UIC Law Review

Volume 15 | Issue 2 Article 10

Spring 1982

Pennslyvania v. Porter: The State as Plaintiff under 42 U.S.C. 1983, 15 J. Marshall L. Rev. 515 (1982)

Cheryl Johnson

PENNSYLVANIA v. PORTER *: THE STATE AS PLAINTIFF UNDER 42 U.S.C. § 1983

Section 1983 provides that every "person" who deprives any citizen or other "person" of constitutional rights shall be liable to that "person."[1] Courts have frequently faced the question of whether states and other governmental bodies are "persons" and, therefore, appropriate defendants under § 1983.[2] In *Penn-*

---

* 659 F.2d 306 (3d Cir. 1981).

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

2. States are not usually appropriate defendants under § 1983 because immunities are granted to the states by the eleventh amendment. Alabama v. Pugh, 438 U.S. 781 (1978) (*per curiam*) (federal injunction violated ban on federal suit by private parties against the state without its permission); Edelman v. Jordan, 415 U.S. 651 (1974) (award of wrongfully withheld welfare payments violated prohibition on awards of funds from state treasury); Thompson v. New York, 487 F. Supp. 212 (N.D.N.Y. 1979) (state is not a "person" under 42 U.S.C. § 1983). Congress, however, has sometimes expressly allowed suits against, or recovery of damages from, the state. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978) (Civil Rights Attorney's Fees Awards Act of 1976, which authorized the award of attorneys' fees in suits against state officials in their official capacities does not violate the eleventh amendment); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII of the Civil Rights Act of 1964 gives employees of the state the right to bring suit against the state); Peel v. Florida Dept. of Transp., 600 F.2d 1070 (5th Cir. 1979) (Veterans' Reemployment Rights Act authorizes suit against a state).

Courts routinely extended immunity to local governments. *See, e.g.*, City of Kenosha v. Bruno, 412 U.S. 507 (1973) (city not a "person" for purposes of equitable relief under § 1983); Monroe v. Pape, 365 U.S. 167 (1961) (city not a "person" for purposes of § 1983). The Supreme Court, however, withdrew absolute immunity for municipalities in 1978 and allowed suit against New York City for the misconduct of its employees. Monell v. Department of Social Services, 436 U.S. 658 (1978) (city liable for damages arising from department policy which forced pregnant employees to go on unpaid leave before it was medically necessary). The Court affirmed its decision in 1980 and at the same time settled the controversy among the lower courts over whether good faith is a valid defense in § 1983 actions. Owen v. City of Independence, 445 U.S. 622 (1980) (police chief sued city for wrongful discharge; good faith does not entitle the city to qualified immunity under § 1983). *Accord* Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979) (wrongful discharge; right to recovery does not depend on bad faith). *Contra*, Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (*per curiam*) (forced maternity leave; officials enjoy immunity as long as they act in good faith; decided before *Owen*).

sylvania v. Porter,[3] a federal court for the first time faced the question of whether the state, even though not a "person," is an appropriate plaintiff. In a plurality opinion,[4] the Court of Appeals for the Third Circuit granted standing as a plaintiff to the state under the doctrine of *parens patriae*.[5]

The Borough of Millvale is a small town on the fringes of Pittsburgh. In 1973, the Borough Council of Millvale hired Frank L. Baranyai as a police officer. About one year later, citizens began complaining to the council about Baranyai's methods of law enforcement.[6] The complaints continued for the next three years and progressed from allegations of verbal harassment to corroborated charges of illegal searches and seizures and of beatings of handcuffed prisoners.[7] Neither the mayor, the police chief, nor the council took any action to curb Baranyai's alleged excesses, or even to investigate the complaints.[8] On the contrary, the mayor, the police chief, and some of the council members openly supported Baranyai's tactics and joined him in

3. 480 F. Supp. 686 (W.D. Pa. 1979), *rev'd*, 642 F.2d 687 (3d Cir. 1980) (3 judge panel reversed holding that Pennsylvania lacked standing), *en banc vacating and withdrawing* the 3 judge panel's opinion, 659 F.2d 306 (3d Cir. 1981) (affirming the state's standing and reversing as to the injunction's applicability to the borough council).

4. Three judges voted to affirm the injunction granted by the district court in its entirety, three to reverse in its entirety, and two to affirm in part and reverse in part. For the purposes of this discussion, the affirming opinion will be referred to as the majority and the dissenting/reversing opinion as the minority.

5. The doctrine of *parens patriae* gives the state standing to litigate injuries to its citizens if its own interests were also injured in a separate and distinct way by the acts of the defendants. *See infra* notes 24-30 and accompanying text.

6. Most of the complaints involved a 1911 disorderly conduct ordinance which defined disorderly persons as "[a]ll persons persisting in loitering upon the public highway or streetcorners and in front of any store, shops, places of business, place of amusement or place of worship after being requested to vacate such place or places and move on" and "[a]ll suspicious persons or person who can give no reasonable account of themselves." Millvale, Pa., Ordinance 305 (1911). Officer Baranyai interpreted the ordinance broadly; in separate incidents, he arrested two women, one of whom was a clerk of the county court, a group of men, and an eleven-year-old boy while they were lawfully on the streets. Baranyai held the child at the police station without reading *Miranda* warnings or calling the boy's parents. He later testified that he did not regard this as an arrest. 480 F. Supp. 686, 688-90 (W.D. Pa. 1979).

