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CLARIFYING *PARENS PATRIAE*

James G. Dwyer

LEGAL SYSTEMS treat a third of the human population as nonautonomous, incompetent to govern their own lives. This includes persons of any age with incapacitating mental conditions (intellectual disability, mental illness, dementia, etc.) and minors. Recent decades have seen challenges to the categorization by lawmakers of individuals as such, with theorists urging greater respect for the views of adults with lesser cognitive capacity, of adolescents, and even of young children.[1] Without articulating and defending here a position on the complex matters of where the law should draw lines between those entitled to make life-determining decisions for themselves (with or without support) and those who need some entity to make certain decisions on their behalf (with their input as appropriate) and of how the law should treat transitions from one to the other, this article aims to clarify the role of the state in the lives of persons in the latter category.[2] Certainly, this category includes newborns and prelingual infants, and arguably, it also includes older children in connection with relatively complex and momentous choices such as medical treatment and type of schooling. It also includes a significant percentage of adults, such as those with advanced dementia and those unable to make or communicate choices because of severe disability, mental illness, or brain injury.[3]

1 See Archard and Uniacke, "The Child's Right to a Voice"; and Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities*. The United Nations Convention on the Rights of the Child (UNCRC) urges greater voice and freedom for children. See art. 12 ("State parties shall assure to a child who is capable of forming his or her own views the right to express those views freely and for the views of the child to be given due weight in accordance with the age and maturity of the child") and art. 14 (on freedom of thought, conscience, and religion). However, the Convention also ascribes to parents, extended family, and communities "rights" to direct and guide children's exercise of any rights they have (art. 5), which this article will show to be problematic. For a child-centered critique of the UNCRC, see Dwyer, "Inter-Country Adoption and the Special Rights Fallacy."

2 See Howard, "Deciding for the Incompetent" (analyzing more and less respectful ways of deciding on behalf of persons with some agential capacity that is nevertheless insufficient to be characterized as autonomous).

3 Peter Vallentyne writes: "An individual is psychologically autonomous just in case (roughly) she has a sufficiently good capacity for rational reflection and revision of her beliefs, desires, and intentions" ("Libertarian Perspectives on Paternalism," 182).

Anglo-American legal systems have long placed together these groups of nonautonomous persons and adopted a similarly solicitous disposition toward all of them, authorizing state actors to exert protective control and supervision over aspects of their lives that for autonomous persons would generally be outside the state's proper authority—that is, would be, by right, matters of self-determination.[4] These legal systems have done so under the banner of *parens patriae*, a term meaning parent of the country and connoting an inherent authority and duty of government to exercise protective care and control as to persons unable to guard or promote their own welfare. Yet the precise nature of the state's role *qua parens patriae* is obscure. This article aims to clarify how we should understand it when it is appropriately deployed—in particular, whether and how *parens patriae* differs from the more familiar "police power" role that states fulfill when they act as the agent for society as a whole, promoting public goods and resolving conflicts between rights. (The word 'police' in this standard characterization is misleading; 'police power' connotes not just law enforcement but any state action in service to society, including, for example, building highways.)

Which model of decision-making state actors adopt for *parens patriae* intervention has important real-world consequences for persons deemed nonautonomous. This article focuses on the specific question whether the best model allows interests of other individuals or of society to influence outcomes or whether instead, it requires an exclusive focus on the welfare of the nonautonomous persons. It aims to answer this first by undertaking conceptual analysis aimed at identifying discrete and coherent conceptions of the *parens patriae* role and then by offering normative reasons for choosing one among those conceptions.

Philosophers and legal scholars have paid little direct attention to this question. They have addressed it only in an indirect and narrow way by theorizing about parental entitlement to possess legal power over children's lives, without acknowledging and defending the implicit view of the state's role in children's lives that their theory entails—namely, that the state appropriately exerts power over certain aspects of children's lives in order to serve interests of other persons (parents).[5] This article shifts focus to the state and its position in the lives of

4 See *E. (Mrs.) v. Eve (Re Eve)* [1986] 2 SCR 388 (Canada), § 72: "In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its *rationale* is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship."

5 Philosophers generally agree that defense of parents' rights must rest on parental interests. Common arguments among nonphilosophers that parents have a moral right to control children's lives because that is good for children rest on lack of understanding of the nature of rights and failure to distinguish entitlement from authority. Rights are entitlements

children and other nonautonomous persons. And so, in part, it casts the parents' rights debate in a new light that should yield fresh insights. Rather than beginning with parents' perspectives and desires, and rather than rehearsing and critiquing the philosophical literature on parents' rights, this article focuses on and develops a theory of the state's relationship to children.[6] At the same time, it broadens the scope of theorizing about the state's treatment of nonautonomous persons to encompass also any adults in that category. This should foster more principled reasoning than one finds in writings limited to child rearing. From this higher vantage, the article aims to clarify *parens patriae*'s practical scope, how it ought to be conceptualized, and what aims it may properly serve.

Section 1 presents a taxonomy of relevant state actors and the types of decisions they make that impact nonautonomous persons. Section 2 briefly recounts the history of *parens patriae* in the Anglo-American legal tradition. Section 3 describes the diversity of conceptions of the *parens patriae* role that judges and legal scholars have deployed in the modern era. The next two sections form the core of the analysis. Section 4 assesses which conceptions of the *parens patriae* role are coherent and differentiates it from the state's more familiar police power role. Section 5 illustrates how choice among coherent conceptions on normative grounds depends on which moral outlook one believes underlies existing constraints on state exertion of power over the private lives of autonomous individuals. It ultimately recommends a conception in which the state *qua parens patriae* acts as fiduciary for nonautonomous individuals, obligated to serve only those individuals and to effectuate their rights (choice-protecting or interest-protecting as appropriate), as most consistent with the prevailing, deontological view of why the state respects individual rights. Not everything the state does that impacts nonautonomous persons is done *qua parens patriae*. But when the state does act in that role—that is, when it takes over decisions in an individual's life that for autonomous persons are a

correlative to duties owed to right holders, and duties are owed to persons whose interests are the moral foundation for their existence. See Sreenivasan, "Duties and Their Direction," 484; and Kramer, "Refining the Interest Theory of Rights," 32. An argument that begins with children's interests should therefore end with children's rights, not with rights of anyone else. Children might have a right that their parents possess substantial *authority* in their lives, but that is different from saying parents are *entitled* to possess such authority, such that the state owes a duty *to the parents* to confer that authority. Similarly, we say incompetent adults have a right that their guardians (as opposed to, for example, the state's department of social services) possess authority over certain aspects of their lives, but no guardian has a right to possess such authority. Likewise, criminal defendants have a right that their attorneys possess substantial authority in legal proceedings, but the attorneys have no entitlement to such authority.

6 For review and critique of parents' rights arguments, see Dwyer, "Deflating Parents' Rights."

matter of self-determining right (e.g., to undergo a medical procedure)—the state is, just like a guardian or other private fiduciary, constrained by the fiduciary duty of loyalty to serve only the welfare of that individual.

Finally, section 6 explores implications of adopting this fiduciary conception of *parens patriae*. Doing so is consistent with the law's current treatment of adults who lack legal competence, but it calls into question prevailing intuitions today about parents' normative position in decision-making about children's lives and the many legal rules that rest on those intuitions, and it poses a new kind of challenge to theorists who endeavor to defend parents' rights. There might be morally sound reasons for treating different groups of nonautonomous persons differently in the respect this article addresses—that is, as to whose interests count in state decision-making about certain aspects of their lives. However, this article's analysis generates conclusions as to the state's response to lack of autonomy in general, so it places on anyone who insists on different treatment of some group (e.g., children) the burden of presenting such reasons and of showing in a principled way why the general conclusions should not apply to that group.[7]

1. THE WHO AND WHAT OF *PARENS PATRIAE*

The state acts through many entities—executive officers, administrative agencies, legislatures, courts, and so on. Decisions by any of those entities can impact nonautonomous persons. Some decisions do not target nonautonomous persons specifically but rather concern the population generally—for example, decisions to improve highways or to prohibit theft. As to those state actions, nonautonomous persons stand in the same relation to the state as autonomous persons, and such actions are regarded as ordinary aspects of police power governance of a society, not part of the state's *parens patriae* authority. Other state decisions, though, do target persons deemed nonautonomous, aiming to disable, protect, or benefit them in light of their lesser capacities or greater vulnerability, in some way that the state ordinarily does not do with autonomous persons—for example, ordering that they receive certain medical treatment or education. State officials frequently invoke the state's *parens patriae* role as the basis for their authority to make this latter sort of decision for children or incompetent adults.

