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Juvenile law scholars are coalescing around the idea that the originating theory of the juvenile system—the theory of the state's parens patriae *power—is a largely obsolete relic of the past. This theory holds that when children commit offenses or crimes, the state as a super-parent should respond in a manner that cares, treats, and advances the best interest of the youth. Rather than live up to its ideals, however, these benevolent aims often masked abuse and limited minors' constitutional rights. The new consensus in current juvenile law scholarship is that juvenile law policy and advocacy ought to rely on a developmental framework as the primary guide for state action.*

This Article breaks from this emerging consensus. It reexamines the theory of the parens patriae *power and shows that far from being obsolete, it continues to have an impact in the juvenile legal system, particularly on the interpretation of minors' constitutional rights in juvenile and criminal law. Moreover,* parens patriae *principles and ideals are increasingly appearing for adults in the criminal system.*

The theory of this state power, therefore, should not be ignored, but rather modernized in conjunction with the developmental framework to address the contemporary concerns in juvenile and criminal law.

INTRODUCTION

The state *parens patriae* power lies at the foundation of the juvenile legal system.[1] The state's inherent power and authority to act as *parens patriae*—defined as "super-parent,"[2] "the state as parent,"[3] or "parent of the country"[4]—fueled the creation of juvenile courts in the late-nineteenth to early-twentieth centuries.[5]

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1. *See In re* Gault, 387 U.S. 1, 16 (1967); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–05 (1909) [hereinafter *The Juvenile Court*].

2. BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 19 (2017) [hereinafter THE EVOLUTION OF THE JUVENILE COURT].

3. *In re* Julie Anne, 780 N.E.2d 635, 652 (Ohio Ct. Com. Pl. 2002).

4. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).

5. *See* THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2. Reformers called the Progressives, which included Jane Addams, established the first juvenile court in Illinois in 1899. Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 11–12 (Thomas Grisso & Robert G. Schwartz eds., 2000). "By 1920, all but three [states] had" created juvenile courts. Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 61 (2009). By 1945, juvenile

Thereafter, this controversial and polarizing state power defined and shaped the development of the juvenile legal system and minors' constitutional rights in juvenile and criminal law.

In the first three eras of juvenile law[6]—the Progressive Era from the 1890s to 1960s, the Due Process Era from the 1960s to 1970s, and the Get Tough Era from the 1980s to the 1990s—*parens patriae* principles featured prominently in seminal court opinions and scholarship in both positive and negative ways.[7]

The focus on the *parens patriae* power noticeably faded in this fourth and current era of juvenile law—the Developmental Era[8]—which began in 2005 with the Supreme Court's landmark death-penalty decision *Roper v. Simmons*.[9] According to scholars, this case and the four Supreme Court landmark cases that followed it ushered in a new developmental approach to minors' constitutional questions—one that recognizes the developmental differences of minors and weaves these differences into minors' constitutional-rights doctrine.[10] With this new approach, the concept of *parens*

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courts were in every jurisdiction, including the federal government. Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

6. Scholars generally agree that there are four eras of juvenile law. While the characteristics of the eras may overlap and the exact years for each era are not always agreed upon, there is widespread consensus on the defining features of each era. *See* THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 1; Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 5, at 291, 291; David S. Tanenhaus, *The Elusive Juvenile Court: Its Origins, Practices, and Re-Inventions*, *in* THE OXFORD HANDBOOK ON JUVENILE CRIME AND JUSTICE 419, 419 (Barry C. Feld & Donna M. Bishop eds., 2012) (discussing the three eras prior to the Developmental Era); *see also infra* Part I.B.

7. *See infra* Part 0.

8. Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1627 (2018) (labeling this current era as "the [D]evelopmental [E]ra"); *see* Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016) (characterizing the last decade of Supreme Court jurisprudence as the "developmental approach" (internal quotation marks omitted)); *cf.* THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 1 (labeling this era as the "Kids Are Different Era"); Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 211 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (labeling this era as "[t]he [R]ebuilding [E]ra").

9. 543 U.S. 551 (2005).

10. Buss, *supra* note 8, at 741–42; *see also* Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 678 (2016) (using the phrase "developmental framework").

patriae moved to the background of juvenile law scholarship and advocacy, viewed generally as a relic of the past.[11]

This Article brings it back to the forefront. As imperative as it is for the developmental framework to continue to guide juvenile law scholarship and policies, it also remains just as important to not lose sight of the theory and exercise of the state *parens patriae* power. Indeed, scholars should reexamine the *parens patriae* power with fresh eyes, study its ongoing influence in this Developmental Era, and analyze whether the accounting of this state power should change or be reassessed in light of the groundbreaking changes that occurred in this Developmental Era.

At first glance, the lack of attention to the *parens patriae* power in this era may appear justified. The Supreme Court, after all, did not expressly refer to the *parens patriae* power or interest in any of the five landmark constitutional-rights decisions that define this Developmental Era.[12] Rather, scholars assert that the Supreme Court applied a new developmental framework to minors' constitutional rights interpretation that does not require that the state act as *parens patriae*.[13]

Additionally, some scholars have long propounded that *parens patriae* principles should have minimal influence.[14] To them, the *parens patriae* interest was a mere cover-up for other punitive state interests,[15] and the harm imposed on minors in the name of *parens*

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11. *See infra* Part I.

12. *See generally* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012); J.D.B. v. North Carolina, 564 U.S. 261 (2011); Graham v. Florida, 560 U.S. 48 (2010); *Roper*, 543 U.S. 551.

13. *See infra* Part I.

14. *See generally* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1097 (1991) (asserting that the separate juvenile justice system—based in *parens patriae* principles—should be abolished).

15. *See* J. BERNARD & MEGAN C. KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 101 (2d ed. 2010) (stating that the Supreme Court's decision in *Kent v. United States* signaled that "*parens patriae* was dead"); Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1, 4–7 (2012) (describing the juvenile system as no longer rehabilitative, but punitive, yet still advocating for a separate juvenile system where Sixth Amendment rights to a public trial and jury trial can be granted); Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 10 (2009) ("Most of the history of the juvenile court in the past half-century has consisted of backing away from the substantive implications of the rehabilitation vision."); Stephen Wizner, *On Youth Crime and the Juvenile Court*, 36 B.C. L. REV. 1025, 1031–32 (1995).

patriae has been so detrimental that any renewed attention to this state interest will likely be unwelcomed.

These reasons, however, are insufficient to keep the discussion about the theory and exercise of the state *parens patriae* power in the dark. For one, state *parens patriae* interests still remain a part of the majority of purpose clauses of juvenile law codes and continue to make a material impact on the interpretation of minors' constitutional rights in both the Supreme Court and lower courts in this era. Furthermore, the states' desire to act as *parens patriae* is likely to grow, not diminish, given the current trends in juvenile and criminal law.

As the ideas and assessment of the state *parens patriae* power have evolved throughout the three eras of juvenile law, there should be further thought and discussion about how the views surrounding the *parens patriae* power should also be updated in this Developmental Era. One proposal is that these two approaches—the *parens patriae* approach and developmental framework—should be combined. Specifically, neuroscience and developmental research should both assess whether states are truly acting as *parens patriae* and help guide their actions taken for the best interests of youth.

This Article develops these topics in four Parts. Part I provides the notable shift that juvenile law scholars have made in this Developmental Era from focusing on the *parens patriae* power to now propounding the developmental approach as the way forward in juvenile law policy and jurisprudence. It underscores the prominence and pervasiveness of the *parens patriae* power in the first three eras of juvenile law and explains how the two principles of the theory of *parens patriae* helped create and shape the juvenile legal system. Part II argues that discussion regarding the *parens patriae* power remains as important as ever as this state power continues to influence juvenile law policy and jurisprudence. Lastly, Part III considers how the role of the *parens patriae* power should evolve in light of changes ushered in during this Developmental Era.

I. THE "OUTDATED" *PARENS PATRIAE* POWER

For over a century, the theory of the state *parens patriae* power captured the attention of juvenile law scholars. This focus shifted in 2005 when the Supreme Court decided a series of five cases in a short span of approximately ten years that relied on research

regarding the development and neuroscience of minors to interpret their Eighth and Fifth Amendment rights.[16] Scholars lauded the advent of the developmental approach, announced a new era of juvenile law—the Developmental Era—and increasingly referred to the state *parens patriae* power as a harmful and obsolete relic of the past.[17] This Part provides an overview of the shift in scholars' attention from the *parens patriae* power to the developmental approach. It starts with the prominent role that the theory of the *parens patriae* power had in the formation of the juvenile legal system, and it then explains how this theory continued to hold the focus, and mostly disdain, of scholars as the *parens patriae* power impacted other areas of juvenile law, such as the interpretation of minors' constitutional rights. It then explains how the emergence of the developmental approach pushed the already-unpopular *parens patriae* theory to the background.

A. Parens Patriae *and the Creation of the Juvenile Legal System*

Modern society largely agrees that youth who commit crimes generally should not be charged or prosecuted in the criminal system. What seems like common sense now, however, was not always the case. Historically, children as young as seven years old could be tried in the same criminal courts and face the same punishment as adults as long as it was established that they knew right from wrong.[18] This practice and mindset changed because grass-roots reformers and activists successfully articulated that the state should exercise a different state power towards youth who committed offenses—the state *parens patriae* power—instead of its

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16. *See Montgomery*, 136 S. Ct. at 733; *Miller*, 567 U.S. at 471–75; *J.D.B.*, 564 U.S. at 269; *Graham*, 560 U.S. at 68–69; *Roper*, 543 U.S. at 617–22 (Scalia, J., dissenting).

17. *See supra* notes 8–10 and accompanying text.

18. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145–46 (2003). Specifically, children between seven and fourteen years old, while assumed to not be capable of a felony, could still be convicted and put to death if a court or jury found that the child "'could discern between good and evil,'" and children under seven were "considered incapable of mischief." Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68, 70 (1972) [hereinafter *Origins of the Juvenile Court*] (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *23); *see also* Gardner, *supra* note 15, at 7; *The Juvenile Court*, *supra* note 1, at 106.

police power.[19]

While there is no lack of scholarship regarding the *parens patriae* power in juvenile law,[20] this Part summarizes this important past and also adds a new gloss. It breaks down the theory of *parens patriae* in juvenile law to show that it consists of two foundational parts: (1) the state possesses an inherent authority to become involved in a child's life when it deems it necessary due to parental deficiency and/or child immaturity; and (2) when the state so intervenes, it acts as a super-parent. These principles directly led to the creation of a separate legal system in the late-nineteenth to early-twentieth centuries for youth who committed offenses. They also shaped the workings of the juvenile system, particularly the interpretation of minors' constitutional rights. These two principles of the theory of the *parens patriae* power will be explained in more detail here.

1. The First Principle of the *Parens Patriae* Power

The first principle of the *parens patriae* power provides that the state holds an inherent authority to become involved in a child's life when it believes it is appropriate to do so, generally justified by the actual or perceived deficiency of the parents and/or the immaturity of children. The *parens patriae* power is a plenary state power like the police power, and the two state powers arose from the same historical roots that trace back to the "sovereign prerogative" of the

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19. The tell between the two state powers boils down to the primary purpose and intended primary beneficiary of the state action—to care for specific individuals or to protect the general public. The Supreme Court, for example, differentiated between the two state powers in a case involving civil commitments in the following manner: The state has the *parens patriae* power to "provid[e] *care to its citizens* who are unable because of emotional disorders to care for themselves" and the "police power to *protect the community* from the dangerous tendencies of some who are mentally ill." Addington v. Texas, 441 U.S. 418, 426 (1979) (emphasis added).

20. There are various expressions of the state's *parens patriae* power, and this Article explains how this power is defined and exercised towards minors in juvenile and criminal law. For example, states pass laws pursuant to their *parens patriae* power to regulate various aspects of children's lives, such as their education, labor, and health. Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2105 (2011). States also act in their *parens patriae* power towards adults in need, such as the mentally ill. *Addington*, 441 U.S. at 426. States may also bring *parens patriae* lawsuits to "vindicate their quasi-sovereign—sometimes called *parens patriae*—interests." Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 211 (2017) (citation omitted).

King of England.[21] The state's asserted power to intervene in children's lives derives from English common-law principles that established the King or Crown as *parens patriae* over infants[22]—a concept that dates back at least to the seventeenth century.[23] The King was the "general guardian of all infants, idiots, and lunatics,"[24] and "by virtue of the prerogative which belongs to the Crown as *parens patriae*," English courts of chancery claimed jurisdiction in matters involving children who needed protection.[25] In the United States, the states in lieu of a king, claimed this *parens patriae* power to protect children from deficient parents (actual or assumed) and the child's own immaturity.

This state *parens patriae* power shielded children from parents who were poor or neglectful towards them.[26] Prior to states

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21. William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1085–87, 1093–95 (1994).

22. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982); Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 526 n.45 (1996); *The Juvenile Court*, *supra* note 1, at 104, 104 n.1 (collecting cases). *But see* Douglas R. Rendleman, Parens Patriae*: From Chancery to the Juvenile Court, in* JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 72, 115 (Frederic L. Faust & Paul J. Brantingham eds., 1974) (rejecting "[t]he authorized version of the juvenile courts' history" as a "successor to chancery" where, "[f]rom the earliest times, equity has protected infants who were dependent or neglected under *parens patriae*"); Margaret S. Thomas, Parens Patriae *and the States' Historic Police Power*, 69 SMU L. REV. 759, 768–69 (2016) (arguing that the *parens patriae* power in America did not actually originate from English "royal prerogatives").

23. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 24 ("[*P*]*arens patriae* doctrine originated in medieval English law to assure property interests and feudal succession . . . ." (citation omitted)); Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 205 (1978) (same, but stating it was not firmly established in courts until the late-eighteenth century); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 297–98 (2005); Kindred, *supra* note 22 (tracing the doctrine to seventeenth-century England); Ann McGillivray, *Childhood in the Shadow of* Parens Patriae, *in* MULTIPLE LENSES, MULTIPLE IMAGES: PERSPECTIVES ON THE CHILD ACROSS TIME, SPACE, AND DISCIPLINES 38, 38 (Hillel Goelman et al. eds., 2004) (connecting the origins of *parens patriae* to Roman law that was in existence for some "[2,500] years").

24. 3 WILLIAM BLACKSTONE, COMMENTARIES *47.

25. *The Juvenile Court*, *supra* note 1, at 104 (internal quotation marks omitted) (citation omitted); *see* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970); *Origins of the Juvenile Court*, *supra* note 18, at 69.

26. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 24. *But see* Rendleman, *supra* note 22, at 86 (stating that such practices really derived from English statutory poor laws and that the phrase "*parens patriae*" was later added by

articulating this power, parents had "virtually absolute authority and responsibility" over their children.[27] Beginning in the 1820s, state actors invoked the state *parens patriae* power to create institutions, such as Houses of Refuge and reform schools to oversee wayward or neglected children.[28] Following this, reformers called the Progressives again relied on the state *parens patriae* power to advocate for the creation of juvenile courts in the late-nineteenth to early-twentieth century.[29] All of these institutions recognized that youth who committed criminal offenses were not much different from those who suffered poverty or abuse[30]—they all had parents who were deemed lacking by society. As such, the Houses of Refuge and reform schools housed youth "criminal offenders; wayward and disobedient children; and orphaned, dependent, or neglected youngsters."[31] Similarly, the juvenile courts heard all matters involving children's behavior, including engaging in criminal wrongdoing and being victims of poverty, neglect, and abuse.[32] Early supporters of the new juvenile courts that would address juvenile delinquency acts explained that the new institution represented "the *parens patriae* power of the state, the court of chancery" to handle delinquent and dependent children.[33] These courts enabled "the state [to] intervene between the natural parent and the child because the child needs it, as evidenced by some of its acts, and because the parent [was] either unwilling or unable to train the child properly."[34] Poor and immigrant parents were

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courts).

27. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 62 (2008); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1380–81 (2020).

28. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 26; Steinberg & Schwartz, *supra* note 5, at 11.

29. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 22.

30. Huntington & Scott, *supra* note 27, at 1381, 1381 n.44.

31. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 26 (citation omitted).

32. *See id.* at 32, 36–37; Fox, *supra* note 25; Robert M. Mennel, *Attitudes and Policies Toward Juvenile Delinquency in the United States: A Historiographical Review*, 4 CRIME & JUST. 191, 207–08 (1983) [hereinafter *Attitudes and Policies*].

33. *The Juvenile Court*, *supra* note 1, at 109. *But see Origins of the Juvenile Court*, *supra* note 18, at 69–70 (noting critiques of this history, including theories that juvenile courts' origins are in criminal law, not chancery, that *parens patriae* was an "*ex post facto* justification," and that the juvenile court was not a new institution).

34. *The Juvenile Court*, *supra* note 1, at 109; *see also* Henning, *supra* note 23 (stating that the early juvenile courts characterized parents of such delinquent

disproportionately the ones who were deemed inadequate.[35] Meanwhile, black youth were largely excluded from the system in the beginning, and black child-savers worked to create a multiracial parental state to include black youth in the emerging juvenile system.[36]

In addition to parental deficiency, the state's inherent *parens patriae* power was also justified by the immaturity and unrealized development of children. Again, before the *parens patriae* power was expressed through reform schools, Houses of Refuge, and juvenile courts, states applied the police power towards children seven years or older by prosecuting and punishing them as adults if they had the requisite mental state.[37] The Progressives maintained a different vision of children. Relying on "new scientific knowledge" about children, they expressed the differences between adolescents and children from adults, sought to extend the meaning of childhood, and advanced the principle that "older youth[] as well as younger children should enjoy the protection of the state."[38] While the differences between children and adults were already well-established by this time, this idea "achieved a new stature . . . and became the first principle of modern juvenile justice."[39] The "paternalistic rhetoric" of the Progressive reformers, who advocated

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children as "derelict in their duty to discipline and supervise the child" and thus these parents "forfeited their right to make decisions on the child's behalf and . . . consented by default to the state's intervention" (citation omitted)). Notably, the nineteenth-century reformers who created the Houses of Refuge, reform houses, and juvenile courts rested on this concept of *parens patriae* to "intervene in the lives of *all* children who might become a community crime problem," including "neglected and criminal children." Fox, *supra* note 25. There was no difference between the "neglected children and delinquent children." *Id.* at 1192.

35. THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 36 (noting that "children of the poor and immigrants" were disproportionately sent to punitive "institutions and reformatories" by juvenile court judges (citations omitted)); SCOTT & STEINBERG, *supra* note 27, at 63 ("[S]ome historians have questioned the motives of these enthusiastic [Progressive] reformers, arguing that their ultimate goal was to inculcate American values by diluting the influence of immigrant parents over their children." (citation omitted)); Huntington & Scott, *supra* note 27, at 1382.

36. *See* GEOFF K. WARD, THE BLACK CHILD-SAVERS 11, 105–06, 233 (2012).

37. *See supra* note 18 and accompanying text.

38. SCOTT & STEINBERG, *supra* note 27, at 64; *see also* David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 13, 17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (noting that "the new science of child development successfully made the case that adolescents were" more similar to children than adults (citation omitted)).

39. Tanenhaus, *supra* note 38 (citation omitted); *see also* SCOTT & STEINBERG, *supra* note 27, at 64.

for a separate juvenile legal system, described the "vulnerability, dependency, and innocence" of both adolescents and young children.[40] Thus, youth immaturity also justified the existence and application of the state's *parens patriae* power.

2. The Second Principle of the *Parens Patriae* Power

The first foundational principle of *parens patriae* provides the source of the power and the reasons the state can intervene—parental deficiency and/or child immaturity. The second foundational principle of the *parens patriae* power explains how the state intervenes—that once the state steps in, it should act as a super-parent.[41] Like the first, this principle has the same English common-law roots.[42] Under this theory, the state, as the "higher parent," addresses a delinquent child "as a wise parent would deal with a wayward child"[43] and has not only the right but a duty to intervene on behalf of the child.[44] In its *parens patriae* role, the state is "benign, nonpunitive, and therapeutic,"[45] while state actors in the juvenile court system—"judges, social workers, and probation officers—[are] parent surrogates, providing caring discipline and treatment to wayward children."[46] The state also purportedly acts in the child's best interests[47] with the primary goal of rehabilitation.[48]

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40. SCOTT & STEINBERG, *supra* note 27, at 64.

41. *Origins of the Juvenile Court*, *supra* note 18, at 78 ("The juvenile court, like the early reform school, exercised parental power to punish parents for their children's delinquencies . . . .").

42. *See The Juvenile Court*, *supra* note 1, at 107–09.

43. Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, *in* THE CHILD, THE CLINIC AND THE COURT 310, 310 (1925).

44. *See id.*

45. Donna M. Bishop & Barry C. Feld, *Trends in Juvenile Justice Policy and Practice*, *in* THE OXFORD HANDBOOK ON JUVENILE CRIME AND JUSTICE, *supra* note 6, at 898, 900.

46. Scott, *supra* note 6, at 294.

47. *See, e.g.*, Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 838 (1988) [hereinafter *The Juvenile Court Meets the Principle of Offense*] ("The Progressives envisioned, and the *McKeiver* decision endorsed, a model of the juvenile court as a benevolent treatment agency making dispositions in the 'best interests of the child.'" (citation omitted)); *The Juvenile Court*, *supra* note 1, at 119–20 (finding that the one of the judge's main duties is to determine "what had best be done in [the child's] interest and in the interest of the state to save him from a downward career"); Frank A. Orlando & Gary L. Crippen, *The Rights of Children and the Juvenile Court*, *in* JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 89, 90 (Ira M. Schwartz ed., 1992) (citation omitted).

The juvenile court and the judge were considered the embodiment of the state as *parens patriae*—here, the state "t[ook] the place of the father" to save a child and "shield it from the consequences of persistence in a career of waywardness."[49] The juvenile court was "grounded in a commitment to . . . rehabilitation"[50] and worked to "mold wayward youth[] into good citizens."[51] It served a "'medical' function" of treating and helping youth.[52] Yet, as noted below, the actual implementation of these goals largely did not come to bear even in the early days—particularly for black youth who were denied access,[53] and even when they were included, received less education and training compared to white youth,[54] consistent with the racism that was present in society writ large.[55]

These two principles of the *parens patriae* power led to a significant and seismic change for youth who committed offenses. The first juvenile court was founded in Illinois in 1899, and by 1920—just over two decades later—all but three states created a juvenile court.[56] This progress shows the effectiveness and power of the theory of *parens patriae*. Within a short timeframe, a substantial subset of the population was removed from the criminal system to one that was not driven by punishment but rather allegedly prioritized the best interests of children.

B. The Prominent and Pervasive Parens Patriae *Power in the First Three Eras of Juvenile Law*

The *parens patriae* power played a significant role in the creation and development of the juvenile legal system. Its influence was

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48. Gardner, *supra* note 15, at 7–10.

49. Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905).

50. Scott, *supra* note 6, at 294.

51. Ainsworth, *supra* note 14, at 1098–99.

52. Martin Guggenheim, *Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles*, 52 N.Y.U. L. REV. 1064, 1069 (1977); *see also In re* Gault, 387 U.S. 1, 15–16 (1967) (stating that the early reformers believed that the child should be treated, rehabilitated, and handled in a clinical manner).

53. WARD, *supra* note 36, at 105–06.

54. *See* Henning, *supra* note 8, at 1614–16.

55. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116, 1119–20, 1146 (1997).

56. Sankaran, *supra* note 5. By 1945, juvenile courts were in every jurisdiction, including the federal government. Thomas & Bilchik, *supra* note 5.

particularly salient in the interpretation of minors' constitutional rights in juvenile and criminal law. The courts' acceptance or doubts about the two foundational principles of the state *parens patriae* power influenced how courts interpreted minors' constitutional rights in the first three eras of juvenile law, which scholars have also examined in great detail.

In the first era of juvenile law, the Progressive Era from the late-nineteenth century to the 1960s,[57] the two foundational principles of *parens patriae* were so widely accepted that minors' constitutional rights generally were deemed unnecessary.[58] The state depriving the child of liberty was a "logical extension" of the natural parent's control of the child,[59] and the state's interventions were seen as parental, non-punitive, and doused with "benevolent intent."[60] There was thus little to no need for minors' constitutional rights.

In the second era of juvenile law, the Due Process Era from the 1960s through the 1970s, the relationship between the *parens patriae* power and minors' constitutional rights notably changed.[61] Here, the Supreme Court's serious doubts about the state's actual implementation of its *parens patriae* power led the Court to grant minors basic due process protection in juvenile delinquency proceedings, which in turn set limits on the state's exercise of its *parens patriae* power.[62] However, the Court's continued respect for

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57. COMM. ON ASSESSING JUV. JUST. REFORM, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 31 (Richard J. Bonnie et al. eds., 2013); Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 474 (2017) [hereinafter *Competence and Culpability*]; Scott, *supra* note 6.

58. COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 57, at 34.

59. Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 561 (2012); *see also Origins of the Juvenile Court*, *supra* note 18, at 78 (stating that the juvenile court "den[ied] children legal rights on the pretext that they were being protected, not punished").

60. *Attitudes and Policies*, *supra* note 32, at 209 (stating that early juvenile courts faced criticism but generally there was no doubt about its "benevolent intent").

61. COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 57, at 36–37.

62. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 534 (1971) (recounting "the high hopes and aspirations of Judge Julian Mack" and other juvenile court leaders and founders and giving "praise for the system and its purposes" but also noting "the disappointments of the system's performance and experience and the resulting widespread disaffection" and "alarm over its defects"); *In re* Gault, 387 U.S. 1, 26 (1967) (noting that while the Progressives envisioned the juvenile court as a "fatherly judge" to provide "guidance and help 'to save [the minor] from a downward

the state's role as *parens patriae* meant that minors were awarded fewer constitutional rights than adults, even as the Court criticized the "abusive application" of this doctrine.[63]

In the third era of juvenile law, the Get Tough Era from the 1980s to the 1990s,[64] there was another shift in the relationship between minors' constitutional rights and the *parens patriae* power.[65] As a result of public perception that youth during this era were more prone than in the past to commit dangerous, violent crimes and fed by claims (later proven false) about a wave of mostly male black "superpredator" adolescents,[66] state legislators passed tougher laws.[67] They expressly repudiated the rehabilitative goals as the only aim of the juvenile legal system and increased the severity of punishments for young people, both in the juvenile court itself and by sending a significant number of youth to be tried and punished as adults in criminal courts.[68] Juvenile law statutes now expressly

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career' . . . recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception" (citation omitted)). The decision was also influenced by the civil rights movement and the children's rights movements in the 1960s and 1970s, where children were beginning to be viewed as "rights-bearing persons, with independent legal interests not represented by their parents or the state." Huntington & Scott, *supra* note 27, at 1390 (citation omitted).

63. Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL'Y REV. 137, 141 (1995).

64. *See, e.g.*, *Competence and Culpability*, *supra* note 57; Scott, *supra* note 6 (describing the "third wave of reform").

65. *See* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 472–73 (2012).

66. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html. This time period also overlapped with disproportionate imprisonment of black and brown men in the criminal legal system. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1031–34 (2010).

67. *See Competence and Culpability*, *supra* note 57; Guggenheim, *supra* note 65.

68. Guggenheim, *supra* note 65; *see* Taylor-Thompson, *supra* note 18, at 148. Shifts toward harsher measures began in the late 1970s but were not widespread until the 1980s and 1990s. *See, e.g.*, *In re* Vinson, 260 S.E.2d 591, 599 (N.C. 1979) (citing the legislator's new juvenile code, enacted in 1979 and effective January 1, 1980, which provided for "stricter measures for dealing with serious youth crime"); *Competence and Culpability*, *supra* note 57; Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 878 (2010) (stating that between 1992 and 1997, forty-five state legislatures imposed or enhanced adult-transfer laws; forty-seven states passed laws that changed or abolished confidentiality requirements in juvenile court; and twenty-two states gave juvenile crime victims a bigger role in juvenile justice proceedings); Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L.

included police-power interests, such as public safety and accountability.[69] Meanwhile, for minors tried as adults by the state, who were disproportionality children of color,[70] this period was characterized as a "[r]ejection of [*p*]*arens* [*p*]*atriae* [i]deology" towards them.[71] Thus, the state *parens patriae* interest, even when applied to minors, was now balanced with these other police-power interests. The two fundamental principles of *parens patriae*, now set against the background of growing toughness and concerns for public safety, manifested themselves in traditional and more stringent ways in minors' constitutional-rights questions. The harm that states inflicted on children under the cover of *parens patriae* in the Get Tough Era led some prominent scholars to propose the abolishment of *parens patriae* as a guiding principle of juvenile law.[72] These scholars proposed that minors in juvenile proceedings should have the same constitutional rights as adults or otherwise that the juvenile system should be abolished entirely.[73]

In sum, in the first three eras of juvenile law, the *parens patriae* power infiltrated every aspect of the juvenile legal system from the creation of the juvenile courts to the interpretation of minors' constitutional rights in juvenile and criminal law.

C. The "New" Developmental Approach

In contrast to the first three eras of juvenile law, the role and impact of the *parens patriae* power has been unexplored in this current Developmental Era. Juvenile law scholars and advocates have instead adopted the developmental approach as the way forward. The *parens patriae* power, which has been tethered so long to harm and discrimination against youth, has often been characterized as a relic of the past.

The developmental approach in juvenile law began with the

REV. 413, 469 (2017).

69. Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1108 (2009).

70. *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1024–25 (2001).

71. *See* Ainsworth, *supra* note 14, at 1104–06.

72. *See infra* notes 106–16 and sources cited therein.

73. *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 90–91 (1997) [hereinafter *Abolish the Juvenile Court*].

