

Dented and rusty like a suit of armour?

Reflections on the origins of the *parens patriae* jurisdiction¹

“[A] noble ideal had somehow survived into the modern era, dented and rusty like a suit of armour. Judges had stood in for the monarch and had been for centuries the guardians of the nation’s children.”

Ian McEwan, *The Children Act* (2014)

The *parens patriae* jurisdiction remains as extensive in its potential application as its origins remain shrouded in uncertainty. Those origins are the subject of two competing historical narratives.

In the first narrative:

- Jurisdiction was concerned with the administration of infants’ property.
- Guardianship was a valuable proprietary and pecuniary right, which the Crown ultimately assumed for itself as a source of revenue.
- It was based on feudal principles and the rights of the Crown as superior lord.
- Only after the abolition of military tenures did the jurisdiction evolve into the protective jurisdiction that it embodies today.

In the second narrative:

- The King was the *pater patriae* and infants and lunatics were objects of royal protection.

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- The protective jurisdiction developed as a separate and distinct jurisdiction from the jurisdiction of the Court to supervise wardships and guardianships. The basis of the jurisdiction was the monarch's obligation to care for those who could not care for themselves.
- This version accommodates the notion that the jurisdiction included, or even developed out of, traditional Christian values that emphasised obligations to the vulnerable.

Understanding the jurisdiction's source or origin is important for its principled exercise. While traditionally focused on lunatics and children, it has now moved far beyond that. By way of examples the Court can contradict the wishes of parents or, in the case of older children, the child themselves (*X v The Sydney Childrens' Hospitals Network* [2013] NSWCA 320; (2013) 85 NSWLR 294), it can sanction things a parent cannot (e.g. compel sterilisation (*Secretary, Department of Health & Community Services v JWB & Anor (Marion's Case)* (1991-1992) 175 CLR 218)) and it can give directions about medical treatment for unconscious adults (*Northridge v Central Sydney Area Health Service* [200] NSWSC 1241; (2000) 50 NSWLR 549).

The argument of this paper is that, given the modern breadth of the jurisdiction, the only satisfactory explanation of its origin or source is the prerogative of the English Christian monarch to care for his or her subjects when they cannot care for themselves. As such, it is perhaps the last example of the exercise by the Court as delegate of a largely unrestrained royal power, which has led to the jurisdiction being described as limitless.

While understandable, that is an unhelpful description. Since it is now exercised by the Court, albeit on behalf of the monarch, certain limitations do exist. Three are unlikely

to be particularly controversial. These observations also propose a fourth limitation which may be more challenging in these secular times.

First, the jurisdiction is engaged in respect of a specific individual who is incompetent legally (e.g. a minor), physically (e.g. unconscious) or mentally (e.g. serious mental disorder) and must be cared for in some way. It is not a jurisdiction that is invoked to enforce a general social good (e.g. to preserve the community from the evils of playing cards: *The Case of Monopolies (Darcy v Atkin)* (1602) 11 Coke's Rep 846, 77 ER 1260).

Second, it is subject to any expressly applicable statutory regime or can be otherwise removed. For example, it was accepted by the parties in the House of Lords in the case of *In Re F* [1990] 2 AC 1 (a sterilisation case) that the English court no longer possessed the *parens patriae* jurisdiction in relation to mentally incompetent adults because the last warrant under the Sign Manual delegating the Crown's prerogative to the Lord Chancellor was revoked in 1960. This necessitated the creation of a declaratory jurisdiction of the kind that was used to authorise the withdrawal of nutrition from a patient in a permanent vegetative state in *Airedale NHS Trust v Bland* [1993] AC 789.

Third, the jurisdiction must be exercised judicially, i.e. rationally and for the purpose for which it exists. This also invokes the notions of procedural fairness and similar considerations which apply in the ordinary conduct of litigation before the courts.