Some targeted decisions or acts establish uniform rules and prescribe the same treatment for large numbers of nonautonomous persons. These could be

7 See Munby LJ in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam) (Munby J) § 37: "It is now clear . . . that the court exercises what is . . . a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdictions in relation to children."

executive orders, legislation, or administrative regulations. Examples include a health department directive that all residents of Alzheimer's units in care facilities receive periodic medical exams and legislation prescribing which subjects children should learn in schools. Other state decisions are specific to individuals—for example, a court order of surgery for a mentally disabled adult or a child protection agency's decision to remove a child from the custody of neglectful parents. Legislative prescriptions do not inherently differ in content from individualized decisions, however; the state can make the same kind of decision by either means. For example, states place infants into legal parent-child relationships both by legislation (e.g., via presumptions of maternity based on giving birth and presumptions of paternity based on being married to the mother) and by individualized court decisions (e.g., via adoptions and challenges to the marital presumption of paternity). Allocation of decisions to different types of state actors instead typically reflects efficiency judgments, depending on how common and easily established are the determinative facts.

Both state decisions that address a class of persons and those focused on a particular individual can either directly dictate some aspect of nonautonomous persons' lives, as in the examples above, or delegate direct decision-making to a private entity. As to the latter, legal systems have statutes conferring broad presumptive powers on guardians and conservators for incompetent adults and on parents of minor children.[8] But in addition, courts sometimes tailor the powers of such caretakers to individual circumstances (e.g., authorizing a conservator to sell the ward's major assets or dividing authority over a child's education in a particular way between divorced parents).[9]

Finally, state decisions and actions that target nonautonomous persons can pertain to a vast range of substantive matters: formation and dissolution of legal relationships; choices as to residential location, medical care, education, and finances; avoidance of disturbing speech or conduct by custodians; and so on. Importantly, all possible decision contexts have analogues in the lives of autonomous persons—that is, situations in which autonomous persons make similar decisions for themselves. This is more readily apparent with some practical matters. For example, my making decisions about my own health care is a clear analogue to the state's actions of mandating some forms of health care

8 See, e.g., Protection of Personal and Property Rights Act 1988 (New Zealand) (PPPRA), § 18(2) (welfare guardian for incompetent adult); Uniform Probate Code (U.S.) § 72-5-427 (UPC) (conservatorship); and Arizona Revised Statutes § 1-601 (declaring broadly the "liberty of parents to direct the upbringing, education, health care and mental health of their children").

9 See, e.g., Massachusetts Gen. Laws, UPC § 72-5-425 (tailoring of conservator powers); and Florida Statutes § 61.13 (court discretion regarding legal custody).

for all children, such as immunizations and medical treatment in the event of injury. Less familiar perhaps are analogues to the state's creation of legal caretaking relationships for nonautonomous persons (i.e., guardian-ward and parent-child) and delegation of decision-making power to the caretakers. But autonomous adults do make similar decisions. They can choose for themselves who will serve as their guardian or make medical decisions for them in the event of their incapacity (in an advance directive or health care proxy).[10] They can select someone to manage their finances should they lose competence or even while they remain competent (e.g., while they travel, undergo major surgery, or devote their attention to other things) by creating a trust with someone else as trustee, nominating someone for conservatorship, or conferring a power of attorney.[11] The caretaker or agent whom one selects can, like a parent, be someone with whom one shares a close family relationship and daily life, such as a spouse, sibling, or adult offspring. Indeed, it can be one's parent.

The point of establishing that state decisions specifically concerning nonautonomous persons all have analogues in decisions autonomous persons make for themselves is to motivate consideration below of whether the former, which state actors typically characterize as carried out in their *parens patriae* capacity, can and should be guided by principles underlying the law's treatment of autonomous adults' decisions about their own lives in those same realms. Before delving into that question, the next two sections provide historical background and contemporary context.

2. ORIGINS

Scholarly writing on the state's *parens patriae* authority over nonautonomous persons is predominantly historical.[12] The origins are somewhat unclear.[13]

10 See, e.g., PPPRA (New Zealand), § 12(7); Patients Property Act (PPA), Rev. Stat. British Columbia [1996] (PPA), Ch. 349, § 9; Massachusetts Gen. Laws, UPC § 72-5-305(b) ("Unless lack of qualification or other good cause dictates to the contrary, the court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney"); and Conn. Gen. Stat. § 19a-575a(a) ("Any person eighteen years of age or older may execute a document that contains health care instructions, the appointment of a health care representative, the designation of a conservator of the person for future incapacity").

11 See, e.g., PPA (British Columbia), Ch. 349, § 9; UPC § 72-5-410.

12 See, e.g., Seymour, "*Parens Patriae* and Wardship Powers"; Payton, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons"; and Custer, "The Origins of the Doctrine of *Parens Patriae*."

13 *Re Eve* [1986] 2 SCR 388 (Canada) § 32: "The origins of the Crown's *parens patriae* jurisdiction over the mentally incompetent . . . is lost in the mists of antiquity."

The most plausible view seems to be that it originated in seventeenth-century England with transfer of jurisdiction over "infants," "lunatics," and "imbeciles" from the Court of Wards and Liveries (which was concerned principally to protect the Crown's interest in feudal tenancies when nonautonomous persons inherited land) to the Chancery Court, "Keeper of the King's Conscience" (which was charged generally with effecting justice for the king's subjects, with greater flexibility and discretion than the common law courts).[14] Though initially concerned principally with appointing guardians and preserving ward's property, the *parens patriae* function came to encompass also protective intervention to stop abuse and neglect by custodians, whether parents or appointed guardians.[15] The concept of neglect expanded over time to include failure to secure not just necessities of bare survival but also developmental goods such as education and preventive health care.[16] Still later, it extended to custody disputes between parents.[17]

14 Custer, "The Origins of the Doctrine of *Parens Patriae*," 206; and Seymour, "*Parens Patriae* and Wardship Powers," 175–76. From at least the thirteenth century, the English monarch assumed "wardship" of incompetent persons, but primarily or solely those who owned property, in order to extract rents. Australian jurist Paul Brereton observes that "the feudal wardship system was a rudimentary predecessor" to the altruistic *parens patriae* jurisdiction ("The Origins and Evolution of the *Parens Patriae* Jurisdiction," 4). Cf. *In re Spence* (1847) 2 Ph 247 (England), Op. Lord Cottenham: "The cases in which this court interferes on behalf of infants are not confined to those in which there is property. . . . This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*."

15 Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand," 227: "Over time, wardship became procedurally and substantively connected with the *parens patriae* jurisdiction. It lost its connection with property and became purely protective in nature."

16 *Re Eve* [1986] 2 SCR 388 §§ 35ff (identifying cases in Canada and England invoking *parens patriae* to support court-ordered medical procedures) and § 74 ("It can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations"); *Re Jules* [2008] NSWSC 1193 (New South Wales) 14 ("It has been said that no limit has ever been set to it and that it extends as far as is necessary for the protection and education of children"); *Re X (a Minor)* [1975] 1 All ER 697, 703 (England) ("The court has power to protect the ward from any interference with his or her welfare, direct or indirect"); and Thomas, "Limitations on *Parens Patriae*," 57 ("Ever since the mid-19th century, state legislatures have relied on the *parens patriae* doctrine in enacting compulsory-education laws").

17 *Henderson v. Henderson*, 91 A.2d 747, 749–50 (NJ 1952) ("The power of the former Court of Chancery, to which the Superior Court succeeded as *parens patriae*, is firmly established in our jurisprudence. . . . In dealing with the custody and control of infants the touchstone of our jurisprudence is their welfare and happiness"); and Bishop, *Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits*, § 636.

All branches of government in England and in countries that inherited its legal system have participated in fulfilling the *parens patriae* role.[18] Adoption of the function originally was typically not by explicit authorization in government charters such as constitutions, nor with public deliberation. Rather, courts, legislative bodies, and executive officers simply continued a familiar, taken-for-granted state practice based upon a protective authority viewed as inherent to enlightened government.[19] Over the centuries, though, many jurisdictions have codified the authority.[20] Other legal traditions in the Western

18 See Graham, "*Parens Patriae*," describing its application in Australia, Canada, and New Zealand. See also Payton, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons," 618 (the *parens patriae* function "was incorporated into the equity jurisdiction of the newly independent American states with no recorded objection"); *In re DS*, 763 N.E.2d 251, 261 (Ill. 2001) ("Each branch of government has concurrent powers and responsibilities that are in the nature of *parens patriae*"); and *In re J. J. Z.*, 630 A.2d 186, 193 (DC 1993) ("The statute also places within the power of the executive branch, through the Corporation Counsel, *parens patriae* responsibilities to the child").