7. The first finding of fact by the district court of violations of rights was the arrest of Margaret Blume. Baranyai claimed that the middle-aged woman dressed up like her teenaged daughter in order to entrap him into making a false arrest, but he completed the arrest even after he recognized Mrs. Blume. Subsequent findings noted six instances of physical assault with a blackjack or nightstick upon handcuffed prisoners, two instances of physical assault on the street, two illegal searches, and four attempts to intimidate complainants. 480 F. Supp. 686, 688-91 (W.D. Pa. 1979).

8. *Id.* at 690-91.

harassing, intimidating, and villifying those who complained.[9] The situation came to the attention of the Community Advocate Unit of the Office of the Pennsylvania Attorney General, which filed criminal charges against Baranyai in the summer of 1977. After his indictment and even after his conviction,[10] Baranyai remained on active duty. During this time, the council passed two resolutions supporting his conduct.[11]

In October, 1977, the Community Advocate Unit filed suit under § 1983 in federal court seeking to enjoin Baranyai, the mayor, the police chief, and the Borough Council from committing or encouraging further violations of fourteenth amendment rights.[12] The state claimed standing as a plaintiff under the doctrine of *parens patriae*. The defendants challenged the standing of the state as a plaintiff and also moved to dismiss the action for failure to state a claim for which injunctive relief could be granted.[13] The court denied the motion to dismiss for lack of standing, provided that within twenty days the state added individual plaintiffs.[14] Based on forty-four findings of fact, the dis-

9. *Id.* at 689-91.

10. Baranyai was convicted of one count each of simple assault and official oppression on complaint of David Stier, and one count of official oppression on complaint of the Deputy Attorney General. Twenty-two other charges were dismissed. 480 F. Supp. 686, 690 (W.D. Pa. 1979).

11. The council passed the first resolution in support of Baranyai on July 12, 1977, after it learned of the state's indictments; the second resolution came on February 14, 1978, after Baranyai's conviction. The conviction is currently on appeal. 480 F. Supp. 686, 691 (W.D. Pa. 1979). While the suit was pending in district court, the mayor tried to promote Baranyai to sergeant, but the council refused to confirm the appointment. Brief for Appellee at 22, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981).

12. The Commonwealth filed suit in federal court because it had no adequate remedy under its own laws. Millvale is incorporated under the Pennsylvania Borough Code, which provides for removal of police officers by the borough council upon complaint of the mayor. The collaboration of the mayor and the police chief with Baranyai made voluntary removal of Baranyai unlikely. 480 F. Supp. 686, 695 (W.D. Pa. 1979).

13. The defendants moved to dismiss for failure to state a cause of action, alleging that the court had no power to interfere with the operations of Millvale's police force under the decision in Rizzo v. Goode, 423 U.S. 362 (1976) (citizens sued city of Philadelphia for brutality by two police officers who were not party to the suit). The district court refused to follow *Rizzo*, noting that the present case is not analogous. In *Rizzo*, two nonparty officers in a force of 7500 which served a city of 1,750,000 were accused of twenty instances of misconduct. There was neither evidence of official encouragement nor official knowledge. In this case, a named defendant single-handedly inflicted more than twenty injuries in a town of 5000, and the town fathers had knowledge of his activities and actively encouraged him. Further, the *Rizzo* decision was based partially on the prohibition of federal meddling in state affairs. Federalism is not an issue here, however, since the state itself requested federal aid. 480 F. Supp. 686, 694 (W.D. Pa. 1979).

14. The district court required the addition of private plaintiffs, but denied class certification, ruling that "the Commonwealth was representing the rights of all of its citizens," and that "the action is properly brought by

trict court also ruled that the complaint did state a cause of action and that a permanent injunction should issue.[15]

On appeal, a three-judge panel of the Court of Appeals for the Third Circuit denied the state's claims of standing as a plaintiff and reversed the district court.[16] On petition by the plaintiffs, the court ordered a rehearing *en banc* and vacated the panel opinion.[17] In a plurality opinion, the full court affirmed

---

the Commonwealth joining to protect the constitutional rights of its citizens and to support those individuals who have specifically joined alleging individual grievances." 480 F. Supp. 686, 695 (W.D. Pa. 1979).

15. The order of the district court enjoined Baranyai from detaining citizens without probable cause, using wrongful or excessive force or physical abuse, or illegally searching citizens or their homes or automobiles. Baranyai, the mayor, and the police chief were enjoined from harassing, threatening, intimidating, or retaliating against plaintiffs or other complainants. All defendants were enjoined from encouraging or abetting violations of the injunction, and were prohibited from employing Baranyai except as an unarmed desk officer. The court also retained jurisdiction over the case for purposes of enforcing the order.

Problems arose from the court's syntax in the section which limited the scope of Baranyai's employment:

> All of the defendants are hereby enjoined effective 5 days from the date of this order from employing defendant Baranyai and Baranyai is enjoined from serving as a police officer or law enforcement official on any basis in the Borough of Millvale except as a desk policeman whose activities shall be entirely confined to the police station of the Borough of Millvale and he is further enjoined from possessing or using upon prisoners or other persons any weapons of any kind, . . . so that his activities with the Millvale Police Force shall be entirely confined to desk duty and in the course of such duty he shall not be permitted to use any weapons of any kind upon prisoners or other persons.