Supreme Court's decision in *Roper v. Simmons*[74] in 2005. This case was then followed by *Graham v. Florida*[75] in 2010, *J.D.B. v. North Carolina*[76] in 2011, *Miller v. Alabama*[77] in 2012, and *Montgomery v. Louisiana*[78] in 2016. Put together, these cases created a "new 'developmental approach'" in the criminal and juvenile legal systems, where courts take the developmental differences in children into account for constitutional doctrinal purposes.[79]

Juvenile legal scholars have highlighted the reasons that these decisions—individually or in sum—are remarkable.[80] The first case *Roper*,[81] in addition to abolishing the death penalty for sixteen and seventeen-year-old minors under the Eighth Amendment, was described as "new and noteworthy" because, while the Supreme Court had previously "noted that children were different, or reached a decision in a case based on that fact[,] . . . the extent of the Court's embrace of developmental science" had not been seen before.[82] In *Roper*, the Court set forth three distinguishing features of children under eighteen years old that minimize their culpability and increase their capacity for change, and these features served as a foundation for the remaining Supreme Court cases: (1) minors have a "lack of maturity and an underdeveloped sense of responsibility";[83] (2) minors are "more vulnerable or susceptible to negative influences and outside pressures"; and (3) minors' "personality traits . . . are more transitory, less fixed."[84]

The second case *Graham*,[85] which abolished the sentence of life

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74. 543 U.S. 551 (2005).
75. 560 U.S. 48 (2010).
76. 564 U.S. 261 (2011).
77. 567 U.S. 460 (2012).
78. 136 S. Ct. 718 (2016).
79. Buss, *supra* note 8.
80. *See, e.g.*, Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 542 (2016) ("The *Roper* line and *J.D.B.* will undoubtedly be recognized as watershed moments in the context of Eighth and [Fifth] Amendment jurisprudence . . . ."); Eric Schab, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 215 (2014) (asserting that *Miller*, *Roper*, *Graham*, and *J.D.B.* collectively "create[ed] a watershed rule that 'kids are different' and must be treated differently throughout the criminal trial process" for purposes of retroactivity).
81. Roper v. Simmons, 543 U.S. 551 (2005).
82. Buss, *supra* note 8, at 742–43.
83. *Roper*, 543 U.S. at 569 (internal quotation marks omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
84. *Id.* at 569–70 (citations omitted).
85. Graham v. Florida, 560 U.S. 48 (2010).

without parole ("LWOP") for youth in all nonhomicide offenses, led one scholar to opine that "[i]f *Roper* was groundbreaking, *Graham* was seismic" in finding that youth "are categorically less culpable than adults."[86] The third case *J.D.B.*,[87] which required the state to account for a minor's age (as known to an officer or objectively apparent to a reasonable officer) in Fifth Amendment custodial determinations, signaled for scholars "a watershed moment in the jurisprudence of juvenile rights."[88] The fourth case *Miller*,[89] which declared mandatory LWOP sentences for homicide offenses unconstitutional under the Eighth Amendment for minors, led another scholar to describe it as "a revolutionary decision" that "portend[ed] a tremendous shift in juvenile justice policy and practice."[90] Thus, the "*Miller* trilogy" of *Miller*, *Roper*, and *Graham* announced that a "juvenile justice revolution" was taking place in juvenile sentencing, confinement, and adult-transfer laws.[91] Lastly, scholars considered *Montgomery*[92] as landmark and significant not only for enabling state collateral post-conviction attacks based on the *Miller* holding[93] but also for ushering in an overall structural change to post-conviction collateral attacks.[94]

These landmark Supreme Court decisions led to "unprecedented advances in juvenile-justice jurisprudence"[95] and "an explosion of scholarship, litigation, and other advocacy efforts" based on the developmental approach.[96] Advocates and nonprofit agencies funded

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86. Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 951–52 (2015).

87. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

88. Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASHINGTON U. J.L. & POL'Y 109, 109 (2012).

89. Miller v. Alabama, 567 U.S. 460 (2012).

90. Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1788–89 (2016) (citations omitted).

91. *See id.* at 1788.

92. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

93. Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 1004 (2017).

94. *See, e.g.*, Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 481–82 (2017); Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. PA. L. REV. ONLINE 33, 37 (2016); Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 905 (2017).

95. Robin W. Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295, 295 (2015).

96. Buss, *supra* note 8, at 746; *see, e.g.*, Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 267

scientific research that helped usher in this era and then advanced reforms based on this neuroscience and developmental science regarding youth's lessened culpability compared to adults.[97] For example, the MacArthur Foundation through its Models for Change initiative awarded a total of $218 million dollars in 425 grants from 1996 to 2019 that supported reform based on the "growing body of behavioral and neuroscience research on youth development."[98] The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice conducted research primarily on teenagers' competence and culpability, some of which were expressly relied on by the Supreme Court in its *Roper* and *Graham* decisions.[99]

Meanwhile, references to *parens patriae* principles in this current Developmental Era largely consisted of passing references regarding the history, background, or limitations of the *parens patriae* power.[100] For too long, the states failed to actually live up to their *parens patriae* ideals as observed by both scholars[101] and

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(2018) (relying on the principle that "juveniles are constitutionally different from adults" from the Developmental Era cases to argue that minors should have substantive due process rights to receive individualized consideration before transfer to adult court and sentencing); Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 499–502 (2006) (asserting that developmental psychology and common sense should dictate how criminal laws regarding sex and sexuality of minors should be prosecuted); Sterling, *supra* note 95, at 296–97 (relying on developmental differences of minors, as set forth in *Roper*, to abolish lifetime sex-offender registry for juveniles). *See generally* Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015) (applying developmental principles to guide law enforcement on how to gather and store information on youth); Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179 (2017) (organizing the children-are-vulnerable theory from Developmental Era cases into five categories and calling for increased use of developmental science to scrutinize the Court's reference to minors' vulnerability in constitutional questions involving various children's rights).

97. *See infra* notes 98–99 and accompanying text.

98. *Juvenile Justice*, MACARTHUR FOUND., https://www.macfound.org/programs/juvenile_justice/ (last visited Feb. 11, 2020).

99. *Research Network on Adolescent Development & Juvenile Justice*, MACARTHUR FOUND., https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil/ (last visited Feb. 11, 2020).

100. *See, e.g.*, Buss, *supra* note 8, at 754–55; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1467 (2018); Darden, *supra* note 96, at 225.

101. *See, e.g.*, THE EVOLUTION OF THE JUVENILE COURT, *supra* note 2, at 13, 106; Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASHINGTON U. J.L. & POL'Y 53, 65–66 (2012) (documenting scholars' observations from the 1920s, 1940s,

courts.[102] Some scholars, especially in the Get Tough Era of the 1980s and 1990s, had already concluded that the juvenile legal system had abandoned the *parens patriae* model entirely or urged it to do so more forcefully.[103] For example, Andrew Wakefield in 1984 stated that "the demise of parens patriae theory as the key principle underlying juvenile court jurisdiction and practice" took place in 1966 when the Court decided *Kent v. United States*,[104] a case about a D.C. statute regarding transfers to the adult criminal court and led the Court to observe in dicta that "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[105] Janet Ainsworth in 1991, noting the lack of evidence that the rehabilitation model actually worked, called for juvenile courts to be abolished.[106] Barry Feld in 1997 wrote about the ineffectiveness of combining state social welfare policies with penal, crime-control interests and recommended against the pairing of these two state interests by getting rid of the juvenile court.[107] Combining these two state interests ultimately weakened the state's efforts to fully effectuate social welfare policies for all minors, irrespective of whether or not they committed a crime.[108] The *parens patriae* doctrine did not seem particularly important to save or highlight.

Moreover, the theory of *parens patriae* did not appear necessary. The Supreme Court's application of developmental jurisprudence did

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and 1960s about the harms of the juvenile courts and their discretion to implement *parens patriae*).

102. *See, e.g.*, *In re* Gault, 387 U.S. 1, 22–23 (1967); Kent v. United States, 383 U.S. 541, 555–56 (1966).

103. *See, e.g.*, *infra* notes 104–08 and accompanying text.

104. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 518–19 (1984).

105. *Kent*, 383 U.S. at 556 (footnote omitted) (citation omitted).

106. *See* Ainsworth, *supra* note 14, at 1105–06, 1126.

107. *Abolish the Juvenile Court*, *supra* note 73, at 68–69; Barry C. Feld, *The Transformation of the Juvenile Court–Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 331 (1999) [hereinafter *The Transformation of the Juvenile Court*]; Slobogin & Fondacaro, *supra* note 15, at 34 ("We need to stop thinking of the juvenile court as an appendage of the welfare state and aim it toward the goal of dealing with juvenile crime.").

108. *Abolish the Juvenile Court*, *supra* note 73, at 68–69, 134; *The Transformation of the Juvenile Court*, *supra* note 107.

not depend on the state acting as *parens patriae*.[109] None of the five landmark Supreme Court decisions of this Developmental Era explicitly refers to the phrase "*parens patriae*."[110] In fact, the states did not even purport to act pursuant to their *parens patriae* power in these cases.[111] Instead, even though all five decisions involved minors, the states primarily interacted with them pursuant to their police power.[112] Specifically, in the four Eighth Amendment sentencing decisions, the states affirmatively removed the minors from juvenile courts, tried them as adult defendants in criminal courts, and imposed the harshest criminal sentences available only to adult criminal defendants—the death penalty and LWOP.[113] In *J.D.B.*, a case that involved a minor's Fifth Amendment right against self-incrimination, the state again did not assert that it acted as *parens patriae*.[114] Rather, the police officer in this case questioned the minor to solve a crime for the benefit of the community,[115] which again is primarily an exercise of the police power and not the state's *parens patriae* power.

Accordingly, scholars have propounded the developmental approach without reference to the state *parens patriae* power towards youth. For example, Elizabeth Scott advanced that under the Court's "developmental framework," sentencing decisions should reflect that minors are less culpable due to their developmental immaturity and are more likely to reform.[116] This concept applies broadly, regardless of whether the minor is in criminal court, where police power governs and the *parens patriae* rationale is unavailable, or in juvenile court, where *parens patriae* principles had led to the creation of the juvenile legal system.[117]

This "new" developmental approach has been prominently

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109. *See generally* J.D.B. v. North Carolina, 564 U.S. 261 (2011) (determining whether a child's age is relevant to the *Miranda* custody analysis but not mentioning the state's *parens patriae* power).

110. *See generally* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012); *J.D.B.*, 564 U.S. 261; Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

111. *See generally Montgomery*, 136 S. Ct. 718; *Miller*, 567 U.S. 460; *J.D.B.*, 564 U.S. 261; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

112. *See generally Montgomery*, 136 S. Ct. 718; *Miller*, 567 U.S. 460; *J.D.B.*, 564 U.S. 261; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

113. *See generally Montgomery*, 136 S. Ct. 718; *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

114. *See generally J.D.B.*, 564 U.S. 261.

115. *Id.* at 265–67.

116. Scott, *supra* note 6, at 292.

117. *See* discussion *infra* Part II.

featured in recent juvenile scholarship while *parens patriae* arguments or critiques have been comparatively lacking.[118]

II. THE *PARENS PATRIAE* POWER IN THE DEVELOPMENTAL ERA

While the developmental approach has been set forth as the way forward in juvenile law, ignoring the state *parens patriae* power is unwise and unjustified. Even in this Developmental Era, the *parens patriae* power continues to materially impact minors' lives in juvenile and criminal law.[119] Moreover, criminal law scholars and advocates are increasingly relying on *parens patriae* principles and language for changes in criminal law.[120] Thus, it is imperative that scholars continue to pay close attention to this state power and also consider how it intersects with the developmental framework. This Part explains the four pronounced ways that the *parens patriae* power continues to materially impact minors in juvenile and criminal law.

First, the *parens patriae* interest still remains a material part of a majority of state juvenile code statutes, which is notable because this influences how states assert their governmental interest in constitutional questions. Second, the interest continues to actually affect how federal and state courts interpret minors' constitutional rights. Third, the landmark developmental Supreme Court decisions actually relied on *parens patriae* principles, in addition to the developmental jurisprudence framework, to interpret minors' constitutional rights. The influence of *parens patriae* is evident even though in these cases, the states expressly withheld their *parens patriae* power and acted primarily pursuant to their police power. And fourth, *parens patriae* principles are increasingly appearing in the criminal law field towards adults, which portends that state *parens patriae* actions will likely grow rather than disappear.

A. Parens Patriae *in Legislative Statutes*

A majority of state statutes in this Developmental Era still mandate state actors in the juvenile legal system to act as *parens patriae*.[121] Of the fifty-one juvenile legal systems in the United

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118. *See* discussion *supra* Part I.C.
119. *See* discussion *infra* Parts II.A–D.
120. *See* discussion *infra* Part II.D.
121. *See infra* notes 122–34 and accompanying text.

States, which consists of fifty states and Washington D.C., *parens patriae* language appears in thirty-eight of the statutory purpose clauses of the juvenile court or juvenile law.[122] The purpose clause is a "statement of the underlying rationale of the legislation intended to aid the courts in interpreting the statute."[123] The federal Office of Juvenile Justice and Delinquency Prevention (the "OJJDP")[124] examines purpose clauses and labels them with the juvenile law era that they most emulate—*Parens Patriae*, Due Process Era,[125] Balanced and Restorative Justice ("BARJ"),[126] or Developmental

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122. *See generally Juvenile Justice System Structure & Process: Organization & Administration of Delinquency Services*, OJJDP STAT. BRIEFING BOOK (Mar. 27, 2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2016 [hereinafter *Juvenile Justice System Structure*] (stating that the purpose clauses in the states of Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Louisiana, Massachusetts, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming contain *parens patriae* language). In addition to these statutes, the purpose clauses of twelve more states (Connecticut, Georgia, Indiana, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, Tennessee, Texas, and West Virginia) also contain *parens patriae* language regarding the care, projection, treatment, and/or supervision of children. *See, e.g.*, CONN. GEN. STAT. § 46b-121h (2021); GA. CODE ANN. § 15-11-1 (2021); IND. CODE § 31-10-2-1 (2021); MONT. CODE ANN. § 41-5-102 (West 2021); NEB. REV. STAT. § 43-246 (2021); NEB. REV. STAT. § 43-402 (2021); N.H. REV. STAT. ANN. § 169-B:1 (2021); N.M. STAT. ANN. § 32A-2-2 (2021); OHIO REV. CODE ANN. § 2152.01 (West 2021); OR. REV. STAT. § 419B.090 (2021); TENN. CODE ANN. § 37-1-101 (2021); TEX. FAM. CODE ANN. § 51.01 (West 2021); W. VA. CODE § 49-1-105 (2021).

123. *The Juvenile Court Meets the Principle of Offense*, *supra* note 47, at 841.

124. The OJJDP is a federal agency under the Office of Justice Programs of the Department of Justice that "support[s] local and state efforts to prevent delinquency and improve the juvenile justice system." *About OJJDP*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/about/about.html (last visited Mar. 16, 2021). In addition to compiling data, the OJJDP gives grants to states and oversees states' implementation of certain mandates. Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 315–17 (2008).

125. The "Due [P]rocess [E]ra" category refers to purpose clauses that reflect the due process reforms in "federal laws, model acts, and Supreme Court cases" from the 1960s and 1970s. *Juvenile Justice System Structure*, *supra* note 122.