19 See Seymour, "*Parens Patriae* and Wardship Powers," 162: "The first [US] case to invoke the *parens patriae* power in the public custody context was *Ex parte Crouse*, 4 Whart. 9 (PA 1839). The court cited no authority, and simply asked 'may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?'" See also *Re Eve* [1986] 2 SCR 388 (Canada), § 65 ("That jurisdiction is based on the inherent equitable power of the courts to act in the best interests of the mentally incompetent person"); *Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 US 1, 57–58 (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 . . . for the prevention of injury to those who cannot protect themselves. . . . [T]his beneficent function has not ceased to exist under the change of government from a monarchy to a republic, but it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right"); and *Vidal v. Girard's Ex'rs*, 43 US 127, 144, 167–68, 195 (1844) ("From the time of Augustine, the common law had been undergoing changes to suit the spirit of the age, but the revealed law was a part of it all the time. . . . To this same great source we owe the idea of a paternal power in the state—a *parens patriae*—not the king, nor the chancellor, but a power existing somewhere to take care of the sick, the widow, and the orphan").

20 See, e.g., the Mental Capacity Act (MCA) 2005 (UK) ("An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests"); Scottish Adults with Incapacity Act (2000); Chancery Act, Rev. Stat. 1951 (Prince Edward Island), c. 21, sec. 3; and Judicature Act 1908 (New Zealand), sec. 17. See also Donnelly, "Inherent Jurisdiction and Inherent Powers of Irish Courts," 134: "Section 47 of the Regulation of Commission in Lunacy Act, 1853 established a Court of Protection entrusted with functions to manage the affairs of legally incapacitated adults. In Ireland, the state's wardship jurisdiction with respect to persons of unsound mind was granted a separate statutory basis by virtue of the Lunacy Regulation (Ireland) Act, 1871." See also Kindred, "God Bless the Child," 526: "The *parens patriae* power has been recognized from earliest times in the United States as well and now is largely governed by state statutes."

world assign a similar role to the state.[21]

This background is just to establish long and widespread acceptance that an enlightened society will assign to the state a function of protecting persons unable to safeguard their own interests.[22] Further, that in doing so the state exercises a power or jurisdiction that is special, different in some way from state action in contexts involving only autonomous persons, including in its scope, insofar as it entails intervening in areas of their life ordinarily considered private and not subject to state control.[23] How exactly it is different in its nature and operation, though, has never been a subject of close study. This article's aim is not to establish a prevailing understanding of the role among state actors historically but rather to establish normatively what view they should adopt.

3. ALTERNATIVE MODERN CONCEPTIONS

Current conceptualization of the state's *parens patriae* role as protector of nonautonomous persons is, in Anglo-American jurisprudence, inconsistent in material respects across instances of its application by various legal actors.[24] In judicial decisions and legal scholarship, one finds two seemingly disparate understandings of that role.

First, many ostensibly treat *parens patriae* as a special fiduciary role in which the state serves as agent not for society as a whole, as it does in its police power role.[25] Rather, it serves as agent solely for nonautonomous individuals, as a private fiduciary would.[26] A distinctive feature of fiduciary roles is a duty of

21 See Merkel-Holguin et al., *National Systems of Child Protection* (collected papers describing child protection systems in Australia, Canada, England, France, Germany, Ireland, Israel, the Netherlands, South Korea, and Switzerland); and Holland, *The Law Relating to the Child, Its Protection, Education, and Employment* (describing child protective laws in Spain, Germany, France, and Italy).

22 *Late Corporation*, 136 US at 58: "Take this away and we become a nation of savages." See also Legarre, "The Historical Background of the Police Power," 764: "The doctrine of *parens patriae* is present in some form and under some name in every reasonable legal system, for no reasonable state would wish to violate the basic ethical imperative of looking after children deserted by their parents."

23 Payton, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons," 641: "The *parens patriae* jurisdiction . . . is fundamentally unlike other powers of the state."

24 See *In re Gault*, 387 US 1, 16 (1967), saying of *parens patriae* that "its meaning is murky."

25 Gold and Miller, "Introduction," 1: "There is even a storied tradition of thinking of the authority of the state in fiduciary terms."

26 A large literature has developed in recent years debating whether the fiduciary model of agency in private law can sensibly be exported to government in its police power capacity, serving society as a whole, given the great diversity and conflict of interests across

loyalty, owed to the person for whom the agent is a fiduciary, entailing exclusive devotion to that person's welfare.[27] The Supreme Court of Canada advanced this fiduciary conception with unusual explicitness in its seminal *Re Eve* case in 1986, rejecting "an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others":

> The *parens patriae* jurisdiction is … founded on necessity, namely the need to act for the protection of those who cannot care for themselves.… The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare." It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised.… The discretion is to be exercised for the benefit of that person, not for that of others.… This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.… One may sympathize with [Eve's mother].… But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve.… So we are left to consider whether

groups and individuals within a society. See Leib et al., "Mapping Public Fiduciary Relationships"; and Criddle et al., eds, *Fiduciary Government*. That problem does not arise when the state acts solely as agent for an individual, as courts often do—for example, in deciding whether to order a medical procedure for an incompetent adult. "In some cases public officials undertake fiduciary duties, as where the state exercises custodial power over children.… But exercising power of this sort relative to an ascertainable beneficiary is very different form exercising power for the sake of the public" (Criddle et al., "Introduction," 17). Somewhat different is legislation as to some aspect of life for a large group of nonautonomous persons, if there can be a conflict of interest among them (e.g., if two or more co-reside or are in the same classroom). But there is also a private law analogue to that situation, in trust law, where the fiduciary duty of loyalty cashes out in a duty of impartiality across beneficiaries coupled with the universal proscription of self-dealing or aiming to serve nonbeneficiaries. See the US Uniform Law Commission's Uniform Trust Code § 803. And much legislation concerning nonautonomous persons does not present such intergroup conflicts (e.g., a patients' bill of rights or teacher qualification requirements for schools).

27 Gold and Miller, "Introduction," 5: "The duty of loyalty is one of the most prominent features of fiduciary law." See also Bogert et al., *The Law of Trusts and Trustees*, § 543: "Perhaps the most fundamental duty of a trustee is the trustee's duty of loyalty to the beneficiaries, often stated as the duty to act solely in the interests of the beneficiaries. This duty is sometimes stated as the rule of undivided loyalty. The trustee must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons."

> the purposes underlying the operation are necessarily for Eve's benefit and protection. . . . Many [such persons who conceive a child], it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem. . . . Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. . . . Accordingly, the procedure should never be authorized for nontherapeutic purposes under the *parens patriae* jurisdiction. . . . The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.[28]

Likewise, in a case involving a minor and a petition to order lifesaving medical treatment, the Supreme Court of New South Wales stated:

> In a case such as the present, the Court is not balancing the interests of the individual against broader public or governmental interests. . . . All humans affect others and are affected by a myriad of relationships. . . . However, the *parens patriae* jurisdiction is not used for or directed to the benefit of parents or others related to or connected with a child that is the subject of the Court's consideration. Its exercise is directed to, and in that sense circumscribed to, doing what is necessary for the benefit and protection of such child.[29]

Thus, if the state's *parens patriae* role is in the nature of a fiduciary for a nonautonomous individual, then presumptively state actors must, when making decisions for the individual in that capacity, adopt a singular aim of serving the dependent person's interests, to the exclusion of other considerations. The duty of loyalty would proscribe both self-dealing (serving state interests) and

28 *Re Eve* [1986] 2 SCR 388 (Canada) §§ 1, 73, 77, 82, 84, 86, 92.

29 *H v. AC* [2024] NSWSC 40 (New South Wales), §§ 54–55. See also *LS v. British Columbia* (2018) BCSC 255, § 30: "Courts have frequently stated that it is to be exercised in the 'best interest' of the protected person, or again, for his or her 'benefit' or 'welfare'. . . . This jurisdiction is to be exercised to protect children and other vulnerable individuals, not their parents." See also *JP v. British Columbia* (2015) B.C.S.C. 1216, concluding that social workers in a pediatric psychiatric facility "should not have to weigh what is best for the child on the scale with what would make the family happiest." See also *Rogers v. Okin*, 634 F.2d 650, 654, 657, 661 (1st Cir. 1980): "Following a determination of incompetency, state actions based on *parens patriae* interests must be taken with the aim of making treatment decisions as the individual himself would were he competent to do so."

aiming to serve interests of third parties (family members, etc.) when acting as agent for the dependent individual.[30]

Such surrogate decisions must take place, of course, just like autonomous persons' self-determining choices regarding similar matters, within the context of an existing distribution of societal resources determined by the market and by decisions the state renders in its police power capacity. The fiduciary conception of *parens patriae* does not entail that the state must commit all available state resources to the welfare of nonautonomous persons with no heed for the impact on other members of society. But once the state, wearing its police power hat, has determined a fair distribution of public resources across society, it must, when wearing its *parens patriae* hat, choose from among options then available to a nonautonomous person solely based on which will best serve that person's well-being. In other words, it steps into that person's shoes and acts on his or her behalf, with a presumption of only self-regarding motivations.[31] It would thus be improper to allow collective societal aims or preferences of other private individuals or groups directly to influence a state actor's decision-making about, for example, whether a nonautonomous person receives medical treatment that is available to them. That state actor would operate the same way we would expect of a private individual holding a medical power of attorney for an adult who has lost capacity to make decisions—that is, as a fiduciary under a duty of loyalty to the ward, with exclusive focus on the ward's interests, not balancing those interests against the desires of others or state interests.[32]

Outcomes in high-profile legal disputes concerning severely brain-damaged adults on life support have reflected this view, as have many cases involving petitions for sterilization (such as *Re Eve*), abortion, or other medical intervention.[33] Likewise with respect to children, many scholars and courts through-

30 See Uniform Trust Code § 802.

31 Miller, "Fiduciary Representation." Proxy altruism is discussed in detail in note 49 below.

32 Payton, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons," 617: "Under the law that has governed the *parens patriae* jurisdiction ever since it was created . . . , a person whose powers of self-management have been taken from him by the state has a right that those who exercise the power to manage his affairs on his behalf do so in a fiduciary capacity. . . . The state takes jurisdiction only as a trustee: the jurisdiction has been designed to avoid vesting in the state any authority or incentive to act in a self-interested manner vis-à-vis the incompetent." The jurisdiction has been "designed from the beginning to be wholly fiduciary. . . . [T]he state's role has been exclusively that of trustee" (616).