(3d Cir. 1981) 659 F.2d 306, 313 n.7.

The structure of the sentence allowed the minority to argue that the injunction was internally inconsistent, first prohibiting employment completely and then limiting employment to desk duty. 659 F.2d 306, 338 (3d Cir. 1981) (Garth, J., dissenting).

Four days after the injunction was issued, the court modified the order to stay the portion that limited Baranyai to desk duty and barred him from possessing weapons. The stay was conditioned on the filing by Baranyai of a $10,000 surety bond and on Baranyai's compliance with the other provisions of the order. The same day, the defendants filed an emergency petition with the circuit court. Judge Aldisert affirmed the trial court's order, modifying it only to the extent that the bond could be supplied by Baranyai or the borough. Subsequently, the Borough Council posted the bond. Brief for Appellee at 5-6, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981).

16. The panel denied standing to the state on any basis and in particular held that the state is not a "person" under § 1983. The definition of "person" became an issue because the state was claiming standing both as *parens patriae* for the injury to its quasi-sovereign rights and as a "person" for the injury to its sovereign rights. *See infra* note 25. The lower court disposed of the question by finding no injury. The Commonwealth continued to assert personal standing until just before the rehearing before the full court, and then conceded that the state is not a "person," and that its sovereign rights are not protected by § 1983. 659 F.2d 306, 327 (3d Cir. 1981).

17. While the appeal was pending, Baranyai left Millvale to take a position as a police officer in another Pennsylvania town. The other defendants

the trial court's decision to apply *parens patriae* and upheld the injunction as to Baranyai, the mayor, and the police chief, but reversed as to the Borough Council.[18] The question which divided the court was, once again, the standing of the state as a plaintiff. All of the judges accepted the trial court's findings, of fact, and all agreed on the propriety of injunctive relief.[19] The minority, however, urged remand for certification as a class action[20] and removal of the state as a plaintiff,[21] while the majority accepted the state as a plaintiff under *parens patriae*.[22]

The doctrine of *parens patriae* arose in medieval Britain when the king stood at court for charitable uses and for persons who were under legal disability, such as children and incompetents.[23] That application of the doctrine was adopted by courts in the United States and is still in use.[24] American courts ex-

---

moved to dissolve the injunction for mootness. The circuit court denied the motion, noting that Baranyai was still employed as a police officer and that the mayor and the police chief continued in their offices. Since the court could not say with assurance that the abuse would not recur if the injunction was dissolved, the order was left intact. 659 F.2d 306, 313 (3d Cir. 1981).

18. The standards set by *Rizzo* require that the defendant be causally connected to the violation if he is to be held liable; mere failure to act is not enough. Rizzo v. Goode, 423 U.S. 362, 371 (1976). *See also* Allee v. Medrano, 416 U.S. 802 (1974) (Texas Rangers engaged in a pattern of intimidation of farm labor organizers in direct violation of plaintiff's rights); Hague v. CIO, 307 U.S. 496 (1939) (city officials actively violated plaintiffs' rights by adopting policy of harassing union organizers). The minority felt that the evidence strongly supported the injunction as to the three individual defendants, but was less clear as to the council.

Rizzo requires positive action which violates the plaintiffs' rights; the Borough Council was guilty only of inaction. In addition, the membership of the council had changed. 659 F.2d 306, 337-39 (3d Cir. 1981) (Garth, J., dissenting). In contrast, the majority noted that even if one did not find the council culpable under *Rizzo*, enjoining the council was still an appropriate means of making the injunction fully effective against the other defendants. When a nonculpable party is capable of frustrating the purpose of an order, it also may be properly enjoined. 659 F.2d at 325 (3d Cir. 1981).

19. 659 F.2d at 325, 339 (3d Cir. 1981).

20. The individual plaintiffs requested class certification at the trial level; defendants opposed it. The district court denied certification because the state was a party and was representing the persons who would have been included in the class. On appeal, the defendants argued that the state was not a valid plaintiff, that the individual plaintiffs were not class representatives, and that, therefore, the injunction ran only as to the named plaintiffs. The court noted that such modification left the defendants free to abuse all other persons in Millvale, and remarked that "it comes with little grace for the defendants to urge as a ground for reversal the very absence of class action certification which they insisted upon in the trial court." *Id.* at 313-14.

21. *Id.* at 339.

22. *Id.* at 314. *See supra* note 6.

23. W. BLACKSTONE, COMMENTARIES, 47-78 (12th ed. 1793).

24. *See, e.g.*, United States *ex rel.* Smithsonian Institution, 485 F. Supp. 1222 (D.D.C. 1980) (declaratory judgment asked to construe terms and conditions of charitable gifts to the Smithsonian); Pennsylvania v. Brown, 260

panded the doctrine allowing states to defend their "quasi-sovereign interests." Although "quasi-sovereign interest" has never been defined,[25] courts have limited application of the doctrine almost exclusively to disputes over the environment[26] and interstate commerce.[27] Regardless of the nature of the dispute, three requirements must be fulfilled before quasi-sovereign interest *parens patriae* can be applied: 1) the dispute must affect a substantial portion of the population,[28] 2) the private remedy

F. Supp. 323 (E.D. Pa. 1966), *rev'd and rem'd*, 373 F.2d 771 (3d Cir. 1967) (*en banc*), 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3d Cir.) (*en banc*), *cert. denied*, 391 U.S. 921 (1968) (state sued on behalf of minor orphans to desegregate a charitable educational institution).