126. The "BARJ" category includes "a model of reform released in the early 1990's on the heels of the most punitive era of juvenile justice." *Id.* Five states have purpose clauses that are labeled the "[D]evelopmental [A]pproach," which means that "[t]hese states retain elements of prior categories, but have purpose clauses that mention the use of adolescent development or other research or data to assist the juvenile justice system, or require[] the use of evidence based practices." *Id.* Two states, Arizona and North Dakota, do not have purpose clauses. *Id.* While Arizona's purpose clause is not set forth in a statute, a rule of juvenile court states that proceedings "shall be conducted as informally as the requirements of due process and

Approach.[127] These four eras generally overlap with the four eras described by scholars—the Progressive, Due Process, Get Tough, and Developmental Era. Of these thirty-eight states, eight states—Delaware, Iowa, Massachusetts, Michigan, Missouri, Nevada, Rhode Island, South Dakota—have purpose clauses that are primarily categorized as "*Parens Patriae*" or "clauses that reflect the juvenile court [judges'] earliest role as the state's designated protector of children."[128] An example of a purpose clause that is categorized as *parens patriae* is Massachusetts's, which is modeled on the Standard Juvenile Court Act of 1959 and provides that statutes regarding delinquent children:

> shall be liberally construed so that the care, custody[,] and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement[,] and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.[129]

The remaining thirty states whose purpose clauses are primarily categorized under a different classification—either Due Process Era, BARJ, or Developmental Approach—still contain express *parens*

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fairness permit." ARIZ. R. JUV. P. 6. North Dakota has a short purpose statement in the rules of juvenile procedure that mentions that actions "must be . . . administered to protect the best interests of children and to address the unique characteristics and needs of children." N.D. R. JUV. P. 1.

127. *Juvenile Justice System Structure*, *supra* note 122.

128. *Id.*

129. MASS. GEN. LAWS ch. 119, § 53 (2021). The Standard Juvenile Court originated in 1925, but the "most influential version" was issued in 1959, with:

> [t]he declared purpose . . . that "each child coming within the jurisdiction of the court shall receive . . . the care, guidance, and control that will conduce to his welfare and the best interest of the state, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him."

OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., 1999 NATIONAL REPORT SERIES: JUVENILE JUSTICE BULLETIN 3 (1999) (alteration in original) (citation omitted).

patriae language.[130] For example, the purpose clause of Arkansas, which is categorized as "Due Process Era" also includes language that:

> all juveniles brought to the attention of the courts receive the guidance, care, and control, preferably in each juvenile's own home when the juvenile's health and safety are not at risk, that will best serve the emotional, mental, and physical welfare of the juvenile and the best interest of the state.[131]

The purpose clauses of Ohio and Connecticut are categorized as BARJ, but both still direct the juvenile legal system or laws to provide for the care, treatment, supervision, or rehabilitation of children.[132] Lastly, even if *parens patriae* language is not expressly provided in a purpose clause or is a minimal part of the statute, a state may still continue to assert its *parens patriae* interests in cases that involve minors. For example, the purpose clause of the juvenile delinquency system from Illinois is characterized as BARJ[133] and has limited traditional *parens patriae* language,[134] but juvenile courts in Illinois still recognize its power to act as *parens patriae*.[135]

The majority of purpose clauses of juvenile legal systems continue to incorporate *parens patriae* as a foundational purpose of

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130. *See, e.g.*, *infra* notes 131–32 and accompanying text (discussing the *parens patriae* language in a few Due Process Era and BARJ purpose clauses); *see also supra* notes 125–29 (discussing the Due Process Era, BARJ, and Developmental Approach).

131. ARK. CODE ANN. § 9-27-302(1) (2021).

132. *See, e.g.*, CONN. GEN. STAT. § 46b-121h (2021) (stating in part that "[i]t is the intent of the General Assembly that the juvenile justice system provide individualized supervision, care, accountability[,] and treatment in a manner consistent with public safety to those juveniles who violate the law. The juvenile justice system shall also promote prevention efforts through the support of programs and services designed to prevent re-offending"); OHIO REV. CODE ANN. § 2151.01 (West 2021) (stating that the statutes "shall be liberally interpreted and construed so as to effectuate the following purposes: (A) '[t]o provide for the care, protection, and mental and physical development of children'").

133. *Juvenile Justice System Structure*, *supra* note 122.

134. *See* 705 ILL. COMP. STAT. 405/1-2 (2021).

135. *See, e.g.*, *In re* T.B., 148 N.E.3d 251, 267 (Ill. App. Ct. 2020) ("Juvenile courts possess the power of *parens patriae*, the power and, indeed, the 'duty to act in the best interests of the minor and for the minor's own protection.'" (citations omitted)).

maintaining juvenile legal systems.[136] In light of this, courts regularly consider whether and how this unique interest justifies treating children differently from adults when claims are made that youth are deprived of constitutional rights, as explained in the next Section.

B. Parens Patriae *in State Juvenile Courts and Facilities*

The state *parens patriae* power also continues to have a direct impact on the interpretation of minors' constitutional rights in state juvenile courts and facilities in this current Developmental Era.[137] The *parens patriae* interest impacts various minors' constitutional rights in juvenile and criminal law, including minors' constitutional rights against unreasonable searches under the Fourth Amendment, rights to a jury under the Sixth and Fourteenth Amendments, and due process and equal protection rights under the Fourteenth Amendment.[138]

1. *Parens Patriae* and Minors' Constitutional Rights During Juvenile Court Hearings

In this current Developmental Era, state juvenile court judges are still often viewed as the embodiment of *parens patriae* and thus vested with wide discretion, flexibility, control, and responsibility over a minor's case, which in turn affects how minors' due process rights and other constitutional rights in juvenile delinquency hearings are interpreted.

For example, the *parens patriae* interest still dictates whether a judge, instead of a jury, should serve as a factfinder in a closed juvenile delinquency hearing.[139] While the Supreme Court in *McKeiver*[140] in 1971 established that minors do not have a Sixth Amendment constitutional right to a jury trial in juvenile courts, minors have continued to challenge this holding under the Fourteenth Amendment Due Process and Equal Protection Clauses and the Sixth Amendment, and their success has been directly

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136. *See supra* note 122 and accompanying text.
137. *See* discussion *infra* Parts II.B.1–3.
138. *See* discussion *infra* Parts II.B.1–3.
139. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).
140. *Id.* ("If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.").

linked to the interpretation of the juvenile courts' role as *parens patriae*.[141] For example, the Supreme Court of South Carolina in 2014 reiterated that minors were not entitled to juries under the Sixth Amendment because in the juvenile system, "South Carolina, as *parens patriae*, protects and safeguards the welfare of its children," and this *parens patriae* nature of the juvenile justice system distinguished it from "the traditional criminal justice process."[142] Meanwhile, the Kansas Supreme Court in 2008 awarded minors the constitutional right to a jury under the Sixth and Fourteenth Amendments precisely because the "changes to the juvenile justice system," including the statutory elimination of the presumption of confidentiality of juvenile court proceedings, "have eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system."[143] It acknowledged, however, that this same argument was rejected by other state courts, including Arkansas, California, Georgia, Louisiana,[144] and Washington in the late 1970s to early 2000s.[145]

Similarly, the right to a public trial often has depended on the interpretation of the *parens patriae* nature of the juvenile court proceedings. While minors do not have a Sixth Amendment constitutional right to a public trial,[146] a Texas appellate court found that minors had a Fourteenth Amendment due process right to a public trial[147] because of the increasingly non-*parens patriae* nature

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141. *See, e.g.*, *In re* Stephen W., 761 S.E.2d 231, 232 (S.C. 2014) (finding *McKeiver* binding and rejecting the minor defendant's federal constitutional claim for a jury in a juvenile delinquency hearing).

142. *Id.* at 234 (internal quotation marks omitted) (quoting Harris v. Harris, 415 S.E.2d 391, 393 (S.C. 1992)).

143. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008) (finding changes in juvenile statutes no longer reflect the *parens patriae* character and thus granting the jury right).

144. The Supreme Court of Louisiana also rejected an equal protection challenge for jury trials in juvenile court proceedings on the basis that the state's *parens patriae* role in juvenile court proceedings made minors not similarly situated to adults in criminal proceedings. *In re* State *ex rel.* A.J., 27 So. 3d 247, 267 (La. 2009) (reversing lower court holding that required a jury under the Equal Protection Clause and finding that "specialized treatment of juveniles" including the "state's role as [*parens patriae*] in managing the welfare of the juvenile in state custody" is "an appropriate governmental purpose for purposes of the [E]qual [P]rotection [C]lause").

145. *See, e.g.*, *In re* L.M., 186 P.3d at 170.

146. McKeiver v. Pennsylvania, 403 U.S. 528, 550–51 (1971).

147. *In re* A.J.S., 442 S.W.3d 562, 565–66 (Tex. App. 2014). The court also acknowledged that Texas has given minors a statutory right to open juvenile court proceedings since 1995. *Id.* at 566.

of delinquency proceedings.[148] While the court acknowledged the "historical and idealistic view" that procedural rights were not necessary because "delinquency proceedings [were] brought in *parens patriae* by the State for the child's best interest," it pointed to the modern "'grim realit[y]'" of juvenile delinquency hearings that have become "increasingly more formalized and punitive" to ultimately hold that open hearings were constitutionally required.[149]

The *parens patriae* duty of the juvenile court also helps define minors' Fourteenth Amendment due process or equal protection rights that arise in the context of other hearings in state juvenile courts, such as waivers of right to counsel, transfer hearings, and competency hearings. Generally, the *parens patriae* interest requires that judges give extra time, protection, or care to ensure that minors knowingly waive rights, such as waiving their right to counsel[150] or an amenability hearing.[151] Juvenile court judges are also granted extra flexibility to determine the competency of minors to participate in juvenile court proceedings because of their *parens patriae* role.[152]

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148. *Id.* at 566.

149. *Id.* at 565 (citations omitted).

150. *See, e.g.*, *In re* C.B., Nos. 2-11-13, 2-11-14, 2012 WL 5397602, at *2–3 (Ohio Ct. App. Nov. 5, 2012) (holding that under the Fourteenth Amendment Due Process Clause, in order for a minor to waive counsel, the juvenile court judge must "scrupulously ensure[]" that the minor understands the waiver and engage in an "inquisitional approach . . . more consistent with the juvenile court's goals" (citations omitted)).

151. *See, e.g.*, State v. Brown, No. 17AP-695, 2018 WL 5014192, at *3–4 (Ohio Ct. App. Oct. 16, 2018) (holding that, in order for a minor to waive an amenability hearing to determine whether to transfer to criminal court, the juvenile court must engage in a "'two-step process'" as this process "effectively 'balances the [*parens patriae*] duty of the juvenile court with the juvenile's due process rights'" (citation omitted)).

152. *See, e.g.*, *In re* W.P., 295 P.3d 514, 526–27 (Colo. 2013) (rejecting an equal protection claim based on denial of a minor's request for a second competency evaluation that was available to adult indigent defendants because of the state's "very different role" as *parens patriae* in juvenile court proceedings (citations omitted)); J.C. v. State, No. 87A01-1403-JV-134, 2014 WL 4537512, at *3–4 (Ind. Ct. App. Sept. 15, 2014) (holding that while minors have a due process right to a competency determination, the *parens patriae* role of the juvenile court also gave it a "degree of discretion and flexibly, unparalleled in the criminal code, to address the needs of children and to act in their best interests" (quoting *In re* K.G., 808 N.E.2d 631, 635 (Ind. 2004)); *In re* G.T.M., 222 P.3d 626, 629 (Mont. 2009) (denying minors' equal protection claim regarding competency hearings and distinguishing between minors' incompetency based on immaturity and adults' incompetency based on mental illness and finding that classes are not similarly situated due to the different underlying purposes of the juvenile court compared to criminal court systems—"rehabilitative, rather than punitive" (citations omitted)).

Thus, minors' Sixth Amendment rights, and Fourteenth Amendment due process and equal protection rights in juvenile delinquency proceedings continue to be filtered through the presence or noted absence of states' *parens patriae* interest.

2. *Parens Patriae* and Minors' Constitutional Rights in Dispositions

The *parens patriae* interest also continues to impact minors' constitutional claims in the disposition of cases in the Developmental Era. Here again, the judge, as *parens patriae*, is given more discretion in setting the disposition of a minor's case under the Fourteenth Amendment Due Process Clause.[153] For example, the Ohio Supreme Court found that a minor's due process rights did not require that a jury (rather than a judge) impose a mixed juvenile-adult sentence where the adult sentence was stayed.[154] This particular issue is related to a larger debate about whether under the Sixth Amendment, prior juvenile delinquency adjudications or findings imposed by a juvenile court judge (and not a jury) may be used to increase a subsequent adult sentence.[155] In this particular case, due in large part to the "paternal role that the state continues to play in juvenile justice,"[156] the state's "[*parens patriae*] interest in preserving and promoting the welfare of the child"[157] and the "expert" determination by the judge to meet those rehabilitative goals, the youth's disposition met due process requirements and did not require a jury finding.[158]

Constitutional challenges to minors' probation terms are also

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153. *See generally* State v. D.H., 901 N.E.2d 209 (Ohio 2009) (holding that the Sixth Amendment right to a trial by jury has more limited application in juvenile sentencing).

154. *Id.* at 212. In this case, the minor was tried as a serious youthful offender, which in Ohio, entitles a minor to a jury trial in juvenile court. *Id.* at 210. The minor argued that the juvenile court erred when the judge (and not a jury) imposed a discretionary adult sentence that required specific factual findings. *Id.* at 211.

155. *See* Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions"*, 49 B.C. L. REV. 495, 496 (2008) (discussing a split in the federal circuits regarding whether non-jury juvenile court adjudications can be considered as a "prior conviction" that increases subsequent adult sentences in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005)).

156. *D.H.*, 901 N.E.2d at 216.

157. *Id.* (internal quotation marks omitted) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

158. *Id.* at 217.

interpreted differently from adults' due to *parens patriae*. The West Virginia Supreme Court distinguished probation terms for adults from those for children.[159] For adults, "[e]very condition of probation constitutes a restriction of liberty[.]"[160] However, for children, "[t]he state's authority over children's activities is unquestionably broader" than over adults' actions because of the state's well-established *parens patriae* power in "preserving and promoting the welfare of children"[161] and its duty to "play its part as *parens patriae*" when "parental control falters."[162] Similarly, in California, "discretion in formulating terms of juvenile probation is even greater than that allowed for adults" due to the juvenile court acting as *parens patriae*.[163] In its *parens patriae* role, the juvenile court could limit a minor's constitutional right to freedom of association "in ways that it arguably could not limit an adult's."[164] Similarly, in Illinois, the court "through the doctrine of *parens patriae*, has an inherent plenary power, independent of any authority given to it by the legislature, to act solely in the best interests of the child and for his [or her] own protection."[165] While limits still apply, including "constitutional safeguards" and "whether the restriction is related to the nature of the offense or the rehabilitation of the probationer,"[166] the *parens patriae* duty of juvenile courts means that minors' due

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159. *In re* Brandi B., 743 S.E.2d 882, 886 (W. Va. 2013).