33 See *K v. Minister for Youth and Community Services* [1982] 1 NSWLR 311 (New South Wales) (abortion); *In re Guardianship of Schiavo*, 851 So. 2d 182, 186–87 (Fla. Dist. Ct. App. 2003) (life support) ("this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents

out the English-speaking world have characterized *parens patriae* as calling for exclusive focus on the welfare of the child when state agencies must get involved in intimate aspects of their lives.[34] Others suggest a similar view by stating that a child's welfare is "paramount" or the like and not referring to any other interests as relevant.[35] Or they describe the state's role as that of a "wise

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and independent of her husband. In circumstances such as these, . . . trial judges . . . serve as surrogates or proxies to make decisions about life-prolonging procedures. . . . [T]he trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself"); and *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 US 261, 286 (1990) (rejecting parents' assertion of a right to decide about life-sustaining care of their adult offspring, stating "we do not think the due process clause requires the state to repose judgment on these matters with anyone but the patient herself"); *In re Quinlan*, 355 A.2d 647, 661–62 (NJ 1976) ("We do not recognize an independent parental right of religious freedom to support the relief requested"). See also *O'Connor v. Donaldson*, 422 U.S. 563, 573–75 (1975) (stating that mere preferences of the public not to see mentally ill persons was not a constitutionally permissible consideration in commitment decisions); and *In re Terwilliger*, 450 A.2d 1376, 1382 (PA Super. Ct. 1982) ("In making the decision whether to authorize sterilization, a court should consider only the best interest of the incompetent person, not the interests or convenience of the individual's parents, the guardian or society").

34 See, e.g., Pomeroy, *A Treatise on Equity Jurisprudence*, § 1307, 330n1 ("the exercise of the jurisdiction depends on the sound and enlightened discretion of the court and *has for its sole object* the highest well-being of the infant"); *Smith v. Smith*, 26 Eng. Rep. 977, 977 (Ch. 1745) (England) ("It is not a profitable jurisdiction of the crown, but for the benefit of infants themselves"); *Wentzel v. Montgomery Gen. Hosp.*, 447 A.2d 1244, 1253 (Md. 1982) ("It is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the individual's best interests"); Harvard Law Review Association, "Developments in the Law," 1199 ("when the state acts as *parens patriae*, it should advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual's welfare"), 1200 ("it should exercise the *parens patriae* power solely to further the best interests of the child"); and Hatcher, "Purpose vs Power," 171–72 ("State child welfare agencies exist to protect the interests, and the rights, of abused and neglected children. . . . The agencies serve in the nature of a fiduciary for children's rights").

35 *H v. AC* [2024] NSWSC 40 (New South Wales), § 47: "The inherent, protective jurisdiction of the Court exists for the protection of those (including, but not limited to, minors) who are unable to protect themselves. It accords paramountcy to the welfare of the person in need of protection." See also *J. v. C.* [1970] AC 668, 697 (UK) (Guest LJ) ("the law administered by the Chancery Court as representing the Queen as *parens patriae* never required that the father's wishes should prevail over the welfare of the infant. The dominant consideration has always been the welfare of the infant"); *Re Frances and Benny* [2005] NSWSC 1207, 17 (Young CJ in Eq) ("In exercising that [*parens patriae*] jurisdiction the court's concern is predominantly for the welfare of the person involved"); *In re J. J. Z.*, 630 A.2d 186, 193 (DC 1993) ("this court has recognized the longstanding principle that 'in a civil proceeding predicated on alleged child neglect or abuse, the best interest of the child is the paramount consideration.... Neglect statutes authorizing state intervention on a child's

parent" or guardian.[36]

However, there is a competing conception with some currency, albeit one not so clearly articulated, mostly implicit. Other sources appear to treat *parens patriae* decision-making as a matter of simply paying special heed in some way to the interests of dependent persons while also letting preferences or interests of other individuals or of society as a whole influence state decisions about a nonautonomous person's life. On this *special heed conception*, it seems state actors aim simply to ensure nonautonomous persons' interests receive direct attention and carry some weight—perhaps heightened, perhaps equal (this is never clear)—along with other individuals' interests and even collective societal aims that might be impacted by decisions, in some sort of balancing if those several interests do not all align.[37] The state does not act as agent exclusively

behalf … should be liberally construed to enable the court to carry out its obligation as *parens patriae*'"); *In re Karwath*, 199 N.W.2d 147, 150 (Iowa 1972) ("Our paramount concern for the best interests and welfare of the children overrides the father's contention that absolute medical certitude of necessity and success should precede surgery"); *Henderson v. Henderson*, 91 A.2d 747, 750n18 (NJ 1952) ("the touchstone of our jurisprudence is their welfare and happiness"); *Vannucchi v. Vannucchi*, 272 A.2d 560, 563 (NJ App. Div. 1971) ("In the exercise of their *parens patriae* jurisdiction, our courts look always to the protection of the child's best interests—the happiness and welfare of a child are paramount in determining custody").

36 E.g., *Re Jules* [2008] NSWSC 1193, 16 ("In exercising this jurisdiction, the Court endeavours to act as would a wise parent.… The Court may in place of the parents make those decisions which it considers appropriate in the best interests of the child"); *Re J* [1992] 4 All Eng. L. Rep. 614 (characterizing the court in medical treatment cases as "adopting the standpoint of reasonable parents who had the child's best interests at heart without regard to their own interests"); *Rogers v. Okin*, 634 F.2d 650, 654, 657, 661 (1st Cir. 1980) (US) ("The concept of *parens patriae* … developed with reference to the power of the sovereign to act as 'the general guardian of all infants, idiots, and lunatics'"); *Kicherer v. Kicherer*, 400 A.2d 1097, 1100 (MD 1979) ("In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility"); *R. v. Gyngall* [1893] 2 QB 232, 239 ("It was a paternal jurisdiction … as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child"); and Kindred, "God Bless the Child," 526 ("This state power, known as the *parens patriae* doctrine, in essence, gives the state authority to serve as a substitute parent and ultimate protector of children's interests"). Other courts have stated that the state's *parens patriae* power can extend beyond that accorded parents in a given jurisdiction to include such things as authorizing civil commitment, certain medical treatments, and underage marriage. See, e.g, *Re R.* [1991] 4 All ER 177, 186 (England) (involuntary administration of antipsychotic medication).

37 See, e.g, *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (asserting, in a case concerning parental control over children's visitation with grandparents, that "a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae* … and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection"); *Matter of Weberlist*, 360 N.Y.S.2d

for the individual; this is what distinguishes this special heed conception from the fiduciary conception. For example, if the issue is with whom a person will live, whereas a competent adult can choose not to live with someone whose religiously grounded speech upsets them, giving no consideration to that other person's desire to cohabit or right to free speech, on the special heed conception of *parens patriae*, the state making the same sort of decision about cohabitation for a mentally disabled adult would permissibly take into account the disappointment a potential guardian would feel if denied the role and the impact it could have on that person's sense of religious or expressive freedom.[38] A competent adult can choose to undergo cosmetic surgery without regard for the feelings or moral beliefs of parents, other family members, or the public, but on the special heed view, it is appropriate for the state to aim to satisfy such third parties when legislating as to whether minors or adults under a guardianship can undergo any such procedures; the state must simply also attend in some way to the minors' or wards' own interests.