25. A number of courts have attempted to define "quasi-sovereign interest," but have been uniformly unsuccessful. One court called the attempts largely unhelpful generalities. Some examples are: "health and comfort of the inhabitants," Missouri v. Illinois, 180 U.S. 208, 241 (1901); "general welfare," Kansas v. Colorado, 206 U.S. 46, 99 (1907); "independent of and behind the titles of its citizens, in all the earth and air within its domain," Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); "an interest apart from that of the individuals affected," Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923); "state's economy and the health, safety, and welfare of its people," Pennsylvania *ex rel.* Shapp v. Kleppe, 533 F.2d 668, 671 (D.C. Cir.), *cert. denied*, 429 US. 977 (1976); "controversy must . . . implicate the state's interest in economic supervision." *Id.* at 674.

What began as interests of the state which arose from its sovereignty over all territory within its boundaries expanded to include interests in nontangibles such as the economy and general welfare. What is included within those nebulous boundaries remains unclear. Courts treat the categories as elastic and stretch them to cover modern concerns. A recent decision extended general welfare to include public morale. Puerto Rico v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980).

26. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (noxious fumes from plant in Tennessee killed vegetation in five Georgia counties); Kansas v. Colorado, 185 U.S. 125 (1902) (diversion of natural water flows); Missouri v. Illinois, 180 U.S. 208 (1901) (Illinois corporation polluted the Mississippi River).

27. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (railroad charged higher rates in Georgia than in surrounding states); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (West Virginia natural gas regulations discriminated against out-of-state users).

Courts have been reluctant to extend *parens patriae* beyond the traditional bounds of interstate commerce and the environment or to the traditional remedy of injunction. Even when they expand the bounds, they retain the remedy. For example, in 1945, the Supreme Court allowed *parens patriae* in an antitrust action for injunction, but in 1972, disallowed *parens patriae* in an antitrust suit which requested both an injunction and damages. *Compare* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (antitrust suit for injunction and damages; *parens patriae* denied), *with* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (anti-trust suit for injunction only; *parens patriae* allowed). The expressed fear of the court in damage suits is the possibility of double recovery. 405 U.S. 251, 264 (1972).

28. Under this requirement, a state may not redress purely private grievances as a volunteer. If this were not so, the original jurisdiction of the Supreme Court in cases which involve states would enable disputes which otherwise had no rightful access to the federal courts to be heard by the Supreme Court. Missouri v. Illinois, 180 U.S. 208 (1901) (discharge from an

must be inadequate,[29] and 3) the injury to the state's quasi-sovereign interest must be separate and distinct from the injury to the citizens' interest.[30]

The majority and dissenting opinions disagreed on all three points. The majority did not address the "substantial portion" requirement, apparently feeling that sufficient numbers were involved.[31] With respect to remedy, they argued that the private remedy was inadequate because of the nature of the injury; fear of retribution prevented suit until the state stepped in, and fear could prevent enforcement of the injunction as well.[32] A remedy without enforcement is no remedy at all. The majority also argued that the state had a quasi-sovereign interest in the ability of its officers to perform their sworn duty to uphold the Constitution and the fourteenth amendment, and that the defendants' actions had injured the state by impairing the performance of that duty.[33] The majority concluded that the state was entitled to standing as *parens patriae*.

The minority responded that five thousand persons out of a total state population of more than eleven million was insufficient.[34] They also arged that under *parens patriae* "the sover-

---

Illinois-chartered manufacturer polluted the Mississippi River, affecting all Missouri citizens who lived near the river; *parens patriae* allowed); New Hampshire v. Louisiana, 108 U.S. 76 (1883) (New Hampshire citizens assigned overdue bonds to the state, which then sued for collection; *parens patriae* denied). Courts tend to balance number affected and severity of injury; a severe injury requires fewer plaintiffs than a lesser one. Puerto Rico v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980).

29. This is closely tied to the first requirement and is intended to keep private suits private. If the individuals can obtain complete relief on their own, there is no need for the sovereign to intervene. The key is *complete* relief. Missouri v. Illinois, 180 U.S. 208 (1901).

30. A separate interest ensures vigorous prosecution of the action and reinforces the prohibition on vindication of private grievances. North Dakota v. Minnesota, 263 U.S. 365 (1923) (flooding which was allegedly caused by diversion of natural water flows flooded private lands and destroyed public roads and bridges); Oklahoma v. Atchison, Topeka & Santa Fe R.R., 220 U.S. 277 (1911) (state had no interest in excessive freight rates separate from its citizens' economic interest; *parens patriae* denied).

31. The majority also may have been following some Supreme Court cases which do not concern themselves with numbers, apparently because the suit is between a state and private citizens of another state. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (railroad shippers affected by high freight rates); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (only five counties affected by pollution).

32. 659 F.2d 306, 316 (3d Cir. 1981).