160. *Id.* at 895 (alteration in original) (internal quotation marks omitted) (quoting Louk v. Haynes, 223 S.E.2d 780, 787 (W. Va. 1976)).

161. *Id.* at 896 (quoting Sale v. Goldman, 539 S.E.2d 446, 455 (W. Va. 2000)).

162. *Id.* at 895 (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)).

163. *In re* Victor L., 106 Cal. Rptr. 3d 584, 590 (Ct. App. 2010); *see also In re* J.W., No. A146017, 2016 WL 4140901, at *7 (Cal. Ct. App. Aug. 4, 2016) (imposing slight modifications to a probation term regarding electronics search while acknowledging the greater discretion that juvenile courts have as *parens patriae* to set probation conditions); *In re* E.Z., No. A142070, 2015 WL 3883179, at *1 (Cal. Ct. App. June 24, 2015) (upholding a probation condition that barred a minor "from associating with anyone [the m]inor knows or reasonably should know is a member of a criminal street gang").

164. *In re* E.Z., 2015 WL 3883179, at *4 (internal quotation marks omitted) (quoting *In re* Byron B., 14 Cal. Rptr. 3d 805, 809 (Ct. App. 2004)).

165. Interest of J.P., 125 N.E.3d 1229, 1238 n.4 (Ill. App. Ct. 2019) (quoting *In re* O.H., 768 N.E.2d 799, 804 (Ill. App. Ct. 2002)) (upholding probation condition limiting gang contact as it was "related to her rehabilitation" but remanding probation condition that required tattoo removal); *see also In re* R.H., 99 N.E.3d 29, 33–34 (Ill. App. Ct. 2017) (discussing deference and discretion of courts to impose probation conditions under their *parens patriae* role).

166. *In re* Rayshaun C., No. 1-18-1681, 2019 WL 544597, at *3 (Ill. App. Ct. Feb. 8, 2019).

process rights are minimized compared to adult defendants.[167]

As the tentative draft of the Restatement of the Law from 2018 acknowledges, "[i]n general, the law assumes that children, including adolescents, are subject to adult authority and do not enjoy the liberty interests of adult citizens" and that "if parents falter in exercising their authority, the state steps in as *parens patriae*."[168]

This is not to say that merely because the state asserts a *parens patriae* interest in children, their liberty interests are always limited or minimized. For example, in 2015, a Connecticut appellate court found a minor's due process rights were violated when he was transferred to the Department of Corrections without clear and convincing evidence; the minor had a "liberty interest in not being transferred from the protective umbrella of [Department of Children and Families] to the penal environment of a [Department of Corrections] institution" due to the state's *parens patriae* responsibility.[169] In 2012, the Ohio Supreme Court struck down a mandatory sex-offender registry under the Eighth Amendment based on the *Graham* factors, but also under the Due Process Clause because the mandatory registry cut against the *parens patriae* function of the court and its discretion.[170] These examples show how the state's *parens patriae* interest impacts minors' constitutional rights—particularly their due process rights—in dispositions.

3. *Parens Patriae* and Minors' Constitutional Rights in Juvenile Detention Centers

Minors' constitutional rights in juvenile detention centers, such as their Fourth Amendment rights, are also impacted by the *parens patriae* interest in this Developmental Era. The Fourth Amendment protects individuals from unreasonable searches and seizures by the government.[171] Generally, Fourth Amendment questions involve balancing interests, such as an individual's privacy interests against the government's interests.[172] This balancing test is disturbed when

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167. *See In re* G.T.M., 222 P.3d 626, 629 (Mont. 2009).

168. RESTATEMENT OF CHILD. & THE L. § 14.20 (AM. L. INST., Tentative Draft No. 1, 2018).

169. *In re* Angel R., 118 A.3d 117, 134–35, 137 (Conn. App. Ct. 2015).

170. *In re* C.P., 967 N.E.2d 729, 748 (Ohio 2012).

171. U.S. CONST. amend. IV.

172. Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (finding that, unless common law provides guidance, a search or seizure must be evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to

the state asserts *parens patriae* as a governmental interest.[173]

For example, in a Fourth Amendment case regarding a standardized intake protocol that required minors to be strip searched at a juvenile detention facility, the Third Circuit inquired whether it should follow the Supreme Court's decision in *Florence v. Board of Chosen Freeholders*,[174] which upheld a similar strip-search protocol in adult detention centers.[175] After balancing "juvenile [detainees'] privacy interest[s] with the risks to their well-being and the institutional security risks in not performing such searches,"[176] the Third Circuit upheld the practice as constitutional.[177] While acknowledging that the privacy interests of youth who are strip searched are enhanced because of the trauma that the search inflicts,[178] the court found that the government's interests were also enhanced due to its special relationship with the youth.[179] It found that in addition to the government's security concerns identified in *Florence*,[180] under the state's role as *parens patriae*, the state also became the "de facto guardian, or *in loco parentis*" for minors in the juvenile detention center.[181] After balancing these interests, the court found the mandatory strip-search protocol constitutional, even though an individualized reasonable suspicion assessment did not take place.[182] Even prior to the Supreme Court's decision regarding strip searches of adult defendants in *Florence*, strip searches of minors in juvenile detention centers were often upheld due to the

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which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests" (citations omitted)); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 526 (2011) (setting forth the inherent balancing that takes place in Fourth Amendment questions).

173. Other times, the government may not assert *parens patriae* as an interest. *See generally* Florida v. J.L., 529 U.S. 266 (2000) (focusing on the reliability of an anonymous tip rather than the state's *parens patriae* interest related to the fifteen-year-old petitioner).

174. 566 U.S. 318 (2012).

175. *Id.* at 339.

176. J.B. *ex rel.* Benjamin v. Fassnacht, 801 F.3d 336, 341 (3d Cir. 2015).

177. *Id.* at 347.

178. *Id.* at 342. The minors brought a civil action "under 42 U.S.C. § 1983 for false arrest, unreasonable search and seizure, false imprisonment, and violations of due process[.]" *Id.* at 338.

179. *Id.* at 343 n.41.

180. *Id.* at 343 (citations omitted).

181. *Id.* (footnote omitted).

182. *Id.* at 344–47.

state's interest as *parens patriae*.[183] While this holding should be revisited in light of the proposed changes to the interpretation of *parens patriae* as discussed in Part IV, these case examples show that courts still materially rely on the state's *parens patriae* interest to interpret minors' constitutional rights in juvenile courts and facilities in the Developmental Era. These cases, along with past Supreme Court decisions that limited or denied minors' Sixth and Fourteenth Amendment rights due to the state's *parens patriae* interest,[184] signal the ongoing importance of this state power.

C. Parens Patriae *Principles in the Supreme Court*

The *parens patriae* power also impacted how the Supreme Court decided its landmark cases in this Developmental Era.[185] At first blush, the *parens patriae* power is not readily visible in the opinions. In each of these five landmark cases, the states did not assert a *parens patriae* interest, but rather, they chose to act primarily pursuant to their police power. The influence of the *parens patriae* power, however, becomes apparent upon a closer look. The Court borrowed large swaths of the fundamental principles of the *parens patriae* power to support their five landmark decisions in the Developmental Era. Viewing these cases through a *parens patriae* lens is not meant to substitute or cast doubt on the developmental approach that the Supreme Court used in these cases. Rather, this

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183. *See, e.g.*, Doe *ex rel.* Doe v. Preston, 472 F. Supp. 2d 16, 26–32 (D. Mass. 2007) (finding that state officials were entitled to qualified immunity regarding a claim that standardized strip searches were allegedly unconstitutional under the Fourth Amendment, and citing cases, like the Second Circuit's case, that had upheld intake strip searches in part on theory of *parens patriae* (citations omitted)); N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004) (taking state *parens patriae* and *loco parentis* interests into account when evaluating strip searches of minors and upholding a strip search at initial entry into a detention facility but not during a transfer to another facility or during a search regarding a missing pencil).

184. *See generally* Schall v. Martin, 467 U.S. 253 (1984) (holding that a particular New York Family Court Act authorizing the pretrial detention of juveniles did not violate the Due Process Clause of the Fourteenth Amendment); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that a trial by jury in the adjudicative stage of juvenile court delinquency proceedings is not constitutionally required); *In re* Gault, 387 U.S. 1 (1967) (holding that youth have a privilege against self-incrimination, a right to notice of the charges against them, a right to counsel, and a right to confront witnesses against them).

185. These cases are: Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012); J.D.B. v. North Carolina, 564 U.S. 261 (2011); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

parens patriae lens serves as an additional way to view and understand these landmark Developmental Era decisions.

1. The First Principle of the *Parens Patriae* Power

In all five landmark Supreme Court decisions, the Court reminded the states of the first principle of *parens patriae*—that states hold the inherent authority to intervene in the lives of children who committed an offense or crime due to assumed or actual parental deficiency and/or child immaturity.[186] The latter reason—children's immaturity and ongoing development—were the driving force behind the Court's decisions. However, the influence of parental deficiency is also apparent. While the Court did not expressly factor in parenting deficiency as part of its legal analysis, details of parenting failure were a notable part of the minors' narratives and upbringings.[187]

As for its findings regarding children, the Court relied on various tools linked to the *parens patriae* theory. For example, regarding youth development, the Court invoked "scientific and sociological" research[188] as well as common knowledge to find that youth generally have a "lack of maturity and an underdeveloped sense of responsibility."[189] This reliance is reminiscent of the "new scientific knowledge" about children that Progressives used to advocate for *parens patriae* in the first place.[190] Next, the Court underscored that states also inherently recognized this difference between children and adults as the state exercised *parens patriae* power over this

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186. *See supra* Part I.A.1.

187. *See, e.g.*, *Miller*, 567 U.S. at 478–79 (observing that defendants' parents or other parental figures abused alcohol, drugs, and created environments "immers[ed] in violence"); *Graham*, 560 U.S. at 53 (starting the defendant's story with the fact that his parents were "addicted to crack cocaine[] and their drug use persisted in [the defendant's] early years"). The Court also noted that the biological parents were often missing. In *J.D.B.*, the minor's parents were not present as the Court noted that the police spoke to his grandmother, his legal guardian, and his aunt. *J.D.B.*, 564 U.S. at 265. In *Miller*, the Court wrote that one defendant "at the time of his crime . . . had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him." *Miller*, 567 U.S. at 467.

188. *Roper*, 543 U.S. at 569.

189. *Id.* (internal quotation marks omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

190. SCOTT & STEINBERG, *supra* note 27, at 64; *see also* Tanenhaus, *supra* note 38 (noting that the "new science of child development successfully made the case that adolescents" were more like children than adults (citation omitted)).

population in other ways: "[A]lmost every State prohibits those under [eighteen] years of age from voting, serving on juries, or marrying without parental consent."[191] Third, the Court cited to classic texts tied to *parens patriae*, such as Blackstone's Commentaries on the Law of England,[192] to conclude that children "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[193] The three *Roper* findings regarding children—that (1) minors have a "lack of maturity and an underdeveloped sense of responsibility"; (2) minors are "more vulnerable or susceptible to negative influences and outside pressures"; and (3) that minors' "personality traits . . . are more transitory, less fixed"[194]—are reminiscent of the Progressives' characterization of children that serves as a foundational principle of the state *parens patriae* power.

2. The Second Principle of the *Parens Patriae* Power

Aspects of the second foundational principle of the *parens patriae* power—that the state should act as a super-parent[195]—are also evident in the Eighth Amendment Developmental Era cases. In these cases, the Court imposed a duty on the state to act more *parens patriae*-like by pressing the state to allow for rehabilitation and care. Here, the Supreme Court refused to accept the state's characterization of these minors as adults deserving of death or life in prison and instead explicitly urged states to give them opportunities to rehabilitate and develop into adults.

The difference in opinion between the state and the Court is quite stark. For example, in *Graham*, a state judge sentenced a minor to LWOP and said, "you decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you."[196]

In contrast to this viewpoint, the Court urged states to care more for these minors. In eliminating the death penalty for sixteen- and seventeen-year-old minors under the Eighth Amendment, the *Roper*

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191. *Roper*, 543 U.S. at 569 (citation omitted).

192. *J.D.B.*, 564 U.S. at 273.

193. *Id.* (citation omitted).

194. *Roper*, 543 U.S. at 569 (internal quotation marks omitted) (citations omitted).

195. *See supra* Part I.A.2.

196. Graham v. Florida, 560 U.S. 48, 57 (2010) (internal quotation marks omitted) (citation omitted).

Court held that while the state could "exact forfeiture of some of the most basic liberties," it could not "extinguish his life and his potential to attain a mature understanding of his own humanity."[197] Next, when banning LWOP sentences for minors who committed nonhomicide offenses,[198] the *Graham* Court held that these sentences were disproportionate because they "improperly denie[d] the juvenile offender a chance to demonstrate growth and maturity."[199] The state's decision to "forswear[] altogether the rehabilitative ideal" was "not appropriate" due to the minor's "capacity for change and limited moral culpability."[200] Also, the "absence of rehabilitative opportunities or treatment," such as vocational trainings and other services, made the "disproportionality . . . all the more evident."[201] Thus, while the Court did not require states to promise "eventual freedom" for minors who were convicted of a non-homicide crime, states were required to give them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[202] The *Miller* Court then prohibited all mandatory LWOP sentences for youth—even those convicted of homicide—because the "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."[203] It "reflect[ed] 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change."[204] In *Montgomery*, this rule was deemed to be a "substantive rule of constitutional law"[205] and as a result, required to retroactively apply in state collateral attacks on past mandatory LWOP sentences.[206] The Court opined in *Montgomery* that states could "remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole"[207] and that the "opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children

197. *Roper*, 543 U.S. at 573–74.
198. *Graham*, 560 U.S. at 74.
199. *Id.* at 73.
200. *Id.* at 74.
201. *Id.*
202. *Id.* at 75. The Court left it up to the state the "explore the means and mechanisms for compliance." *Id.*
203. Miller v. Alabama, 567 U.S. 460, 478–79 (2012).
204. *Id.* at 473 (alteration in original) (quoting *Graham*, 560 U.S. at 74).
205. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).
206. *Id.* at 732.
207. *Id.* at 736 (citation omitted).

who commit even heinous crimes are capable of change."[208] It required states to give minor offenders the "opportunity to show their crime did not reflect irreparable corruption[,] and, if it did not, their hope for some years of life outside prison walls must be restored."[209] Notably, such language about restoring hope, or giving minors the chance to rehabilitate and mature, was missing in *Thompson v. Oklahoma*,[210] an Eighth Amendment case from the Get Tough Era that banned the death penalty for minors who committed crimes before they turned sixteen years old.[211] The Court's consistent and continual reminder that children are not fully-developed beings, and its charge that the state should give children the opportunity to develop, rehabilitate, and potentially rejoin society, are concepts immersed in the foundational principles of the theory of the *parens patriae* power.