This special heed view thus appears implicitly to suppose that, given nonautonomous persons' inability to advocate for themselves, absent assertion of *parens patriae* authority, their interests would receive no consideration at all in legal decisions about their lives or in private actors' decisions that impact them. The state might cite its *parens patriae* role to explain why it has gotten involved in some aspect of a nonautonomous person's life when no one asked it to do

783, 786 (1974) ("the state must intervene in order to protect an individual who is not able to make decisions in his own best interests. The decision to exercise the power of *parens patriae* must reflect the welfare of society, as a whole, but mainly it must balance the individual's right to be free from interference against the individual's need to be treated, if treatment would in fact be in his best interest"); *Ex parte Wallace*, 190 P. 1020, 1022 (NM 1920) ("in all cases the state is *parens patriae* to the child, and it has power to, by legislation, control the right of the child to inherit, to take it from its parents, and give it into custody of others, to determine what is for the best interests of the child, and that which will promote the welfare of the state"). See also Seymour, "*Parens Patriae* and Wardship Powers," 186 ("The fact that the need to treat the welfare of the child as the paramount consideration is a distinguishing feature of some types of proceedings does not mean that these proceedings can be conducted without regard to the interests of others who might be affected"); and Weithorn and Reiss, "Providing Adolescents with Independent and Confidential Access to Childhood Vaccines," 797 (characterizing the effect of *parens patriae* action as "triggering a higher level of protection from the state" for nonautonomous persons).

38 *Shepp v. Shepp*, 588 PA 691 (2006), holding that a father had a constitutional right against being denied custody of his daughter because of his efforts to impress Mormon views on her, including the view that she should enter into a plural marriage and choose a life of service to a husband (even though that expression of views had caused his wife to petition for divorce), unless his expression was proven to "jeopardize the physical or mental health or safety of the child, or have a potential for significant social burdens" (706). See also Volokh, "Parent-Child Speech and Child Custody Speech Restrictions."

so—for example, when it intervenes to block choices or conduct by guardians or parents that it deems detrimental.

The basic distinction between the two conceptions, then, is that the fiduciary conception does not allow interests other than those of the ward to influence decisions directly, whereas the special heed conception does, even when those other interests are antithetical to those of the ward. Invocation of one conception or the other is typically undefended, and invocation of the special heed conception typically unreflective. Yet in numerous contexts, state decisions about central aspects of nonautonomous persons' lives are profoundly important, and the model of *parens patriae* adopted could determine outcomes. This is clearest when a legislature or court says explicitly that a best interests finding is not enough to override competing interests.[39] Among the most important state decisions for children is choice of legal parents. Though generally unrecognized, state laws that confer initial legal parenthood on birth parents, almost without exception (one exception being anonymous birth, another being denial of paternity to rapists), rather than attempting to screen out those manifestly unfit to care for a child, reflect a legislative choice. Even if one believes the state morally must make that choice, the fact is that the state is making a choice, and that choice greatly influences the life courses of children. State decisions about the residence and care of mentally disabled or mentally ill adults, when they cannot live with family, are similarly impactful. Less momentous decisions can have a cumulative effect in shaping lives and determining experiences.

39 A salient example in the US is the Indian Child Welfare Act, which explicitly aims to serve tribes' interests in sustaining membership by channeling to tribal lands children in mainstream society whom the state must place in foster care or adoption because of parental maltreatment. Most Supreme Court justices acknowledged in a recent decision that the act frequently operates to the children's detriment—in particular, when placement preferences force termination of a child's attachment relationship with long-term non-Indian caretakers. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1622 (2023) (majority). See also JJ Thomas and Alito dissenting (1662). See also the Code of Federal Regulations, 25 CFR 23.143(c) (stating the position of the Bureau of Indian Affairs that a best-interests determination does not constitute "good cause" to deviate from adoption preferences). See also *Palmore v. Sidoti*, 466 U.S. 429 (1984) (subordinating child welfare concerns in a custody dispute between parents to the state aim of eliminating racism); and *People in Int. of D.L.E.*, 614 P.2d 873, 875 (CO 1980) (refusing to order treatment for seizures, out of deference to mother's religious beliefs, unless and until the child was in imminent danger of death; a best interests finding was insufficient).

4. CONTRASTING *PARENS PATRIAE* WITH OTHER STATE FUNCTIONS

Determining which conception is normatively preferable might begin by situating *parens patriae* within the full range of state functions. Though most people might think of the state as always operating in the same way, in a police power capacity, the state in any society inevitably operates in many capacities. As noted, when wearing its police power hat, the state acts within its borders as agent for all members of society, promoting the collective good and facilitating social interaction. It legislates and in other ways acts based upon consideration of everyone's interests, giving equal weight to like interests of all persons, balancing interests that conflict. It promotes general welfare and guards against harms to property and person.[40] Paradigmatic exercises of police power include managing the economy, building infrastructure, creating a social safety net, enacting and enforcing statutes criminalizing violence and theft, protecting public goods like the environment, creating rules for orderly movement in public and for transacting, resolving property or contract disputes, and promoting public health (e.g., mandating masks, funding medical research).[41]

However, the state regularly acts in other capacities. At one level or another, government can be an actor in international affairs, a competitive business operator, an employer, a jailer, a speaker in commercial advertising or the public square, a service provider, a funder of private service provision, a party to contracts, or an educator. Each of these roles has its own scope of authority and concerns, powers and duties, and governing norms and constraints. In the United States, different lines of constitutional doctrine pertain to those various functions.[42] For example, individual rights that constrain government when it acts in its police power role might do so less or not at all when it operates in one

40 Brady, "Turning Neighbors into Nuisances," 1659: "[police power] demarcates the boundaries within which the government can affirmatively regulate for the health, safety, and welfare of its citizens, limiting some rights to protect the greater good."

41 Legarre, "The Historical Background of the Police Power," 774: "'police power' refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare."

42 *Enquist v. Oregon Department of Agriculture*, 553 U.S. 591, 598 (2008) ("there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation'"); *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school"); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (public bus is not a public forum for free speech purposes because it is a commercial enterprise); and *Fulton*

of the other roles.[43] This is especially so when a state function approximates that of a private actor; for example, government employees have diminished free speech rights in relation to the government *qua* employer.[44] Some might find it hard to grasp this, reacting by saying "But it's the state!" and struggling to understand how any part of the Constitution could ever not apply to state actors. It is because the Constitution was designed for the core police power function, not for everything the state might do. The *parens patriae* role might be another in which government is not bound by the same norms, because it is acting in a quasi-private capacity. At the same time, government might be under additional *duties* to individuals in any of these non–police power roles—for example, duties *qua* employer that it owes to employees, such as to pay a salary, create healthy working conditions, and provide health insurance.

How, then, to reason to a conclusion about the particular nature of the *parens patriae* role within the range of state functions? We might begin by considering whether and how it differs conceptually from the core police power function, with which it is most often conflated or conjoined. This function has always been the primary focus of political theorists, who typically presuppose the people on whom governments act are autonomous.

Relative to the police power, one possible view of the *parens patriae* role is that it is not distinct; it is simply what we call exercise of police power when nonautonomous persons are centrally involved.[45] This would be consistent with the special heed conception. Its invocation might simply serve as a corrective to a tendency to do police power decision-making badly when nonautonomous persons are impacted, leaving them out of a cost-benefit equation that is supposed to include everyone's interests and objectively weigh each. Invoking the state's *parens patriae* responsibility could be simply a reminder: "Don't forget that intellectually disabled persons' lives matter too!"

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v. City of Philadelphia, 320 F.Supp.3d 661 (ED PA 2018) (conditions impinging religious freedom in "a state contract for … services" are not subject to constitutional challenge).

43 See Kalb, "Gideon Incarcerated," 111, discussing greater judicial deference to governments in their operation of prisons.

44 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006): "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

45 See *In re Spence* (1847) 2 Ph. 247, 252; 41 E.R. 937, 938 (England): "The jurisdiction of this Court … as representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and … the Sovereign, as *parens patriae*, is bound to look to the maintenance and education … of all his subjects."

There are problems with this view. First, it makes *parens patriae* legally and analytically superfluous and its invocation therefore likely to confuse and mislead. More importantly, under the banner of *parens patriae*, the state has extended its decision-making authority to areas of persons' lives ordinarily treated as outside the proper ambit of state police power. These are areas ordinarily considered matters of self-determining right because they satisfy two conditions: (1) they concern central aspects of the right holder's own life, and (2) exercise of the right threatens no "harm" to others, even though it might affect others (e.g., by offending or upsetting them). Let us call these *Private Matters*, giving 'private' here the special meaning of having these two features. They include choices such as with whom one forms close personal relationships, whether and how one receives medical treatment for illness or injury, how one receives education, and who will provide other services relating to one's person or property. Any such choice might disappoint or anger other individuals or undermine the aims of some group.[46] Yet the state ordinarily does not presume, as part of its police power function, to decide these things for private parties nor to force private parties to take into account interests of other individuals, of any groups, or of society as a whole when making their own choices about such matters among available options.