A fourth, and perhaps more challenging potential limitation, may derive from the jurisdiction's origins in that its exercise must be in accordance with ethical norms that, with no disrespect to other traditions, are those of the traditional Christian West. That this is so is demonstrated by the fact that it is the exercise of the monarch's personal

prerogative and that its touchstone is the jurisdiction being the “paternal” care for the wellbeing or best interests of the subject. This may explain the jurisdiction’s presumption of maintaining the sanctity of life (described by the House of Lords in *Bland* as the fundamental principle (at 863 per Lord Goff of Chieveley)), but not at any cost. The oft cited formulation of O’Keefe J in *Northridge* (at [24]) that “there is undoubted jurisdiction in the Supreme Court of New South Wales to act to protect the right of an unconscious person to receive all reasonable and appropriate (as opposed to extraordinary, excessively burdensome, intrusive or futile) medical treatment, sustenance and support” is a statement steeped in the moral thinking of the Christian West as now developed in medical ethics.

In other contexts we might speak of the Judeo-Christian tradition but, with no disrespect, this cannot be done in the case of the *parens patriae* jurisdiction for three reasons:

- Charity to those outside your family or tribe was a uniquely Christian contribution to the West. Generally Judaism traditionally extended what we would today recognise as charity only to its own.
- The English Crown was and is an explicitly Christian institution.
- Jewish legal and ethical thinking on some matters of bioethics (including abortion and death) may not be identical to some aspects of western practice that derive from Christian thought.

Because so much of what is now thought of as secular ethical thinking derives from Christianity, in most cases specific recognition of those origins will not be necessary. However, in a multicultural society difficult cases may arise e.g. concerning the end of

life, where there is a real risk that the originally traditional Christian ethical norms that inform the jurisdiction will collide with other religious based ethical systems e.g. Jewish (cf Rabbi Prof D Sinclair, “Patient Autonomy in the Dying Process and Brain Death: Jewish Law and its Role in Recent Israeli Biomedical Legislation”, (2012) 35 Hamline L Rev 591), Islamic or even non-traditional Christian groups such as Jehovah’s Witnesses (*X v The Sydney Childrens’ Hospitals Network* [2013] NSWCA 320; (2013) 85 NSWLR 294) This will raise potentially difficult questions for the exercise of the jurisdiction.

Two propositions are essential to understanding the origins of the Crown as *pater patriae* (a title which was first used by the Emperor Augustus in 2 BC), First, the idea of anyone, let alone the state and its ruler, having an obligation to care for the helpless not of your own family or tribe was profoundly radical. For brevity’s sake we will refer to this concept as “universal charity”. Second, the idea was a unique contribution of Christianity and came to be seen as part of the personal prerogatives of a Christian king.

The Old Testament certainly commands charity. However, it is generally confined to widows, orphans and other dispossessed of the Jewish community itself. Indeed, the need for ritual purity meant devout Jews would not extend a helping hand to non-Jews. That is why the parable of the Good Samaritan – already a major contributor to our legal system – was so deeply shocking to Jesus’ Jewish audience. The message was that the commandment to love your neighbour extended to non-Jews.

Roman society had no concept of universal charity. The New Testament and other early Christian writings of the first three centuries are replete with references to the

need to offer charity to all. In Chapter 39 of his famous Apology, Tertullian (145-220AD) writes of Christian communities (translation by W. Reeve):

*The kind of treasury we have is not filled with any dishonourable sum, as the price of a purchased religion; everyone puts a little to the public stock, commonly once a month, or when he pleases, only upon the condition that he is both willing and able; there is no compulsion upon any. All here is a freewill offering, and all his collections are deposited in a common bank for charitable uses, not for the support of merry meetings, for drinking and gourmandising, but for feeding the poor and burying the dead, and providing for girls and boys who have no other parents or provisions left to support them, for relieving old people worn out in the service of the saints, or those who have suffered by shipwreck
... .*

Such behaviour was completely different to prevailing Roman imperial concepts. For the Romans, giving to others outside your immediate family was done in order to obtain favours and political advancement. Much giving was devoted to civil projects to acquire popular acclaim (including statues and inscriptions in your honour) and authority,