33. *Id.* at 315. The majority expanded the argument by noting that if not enjoined, continued violations would result in a series of criminal investigations and prosecutions, at great expense to the state. *Id.*

34. In 1970, Millvale had a population of 5815 (U.S. Census 1970). The minority decreased the number even more by requiring direct injury. They then contended that the number of individuals who had been affected was less than fifty. 659 F.2d 306, 330 (3d Cir. 1981).

eign was entitled to proceed . . . *only* when no individual . . . could seek the same relief";[35] since the individual plaintiffs could obtain an injunction just as well as the state, *parens patriae* could not apply. The minority challenged the quasi-sovereign interest proposed by the majority; while the asserted interest might indeed establish grounds for applying *parens patriae*,[36] the interest was neither pleaded nor proved by the state, and was not properly considered by the court.[37] The minority concluded that all of the elements of *parens patriae* were missing,[38] and that class action was more appropriate.[39]

Courts historically have played a "numbers game" with the substantial portion requirement of *parens patriae*. Early opinions said "substantial number,"[40] later opinions said "substantial portion."[41] The minority and some other courts demand

35. *Id.* at 328 (emphasis in the original).

36. *Id.* at 334.

37. *Id.* at 332-34. The plaintiffs argued the general quasi-sovereign interest of the health, comfort and welfare of its citizens, but it also pleaded a specific interest in effective law enforcement, which protects the constitutional rights of the citizens. The injury was in the threat to "security, peace, and good of the state" and the interference with the duty of state officials to "correct unconstitutional conduct." Brief for Appellee at 27-29, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981).

38. The author of the minority opinion, Judge Garth, seems to have changed his thinking in the four years since Jordan v. School District of the City of Erie, 548 F.2d 117 (3d Cir. 1977). In *Jordan*, a panel which included Judge Garth allowed the state to intervene as *parens patriae* without protest or discussion in a class action suit between students and the school district over disciplinary regulations. The suit involved only the school children in a city of 125,000. It began as a private action, and the state intervened because the disciplinary rules allegedly violated the fourteenth amendment, the Pennsylvania constitution, and sections of the Pennsylvania Public Employee Relation Act. Since intervenors have essentially the same standing as original plaintiffs, *In re* Raabe, Glissman & Co., 71 F. Supp. 678 (S.D.N.Y. 1947), the only material difference between *Jordan* and the present action is that, in *Jordan*, the plaintiffs were class representatives. In this case, Judge Garth demands not only a class action, but removal of the state as a plaintiff, a condition he apparently did not find necessary in *Jordan*.

It is possible that the *Jordan* court thought they were applying the "infants, idiots, and lunatics" version of *parens patriae*. The state, however, usually uses that theory when it is protecting the interests of orphans and wards of the state who have no one else to protect their interests. *See supra* note 24. In *Jordan*, it is reasonable to assume that the vast majority of the students would be represented adequately by their parents or guardians. In a memorandum issued January 6, 1976, the *Jordan* court said that the Commonwealth had intervened as *parens patriae* "to protect the constitutional rights of its citizens" and cited Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). Brief for Appellee, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981).

39. 659 F.2d 306, 326, 331 (3d Cir. 1981).

40. *E.g.*, Missouri v. Illinois, 180 U.S. 208 (1901).

41. *E.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Kansas v. Colorado, 185 U.S. 125 (1902) ("considerable portion").

"substantial proportion."[42] The differences are subtle, but important. If courts accept "substantial number," they can establish a minimum requirement; if they accept "substantial proportion," 1,000,000 may be necessary in New York, while 1,000 may be sufficient in Montana. The minority alleged that an insignificant number, fewer than fifty persons, had actually been injured.[43] This argument ignores the purpose of the relief sought; an injunction is intended to protect persons who may be injured in the future.[44] The persons who risk injury in the future are all persons who reside in Millvale, or who may visit there. Because of Millvale's proximity to Pittsburgh,[45] substantially more than the five thousand residents of Millvale may be at risk, but how many more is not known. Depending upon how "community" is defined, the number of possible plaintiffs here may become either the "substantial portion of a community" required by *parens patriae*, or a group so small as to be a forbidden case of the state litigating private claims as a volunteer.[46]

The minority suggests class action as an alternative. Plaintiffs, however, must satisfy the requirements of the Federal Rules of Civil Procedure 23(a) and one of the sections of 23(b), probably 23(b)(2).[47] Defining the class may be difficult. Includ-

---

42. Puerto Rico v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980) ("substantial proportion"); Pennsylvania *ex rel.* Shapp v. Kleppe, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 429 U.S. 977 (1976) ("substantial majority"). The minority goes so far as to require "all members of the community," and then defines the community as the entire Commonwealth of Pennsylvania. 659 F.2d 306, 330-31 (3d Cir. 1981) (Garth, J., dissenting). *But see* note 38 *supra*.

43. 659 F.2d 306, 330 (3d Cir. 1981) (Garth, J., dissenting). Other courts feel that direct injury is not required. Puerto Rico *ex rel.* Quiros v. Bramkamp, 654 F.2d 212, 215 (2d Cir. 1981).

44. Puerto Rico *ex rel.* Quiros v. Bramkamp, 654 F.2d 212, 216 (2d Cir. 1981) (Secretary of Labor of Puerto Rico sued New York apple growers for discrimination against Puerto Rican workers).

45. Population 420,000 (Rand-McNally est. 1979). The metropolitan area has approximately one million residents.

46. Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (Pennsylvania sued New Jersey over New Jersey's tax laws which affected Pennsylvania residents, but did not affect the rights of the Commonwealth itself).