3. *J.D.B.*: The Supreme Court's Hedge on the *Parens Patriae* Power

While the two foundational theories of the *parens patriae* power are apparent in the Eighth Amendment decisions, the Court's Fifth Amendment decision in *J.D.B. v. North Carolina*[212] shows the Court potentially weakening the states' *parens patriae* power by making it more difficult for the state to initiate juvenile delinquency proceedings against minors.[213] However, similar to the Due Process Era cases, the Court appeared more concerned with ensuring accuracy of process rather than eliminating the concept of *parens patriae* altogether.

In *J.D.B.*, the Court did not favorably describe the historic *parens patriae* action that the police officer threatened to the minor: "the prospect of juvenile detention and separation from his guardian and primary caretaker."[214] However, the Court was ultimately more

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208. *Id.*

209. *Id.* at 736–37.

210. 487 U.S. 815 (1988) (plurality opinion). The plurality did emphasize the differences between children and adults but did not include the affirmative language noted in *Montgomery*. *See, e.g., id.* at 833–38 (pragmatically explaining why youth should be considered less culpable than adults for similar crimes).

211. *Id.* at 838.

212. 564 U.S. 261 (2011).

213. *See id.* at 277 (holding that a child's age must be included as a factor in the *Miranda* custody analysis so long as the officer knew the child's age at the time of questioning or the child's age "would have been objectively apparent to a reasonable officer").

214. *Id.* at 276.

concerned with ensuring procedural fairness rather than getting rid of the state's ability to intervene as *parens patriae* entirely. The Court hedged that age would not be a "determinative, or even a significant, factor in every case"[215] and only imposed an actually-known or "objectively apparent" standard on police officers regarding a minor's age.[216] There was no ban on questioning minors in general or a requirement that a parent or counsel be present during questioning. Rather, if the objective or as-known age of a minor would lead the minor to think that the minor was in a custodial interrogation, the Court now required the police to give a *Miranda* warning and allow the minor to stop questioning.[217] The Court's evasiveness about the significance of the minor's age in actually stopping interrogation is reminiscent of a scholar's observations about the Due Process Era—that while the Court strengthened minors' constitutional rights, it still essentially kept in place "the basic form of the *parens patriae* doctrine"[218] as the state was not barred from initiating juvenile court proceedings.

In sum, the Supreme Court in these Developmental Era cases revived the foundational principles of *parens patriae* in the disposition of minors' cases and kept it intact in the context of their procedural rights.

D. Parens Patriae *Principles Outside of Juvenile Law*

Lastly, as *parens patriae* principles and concepts are increasingly spilling over into the criminal system in this Developmental Era, it remains imperative to reexamine this state interest and to ensure that there is a meaningful difference between the state's use of its *parens patriae* power and police power. Criminal law policies and programs, such as expansion of specialty courts and diversion programs, reduction in mass incarceration or abolition of prisons, and other innovative programs like holistic defense, trauma-informed defense, and opioid policing all emphasize the treatment and rehabilitation of the offender. While states, scholars, and advocates often frame these actions as beneficial for public safety, which falls into the state police power category, there is a growing call for state actors to care for and give treatment to those in the

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215. *Id.* at 277 (citations omitted).
216. *Id.* at 274, 277.
217. *Id.* at 265, 281.
218. Friedland, *supra* note 63.

criminal system beyond public safety goals. States, thus, are increasingly acting in a *parens patriae* manner in the criminal system.

Specialty courts, such as drug, mental health, and veterans courts focus on the treatment and well-being of defendants.[219] These courts, known as "problem-solving courts," provide services to the defendants and participants to address their underlying needs, such as drug treatment or mental health needs.[220] For example, drug courts mandate a "rehabilitation regimen" that includes treatment and "intensive supervision" by probation officers.[221] Veterans Treatment Courts function as "one-stop-shops" for veterans and reroute veterans who otherwise would be in a traditional criminal court into a program that provides them with "services, benefits, and program providers . . . and volunteer veteran mentors."[222] These programs "immers[e] veterans in a climate that focuses on individualized treatment rather than mere punishment."[223] These programs certainly look like the state is acting as *parens patriae*.

While some scholars criticize that these "care resources" are taken from the community where individuals would voluntarily seek services into a "coercive court[]" environment in the "punitive arms of the state,"[224] they are nevertheless growing in popularity. Legislators, prosecutors, executive officials, and other stakeholders

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219. While veteran courts serve veterans of the U.S. military, the vast majority of these courts are funded and run by state and local governments. *See, e.g.*, Claudia Arno, *Proportional Response: The Need for More—and More Standardized—Veterans' Courts*, 48 U. MICH. J.L. REFORM 1039, 1051 (2015) (noting state funding as the primary source of funding); Kristine M. Santos, *The Luxury of Rehabilitation: Why District Courts Should Implement Federal Veterans Treatment Courts*, 40 U. LA VERNE L. REV. 176, 181, 187 (2019) (noting that Veterans Treatment Courts are mostly run by state governments).

220. Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 825–27 (2019).

221. Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 411 (2019).

222. Press Release, U.S. Dep't of Just.: Off. of Pub. Affs., Department of Justice Awards Nearly $59 Million to Combat Opioid Epidemic, Fund Drug Courts (Sept. 22, 2017), https://www.justice.gov/opa/pr/department-justice-awards-nearly-59-million-combat-opioid-epidemic-fund-drug-courts [hereinafter Department of Justice Awards Nearly $59 Million] (internal quotation marks omitted).

223. Benjamin Pomerance, *Rational Justice: Equal Protection Problems amid Veterans Treatment Court Eligibility Categorizations*, 97 OR. L. REV. 425, 426 (2019).

224. Bach, *supra* note 220, at 825, 828 (discussing scholarship and recent evidence of this trend); *see* Fedders, *supra* note 221, at 411–12 (stating that drug courts still "remain firmly entrenched within the criminal system" (citation omitted)). *But see* Pomerance, *supra* note 223, at 426–27 (citing published data regarding success of Veterans Treatment Courts).

continue to fund these specialty courts that purport to help and treat participants. It is "estimate[ed] that there are over 2[,]400 drug treatment courts and over 1[,]000 additional specialty courts" across the country.[225] Drug courts are popular on both sides of the political aisle,[226] supported by states,[227] and funded by the federal government. In July 2017, the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration stated that it would grant up to $80.8 million in funding for drug court programs over three to five years.[228] Almost all of the recipients are state and county agencies.[229] The Department of Justice in September 2017 committed approximately $59 million to "strengthen drug court programs and address the opioid epidemic," including awarding over $22.2 million to fifty-three jurisdictions to strengthen adult drug courts and Veterans Treatment Courts, which will provide veterans with comprehensive programs for veterans.[230] More than $9.5 million was committed for youth programs like juvenile drug treatment courts.[231] These programs not only "reduce further criminal justice" but also "promote recovery" for drug addiction and mental health.[232] The goals of recovery, treatment, and helping the participants appear just as important as public safety.[233]

Also, other diversion programs route criminal defendants from jail and other traditional expressions of the state's police power into more treatment-based programs. For example, the various diversion programs in Cook County, which are "recognized as a national model," are based on a "medical model [using] the least invasive

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225. Sara Gordon, *About a Revolution: Toward Integrated Treatment in Drug and Mental Health Courts*, 97 N.C. L. REV. 355, 364 (2019).

226. Fedders, *supra* note 221.

227. Every state now offers drug courts. *Id.*

228. Press Release, U.S. Dep't of Health & Hum. Servs., HHS Announces $80.8 Million in Grants for Adult and Family Treatment Drug Courts, and Adult Tribal Healing to Wellness Courts (July 14, 2017), https://www.hhs.gov/about/news/2017/07/14/hhs-announces-808-million-grants-adult-and-family-treatment-drug-courts-and-adult-tribal-healing.html [hereinafter HHS Announces $80.8 Million in Grants].

229. *TI-17-001 Individual Grant Awards*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/grants/awards/2017/TI-17-001 (last visited Feb. 20, 2021) (listing the individual agencies and organizations that received the grants, which are largely state or county agencies).

230. Department of Justice Awards Nearly $59 Million, *supra* note 222.

231. *Id.*

232. HHS Announces $80.8 Million in Grants, *supra* note 228.

233. *See id.*

treatment that has a chance of success."[234] Individuals charged with misdemeanors may be required to attend two counseling sessions, while those charged with felonies may participate in "a yearlong program overseen by a singing, cowbell-jangling, no-nonsense judge," and participants are required to complete community service only when they do not have a job.[235] Other programs, such as PLEADS in San Diego, provide a "voluntary, pre-booking diversion pathway" for people with substance-control issues to agree to support services instead of prosecution and jail.[236] In Oklahoma, the state increased the mental health and addiction programs of the Board of Mental Health and Substance Abuse Services agency by $14 million and received $10 million for diversion services in the criminal legal system.[237]

Furthermore, the efforts to reduce mass incarceration often involve proposals to increase treatment and care resources. Rachel Barkow recommends increases in education for those in prison and other rehabilitation programs that treat prisoners in order to reduce the prison population.[238] While her recommendations are presented as advancing public safety, the focus on criminal defendants as individuals in need of care, treatment, and supervision are familiar expressions of the state's *parens patriae* power that exists in the juvenile legal system.[239] Others, in an effort to counter mass incarceration, have brought attention to the state harms that have been imposed on perpetrators and victims.[240] Again, the increased attention to the individual, rather than to the public, is in essence a *parens patriae* concept.[241]

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234. Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html.

235. *Id.*

236. *Criminal Diversion Offers Treatment Instead of Jail Time in San Diego*, SDNEWS.COM (May 9, 2019, 9:24 AM), http://sdnews.com/view/full_story/27642793/article-Criminal-Diversion-offers-treatment-instead-of-jail-time-in-San-Diego-?instance=sdnews.

237. K.S. McNutt, *Mental Health, Addiction Funding Increase 'Good Step Forward'*, OKLAHOMAN (May 27, 2019, 5:00 AM), http://oklahoman.com/article/5632408/mental-health-addiction-funding-increase-good-step-forward.

238. RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 61–67 (2019).

239. *See id.* at 64.

240. *See* Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1161 (2018).

241. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that, in mental-health commitment cases, the state's *parens patriae* power is "providing care

Meanwhile, for those who call for the abolition of prisons altogether, their theories are rooted in the value of all individuals, including criminal defendants. As Ruth Wilson Gilmore describes, policies from other countries that impose short prison sentences for violent murders (for example, seven years for murder in Spain) reflect the belief that "where life is precious, life *is* precious."[242] To Gilmore, abolition involves "not just the closing of prisons" but also "government investment in jobs, education, housing, [and] health care."[243]

Other innovative programs and ideas, such as "holistic defense," "trauma-informed" defense, opioid policing, and progressive prosecution, all involve state actors trying to treat and meet the underlying needs of criminal defendants.[244] For example, in a holistic defense model, public defenders work with a team of other professionals to meet client needs, such as "loss of employment [and] public housing" as well as their underlying unresolved issues such as drug addiction and mental health concerns.[245] This holistic defense replaces the model of a single public defender focusing solely on the representation of the client in the criminal case.[246] Trauma-informed defense similarly works to "provid[e] intensive treatment to both crime survivors and offenders."[247]

Meanwhile, police officers in some jurisdictions impacted by the opioid crisis provide services similar to social work, such as "making referrals to treatment[] and providing grief counseling."[248] Other police departments have implemented structural changes where police officers respond with "non-arrest mechanisms" or encourage

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to its citizens who are unable because of emotional disorders to care for themselves" while the police power is "to protect the community from the dangerous tendencies of some who are mentally ill").

242. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html (internal quotation marks omitted).

243. *Id.*

244. NAT'L CTR. FOR CHILD TRAUMATIC STRESS, TRAUMA-INFORMED LEGAL ADVOCACY: A RESOURCE FOR JUVENILE DEFENSE ATTORNEYS 1 (2018); James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 820 (2019).

245. Anderson et al., *supra* note 244, at 821.

246. *Id.*

247. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 50 (2018) (citation omitted).

248. Fedders, *supra* note 221, at 426 (citation omitted).

drug offenders to give up their drugs in order to enter in a detox program.[249]

Furthermore, "progressive prosecutors" are being elected in major cities and attracting major funding and attention.[250] Their proposals and policy changes include reducing the prison population, decreasing prosecution, and increasing humane treatment of criminal defendants. For example, Dallas County District Attorney John Creuzot sought to reduce incarceration by not charging first-time offenders in marijuana cases or prosecuting thefts of personal items of necessity, such as formula and food, that are less than $750.[251] Rachael Rollins from Suffolk County, Massachusetts, ran on a campaign to not prosecute certain crimes, like shoplifting or drug possession, and to resolve non-dismissed cases in nontraditional ways, like "sending defendants to community-service or education programs."[252] Larry Krasner, the District Attorney from Philadelphia, planned to have his assistant district attorneys visit prisons and stay at homeless shelters in order for them to see the "realities of homelessness and addiction and mental illness and danger, potentially, to have been in the vicinity of and to have spoken to some homeless people."[253] In many counties and cities, these progressive prosecutorial reforms have been unpopular with local law enforcement, with police officers stating that prosecutors are putting the needs of those who commit crimes before the safety of law enforcement and the public.[254]

With such increases in *parens-patriae*-like policies and programs

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249. *Id.* at 426, 429–30.

250. *See* Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018) (internal quotation marks omitted), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration.

251. Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019), https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/.

252. Gonnerman, *supra* note 250.

253. *Id.* (internal quotation marks omitted).

254. *See* Marco della Cava, *New, More Progressive Prosecutors are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb 8, 2020, 11:26 AM), https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/; Allan Smith, *Progressive DAs are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019, 4:47 AM), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286.

in the criminal legal system, accompanied by language that emphasizes the welfare, treatment, and care of individuals beyond just public safety, it is unlikely that state actors' actions as *parens patriae* will disappear.[255] Rather, states will continue to assert this state interest to treat, care for, and work for the welfare of minors in the juvenile legal system. Thus, it is imperative for the *parens patriae* power to remain at the forefront of conversations in juvenile research, scholarship, cases, and policy. Scholars, advocates, and policymakers should analyze how the *parens patriae* power is being expressed towards youth in this current era, how this expression should change due to the defining characteristics of this era, and how the state *parens patriae* power should be distinguished meaningfully from the state police power.

III. THE MODERN *PARENS PATRIAE* POWER

How then should the *parens patriae* power keep up with the times? The *parens patriae* power by itself has caused harm for so long and continues to do so in this current Developmental Era. Yet, the developmental framework alone also will not fulfill the ideals of the juvenile system or adequately protect youth from excessive state harm. This Part argues that the concepts of *parens patriae* and the developmental approach should be combined—developmental research should both test the states' claims that it is acting as *parens patriae* and also guide state actions to properly exercise this power. One example of combining these two concepts is to change the way that minors' constitutional rights are analyzed when states assert their *parens patriae* interest as a governmental interest.