The Christian propensity to universal charity was not popular with the Roman state (as opposed to many of the people) and offered yet another reason for persecution. Julian the Apostate (so called because as emperor he sought to reintroduce paganism – what he called Hellenic faith - to a now officially Christian empire) realised that his revamped pagan religion had to go into competition with the charitable Christians, to whom he referred as Galileans. In 362 AD he wrote to one of his high priests that, having set aside large amounts of corn and wine for a particular area:

I order that one fifth of this be used for the poor who serve the priests, and the remainder be distributed by us to strangers and beggars. For it is disgraceful that, when no Jew ever has to beg, and the impious Galileans support not only their own poor but ours as well, all men see that our people lack aid from us. Teach those of the Hellenic faith to contribute to public service of this sort, and the Hellenic villages to offer their first fruits to the gods; and accustom those who love the Hellenic religion to these good works by teaching them that this was our practice of old. (Letter 22, translated by W.C. Wright)

In his magisterial book *The Classical World*, Robin Lane Fox highlights this distinction in the case of Pliny, many of whose letters survive today and who lived in the second half of the first century AD. Referring to Pliny's extensive civic and cultural gifts to his hometown, Lane Fox writes (Penguin Books, 2006 at p577):

Pliny's gifts were part of a widespread donor culture among the rich on which civic life depended throughout the Empire. In Pliny's case, the gifts were not self-interested bids for power. He was locally very prominent already. Rather he gave for the ideals of culture and civic life which he himself upheld. His letters then publicised his gifts. The [Christian] deaconesses by contrast, would have told him to give indiscriminately to the poor, because the poor were blessed by God. Gifts (they believed) were not just for deserving friends or local townsmen. Gifts could earn their donor spiritual treasure in heaven, an idea which Pliny never entertained. Gifts should also be made discreetly, not trumpeted abroad in letters and honorary inscriptions.

The adoption of Christianity as the official religion of the Roman Empire by the Edict of Thessalonica in 380 laid the foundation of the idea of a Christian king, including that a

divine right of kingship put the ruler in a direct line beginning with Solomon and David. As will be developed below, this connection is maintained in the English coronation rite as it stands today.

One curious manifestation of the personal, divine quality of a Christian ruler was that in some places it was thought that the monarch himself had healing powers. This was known as the King's Touch or the Royal Touch, which was a form of laying on of hands. Between the 15th and 18th centuries English monarchs presented the diseased person with a gold medal known as a touch piece and hung it around the subject's neck. Even if not physically successful the medals offered financial benefit as they were often sold. It is said Charles II touched over 92,000 scrofulous people during the course of his 25 year reign. Edward the Confessor's conferring of the touch piece is described by Malcolm in William Shakespeare's *Macbeth*, Act 4, Scene 3.

By the time we reach England at the start of the second millennium AD, the king was a Christian prince who governed a Christian realm. In Book 4, Chapter 4 of the *Commentaries* Blackstone wrote "Christianity is part of the laws of England". It was entirely natural that as a Christian king one of his prerogatives was to care for those who could not care for themselves. So in his *Course of Lectures on the English Law* at Oxford University between 1767 – 1773 Sir Robert Chambers said of one the King's prerogatives of power, "as the king is fourthly, the general guardian of the nation, his attention is particularly extended to those who are incapable of caring for themselves" (Vol 1, University of Wisconsin Press, 1986, p 159). It should be noted that this prerogative antedated and was quite independent of the monarch's post-Reformation role as head of the established (Christian) Church of England.

We suggest that it continues to be significant today that the *parens patriae* power was and remains a personal prerogative of the monarch. Therefore there must be an argument that the traditionally Christian character of the monarch must govern (or confine, depending on your point of view) the exercise by the Court of that power on behalf of the Crown. Blackstone, in Volume 1 Chapter 7 of the Commentaries, explained that “by the prerogative we usually understand that special pre-eminence, which the king both over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity...it can only be applied to those rights and capacities which the king enjoys alone”.

