ones not only to the achievement of present actual ends, but to a variety of future goals that have not even suggested themselves yet to the person who will one day have a stake in them.”³⁷ I think it is reasonable to view *parens patriae* in this manner — a generalized means by which the state can protect the present and future interests of children and other legally incompetent persons.

Some scholars have suggested that parenting ought to be viewed as a privilege, “a benefit contingent upon the fulfillment of attendant responsibilities.”³⁸ Adopting the Lockean view of parental authority, Dwyer argues that “[n]o one should be entitled, as a matter of right, to control the life of another person, free from outside interference, no matter how intimate their relationship, and particularly not in ways inimical to the other person’s temporal interests.”³⁹ Other scholars have conceptualized parenthood as a form of stewardship,⁴⁰ while still others have cast the fiduciary relationship as an appropriate metaphor for the relationship between parents, children, and the state because “in rearing children parents must fulfill the fundamental objective of the state.”⁴¹ Carl Schneider has criticized this model because “the state cannot effectively prevent people from raising their own children (because it lacks the resources and skill to raise them itself).”⁴² If we accept the claim that no state has all the resources and skills needed to raise a child, we must also grant that this is the case for individuals. All parents lack at least some resources and skills, too. Just as it takes a *polis* to live well, it takes a *polis* to raise a child.

Harry Brighouse argues that all children should receive an autonomy-facilitating education because of the important role autonomy plays in enabling people to lead flourishing lives, and human flourishing is a fundamental aim of education.⁴³ Children are more likely to become autonomous if (a) their critical thinking and reflective skills have been cultivated; and (b) they have been presented with a variety of conceptions of what constitutes a quality life. If an autonomy-facilitating education is something to which all persons are entitled, then the education and socialization of children must not be the exclusive domain of either the state into which a child happened to be born or persons to whom a child happened to be born. An autonomy-facilitating education would be one in which both the state (as *parens patriae*) and the parents (as *parens familiae*) provide distinct and discontinuous⁴⁴ institutional learning environments for children. The school and the home should not be the same place.⁴⁵

Even if all parents were required by law to send their children to public schools, they would have ample opportunity to initiate them into whatever ways of living they had chosen for themselves. Public schooling is part-time, after all.⁴⁶ Yet some religious parents regard any amount of public education as a threat to the interests and well-being of their children. Most parents want what is best for their children, and view their own way of thinking as best. When religious parents home school their children, it is undoubtedly an act of love and piety.⁴⁷ Yet to the extent that they

fail to present alternative conceptions of the good in a favorable light, or to portray their faith community as a voluntary association, their efforts are hardly benign.

Because home schooling has become widespread only in recent decades, it may still be the case that many religious parents who home school their children were themselves educated in public schools. To the extent that their critical thinking and reflective skills were cultivated, and to the extent that they were presented with a variety of conceptions of what constitutes a quality life, they have achieved some degree of autonomy. Their faith is their own. Yet in sheltering their children from outside influences, such parents manifest a lack of confidence in either their faith or their children. In either case, segregation is harmful to children and to the political order. Just as widespread tax evasion can undermine the public institutions in which everyone has a stake,⁴⁸ widespread home schooling can undermine the sense of shared identity and shared fate needed for society to function. People who segregate themselves from others rarely do so because they think themselves inferior. The state, notes Kenneth Henley, “must...protect the child from the tendency of his parents to educate him into the kind of life which they want for him, for there can be no parental authority to do this unless the child is born without rights which are independent of the parent-child relationship.”⁴⁹

Both creatures of state and the progeny of particular individuals, children are nonetheless persons in their own right. Justice therefore requires that children receive an education that facilitates their prospective autonomy. Every child — every person — is born into a family of some sort; this is not a matter of choice. Education should provide access to diverse conceptions of what constitutes a good life. An autonomy-facilitating education should enable children to articulate, upon reaching adulthood, the bases for which they would choose the faith tradition into which they were born had they not been born into it. Their faith would then be a genuine choice, not the result of religious indoctrination. Whatever their faith, it will be truly theirs if the product of critical reflection and reasoning. The same might be said of national identity. Virtually everyone is born into a state of some sort; this is not a matter of choice. Education should provide access to alternative views of what constitutes a good society. An autonomy-facilitating education should enable children to articulate, upon reaching adulthood, the bases for which they would choose to be a citizen of the state into which they were born had they not been born into it. Their citizenship would then be a genuine choice, not the result of patriotic indoctrination. Whatever their national identity, it will be truly theirs if the product of critical reflection and reasoning.