A. Ongoing Harms of Parens Patriae

State action, justified in whole or in part by *parens patriae*, still inflicts harm in this current Developmental Era. This continued harm shows that *parens patriae* alone is inadequate to prevent excessive state harm.

For example, *parens patriae* principles and concepts, such as rehabilitation, care, best interests, and treatment, are still invoked

255. *See* BARKOW, *supra* note 238 (advocating for greater investment in rehabilitative programs).

to detain youth away from their homes.[256] A report from December 19, 2019, provides that every day, there are approximately 48,000 youth held in out-of-home facilities, including 16,858 minors in detention centers, 10,777 youth in long-term secure facilities, 10,256 minors in residential treatment, 3,375 youth in group homes, and 4,535 youth in adult prisons and adult jails.[257]

However, juvenile detention facilities, although justified often by the theory of *parens patriae*, are not exactly places of reform, care, rehabilitation, and treatment.[258] Recent research continues to confirm the harmful effects of detention that advocates and past researchers have raised. For example, in 2017, researchers compared the long-term impact on minors between seventh and twelfth grade who were incarcerated (or not) at the following lengths: no incarceration, less than one month of incarceration, one to twelve months of incarceration, and more than one year of incarceration.[259] As summarized by the American Academy of Pediatrics, "[a]fter adjusting for baseline health and socio-demographic factors, participants who were incarcerated less than a month were more likely to experience symptoms of depression as adults, and those incarcerated for [one] to [twelve] months had

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256. *See, e.g.*, J.R. v. State, No. 18A-JV-2206, 2019 WL 2440215, at *3–5 (Ind. Ct. App. June 12, 2019) (upholding the juvenile court's decision to place minor in the Department of Corrections for the best interests of the juvenile and the community); *In re* D.C., No. 18-0976, 2019 WL 1752702, at *2–3 (Iowa Ct. App. Apr. 17, 2019) (upholding the juvenile court's decision to place a minor in residential treatment foster care due in large part to determination by a juvenile court officer that the placement was in the minor's best interests); *In re* J.C., No. 2213 EDA 2018, 2019 WL 1125557, at *2 (Pa. Super. Ct. Mar. 12, 2019) (noting that the juvenile court committed the youth to a "residential youth facility to undergo treatment"); Press Release, Wendy Sawyer, Rsch. Dir., Prison Pol'y Initiative, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [hereinafter *Youth Confinement*] (stating that while facilities allege to focus on corrections, training, or treatment, most are "virtually indistinguishable from incarceration"); *see also* Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448, 450 (2013) (citing studies indicating that incarceration leads to increased recidivism).

257. *Youth Confinement*, *supra* note 256.

258. *See* NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 82–84 (2014) (citing a 2010 federal survey regarding "widespread abuse and maltreatment" and a 2011 report from the Annie E. Casey Foundation documenting "pervasive" abuse (citations omitted)).

259. Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1, 2–3 (2017).

worse adult general health."[260] For youth who were detained for longer than a year, the "most dramatic effects were seen."[261] Their "odds of having depressive symptoms were more than four times as high and odds of having suicidal thoughts were twice as high. In addition, their odds of having physical or mental limitations that interfered with day-to-day functioning were three times higher than participants who hadn't been incarcerated."[262] Furthermore, it is not uncommon to read about guards—who were directly tasked with the care, rehabilitation, and treatment of children—physically and sexually abusing children, placing them in solitary confinement, and encouraging youth-on-youth violence for their entertainment.[263]

The state's purported benevolence in acting as *parens patriae* also loses credibility when the more restrictive actions by juvenile courts disproportionately fall on poor and minority children and can be better explained by racism rather than the *parens patriae* power.[264] The OJJDP long relied on a research tool called the Disproportionate Minority Contact Relative Rate Index to measure the disparities in the juvenile legal system by "comparing rates of juvenile justice contact experienced by different groups of youth."[265] Statistics from 2017 show that minority youth, as compared to white youth, were more likely to be referred to the juvenile court, detained, have juvenile court petitions filed against them, and placed in out-of-

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260. *Studies Highlight Long Term Health Harms of Juvenile Justice System*, AM. ACAD. OF PEDIATRICS (Jan. 23, 2017), https://services.aap.org/en/news-room/news-releases/pediatrics2/2017/studies-highlight-long-term-health-harms-of-juvenile-justice-system/.

261. *Id.*

262. *Id.*

263. *See* BERNSTEIN, *supra* note 258, at 82–84, 90, 100, 103, 106.

264. Birckhead, *supra* note 101, at 83–84 (noting that some statutes prevent release of minors from pretrial detention if they cannot be under the "supervision, care, or protection" of an adult (quoting TEX. FAM. CODE ANN. § 54.01(e)(2) (West 2011)).

265. MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 176 (2014); Moriearty, *supra* note 124, at 310 (observing that, according to the 2002 statistics, "minorities fared worse than whites at every stage of the juvenile justice process and that the effects were cumulative" (citation omitted)). The Juvenile Justice Reform Act of 2018 now requires that, instead of the disproportionate minority contact, participating states report and reduce racial and ethnic disparities in their juvenile systems. Pub. L. No. 115-385, § 205 11133(O)(15), 132 Stat. 5123, 5137 (2018); *see also Racial and Ethnic Disparities*, OJJDP, https://ojjdp.ojp.gov/programs/racial-and-ethnic-disparities (last visited Mar. 10, 2021).

home placements.[266] The greatest disparity existed for black youth, who compared to white youth, were referred to the juvenile court at a ratio of 2.9 to 1.[267] Youth of color are subject to more surveillance that exposes them to the juvenile legal system in the first place, such as having metal detectors and police officers on school campuses.[268] Meanwhile, minority youth were less likely than white youth to be diverted—at a ratio of 0.7 to 1.[269] Even with nationwide youth incarceration declining over the past decade, black, American Indian, and Latinx youth are still incarcerated at higher rates than white youth in every state.[270] Nationally, black youth are approximately five times more likely to be incarcerated than white youth, American Indian youth are "three times as likely," and Latinx youth are "[42%] more likely" to be incarcerated compared to white youth.[271] In New Jersey, black youth are incarcerated at twenty times the rate of white youth.[272] In Connecticut, Wisconsin, Delaware, Illinois, and North Carolina, the black-white disparity equals or is greater than ten.[273] Commitment is justified many times by the state's *parens patriae* power.[274] However, the racial disparity of these more restrictive state actions, which research shows actually harms children's development, continues to raise serious doubts about whether states' *parens patriae* actions are indeed primarily for the child's rehabilitation, care, treatment, and in their best interests.

In conjunction with the past harms propounded by the *parens patriae* power, it would be foolish to rely on this concept alone to guide juvenile law policy and jurisprudence.

B. The (Un)Necessary Parens Patriae *Power?*

Yet, the developmental framework alone also appears inadequate to guide state action for youth. Given the emerging

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266. *Racial and Ethnic Fairness*, OJJDP STAT. BRIEFING BOOK, https://www.ojjdp.gov/ojstatbb/special_topics/qa11601.asp?qaDate=2017 (last visited June 15, 2019).

267. *Id.*

268. BERNSTEIN, *supra* note 258, at 61.

269. *Racial and Ethnic Fairness*, *supra* note 266.

270. SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 4 (2021).

271. *Id.*

272. *Id.* at 7.

273. *Id.*

274. *See supra* note 256 and cases cited therein.

developmental jurisprudence and the growing treatment-focused police power, scholars, policymakers, courts, and advocates may wonder whether the state's expression of its *parens patriae* power is even necessary or beneficial. They should consider whether it is possible that the developmental approach—specifically, accounting for minors' developmental considerations, including lessened culpability and increased ability to change[275]—makes it so that regardless of whether the state is acting pursuant to its *parens patriae* or police power, minors' interests will be protected.

We have already seen an example of this in the Supreme Court's *J.D.B.* decision.[276] There the Court found that state officials must take a minor's objective or known age into account to determine whether one thinks the minor is being interrogated for purposes of the Fifth Amendment.[277] This rule applies regardless of whether the state is interacting with the minor pursuant to its *parens patriae* power or police power.[278] This line of reasoning is also consistent with the group of scholars who have long questioned the place of the state *parens patriae* interest in minors' constitutional-rights analysis or in the overall juvenile legal system and have called for minors to have the same constitutional rights as adults in criminal proceedings.[279]

Furthermore, given the trends that are taking place in the criminal field, where police power interests (like public safety) are either being minimized or increasingly relying on classic *parens patriae* methods (like treatment, rehabilitation, and care of the individual offender), perhaps the *parens patriae* interest will become a redundant, unnecessary state interest. After all, as referenced in Part I, in the 1980s and 1990s Get Tough Era, every jurisdiction changed its juvenile code to affirmatively account for police power interests in the juvenile legal system, like public safety and accountability.[280] Especially now that the police power interests are increasingly relying on *parens patriae* methods,[281] some may argue that a juvenile legal system without *parens patriae* would not be much different than what it is currently, except that minors'

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275. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).
276. *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011).
277. *See id.*
278. *See id.* 274–76.
279. *See supra* notes 105–06 and sources cited therein.
280. *See supra* notes 66–67 and accompanying text.
281. *See supra* Part II.D.

constitutional rights would not be unnecessarily curtailed.[282] Even youth-focused think tanks and organizations employ language that can apply just as aptly to criminal law reform.[283]

While these arguments are compelling, neither developmental jurisprudence nor changes to the police power are sufficient to replace the state's concerted exercise of its *parens patriae* power in the juvenile legal system.

First, the developmental framework alone cannot ensure that states actually interact with minors in a developmentally appropriate manner. There is evidence that developmental jurisprudence has not meaningfully led to doctrinal changes outside the Supreme Court landmark decisions, although scholars continue to posit ways to reform this.[284] Furthermore, with respect to the landmark Supreme Court cases of this era, the standard for developmental jurisprudence was set quite low.[285] The Court, after all, deemed it developmentally appropriate for states to impose an LWOP sentence if a minor commits homicide, as long as it is not a *mandatory* sentence.[286] Thus, it is constitutional even with full application of developmental jurisprudence for a state to order a minor to serve an LWOP sentence.[287] These cases show that when states expressly decide to remove minors from a *parens patriae* environment to a police power one by trying minors as adults, there is a limit to the remedy that the Court may enter.[288] While the Court invoked *parens patriae* principles to urge states to provide an *opportunity* for minors to rehabilitate, the Court ultimately did not

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282. *See supra* Part II.B for a discussion of the effect of *parens patriae* on minors' constitutional rights.

283. *See, e.g.*, *Juvenile Justice*, *supra* note 98 (stating that the MacArthur Foundation gave grants for "juvenile justice reform in [forty] states to accelerate a national movement to improve the lives of young people in contact with the law, while enhancing public safety and holding young offenders accountable for their actions").

284. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 118, 127 (2009) (noting the doctrinal barriers that prevent developmental science and neuroscience from impacting cases and positing that this science may have more impact in laws and policies); *see supra* note 96 and sources cited therein (describing scholarly and advocacy efforts based on the developmental approach).

285. *See* Maroney, *supra* note 284, at 127, 127 n.154–56 (discussing the limited application of developmental neuroscience in juvenile jurisprudence).

286. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

287. *Id.* at 480 (specifically declining to foreclose a sentencer's ability to issue an LWOP sentence to a minor in a homicide case).

288. *See, e.g.*, *id.* at 486–87.

mandate that states actually implement programs that would rehabilitate minors.[289] On the other hand, if states were affirmatively acting as *parens patriae* and working to ensure the care, development, and treatment of youth in the juvenile and criminal fields, then states would be encouraged to go above and beyond this constitutional floor.

Additionally, unleashed from the *parens patriae* power, the "dark side" of developmental science can rear its head to appease shorter-term public safety goals.[290] The *Roper* findings regarding children—that they possess less maturity and understanding of responsibility, that they are "more vulnerable or susceptible to negative influences and outside pressures," and that they have "personality traits" that are "less fixed"[291]—may lead some courts and legislators to choose more restrictive and harmful dispositions to minimize more immediate harms to the public.[292]

Second, a treatment-based and more humane police power is also insufficient to fully replace the *parens patriae* power. The absence of the *parens patriae* power means that the state would primarily act pursuant to its police power, which carries with it the potential for greater harm to minors even if they have the full protection of constitutional rights available to adults. After all, if states are acting primarily or solely pursuant to their police power, then their goals will ultimately focus on the needs of the community.[293] While the rehabilitation, treatment, and care of the individual may be a means to an end, they technically will not be the end themselves. Thus, when shorter-term public safety goals are at odds with the longer-term well-being or the proper development of a child, the public interest will trump the individual's interest.

Additionally, the potential for harm from the state's police power

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289. *See id.* at 488.

290. *See, e.g.*, Mike A. Males, *The Dark Side of "Brain Science": Manufacturing Teenage Crime*, CTR. ON JUV. & CRIM. JUST. (Apr. 5, 2016), http://www.cjcj.org/mobile/news/10285.

291. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

292. Males, *supra* note 290 (observing the increasing enactment of "status crime[]" statutes—which "penalize young people for behaviors that would be perfectly legal if they were older"—and the imposition of harsher punishments "for their own good" (internal quotation marks omitted)).

293. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

is generally worse than that from the *parens patriae* power. The harm that is triggered with the police power includes collateral consequences that automatically or easily attach to criminal convictions, but not to juvenile delinquency findings.[294] For example, immigration consequences, like deportation, may automatically activate after criminal convictions, but they do not attach to juvenile delinquency findings because these findings are not deemed convictions.[295] Adults in the criminal legal system are exposed to longer maximum sentences than minors who may be detained only until a certain age.[296] Meanwhile, if states are acting pursuant to *parens patriae* powers, then they would be required to focus on interests that prioritize the individual's care, welfare, and development, even if they are also mindful of other interests like accountability and public safety.[297]

Lastly, as a practical matter, the *parens patriae* interest is unlikely to ever disappear. Ultimately, a state, as sovereign, maintains the inherent authority to choose to act as *parens patriae* towards certain citizens, especially when its law is violated.[298] As set forth in Part I of this Article, the inherent authority of states to act as *parens patriae* is one that dates back to pre-colonial times.[299] It is

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294. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17 (2012); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010).

295. *See* Devison-Charles, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000) ("We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." (citations omitted)).

296. *Juvenile Justice System Structure & Process: Jurisdictional Boundaries*, OJJDP STAT. BRIEFING BOOK (Dec. 13, 2019), https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2018 (setting forth the maximum ages that the juvenile court maintains jurisdiction for dispositional purposes). According to the OJJDP, two states set the age at eighteen; three states set the age at nineteen; thirty-five states set the age at twenty; one state sets the age at twenty-one; two states set the age at twenty-two; four states set the age at twenty-four, and four states maintain jurisdiction for the full term of the disposition order. *Id.* The same source indicates that some states allow juvenile courts to give a blended sentence that consists of an adult sentence that extends beyond the maximum age for juvenile court jurisdiction. *Id.*

297. *See, e.g.*, *Addington*, 441 U.S. at 426. Furthermore, if individual cases have a different calculus, then defense counsel may seek to waive jurisdiction in juvenile court and seek to transfer the case to criminal court. *See, e.g.*, State v. Randolph, 876 P.2d 177, 179–83 (Kan. Ct. App. 1994) (explaining the process of waiving juvenile court jurisdiction in Kansas).