Before turning to look at the competing historical narratives and some of the cases in more detail, we observe that if talk of the role of *parens patriae* being the personal prerogative of a Christian monarch is thought to be of antiquarian interest only, that is precisely how the king or queen is crowned today. As one scholar has written about the Coronation rite (I Bradley, *God Save the Queen – Spiritual Heart of the Monarchy*, Continuum International Publishing Group, 2012, p 250):

For over 1,000 years the coronation service has stood as the central defining symbol and sacrament of Christian monarchy, and indeed a supreme statement of the principles underlying the British Constitution, through which kings and queens have been consecrated and set apart, taken a solemn oath before God to uphold justice and mercy, and had their rule set in a framework of transcendent metaphysical values.

Taking the coronation of Queen Elizabeth II in 1953 as an example, the Queen was anointed by the Archbishop of Canterbury reminding her and the congregation “as kings, priests and prophets were anointed, and as Solomon was anointed king by

Zadok the priest and Nathan the prophet, so be thou anointed, blessed and consecrated Queen over the peoples who the lord thy God hath given thee to rule and govern.” Significantly for our purposes, upon being given the royal sceptre, which the Archbishop describes as “the ensign of kingly power and justice”, he goes on to enjoin the sovereign to “punish the wicked, *protect and cherish the just*, and lead your people in the way wherein they should go” (emphasis added).

The first historical narrative: The feudal jurisdiction

As identified above, the first historical narrative takes as its focus feudal principles and the rights of the Crown as superior lord. To understand this narrative, it is necessary to provide a brief sketch of military wardships. A more detailed account of this history can be found in the works of historians such as Lawrence Custer (Custer, ‘The Origins of the Doctrine of Parens Patriae’ (1978) 27 Emory Law Journal 195).

When a military tenant died leaving an infant heir, the lord resumed control of the land under the child was 21. During that period:

- The lord took the rents and profits of the ward’s land for his own use. There was no obligation to render an account of his stewardship.
- The Lord also acquired rights over the heir’s person. Accordingly, the marriage of the ward was impermissible without their consent, and Lords frequently arranged the ward’s marriage in a way that would benefit their own estate.
- While some duties existed, such as a duty to provide for the ward’s maintenance and upbringing, guardianship essentially “*conferred proprietary and pecuniary rights on the guardian*”: see John Seymour, ‘Parens Patriae and

Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159. The rights acquired were saleable and assignable.

Military tenures could be contrasted with socage tenures. In such a case, the infant heir was placed under the wardship of a relation, who had an obligation to protect the heir's interests. Thus, in Littleton, *Co Litt* (19th ed, 1832), vol 1, s 125, it was said:

"The guardian in chivalrie hath the wardship to his owne use, and the guardian in socage hath not the wardship to his owne use, but to the use of the heire."

The state of affairs was, unsurprisingly, considered by most tenants to be unsatisfactory. 'Uses' developed as an evasion device to prevent land being held by infant wards. By the end of the 1400s, significant land holdings were held in use and deprived lords, and the King as superior Lord, of revenues.

In 1535, to bolster his finances, Henry VIII passed the *Statute of Uses 1535* (27 Hen 8 c 10). The Statute collapsed all Uses, such that infant heirs came into possession of their land and the King could claim rights of wardship. Shortly after, in 1540, the Court of Wards was established to enforce the King's rights of wardship. Thus, the Court of Wards was intimately connected with enforcing King's revenue.

The Court of Wards survived for over a century, until it was abolished by statute in 1660, along with military tenures. At this time, socage tenures came to dominate, and Chancery assumed all jurisdiction over wardships.

Proponents of the "first version" of the history of *parens patriae* suggest that at this point in history, a broad *parens patriae* jurisdiction that resembled the modern protective jurisdiction was essentially "plucked from the air". Chambers, for example, regarded it as doubtful that the Crown assumed a *parens patriae* jurisdiction before

the creation of the Court of Wards, and wrote in *A Practical Treatise on the Jurisdiction of the High Court of Chancery over the Persons and Property of Infants* (1842) at 11

“It is to be presumed that the previous jurisdiction of the Crown, over infants, proceeded rather on feudal than on general principles, on the rights of the Crown, as superior lord, than on any natural principles of Equity.”