In order to flourish as an adult, every child should ultimately be able to identify with the life s/he is leading, to recognize it as good, and to see it as the product of her/his own choices.⁵⁰ I have argued that the independent welfare interests of children include an autonomy-facilitating education. This is more likely to occur when children are concurrently subject to *parens patriae* educational authority (as creatures of state) and to *parens familiae* educational authority (as the progeny of particular individuals). *Parens patriae* is an important mechanism by which the state can supervise when the present and the future well-being of children is at risk.

1. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), 535.
2. Stephen Arons, *Compelling Belief: The Culture of American Schooling* (Amherst: University of Massachusetts Press, 1986), 206–7 (emphasis added) and 208–9.
3. Barbara Bennett Woodhouse, “‘Who Owns the Child?’: *Meyer* and *Pierce* and the Child as Property,” *William and Mary Law Review* 33, no. 4 (1992): 995–1122, 1119.
4. See Sigal R. Ben-Porath, *Citizenship Under Fire: Democratic Education in Times of Conflict* (Princeton, N.J.: Princeton University Press, 2006).
5. Woodhouse identifies as “a dark side” to the *Pierce* decision “a view of the child as a parent’s private property.” Barbara Bennett Woodhouse, “A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education,” *Ohio State Law Journal* 57 (1996): 393–430, 394.
6. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).
7. *Pierce*, 535 (emphasis added).
8. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
9. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
10. *R. v. Jones*, 2 S.C.R. 284 (1986).
11. Jones does not appear to have recognized any incongruity in his appeal to the authority of the justice system.
12. Section 2(a) of the *Charter* guarantees freedom of conscience and religion. Section 7 of the *Charter* reads, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
13. *Jones*, at para. 51.
14. “Today, education is perhaps the most important function of state and local governments.” *Brown v. Board of Education*, 347 U.S. 483 (1954), 493; cited in *Jones*, at para. 22.
15. “No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens.” *Jones*, at para. 30.
16. *Jones*, at para. 77.
17. “The absence of any home-schooling regulations [in ten states and the District of Columbia] is largely the result of advocacy and litigation by the Home School Legal Defense Association...Once against the law in all but five states, home schooling is now legal throughout the country and highly regulated in just six states.” Jane Gross, “Lack of Supervision Noted in Deaths of Home-Schooled,” *New York Times*, sec. A8, January 12, 2008.
18. James S. Liebman, “Desegregating Politics: ‘All-Out’ School Desegregation Explained,” *Columbia Law Review* 90 (1990): 1639–40.
19. Gross, “Lack of Supervision.”
20. John Stuart Mill, *On Liberty*, in *Great Books of the Western World*, vol. 43, ed. Robert Maynard Hutchins (Chicago: University of Chicago Press, 1952), 318.
21. See Hugh LaFollette, “Licensing Parents,” *Philosophy and Public Affairs* 9, no. 2 (1980): 182–97.
22. *Merriam-Webster’s Dictionary of Law*, s.v. “supervene,” <http://dictionary.reference.com/browse/supervene>.
23. Andrew Jay Kleinfeld, “The Balance of Power Among Infants, Their Parents and the State,” *Family Law Quarterly* 4 (1970): 409–43, 414.
24. James G. Dwyer, “Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights,” *California Law Review* 82, no. 6 (1994): 1371–447, 1373.
25. *Parens patriae* jurisdiction, originating in the Chancery Courts of England, was invoked to protect a child’s property or marital interests. See Natalie Loder Clark, “*Parens Patriae* and a Modest Proposal