47. (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final in-

ing only the residents of Millvale presents no problem, but unrealistically assumes no "spillover" from Pittsburgh and other surrounding areas. Such a class would exclude likely victims such as persons who pass through Millvale each day as they commute to Pittsburgh, and would, in fact, exclude some of the present plaintiffs. If the class includes all persons who might enter Millvale in the future, it may become too large.[48] Also, the present individual plaintiffs may not qualify as adequate class representatives; lack of financial resources or change of residence might result in disqualification.[49] Finally, if the state were removed as a plaintiff, the entire expense of the litigation would fall on the individual plaintiffs.[50] Since this is a suit for injunction only, the individuals might not pursue the action because it would involve great expense with no recovery.[51]

The minority contended that since a private remedy is available, the state cannot intervene,[52] citing *Pennsylvania v. New*

---

junctive relief or corresponding declaratory relief with respect to the class as a whole.

FED. R. CIV. P. 23.

48. When the class is excessively large, it may fail for indefiniteness or for lack of common claims and questions of law. Williams v. Wallace Silversmiths, Inc., 566 F.2d 364 (2d Cir. 1977) (class as proposed was actually four classes). In this case, the plaintiffs originally requested a class of all persons residing in or otherwise lawfully in the Borough of Millvale and all persons who will in the future reside in or lawfully be in the Borough of Millvale. Brief for Appellee, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981).

49. 659 F.2d 306, 315 (3d Cir. 1981). *See* National Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973) (bankrupt plaintiff not adequate representative); P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973) (class certified only after court received assurances that plaintiffs had adequate financial resources); Kay & Sinex, *The Financial Aspect of Adequate Representation Under Rule 23(a)(4): A Prerequisite to Class Certification?*, 31 U. MIAMI L. REV. 651 (1977).

50. 659 F.2d 306, 315-16 (3d Cir. 1981). *See* Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

51. Under the "death knell" doctrine, courts presume that without the possibility of group recovery, individual plaintiffs may find it "economically imprudent" to pursue an action to final judgment; denial of class certification effectively ends litigation. Coopers & Lybrand v. Livisay, 437 U.S. 463 (1978). Casenote, *United Airlines, Inc. v. McDonald: Class Certification and the "Uncertain Sound,"* 11 J. MAR. J. PRAC. & PROC. 635 (1978).

52. The minority apparently confuses "any" with "adequate" and absolute prohibition of intervention by the sovereign with allowing standing when the sovereign has a separate quasi-sovereign interest. It relies on a quote from Pennsylvania v. New Jersey: "It has, however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." 426 U.S. 660, 665 (1975). Neither the language nor the holding support the minority's position of exclusivity of remedy; the court dismissed the suit for lack of injury to quasi-sovereign interests without addressing the question of availability of a private remedy. Another favorite quotation in support of exclusivity of remedy is "it

Jersey.[53] However, neither the quotation which was used to buttress the argument nor the ruling in that case support that proposition.[54] The Supreme Court in *Pennsylvania v. New Jersey* did not prohibit intervention by the sovereign when a private remedy was available, it merely reiterated that the sovereign must have a separate and distinct interest of its own.[55] In further support of their position, the minority listed factors which should be considered in granting *parens patriae* and included "the practical ability of those injured to obtain complete relief without intervention of the sovereign."[56] After including that factor, they ignored it in their discussion. The evidence before

---

has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by citizens and inhabitants for which they may sue in their own behalf." Georgia v. Pennsylvania R.R., 324 U.S. 439, 473 (1945) (Stone, C.J., dissenting). This quotation is from the dissent, however, and the cases cited to support the statement are the classic cases which illustrate the lack of a separate quasi-sovereign interest, and do not support a conclusion that the state may sue *only* if the individuals have no cause of action. Another source of confusion is statements by courts that the state may sue to redress an injury for which no individual has standing to sue. *See, e.g.*, Pennsylvania v. National Assoc. of Flood Insurers, 520 F.2d 11 (3d Cir. 1975). This is merely another way of stating that the state must have a separate interest and does not imply that the state is barred if individuals have standing. *See, e.g.*, Puerto Rico *ex rel.* Quiros v. Bramkamp, 654 F.2d 212 (1981).

53. 426 U.S. 660 (1976) (Pennsylvania sued New Jersey over taxes on income earned in New Jersey by non-residents).

54. The *parens patriae* issue in *Pennsylvania v. New Jersey* was almost an afterthought. The main question was whether Pennsylvania had a cause of action at all. New Jersey taxed any income of non-residents which was earned in New Jersey. By statute, Pennsylvania allowed its citizens to exclude income earned in New Jersey from Pennsylvania taxes. Pennsylvania then sued New Jersey for draining money from the Pennsylvania treasury. The Court noted that Pennsylvania did not have to allow the tax set-off, and that therefore the injury was self-inflicted and did not create a cause of action. Pennsylvania sued in the alternative as *parens patriae*. The Court disallowed standing, citing numerous cases which had denied *parens patriae* for lack of a separate quasi-sovereign interest. 426 U.S. 660, 663 (1976). Including *parens patriae* in the pleadings seems rather odd since there is no indication that any individuals had alleged injury under the New Jersey law.

55. In *Pennsylvania v. New Jersey*, the Court stated that any injury to the state was merely the sum of the injuries to its citizens and noted the decision in Hawaii v. Standard Oil Co., 405 U.S. 25 (1972). In *Hawaii*, the Court conceded that the state had a quasi-sovereign interest in the economic well-being of the populace, but said that there had been no injury to that interest which was separate from the injury to its citizens; the injury to the state was merely the sum of the injuries to the individuals. Under the facts of that case, injunction was an adequate remedy even without state intervention. Treble damages were sufficient incentive to both sides to enforce the order. *Id.* at 262, 265-66.