Thus, to treat *parens patriae* as simply police power applied to nonautonomous persons' lives, the legal system presumably should either (1) constrict *parens patriae* action to the established normal bounds of police power action, deeming state involvement in Private Matters altogether improper even as to nonautonomous persons or (2) provide normative justification for treating as appropriate for police power action, such that everyone's interests weigh in state decisions, aspects of dependent person's lives comparable or equivalent to aspects of autonomous persons' lives deemed inappropriate for police power control (Private Matters). Doing 1 seems unsatisfactory because it leaves nonautonomous persons vulnerable in important areas of their lives. To fulfill 2, it would not suffice simply to point out that nonautonomous persons are unable to make certain decisions for themselves. For as described above, there is another available approach to making decisions for such persons—that is, the fiduciary conception of *parens patriae*.

To illustrate: if I, an autonomous person, have diabetes, whether I take insulin is a Private Matter; it concerns a central aspect of my life, and my decision in and of itself threatens no harm to others.[47] The legal system imbues me with

46 See Banks, *Is Marriage for White People?* 136–66, describing social pressure in the Black community not to "marry out."

47 Driving after choosing not to take insulin is a different story; traffic safety is not a Private Matter.

the right to decide; whether I take insulin is entirely up to me. A liberal state would not presume to compel me to do so on the grounds that it would be best for other individuals, such as my family members, or for society generally, even though that might be true. If *parens patriae* were not a different function relative to police power but rather just a special application of police power to situations in which nonautonomous persons are involved, then the legal system should either (1) cease exerting *parens patriae* authority in the realm of nonautonomous persons' medical care or (2) justify making those persons' medical care a proper subject of police power, to be dictated by the state's balancing of all affected interests such that, for example, the state might prohibit doctors from treating a particular diabetic child if it happened to be factually the case that her parents' interests in preventing treatment (e.g., because it conflicts with their religious beliefs) combined with any other affected private interests (e.g., of co-religionists, siblings in an overcrowded house, health insurance companies) and collective societal aims (e.g., avoiding costs of enforcing treatment mandates over parental objection, lowering medical care prices by reducing demand) outweigh the child's interests. No theorists have provided the justification called for by option 2. Section 5 will consider what justification the state has for exerting power over such aspects of nonautonomous persons' lives and whether it can support a police power approach.

Now consider the opposite position. The *parens patriae* role is completely distinct from the police power role. There is no overlap; they never pertain to the same situation. *Parens patriae* takes over where the police power role must stop. The state wears one hat when fulfilling police power duties and a different hat as *parens patriae*; it compartmentalizes these different roles and shifts from one to the other across contexts, just as a lawyer might represent an organization in a contract dispute today and represent an individual who happens to be a member of that organization in an unrelated criminal prosecution tomorrow. Police power extends to state efforts to improve general welfare and to prevent some persons—whether autonomous or not—from harming others. Call those *Public Matters*. They include some state action upon nonautonomous persons, such as civil commitment and juvenile delinquency proceedings aimed at protecting others in the community from harms a mentally ill adult or youth might cause. But on this position, police power does not extend to Private Matters for any persons, whether autonomous or not. Instead, *parens patriae* pertains to Private Matters for nonautonomous persons, and exclusively so; the state completely shifts focus from the collective to the individual. For present purposes, we need not establish where exactly the line lies between Public Matters and Private Matters.

Presumably, this differentiation between two decision realms, to correspond with treating *parens patriae* as entirely distinct from police power, would mean

the practical operation of the state's roles in the two realms differs. As noted, the police power role of government, as agent for all of society, is carried out by considering interests of all members of society, weighting objectively and balancing as necessary.[48] An operationally different *parens patriae* state function would therefore presumably entail the state considering interests of less than all members of society in rendering decisions within the purview of that function. Given that, by all accounts, this is a role adopted at least in part to protect in some fashion the welfare of nonautonomous persons, naturally, those nonautonomous persons whose lives are the subject of state decision would be included among those whose interests receive consideration. If they are the *only* persons whose interests may influence decisions, that would support adopting the fiduciary conception of *parens patriae*. The question then is whether, on a conception of *parens patriae* as distinct from police power, there are *any* other persons—or perhaps even groups of persons collectively—with interests impacted by decisions concerning Private Matters in nonautonomous persons' lives who ought also to be considered in *parens patriae* decision-making.

The answer cannot be *all* such other persons. That would return us to the position of no practical distinction between *parens patriae* and police power. The point of distinguishing the two roles must be to signal that with *parens patriae* decision-making, some who have interests at stake are not to be included within the state's scope of concern; their interests are real but irrelevant, properly disregarded. Now, if it can be shown that some subset of all other persons stands in a privileged position, such that they rightly have their interests considered even though the actually-impacted interests of some other persons are not, then we might settle on a third conception of *parens patriae*. Call it the *subgroup conception*: the state is not agent for all of society nor agent solely for nonautonomous individuals but rather serves some subset of society, of which an nonautonomous person is just one member. Note that the point of adding others' interests must be that these might conflict with and to some degree override the welfare of a nonautonomous person. If they were presumed entirely consistent with the latter's well-being, then it would be analytically superfluous to add them and to posit this third conception (except perhaps as a tiebreaker in the rare case when two alternatives are equally good for the nonautonomous person—a possibility discussed further below).

48 This is true even when the state is adjudicating competing individual rights and allegations of individual harm, as in contract and property disputes or enforcement of criminal laws. Legislatures and courts consider broader societal effects of potential decisions (e.g., general deterrence in connection with criminal law enforcement, public policy limitations on enforcement of terms in contracts, wills, and trusts).

As among all who might appear plausible candidates for this privileged position (spouses, siblings, offspring, parents, grandparents, other extended family members, neighbors, teachers, fellow town residents, religious or ethnic communities to which nonautonomous persons or their caregivers belong, etc.), it is not obvious on what objective basis one would distinguish among them. Or between any of them and individuals or groups who take an interest yet do not intuitively seem plausible candidates (e.g., right-to-life activists in connection with pregnancy-related decision-making for nonautonomous women, atheist bystanders in connection with regulation of religious schools). In other words, on what rational basis could one say "Well, *those* impacted persons should not be considered *at all* because this is *parens patriae* decision-making we are doing, not police power, but interests of *these* impacted persons *should* be considered and should be treated as a basis for potentially sacrificing the welfare of the nonautonomous person to some degree, even though this matter is equivalent to one that lies within the realm of self-determination for autonomous persons"—that is, is a Private Matter? Further analysis might reveal some plausible basis, but unless and until one is established we should—if *parens patriae* is to be a function distinct from police power—exclude *all* others. The equal moral status of nonautonomous persons gives rise to a presumption of equal protection, an equal moral right to have only their own interests considered in their Private Matters. That would leave us with the first, fiduciary conception of the state in its *parens patriae* role—that is, concerned solely for the welfare of the dependent individual.

A reaction many will likely have is that particular other individuals have a moral *right* in connection with such Private Matters in the lives of nonautonomous persons.[49] On that view, a state decision adverse to those other persons'

49 Scott Altman suggests a different basis for considering parental interests, but only indirectly ("Why Parents' Interests Matter"). He contends a fiduciary for children should do not what is best for children per se but rather what the child would choose if able—i.e., a substituted judgment, taking into account every consideration the child might if he or she were autonomous. This would include, Altman says, the child's love and gratitude toward parents. He notes in support that fiduciaries for incompetent adults are sometimes permitted to act on values and affections the ward displayed while competent—for example, in giving gifts. The problems with this idea are too numerous to present here, but to note a few: that children love and are grateful to their parents is far too broad a concept to guide state decision-makers; one would want actual evidence that at least most people after reaching an age when their views are independent and well informed retrospectively judge that their own welfare was or could have been justifiably sacrificed for the sake of their parents to a particular degree in particular circumstances. Such evidence does not exist, and it seems especially unlikely to be found with respect to state decisions about private matters; filial love and gratitude presumably are weakest toward birth parents who were so little capable or motivated when the child was born that a best-interest assessment of their parentage

wishes might in fact cause "harm to others," if the concept of harm includes any infringement of persons' supposed other-regarding moral rights. The state thus should instead aim in its decisions about nonautonomous persons' lives to avoid conflict with those other persons' wishes.[50] With respect to an autonomous person, the law today in liberal societies does *not* recognize rights of anyone else in connection with these matters, even though other individuals and groups might take an intense interest (e.g., a husband regarding a wife's use of contraception, Native American tribes regarding members' marital and residential choices), make great sacrifices for that person, or hold religious beliefs that ascribe such rights to them. But maybe something distinctive about being nonautonomous means it is appropriate to ascribe to others entitlements as to those aspects of one's life. For example, an elderly incompetent person's offspring might anguish over the type of long-term care facility the parent will enter, perhaps believing the parent's only chance at eternal salvation requires ending life in a facility run by the religious denomination the offspring recently joined and believing they bear a moral duty of the highest order to ensure that outcome. The fiduciary model of deciding for the parent would render the offspring's anguish and conviction of no direct relevance because frustrating the offspring does not constitute harm to them. Yet how can the state be so indifferent to family members' anguish and convictions? Have they no right in this situation?