The alternative narrative: A Christian monarch protects his vulnerable subjects

A number of historians have regarded this account as unsatisfactory. Seymour writes, at 165:

“[T]he body of rules which have been described were not formulated in response to the vulnerability of infancy. Thus it seems that we must look elsewhere in our search for the origins of the ‘paternal jurisdiction’... [T]he better view is that this jurisdiction did not have its roots in the institution of feudal wardship.”

This section of the paper attempts to locate those origins.

Legal manifestations of a Christian King

The King’s status in the Christian religion was manifested in his religious prerogatives. Chitty, in *A Treatise on the Law of the Prerogatives of the Crown* (1820), wrote at 50:

“The supremacy of the Crown in all matters of an ecclesiastical nature is, as observed by Lord Hale, a most indubitable right, which may be proved by records of unquestionable truth and authority; and though the Popes made

great usurpation and encroachments on this right, they were ever complained of and resisted as illegal, and were effectually destroyed in the reign of Hen 8."

Thus, the King could enforce or dispense with ecclesiastical law (e.g. allowing a bastard to be a priest); appoint fast days, and days of thanksgiving and humiliation; issue proclamations for the punishment of immorality. The King was also the ultimate judge in ecclesiastical causes.

The equity jurisdiction itself also had quasi-religious origins. Seymour writes, at 167:

"From Anglo-Saxon times it was recognised that, as the fountain of justice, the King had the power to mitigate and supplement the law. By the fourteenth century this power was recognized as a 'form of equity' which allowed the King to provide 'special remedial justice'. Further, the King's practice of delegating this jurisdiction to the Chancellor (and thence to the Court of Chancery) was long established." (Seymour, 167)

The Chancellor was also the chief royal chaplain and spiritual advisor to the Crown.

Lunatics and Idiots

The Court of Chancery's jurisdiction over the mentally ill developed earlier than its jurisdiction over infants. It is useful to study as it may have served as an early precedent for the Court exercising protective powers.

The King's prerogative over idiots and lunatics was assumed from the Lords around the 1200s. Prior to this date, under the feudal system, lands that were held upon military tenures were subject to the condition that military services be provided to the

Lords. The Lords could claim wardship over the property and body of the idiot or lunatic if those conditions were not fulfilled:

- George Dale Collinson AM, *A Treatise Concerning Idiots, Lunatics and Other Persons Non Compotes Mentis* (1812, volume 1), 88-89: “[*W*]hen the vassal was incapable of rendering them [*i.e. the incidents of the tenure*], the lord seized upon his rents and profits, to enable him to procure a fulfilment of the condition upon which the estate had been granted.”

The King’s power over the property of idiots and lunatics was not absolute; the limits of the prerogative were described in a document titled “*de Praerogativa Regis*”. In respect of idiots, while the King was bound to provide for the subjects “*necessaries*” and to return the property to the rightful heirs upon the idiots death, the King took for his own use the rents and profits of the idiot’s land during the life of the idiot. The property of idiots was therefore a source of revenue for the sovereign.

However, in respect of lunatics, the King could take nothing for his own use. He was bound to preserve the lands and profits of the lunatic, to maintain the lunatic and his family out of the income of the property, and to return the lunatic’s property and any residue income upon the lunatic recovering his senses. If the lunatic died before recovering, the property was returned to his estate.

Maitland and Pollock in *The History of the English Law* (1923), at 481, describe the guardianship powers in relation to lunatics as a “*novel and noteworthy thing*” as it was a guardianship that was not profitable to the guardian. Therefore, from the 1200s, the Chancery exercised a form of guardianship that took as a central concern the welfare

of the subject (and the preservation of their property) rather than the raising of revenue for the Crown. A model existed for the development of the Court's powers over infants.

The emergence of the *parens patriae* concept in legal scholarship

The phrase "*parens patriae*" appears to emerge first in legal scholarship in relation to the court's jurisdiction in lunacy, rather than in case law. Custer suggests that this was motivated "*at least in part by the broadening powers of the crown under the Tudors, best exemplified by the omnipresent influence of Henry VIII*" (Custer, 200). Henry VIII's reign not only expanded monarchical powers, but also gave the monarchy an added religious dimension as Head of the Church of England.