56. 659 F.2d 306, 333 (3d Cir. 1980) (Garth, J., dissenting), *citing* Puerto Rico v. Alfred L. Snapp & Sons, 632 F.2d 365, 369 (4th Cir. 1980) (Puerto Rico sued Virginia apple growers for discrimination against Puerto Rican workers).

the court showed not only repeated violations of rights, but repeated intimidation of those who opposed Baranyai's tactics.[57] As Judge Gibbons noted, fear of retribution is a powerful deterrent to private enforcement. If the suit is retried as a class action, the state will have no clear right to enforcement and must depend on reluctant victims to bring contempt actions.[58] The incentive to obey the injunction is increased if the state has standing to request enforcement. As a practical matter, federal injunctions do not usually require enforcement, but the record of the defendants is such as to raise doubt that they will comply with the court's order voluntarily.[59] Without effective enforcement, neither the rights of the individuals nor the rights of the state are adequately protected.

The greatest obstacle to the use of the doctrine of *parens patriae* is the necessity of showing an injury to a separate and distinct interest. The majority proposed as the separate interest the sworn duty of state officers to uphold the Constitution, and an injury to the state when their ability to perform that duty is impaired.[60] Courts have long held that the presence of a federal duty implies a corresponding federal right to be free from inter-

57. Baranyai physically assaulted persons who had filed complaints and told others to get out of town and stay out. The police chief summoned complainants to the police station and threatened them with suit if they did not retract their complaints. He also made personal attacks on the two council members who voiced opposition to Baranyai, and harassed four other police officers who testified against or complained about Baranyai. One of these officers was suspended and then fired because of his testimony. The chief of police also urged other persons to write to the Attorney General and ask that the Community Advocate Unit be disbanded because of its investigation and prosecution of Baranyai. Two days after the Deputy Attorney General filed charges against Baranyai, Baranyai filed a barratry suit against the Deputy Attorney General. Four months later, the suit was withdrawn. During the trial in district court, in the hallway outside of the courtroom and in the presence of plaintiffs' witnesses, Baranyai described one of the plaintiffs' attorneys as being a Mafia lawyer. He later admitted that he had made similar statements at other times. The district court found that this was "typical of defendant's conduct in attempting to harass witnesses and attorneys who bring proceedings against him." With classic understatement, the court said that "this is some evidence of consciousness of guilt." 480 F. Supp. 686, 689-91 (W.D. Pa. 1979).

58. The state is barred from membership in the class. Since it concededly has no rights of its own which are protectable under § 1983, it does not share the common claims and questions of law as required by Fed. R. Civ. P. 23(a)(2) and 23(a)(3). For the same reason, the state cannot intervene. Fed. R. Civ. P. 24(b)(2).

59. The defendants took no action to restrain Baranyai even after his conviction on criminal charges. Counsel in this action agreed before the trial that Baranyai would be assigned to a desk job until the suit was resolved; Baranyai remained on active duty, patrolling the streets on the orders of the police chief. 659 F.2d 306, 322 (3d Cir. 1981).

60. *Id.* at 314-16.

ference in the performance of that duty.[61] But is the proposed interest separate and distinct? Courts have recognized a separate interest when the injury to any individual was small or difficult to prove, but the injury to the state as a whole was substantial.[62] In such cases, the injury claimed by the state could not be remedied by individual action. The opposite is true here; if the individual plaintiffs obtain an injunction, the state's injury is also remedied. The individual interest is preserving personal rights; the interest of the state is performing its duty under the fourteenth amendment, which requires an interest in preserving personal freedoms. The interests may arise from different sources, but they merge in the result. They are distinct, but not separate.

An alternative approach is to give the state standing *because* there is no separate interest.[63] In a unique decision, the Court of Appeals for the Eighth Circuit used this theory in an analogous situation in *Brewer v. Hoxie School District No. 46*.[64] Shortly after the Supreme Court decided the second *Brown v.*

---

61. United States v. Saylor, 322 U.S. 385 (1944) (voter in congressional election has right to have vote counted honestly); Logan v. United States, 144 U.S. 263 (1892) (prisoners have federal right to protection while in federal custody); United States v. Waddell, 112 U.S. 76 (1884) (homesteader under federal homestead act has right to protection from conspiracy to drive him off his land).

62. New Jersey v. New York, 283 U.S. 336 (1931) (defendant polluted common inland waterways with sewage); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (West Virginia natural gas regulations discriminated against out-of-state users); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (Tennessee smelter destroyed plant life in five Georgia counties); Missouri v. Illinois, 180 U.S. 208 (1901) (Illinois resident corporation polluted Mississippi River).

63. Both the district and circuit courts touched on this approach. "While the court did not certify a class action, it was held that the case was one in effect in view of the fact that the Commonwealth was representing the rights of all its citizens and we are treating this case in such light." 480 F. Supp. 686, 695 (W.D. Pa. 1979).