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would have been a sufficiently close call for gratitude to make the difference, or when legal parents demand because of their religious beliefs power to deny their children education or medical care. Further, children have feelings for many people in their lives, so presumably the state should also take that into account, and interests of some people within the child's love universe might conflict with interests of others in that universe. (For example, one parent might wish to exclude or disempower the other, grandparents might disapprove of parents' choices, etc.) And on the other hand, those other people in the child's world presumably love the child in return and would not want the child's welfare sacrificed at all for their sake, and we might impute to them also a desire that the state decision-maker take into account the possibility that the parents' current desires regarding the child's life are not consistent with the child's "true desires" because distorted by misinformation, ideology they might later abandon, selfishness, etc. Perhaps these problems are among the reasons why the law actually limits altruism by guardians and holders of a power of attorney for an incompetent person to giving modest gifts that in no way adversely impact that person and only insofar as is consistent with that person's gift giving while competent, if they ever were. See *Matter of Hourihan* (2020) WL 5049128, at *4 (NJ Super. Ct. App. Div. Aug. 27, 2020); and *Davis v. Davis*, 298 Va. 157, 835 S.E.2d 888 (2019).

50 There is scholarly debate over the best understanding of harm in the harm principle. See Folland, "The Harm Principle and the Nature of Harm." Most theorists aim to distinguish it from mere offense or upset by interpreting it as a substantial setback to basic interests, like physical integrity and self-determining liberties. See Turner, "'Harm' and Mill's Harm Principle," 299–300.

Section 5 will discuss normative obstacles to ascribing such rights to others in Private Matters in nonautonomous persons' lives, but here note the conceptual implications of doing so: this response amounts in effect to denying that there are any aspects of nonautonomous persons' lives that are inherently Private Matters (i.e., condition 2 above would not pertain). Then, one must also say either:

1. All aspects of nonautonomous persons' lives are Public Matters, with state decision making about them properly influenced by *any* other persons' desires, though especially those who have a moral right to the state's direct concern for their wishes, and by collective societal aims, taking us back to the no-distinction position; or
2. There is a realm of nonautonomous persons' lives, coextensive with autonomous persons' Private Matters yet not treated as such for nonautonomous persons, where decisions are fundamentally and centrally "about" them yet as to which
    a. Some others (but not all who take an interest) can and do have moral rights, of a sort (other-regarding) that no one has in relation to autonomous persons, such that they can be "harmed" by effects (e.g., anguish) not considered harms when occasioned by decisions autonomous persons make about their own lives, which "harms" can be a basis for sacrificing a nonautonomous person's well-being to some degree, whereas
    b. Interests of all persons lacking such moral rights are entirely irrelevant to state decision-making even though it impacts them.

Theorists have not directly addressed the possibility of such a realm of life for anyone, where the subgroup conception of state decision-making would pertain. There has been an effort among philosophers to mount a convincing theoretical defense for ascribing other-regarding moral rights to just one set of other persons in connection with the lives of just one set of nonautonomous persons—namely, parental rights regarding minor offspring. That exertion thus far has not been successful.[51] A common deficiency of the various approaches to mounting such a defense is their failure to identify any plausible general principle that can serve as the major premise in a syllogism that begins with empirical observations about the experience or actions of parents and ends with a conclusion of moral entitlement to other-determining legal power on their part. But in addition, there has been no effort to explain why opening the

51 See Dwyer, "Deflating Parents' Rights," in which I identify flaws in various types of arguments.

door to *some* third parties (parents) does not let in *all* whose interests could be impacted (i.e., why we should prefer 2 over 1 above). Or at least some additional persons. Extended family members or even neighbors might care greatly about, for example, whether the state passes legislation requiring academic accountability of a child's evangelical Christian school, and some such persons might have provided more care for that child than the parents have. In other words, attempts at making the positive case for ascribing control rights to parents have not attempted to show that any other persons impacted by state decisions as to central aspects of a child's life should be excluded from consideration. (Note that showing the parent-child relationship is unique cannot suffice; every type of relationship is unique (that is what it means to be a type), and no normative implications follow from uniqueness per se.)

Moreover, there has been no philosophical attention devoted to third-party rights regarding incompetent adults—that is, to whether spouses, offspring, or guardians of such adults similarly possess a moral right to legally effective power over their lives—power that could entail sacrificing what the state deems in their best interests. (Existing law recognizes no such right.[52]) Thus, much theoretical work would need to be done to support the subgroup conception of the state's role in aspects of nonautonomous persons' lives that are Private Matters for autonomous persons.

Another possibility some might suggest is that police power and *parens patriae* are distinct roles, but the state can operate in both roles in any given situation, if both are appropriate. One can find judicial opinions and scholarly writings that invoke both in support of a particular conclusion, where the two align.[53] Acting in both roles simultaneously, however, is a conceptual

52 *Kicherer v. Kicherer*, 400 A.2d 1097, 1100–1 (MD 1979): "a court of equity assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility. . . . See generally Blackstone, *Commentaries*, 463. Whereas consanguinity is a factor that may well be given consideration by the chancellor in the appointment of a guardian because nearest of kin are more likely to treat a ward with kindness and affection . . . , appointment to that position rests solely in the discretion of the equity court. . . ."

53 See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944): "Acting to guard the general interest in [a] youth's well-being, the state as *parens patriae* may restrict the parent's control. . . ." Also, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. . . . It may secure this against impeding restraints and dangers. . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power" (168–69). See also Weithorn and Reiss, "Providing Adolescents with Independent and Confidential Access to Childhood Vaccines," 799–800 ("Two of the best-known regulatory structures justified by both the *parens patriae* and police power authorities are compulsory education laws

impossibility if they are distinct. We have established that if *parens patriae* is distinct from police power, then it must be so because it requires excluding consideration of some persons' interests. The state cannot so exclude some persons' interests and still be doing police power decision-making because the latter entails considering everyone's interests. If *parens patriae* is distinct, the two roles are logically incompatible.[54] Could they operate sequentially? In theory, yes: state actors could begin their decision-making process by considering only the interests of a nonautonomous person (or of that person and some limited number of others, under the subgroup conception) and break any ties (i.e., outcomes equally good from that initial perspective) by considering what best serves aggregate societal welfare. That would likely be an extremely small set of cases; typically, from a *parens patriae* perspective, there is a clear ranking of options that are sufficiently different to generate strong preferences among third parties. And in practice, legal systems generally preclude fiduciaries from letting ulterior interests serve as a tiebreaker. They do so in part because of a human tendency to rationalize self-serving decisions that sacrifice others' well-being and in part because doing so implicitly sanctions instrumental use of vulnerable persons to benefit others, a normative problem (addressed further below) with taking a police power approach to state control of any persons' Private Matters.[55]

We are left, then, with three contenders for the best conception of the *parens patriae* role. On one, it is not distinct from the police power role; it is simply what we call police power when its exertion impacts nonautonomous persons—or more narrowly, when it is exerted in areas of nonautonomous persons' lives equivalent to aspects of autonomous persons' lives generally considered outside the proper ambit of police power authority (Private Matters)—that is, when application of police power is extraordinary. On this conception, we need justification for extending the police power function to those aspects of only some persons' lives, and arguably we should jettison the concept of *parens patriae* as misleading analytical surplusage. On the other conceptions, *parens patriae* is meaningfully different from police power and operates when

and prohibitions on child labor"); and Donnelly, "Inherent Jurisdiction and Inherent Powers of Irish Courts," 2135 ("where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child").

54 Harvard Law Review Association, "Developments in the Law," 1200: "Given the different premises and purposes of the police power and the *parens patriae* power, courts should apply different principles when they analyze laws based on these two powers."

55 See *Re Eve* [1986] 2 SCR 388 (Canada) § 82, stating that in making surrogate medical decisions for an incompetent adult, "a court … must exercise great caution to avoid being misled by this all too human mixture of emotions and motives."

police power authority is inapposite. This is when decisions to be made are of a type that autonomous persons are entitled to make for themselves on entirely self-regarding grounds. In one variant (the fiduciary conception), the state in the *parens patriae* role should concern itself *solely* with the welfare of the nonautonomous person in question. On another (subgroup) conception, it may aim to satisfy wishes or further interests of some other but not all interested persons.