- Fitzherbert's *Natura Brevium* (1553) – in connection with the writ *de idiota inquirendo*:
 - “[T]he King by Law, of Right, is for to defend his Subjects, their Goods and Chattels, Lands and Tenements; and therefore in the Law every loyal Subject is taken into the King's Protection... And because that every Man is within the King's Protection, an Idiot, who cannot defend or govern himself, nor order his Lands, Tenements, Goods nor Chattels, the King of Right ought for to have him in his Custody, and to rule him and his Lands and Tenements, Goods and Chattels; and that appeareth by the Statute of *Praerogativa Regis*.” (at 232b)
- W Staunford, *An Expositcion on the Kinges Prerogatiue* (London 1567) at 37 - writing in relation to lunatics:

- *“The king is the protectour of all hys subiectes and of all their goods, landes and tenements, and therefore of suche as cannot gouerne them selues nor oder their lands and tenements his grace (as a father) must take vppon him to prouyde for them, that they them selues and their things may bee preserued”*
- see Cogan, ‘Juvenile Law, Before and After the Entrance of “Parens Patriae”’ (1970) 22 *SCLR* 147, 158, who reports this as the first time that the language of “father” was used in respect of lunatics. See also Custer, 201

An interesting early example of the invocation of the *parens patriae* doctrine to support a royal prerogative is *The Case of Monopolies (Darcy v Allein)* (1602) 11 Coke’s Rep 84b, 77 ER 1260. While Lord Coke’s argument in that case was unsuccessful, and the law never developed down this path, it still provides an illustration that the term “*parens patriae*” had gained some currency in legal thinking, and was laden with values and religious morality.

- By letters patent, Queen Elizabeth attempted to grant a monopoly to one tradesman over the importation and sale of playing cards in England. The defendant, Mr Allein, challenged the grant.
- The Attorney General, Sir Edward Coke, challenged the grant by invoking the Queen’s power, as *parens patriae*, to protect her subjects from their wickedness of playing-cards!
- Playing cards were “*things of vanity, and the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of*

servants, causes of want, which is the mother of woe and destruction, and therefore it bellows to the Queen (who is parens patriae, et paterfamilias totius regni...) to take away the great abuse...”

Relationship between the Court of Chancery and the Court of Wards

It's uncontroversial that Chancery exercised a power with respect to guardianships prior to the creation of the Court of Wards (although note that there is no evidence that Chancery exercised a broad parental power, as opposed to a narrower judicial role in resolving disputes in wardship and guardianship.) See eg:

- *Masham v Sabarn* (1417) in W Baildon, *Select Cases in Chancery (1364-1471)* (Selden Society 1896) - Petition to the chancellor to avoid an infant being disinherited. Note protective function - Chancellor was being asked to care for interests of an infant

It also is established that, while the Court of Wards was in operation, Chancery and the Court of Wards operated in parallel – the Court of Wards enforced the incidents of military tenures, while Chancery dealt with remaining wardship matters (Seymour, 169).

The larger claim (which better supports the thesis advanced in this paper) is that the Court of Chancery exercised a paternal jurisdiction over infants that predated the Court of Wards and that was distinct from its wardship jurisdiction. Rather than emphasising the similarity between the modern *parens patriae* jurisdiction and socage tenures, the analogy is instead drawn to the lunacy jurisdiction.

This is supported by the version of history told by the Court of Chancery itself, when justifying its jurisdiction after the fall of the Court of Wards and military tenures in 1660.