for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare," *Michigan Journal of Gender and Law* 6 (2000): 381–448; Neil Howard Cogan, "Juvenile Law, Before and After the Entrance of 'Parens Patriae,'" *South Carolina Law Review* 22 (1970): 147–81; George B. Curtis, "The Checkered Career of *Parens Patriae*: The State as Parent or Tyrant?" *DePaul Law Review* 25 (1976): 895–917; Lawrence W. Custer, "The Origins of the Doctrine of *Parens Patriae*," *Emory Law Journal* 27 (1978): 195–208; George Rossman, "*Parens Patriae*," *Oregon Law Review* 4, no. 4 (1925): 233–56; and John Seymour, "*Parens Patriae* and Wardship Powers: Their Nature and Origin," *Oxford Journal of Legal Studies* 14 (1994): 159–88.

26. I agree with Joel Feinberg's observation that if the Supreme Court had ruled against the Yoders, Amish parents would be put on the same footing everyone else. All parents should have to take their chances with "outside influences." See Joel Feinberg, "The Child's Right to an Open Future," in *Philosophy of Education: An Anthology*, ed. Randall Curren (Malden, Mass.: Blackwell, 2007), 115.

27. Following Dwyer, I adopt the conceptualization of rights outlined in Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 30–6; see Dwyer, "Parents' Religion and Children's Welfare," 1374.

28. *Prince v. Massachusetts*, 321 U.S. 158 (1944), 170.

29. Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 31–64.

30. Joel Feinberg adopts the language of rights, focusing on a "right to an open future" as a sort of right-in-trust, an "anticipatory autonomy right" peculiar to children. See Feinberg, "Child's Right to an Open Future," 113.

31. *Re Supt. of Fam. & Child Service and Dawson et al.*, 42 B.C.L.R. 173 (1983).

32. *Re Weberlist*, 360 N.Y.S. 2d 783 (1974).

33. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971), 248–50, cited by Amy Gutmann, "Children, Paternalism, and Education: A Liberal Argument," *Philosophy and Public Affairs* 9, no. 4 (1980): 338–58, 339–40.

34. Gutmann, "Children, Paternalism, and Education," 340.

35. Aristotle, *The Politics*, ed. and trans. Benjamin Jowett (Oxford: Clarendon Press, 1885).

36. Benedict de Spinoza, *Theologico-Political Treatise*, cited by C.J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, R.I.: Brown University Press, 1957), 45–6.

37. Feinberg, *Harm to Others*, 41.

38. Dwyer, "Parents' Religion and Children's Welfare," 1376; see also Katharine T. Bartlett, "Re-Expressing Parenthood," *Yale Law Journal* 98 (1989): 293–340.

39. Dwyer, "Parents' Religion and Children's Welfare," 1373.

40. Barbara Bennett Woodhouse, "Hatching the Egg: A Child-Centered Perspective on Parents' Rights," *Cardozo Law Review* 14 (1993), 1747.

41. Elizabeth S. and Robert E. Scott, "Parents as Fiduciaries," *Virginia Law Review* 81 (1995), 2432.

42. Carl E. Schneider, "Commentary: On the Duties and Rights of Parents," *Virginia Law Review* 81 (1995): 2477–92, 2483.

43. Harry Brighouse, *On Education* (New York: Routledge, 2007), 15.

44. On the need for discontinuity if public schools are to facilitate autonomy, see Harry Brighouse, "Channel One, the Anti-Commercial Principle, and the Discontinuous Ethos," in *Philosophy of Education*, ed. Curren, 112–23.

45. Nor should the church and the home be the same place. On the dangers of "home churching," see "Huge Fine for Anti-Gay US Church," *BBC News*, November 1, 2007, <http://news.bbc.co.uk/2/hi/americas/7072404.stm>.

46. Residential schools for Native Americans provide a chilling example of total state control, but these cannot be compared to public schooling today.

47. When religious parents deny consent to a blood transfusion, it may also be an act of love and piety.

48. Feinberg, *Harm to Others*, 11.

49. Kenneth Henley, "The Authority to Educate," in *Having Children: Philosophical and Legal Reflections on Parenthood*, eds. Onora O'Neill and William Ruddick (New York: Oxford University Press, 1978), 259.

50. Brighouse, *On Education*, 16.