298. *See supra* Part I.A.1.

299. *See supra* Part I.

an interest that the Supreme Court has consistently upheld in a variety of contexts.[300] In many constitutional-rights questions, such as those involving Fourteenth Amendment due process rights or Fourth Amendment search and seizure rights, the constitutional analysis inherently involves taking into account the state interest.[301] No court is able to compel a state to *not* assert *parens patriae* as its state interest. Similarly, for equal protection rights analysis, the *parens patriae* interest will continue to differentiate minors in juvenile court proceedings from adult defendants in criminal proceedings, such that in most cases, these two populations will be deemed as not similarly situated.

In light of these points, the state *parens patriae* power and interest are here to stay. All this being said, the fact that the *parens patriae* power maintains a significant presence in the juvenile legal system does not mean that it should remain static. This new era demands another reassessment of this state power.

C. The Modernized Parens Patriae *Power*

Neither the *parens patriae* approach nor the developmental approach appears adequate by itself to minimize state harm against youth. However, combining the two—or specifically, incorporating the developmental framework into *parens patriae*—may help fulfill the purpose of this state power. In particular, developmental and neuroscience research should help guide state *parens patriae* actions and should also be used to assess whether those actions are actually in the best interest of children.

One example of incorporating the developmental framework with *parens patriae* is in the interpretation of minors' constitutional rights. The relationship between the *parens patriae* power and minors' constitutional rights has changed throughout the history of

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300. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982) ("At a fairly early date, American courts recognized [the] common-law concept [of *parens patriae*] . . . ."); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) ("This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person, or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people, and the destruction of their liberties.").

301. *See, e.g.*, *In re* Gault, 387 U.S. 1, 69 (1967) (Harlan, J., concurring in part & dissenting in part).

juvenile law.[302] One of the very reasons that there are different eras of juvenile law is that courts' and legislators' assessments of the *parens patriae* power evolved in light of new research, circumstances, and viewpoints. Any revitalization or reassessment of this power should take into account the groundbreaking changes of this Developmental Era. *Parens patriae* should not be a mere repeat of the past, where state actors had near-unfettered discretion to take children away from their parents and put them into institutions that were the functional equivalents of prisons until they reached the age of majority. Its expression should be different.

One significant way to transform the state *parens patriae* interest in this new era is in constitutional questions. Here, courts should rely on developmental science and neuroscience to test whether states are actually acting as *parens patriae*. This proposal is noteworthy because it cabins and may even undercut the discretion that inherently belongs to the state through its *parens patriae* power. Withholding deference to state actors, such as prosecutors, probation officers, and juvenile court judges, may strike at the very idea of the state's inherent authority to act in its *parens patriae* power, but this doctrinal change is supported by recent and even past Supreme Court cases.

This doctrinal change finds support in the five landmark cases of this Developmental Era, where the Supreme Court expressly relied on developmental science and neuroscience research in ways that had not been done before to make findings about children and state authorities.[303] This analysis was especially evident in the Eighth Amendment context. In standard Eighth Amendment questions, courts generally consider the actual practice of states nationwide and give wide deference to state legislators to determine whether a punishment is cruel or unusual.[304] However, for minors' Eighth

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302. *See supra* Parts I.B., II.B–C (discussing the impact of state *parens patriae* power on minors' constitutional rights).

303. *See, e.g.*, Buss, *supra* note 8, at 742–43 (discussing the use of developmental science and neuroscience in the disposition of the early landmark cases).

304. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 493–94 (2012) (Roberts, C.J., dissenting) (stating that the Court did not follow the standard Eighth Amendment framework of starting with the "'objective indicia of society's standards, as expressed in legislative enactments and state practice'" and instead relied on its own subjective judgment (quoting Graham v. Florida, 560 U.S. 48, 61 (2010))); Roper v. Simmons, 543 U.S. 551, 587–607 (2005) (O'Connor, J., dissenting) (criticizing the Court for making independent judgment regarding the death penalty and replacing legislators' judgments and disagreeing that there was a national consensus against the death

Amendment questions, rather than allowing states to exercise their own expertise, the Court turned to scientific research about children's culpability and capacity to find that the death penalty, mandatory LWOP in homicide cases, and LWOP in non-homicide cases, were cruel and unusual, and thus unconstitutional.[305]

This doctrinal shift also finds support in past Supreme Court cases. For example, the Court in *Gault* granted minors due process rights because it took into account actual evidence of what was taking place in juvenile court systems in general rather than just taking the state at its word that it was acting as *parens patriae*.[306] The *Gault* Court, which ruled on a case from Arizona, did not limit its analysis to the actions and judgment of the Arizona state actors.[307] The Court instead found it imperative to "candidly appraise[]" the "claimed benefits of the juvenile process," and to not "shut [its] eyes" to the "startling findings" set forth in studies, such as the "Stanford Research Institute for the President's Commission on Crimes in the District of Columbia."[308]

Now, courts should formally invoke developmental science and neuroscience research to assess whether states are acting as *parens patriae* when states put forward *parens patriae* interests as the governmental interest in constitutional questions. In this way, developmental jurisprudence should not be seen as a way to *replace* the state's exercise of its *parens patriae* power but rather as a way to keep it honest. Thus, when states assert their *parens patriae* interest when minors raise constitutional challenges to state actions, such as state decisions to detain them, conduct strip searches, or impose certain probation conditions, courts should rely on scientific research to assess whether states are indeed acting as *parens patriae*. Courts should ensure that these state actions are furthering minors' treatment, care, supervision, and rehabilitation, and are in their best interests before limiting minors' constitutional rights.

For example, in constitutional questions that take a minor's liberty interest or privacy interest into account, such as Fourth

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penalty for youth who committed offenses when they were sixteen and seventeen years old).

305. *See Miller*, 567 U.S. at 471–72; J.D.B. v. North Carolina, 564 U.S. 261, 273 n.5 (2011); *Graham*, 560 U.S. at 68, 74; *Roper*, 543 U.S. at 569–70.

306. *See In re* Gault, 387 U.S. at 17 n.22, 18 n.23, 21–23.

307. *See id.* at 21–27.

308. *Id.* at 21–22; *see also id.* at 18 n.23 (citing law review articles and congressional materials regarding the actual shortcomings of the juvenile legal system).

Amendment and due process claims, the minor's interest should be subordinated under the state *parens patriae* interest *only* when neuroscience and developmental science research supports that the state is indeed acting pursuant to its *parens patriae* power and not solely its police power. In 1984, the Supreme Court in *Schall v. Martin* subordinated the minor's liberty interest under the state's *parens patriae* interest on the basis that children "are not assumed to have the capacity to take care of themselves" and that pretrial detention furthered the child's welfare because it protected the child from injury and a life of crime.[309] More recently, in 2015, the Third Circuit in *J.B. ex rel. Benjamin v. Fassnacht*,[310] expressly acknowledged the harms of strip searches on minors but then overshadowed this privacy interest with the governmental interest, which consisted of both security concerns *and* the state's *parens patriae* or *loco parentis* duty to care for other juveniles and "screen for signs of disease, self-mutilation, or abuse in the home."[311] Again, the minor's interest was equated with the governmental interest.[312] However, given the harms of strip searches[313] and detention on the

309. 467 U.S. 253, 265, 268 (1984).

310. 801 F.3d 336 (3d Cir. 2015).

311. *Id.* at 341–43 (citation omitted).

312. Relying on the principle stated in *Schall*, the Third Circuit stated:

> "Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm. 'Children . . . are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.'"

J.B., 801 F.3d at 343 n.41 (alteration in original) (quoting N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004)).

313. *See id.* at 342 (recognizing the harm, "'psychological damage'" and trauma that are "inflicted upon a youth subjected to a strip search" (citation omitted)). The Third Circuit's observations are supported by longstanding and recent research regarding the harms associated with strip searches. *See, e.g.*, Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993) (summarizing prior cases that found strip searches to be "dehumanizing," "repulsive," and "thoroughly degrading and frightening" (internal quotation marks omitted) (citations omitted)); F. PHILIP RICE & KIM G. DOLGIN, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE 168 (11th ed. 2005) (describing research showing that strip searches are "more embarrassing" to minors than adults); Jesse A. Raley, *Etiology of Exhibitionism in*

development of minors,[314] minors' interests should be weighed *against* the governmental interest, not subordinated or put on the same side as the governmental interest. The harms done to minors' development and the states' asserted duty to act as *parens patriae* should mean that minors actually receive *heightened* constitutional protection when compared to their adult counterparts, not less. This does not mean that every state action that causes harm will be found unconstitutional; rather it primarily means that the process by which courts conduct the constitutional analysis will change.

A new assessment of the *parens patriae* interest should also impact minors' constitutional rights applicable to their dispositions or other state-imposed consequences. For hundreds of thousands of youth each year, the disposition of juvenile cases will be where their constitutional rights matter the most because the majority of cases formally filed in juvenile court result in a delinquency adjudication. In 2018, of the approximately 744,500 juvenile cases across forty-five states and Washington D.C.,[315] 422,100 cases were formally filed in juvenile court, and 220,000 cases (or 52%) resulted in an adjudication of delinquency.[316] Even for cases that were not formally filed[317] or were filed but did not result in an adjudication of delinquency,[318] state-imposed consequences still resulted. In other words, in 2018, 239,000 cases (or 32.1%) were dismissed outright.[319] The remaining 505,500 cases (or 67.9% of cases) resulted in some state-mandated outcome, such as out-of-home placement, probation, or another sanction that required "minimal continuing supervision," such as an order to pay restitutions or fines or participate in community service, a treatment program, or counseling.[320]

Adolescence: A Case Example of Countershame Theory, 1 ADOLESCENT PSYCHIATRY 179, 181 (2011) ("[R]esearch demonstrates how being forced to strip for a search could warp a child's view about sexual autonomy, personal boundaries[,] and their ability to be able to control access to their own bodies.").

314. *See supra* note 100 and sources cited therein.

315. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018, at iii–iv, 6 (2020).

316. *Id.* at 52.

317. In 2018, there were 322,400 cases that were not petitioned, but of this figure, 49,000 youth received probation and 142,600 received another sanction. *Id.* And of the cases where no petition was filed, 130,400 cases were dismissed. *Id.*

318. In 2018, there were 198,400 cases that were petitioned but did not result in an adjudication of delinquency. *Id.* Of these cases, 71,900 youth received probation, 17,900 received another sanction, and 108,600 cases were dismissed. *Id.*

319. *Id.*

320. *Id.*

Specifically, 3,600 youth were transferred to criminal court,[321] 62,100 youth were placed in an out-of-home residential facility,[322] 260,300 youth were placed on probation,[323] and 179,500 youth received another sanction that required less supervision.[324]

Minors' dispositions or state-imposed consequences should comply with their constitutional rights. When minors raise constitutional challenges regarding their dispositions (most likely, in cases that are filed and adjudicated) and state actors like prosecutors or judges counter that they are acting as *parens patriae*, states' claims should be supported by the growing scientific research about how children actually rehabilitate and grow into well-developed adults. For example, Elizabeth Scott and Laurence Steinberg point to "extensive and remarkably consistent scientific literature" regarding the healthy development of children: that there is "at least one adult . . . who is involved in the adolescent's life and invested in the young person's success"; that there are healthy peer groups and "at least one" close-friend relationship; and that there is "participation in activities that permit the adolescent to develop and practice autonomous decision making and critical thinking."[325] Nell Bernstein, who has written extensively about the harmful realities of juvenile prisons, opines that "having read the literature, interviewed the experts, and visited juvenile prisons across the country . . . a single theme emerge[s] with remarkable consistency: [*R*]*ehabilitation happens in the context of a relationship.*"[326] The current system, however, often does the opposite: "[V]irtually every aspect of our juvenile prison system—designed to disrupt and deny relationships, not foster or forget them—runs counter to this fundamental aspect of human nature."[327]

Scholars have highlighted various programs that help foster

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321. These 3,600 youth constitute less than 1% of all juvenile cases opened in 2018. *Id.*

322. *Id.* at 46.

323. Of the minors placed on probation, 49,400 minors were not petitioned, 71,900 minors were petitioned but not adjudicated delinquent, and 139,000 minors were petitioned and adjudicated delinquent. *Id.* at 52.

324. In 2018, a total of 179,500 minors received another sanction—besides probation or placement outside the home—requiring "minimal continuing supervision." *Id.* Of this number, 142,600 youth were not petitioned, 17,900 youth were petitioned but not adjudicated delinquent, and 19,000 youth were petitioned and adjudicated delinquent. *Id.*

325. SCOTT & STEINBERG, *supra* note 27, at 56–57 (citations omitted).

326. BERNSTEIN, *supra* note 258, at 11.

327. *Id.*

healthy relationships, such as Functional Family Therapy, Multisystemic Therapy, and Multidimensional Treatment Foster Care, where state officials, like therapists, work with the entire family, including biological and foster parents, to focus on improving the parent/guardian and child relationship, changing family-risk factors, and implementing "family-based intervention" strategies to actually change youth behavior.[328] The results thus far have been promising.[329] While these methods are already being employed in some dispositions, these relationship-furthering methods should be part of constitutional analyses when state actors claim that they are acting pursuant to their *parens patriae* power. Whether placed on probation or in treatment programs, minors should have increased opportunities to make positive and lasting relationships with adults and positive peers in their actual communities. Thus, developmental and neuroscience research about how children actually develop, rehabilitate, and grow, should be an essential component of assessing the *parens patriae* interest in these constitutional challenges.

In these ways, the developmental framework can better guide state actions taken pursuant to the *parens patriae* power.

CONCLUSION

The state *parens patriae* power should not be viewed merely as a relic of the past. Even today, the *parens patriae* theory still guides state action in juvenile law, and its principles are increasingly invoked by state actors in criminal law. Rather than view the developmental framework as replacing *parens patriae*, the two should complement one another. States should honor their duties and obligations under the *parens patriae* power and also rely on developmental science and neuroscience research to properly

328. Slobogin & Fondacaro, *supra* note 15, at 28–30.

329. For example, in eight to fifteen Functional Family Therapy sessions, the felony recidivism rate decreased by 40%. *Id.* at 28. For Multisystemic Therapy, after four years, those in this therapy had recidivism rates of 22.1% compared to 71.4% of those in individual therapy, and a study after fourteen years found there were 57% fewer arrests. *Id.* at 29. Also, Multidimensional Treatment Foster Care has resulted in fewer criminal referrals and higher reunification rates with relatives. *Id.* at 29–30. Some juvenile courts have already implemented these therapies into minors' dispositions. *Id.* at 30. While Slobogin and Fondacaro advocate for these therapies as a method of prevention, courts should also adopt these types of dispositions after a juvenile delinquency finding to increase minors' ability to make positive and lasting relationships with adults in their own communities.

exercise this state power.