As evidenced through the following cases:

- *Falkland v Bertie* (1696) 23 ER 814 at 818:
 - Lord Somers LC: *“In this court there were several things that belonged to the King as Pater patriae, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc., afterwards such of them as were of profit and advantage to the King, were removed to the Court of Wards by the statute; but upon dissolution of that court came back again to the Chancery.”*
 - This appears to be the first mention of “parens patriae” in an infant case, and is regarded as giving the *parens patriae* jurisdiction its name (Cogan, 166)

- *Eyre v Shaftsbury* (1722) 24 ER 659
 - *“The Crown, as parens patriae, was the supreme guardian and superintendent over all infants”*
 - *“In [Fitzherbert’s Natura Brevium] the King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King’s protection, for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as pater patriae, and there is the same reason to extend this care to infants”*

- *Shaftsbury v Shaftsbury* (1725) Gilb Rep 172; 25 ER 121:
 - While the Court's earlier jurisdiction "*is fallen now with the Tenures*", the Crown possessed "*another Jurisdiction, and that is as Pater Patriae, as a Father over his Children.*"

- *Smith v Smith* (1745) 3 Atk 304; 26 ER 977
 - Lord Hardwick LC: "*Upon the cessure of the court of wards, the care of the government of infants reverted to this court, to whom it originally belonged, and in respect of lunaticks, idiots and infants, the king is bound to take care of them; It is not a profitable jurisdiction of the crown, but for the benefit of the infants themselves, who must have some common parent.*"

- *Butler v Freeman* (1756) 25 ER 121
 - "[T]his Court does not act on the foot of guardianship or wardship; the latter is totally taken away by the stat.Car.2, and without claiming the former, and disclaiming the latter, has a general right delegated by the Crown as pater patriae, so [sic] interfere in particular cases, for the benefit of such who are incapable to protect themselves."

Another case which evidences the firm establishment of the concept of the King as *parens patriae* is *The Grand Opinion* (1717) 92 ER 909. (It is also included in this paper for its historic interest.) After a falling out between King George I and his son and heir (then the Prince of Wales, and later King George II), the King summoned together "all of the judges of England" to answer the question whether the education, marriage and care of his grandchildren were his by right. He was concerned for the

proper upbringing of his grandchildren. The Judges met in the Lord Chief Justice of England, Lord Parker's, chambers in Fleetstreet. Ten of the twelve judges found in favour of the King, such that his grandchildren remained under his care. Four of the judges examined his role as "father of the people". Of particular note is the judgment of Baron Fortescue:

- At 914: "*Now the King as he is Parens Patriae, he is also Parens Nepotum, Parent of his Grandchildren.*"
- At 915: "*And as this is a Prerogative vested in the Crown, in the Reason of the Law, and Nature of a Monarchy; so in all Ages the Crown has practised, and been in possession of this Right*"
- At 919: "*Duty to Parents must be always subject to the Safety of the whole Community, and the King who is Parens Patriae, as well as Parens Nepotis, must be obeyed, to whom there is a double Obligation by Nature and by Allegiance, i.e. by the Law of God and Law of Man.*"

The influence of religion on the exercise of court's power

- *Shaftsbury v Hannam* (1677) 23 ER 177: Mother only allowed guardianship of child if she could prove she belonged to the Church of England and was not a Catholic.
- *Shelley v Westbrook* (1817) 37 ER 850 – the tragic case of the poet Percy Shelley who was denied custody of his children because of his "*immoral and vicious*" ways. See the account given by R Burch, *The Case of Shelley v Westbrook* (1903) 11 American Lawyer 380.

Modern Applications

In *Secretary, Department of Health and Community Services v JWB and SMB* (1991) 175 CLR 218 (Marion's Case), the High Court was not unanimous in their articulation of the scope of the *parens patriae* jurisdiction. The majority emphasised the essentially limitless scope of the power, whereas Brennan J, in dissent, considered that the Court's powers could not be wider than parental powers.

The historical correctness of the opinions may depend on whether the jurisdiction simply arose out of powers of wards, or if it emerged from the monarch's absolute powers exercised in protection of his infant subjects.

Conclusion

The study of the history of the *parens patriae* jurisdiction has obvious implications for nature and extent of the jurisdiction as now exercised. However, a further justification of the study of the history can be offered: just as history may assist us to better understand the law, the law may help us better understand our history. The study of the history of the *parens patriae* jurisdiction is also a study in the values, religious or otherwise, that shaped our early social and legal structures.