> [E]ven if its *parens patriae* standing as a plaintiff were not recognized, it should in any event be recognized as an adequate class representative of the class of persons . . . who in the past have been and in the future may be subjected to violations of constitutional rights . . . . The trial court's failure to certify the action as a class action is not fatal to recognition of the Commonwealth's representative standing in such a case, since the same record has been made as would have been made had a Rule 23(b)(2) class been certified. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430-31 (1976).

659 F.2d 306, 319 (3d Cir. 1981).

The *Pasadena* case is inapposite here since the right of the United States to maintain the suit as an intervenor even after the suits of the individual plaintiffs became moot was expressly allowed by statute.

64. 238 F.2d 91 (8th Cir. 1956).

Board of Education[65] in 1955, the members of the Hoxie, Arkansas, school board determined that the *Brown* decision required them to desegregate their district as soon as possible, in spite of state laws which required segregated schools.[66] A few weeks after the desegregated Hoxie schools opened, the defendants began efforts to disrupt the operation of the schools and to force a return to segregated facilities. The members of the school board, as a board and as individuals, filed suit in federal court.[67] The district court issued an injunction prohibiting further disruption, and the court of appeals affirmed.

The court of appeals held that the plaintiffs, bound by their duty to uphold the Constitution, had an implied corresponding right to be free from interference with performance of that duty.[68] While the general rule is that a plaintiff does not have standing to vindicate the constitutional rights of another, the court noted that this is "only a rule of practice."[69] Exceptions are made when the plaintiffs' interests are closely aligned with the interests of the parties who were actually injured.[70] The court held that the interests of the school board were sufficiently close to the real parties in interest, *i.e.*, the children, to create an exception.

> [T]he realities of this case are that the school board is in *loco parentis* of the children whose rights are at stake . . . . The school board having the duty to afford the children the equal protection of the law has the correlative right, as has been pointed out, to protection in performance of its function. Its right is intimately identified with the right of the children themselves. The right does not arise solely from the interest of the parties concerned, but from the necessity of the government itself.[71]

---

65. Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955) (the first opinion was the desegration decision; the second was the enforcement order).

66. Arkansas law required maintenance of separate facilities for black and white students. At the time of desegregation, the Hoxie school district had about 1000 students, twenty-four of whom were black. 238 F.2d 91, 93 (8th Cir. 1956).

67. The defendants challenged the jurisdiction of the court saying that the action was a purely state issue of trespass and belonged in the state courts. In a lengthy discussion, the court noted that "whether or not the controversy arises under federal law must be determined by the allegations of the complaint and they were obviously drawn to make the alleged violations of the federal law the basis of the suit." 238 F.2d 91, 95 (8th Cir. 1956).

68. *Id.* at 99.

69. *Id.* at 104, *citing* Barrows v. Jackson, 346 U.S. 249, 257 (1953).

70. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963) (NAACP permitted to litigate the rights of its members); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute required all children to attend public schools; parochial school allowed standing to sue).

71. 238 F.2d 91, 104 (8th Cir. 1956).

A state also has the duty to afford all its citizens the equal protection of the law, and, therefore, the correlative right to freedom from interference in performance of its duty. If the reasoning of the Eighth Circuit is followed in this case, the interests of a state are so interwoven with the rights of its citizens as to give it standing in a court of law or equity. Applying the *Brewer* approach to this case avoids the inherent problems of both *parens patriae* and class actions. Numbers become less critical, certification requirements and diversity or identity of interest become irrelevant, and both the state and individuals can request enforcement.

Using *Brewer* also avoids expanding the boundaries of *parens patriae* which courts have guarded so jealously for so long. *Parens patriae* has been restricted in the past to disputes between states or between a state and citizens of another state. *Brewer* operates rather like *parens patriae*, but on an intrastate level, *i.e.*, a governmental body against its own citizens. The barriers to the use of *parens patriae* were developed for sound reasons[72] which have not eroded with time. It is still important that private suits not abuse direct access to the Supreme Court by masquerading as disputes between states and that any proper suit be prosecuted vigorously. It is also important that a state be able to protect the interests of its citizens in intrastate disputes. Since suits brought under § 1983 rarely involve the large numbers required for standing under *parens patriae* or an interstate dispute, and the requisite injury to the state is not easily proved, the choice becomes one of abandoning the traditional bounds, applying a different legal theory, or allowing a wrong without a remedy. If the choice is to expand the boundaries, the courts must then establish new ones which will not open the floodgates of litigation. On the other hand, limiting actions under § 1983 to individual or class suits permits the possibility or even probability that many victims will choose not to pursue their legal remedies for fear of retribution or for lack of money. *Brewer* allows governmental units to adequately protect the interests of its citizens without diluting the usefulness of *parens patriae*.

The alternative approach of *Brewer* presents a workable compromise on the issues which divided the court. The judges in this case disagreed on legal theories, but agreed on the result. The *Brewer* approach produces the same result as *parens patriae*, but does not involve what might be seen as excessive tinkering with and expansion of an established doctrine. *Parens patriae* is, by its nature, a resort to extraordinary means of ob-

72. *See supra* notes 28-30.

taining justice when private remedies are inadequate. *Brewer* allows the state to litigate the violation of the rights of its citizens without diluting the extraordinary quality of *parens patriae*. It also avoids the delays and uncertainties of remanding for class certification and retrial. *Brewer* has been cited many times for the proposition that a federal duty implies a federal right; perhaps it is time that it was also cited for its unique approach to protection of fourteenth amendment rights.

Cheryl Johnson