Choice among the three options (special heed/no distinction; fiduciary model; subgroup) thus raises the question whether there is normative justification for the state's considering interests of any other persons when it makes decisions about central aspects of nonautonomous persons' lives under the *parens patriae* banner. If no, the fiduciary conception is best. If yes, choice between the special heed/no distinction and subgroup conceptions turns on whether the state should distinguish among persons other than an nonautonomous person in choosing whose interests properly influence its decisions about nonautonomous persons' Private Matters, treating interests of some as relevant but interests of others as irrelevant. Identifying the best conception of the *parens patriae* role seems therefore to rest on questions of justification for letting third-party interests influence state decision-making about nonautonomous persons' Private Matters and thus to require endorsing one or more normative premises, as well as narrowing the options on conceptual grounds.

5. Normative Bases for Selecting a Conception of *Parens Patriae*

Whether the state is justified in allowing other persons' interests to influence decision-making about Private Matters in nonautonomous persons' lives might depend on why the state ought to forbear from constraining, for the sake of other persons' interests or collective aims, autonomous persons' self-determining choices in those aspects of life. That reason might be inapplicable to nonautonomous persons, entirely or in certain contexts. Justification might instead or also depend on what affirmative warrant the state has for injecting itself into such aspects of life with nonautonomous persons.

As to the first possibility, there is of course a variety of philosophical accounts and political views as to where the limits of state power should be drawn in the standard case—that is, state interaction with autonomous persons. Space does not permit canvassing them all, let alone adjudicating among them. This section aims to establish simply that choice among conceptions of *parens patriae* could depend on to which basic normative outlook one generally adheres, assuming one is principled and aims for rational consistency across contexts and persons. The familiar exercise of contrasting deontological and utilitarian outlooks suffices to make the point.

A deontological view in fact predominates in international human rights discourse and in domestic individual rights jurisprudence and scholarship in Western liberal societies. In this outlook, the state owes *every* individual a presumptive negative duty of noninterference in private life because each has an inherent dignity that gives rise to rights of integrity and sovereignty over their own life and person.[56] For autonomous persons, that duty is overridden when individual choices threaten incursion on the integrity or liberty of others, otherwise not.[57] The inherent dignity is also incompatible with treating anyone as an object of other individuals' or any group's rights.

Declarations of rights emanating from this perspective rarely explicate the basis for ascribing dignity and therefore for the state's presumptive negative duty—that is, what it is about human individuals that commands respect. If presently existing autonomy were the sole source of moral worth and rights, the negative duty of noninterference might not be owed at all to nonautonomous persons, and they might be proper objects of anyone else's rights. This would leave the state free to insert itself into their lives however it wishes (unless it owes a duty of restraint regarding them to third parties) or to serve wishes of private parties who take a particular interest. Such a view of moral worth has little support among theorists today.[58] It is also contrary to prevailing moral intuitions reflected in the international human rights regime and Anglo-American legal systems; they ascribe right-conferring dignity to both autonomous and nonautonomous humans, as evidenced by the UN Conventions on children's rights and rights of persons with disabilities (including intellectual disabilities).[59] When rights declarations offer explanation, they typically include

56 Etinson, "What's So Special About Human Dignity?"; Bayefsky, "Dignity, Honor, and Human Rights"; and Kateb, *Human Dignity*. See also the preamble of the International Covenant on Civil and Political Rights: "these rights derive from the inherent dignity of the human person."

57 Folland, "The Harm Principle and the Nature of Harm"; and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003): "The present case … does not involve persons who might be injured.… The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

58 See Clarke and Savulescu, "Rethinking Our Assumptions About Moral Status"; and Dwyer, *Moral Status and Human Life*, ch. 3. Typically, theorists operating from a deontological perspective, if they discuss nonautonomous humans at all, simply assume that they are persons with moral status equal to that of autonomous persons.

59 UNCRC, Preamble, which invokes "the inherent dignity and the equal and inalienable rights of all members of the human family"; and the UN Convention on Rights of Persons with Disabilities (UNCRPD), Preamble, which is similar. All major English-speaking nations other than the United States are parties to the UNCRC and the UNCRPD. The US is a signatory but not yet a party to either convention. The US Supreme Court has yet to recognize fundamental rights of young children, but it has rendered momentous decisions based on

reference to other things about humans that have currency among theorists of moral status, such as sentience, being subject-of-a-life, or capacity for development and flourishing.[60] Court decisions in many jurisdictions reflect this broader view of which persons have inherent dignity and a presumptive right of inviolability and noninstrumentalization, demanding (1) special justification for state exertion of power over intimate aspects of the lives of children or incompetent adults as well as of autonomous persons—specifically, justification tied to their welfare—and also (2) that the exertion not go beyond what that justification supports.[61] This implicitly rules out extension of police power into nonautonomous persons' Private Matters—or indeed, exerting state power over those aspects of their lives so as to serve *any* other persons' interests—thus suggesting *parens patriae* action in that realm is distinct and fiduciary in nature.

From a utilitarian perspective, on the other hand, one might say the state, at a metalevel of lawmaking, always properly considers the interests of all members of society, *à la* the police power, even regarding intimate aspects of autonomous persons' lives. It refrains in practice from substituting its own choices for those of autonomous persons in Private Matters only because it assumes that as to these areas of personal life, maximum aggregate societal welfare is generally optimized by ascribing legal "rights" of self-determination to such individuals. As per Mill, government control of those areas of life would not optimally promote societal welfare because, *inter alia*, (1) the individual has the greatest interests at stake and is better positioned than state actors to determine what best serves those interests, and (2) even when autonomous persons make poor choices, they and others learn from this and become more capable of

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equality rights of young children, such as *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and it has ascribed several constitutional liberties to older children. Numerous lower courts have ascribed fundamental rights to young children, including protections of attachment relationships and bodily integrity.

60 For example, the preamble of the Universal Declaration of Human Rights cites "freedom from fear and want" and "social progress and better standards of life."

61 *H v. AC* [2024] NSWSC 40 (New South Wales) § 64: "Differing measures of legal protection are required according to the physical and mental capacities of individuals at particular times. Human dignity is a value common to municipal law and to international instruments relating to human rights. . . . Human dignity requires that the whole personality be respected: the right to physical integrity is a condition of human dignity, but the gravity of any invasion of physical integrity depends on its effect not only on the body but also upon the mind and on self-perception." See also *Re Kara* [2020] NSWSC 1083 (2020), § 65: "in exceptional cases where deprivation of liberty is a necessary consequence of the exercise of the *parens patriae* jurisdiction for the protection of the child and the promotion of his or her welfare, the making of orders by the Court as *parens patriae* that interfere with the personal integrity and liberty of a child will not contravene the child's human rights."

utility-maximizing decisions in the future.[62] From this outlook, at least part of the state's rationale for withholding the police power from Private Matters (or appearing to) in practice does not apply, might apply to a lesser degree, or might apply in some decision contexts but not others in cases involving nonautonomous persons. Though they also typically have the greatest interests at stake in those aspects of their lives, nonautonomous persons are by definition not in the best position to judge their own welfare, and the costs for them and others of bad decisions might outweigh the benefit of any learning they realize from their own mistakes.

On this consequentialist view of normal limits on police power, the government's *parens patriae* role might not be distinct. Reference to it might serve simply to remind decision makers that nonautonomous persons' interests matter and are weighty, per the special heed conception. Or to signal why state involvement is appropriate in those contexts for these persons. Or it might mark out a subcategory of decisions as to which state actors should focus exclusively on nonautonomous persons' interest, but for pragmatic rather than normative reasons; even a utilitarian view could support the fiduciary conception in practice in some decision contexts while allowing for the special heed conception to apply in others. (It is difficult to imagine how it could yield the subgroup conception in any context.) A utilitarian approach to regulation of nonautonomous persons' private lives thus appears more indeterminate than the deontological view in terms of which decision-making model is best in actual operation. Within it, any invocation of *parens patriae* would not reflect an inherent, normative constraint on normal police power state decision-making. Balancing of all affected interests would be morally appropriate, and if acting against nonautonomous persons' interests or wishes in some instances in Private Matters in their lives would promote aggregate welfare, the state should do that. For example, it might refuse to allow termination of an intellectually disabled woman's life-threatening pregnancy because it thinks the future child will be cognitively high functioning, and saving the child would satisfy preferences of family members and antiabortion activists.

Such an example makes doubtful that widespread commitment to utilitarian thinking best explains liberal states' current practices regarding Private Matters for anyone. One will be accused of moral vacuity if arguing for a position regarding such moralized issues as abortion or treatment of gender dysphoria in minors in terms of utility-maximizing cost-benefit analysis. One might further

62 See Mill, *On Liberty*; and *H v. AC* [2024] NSWSC 40, § 81: "competent adults are assumed to be 'the best arbiter[s] of [their] own moral destiny' and so are entitled to independently assess and determine their own best interests, regardless of whether others would agree when evaluating the choice from an objective standpoint."

test this sociological hypothesis thus: identify aspects of private life with respect to which that outlook's broad empirical assumptions regarding *autonomous* persons are doubtful (perhaps marital choice); then consider the likely popular reaction to a proposal that the state assume greater control of those. The point here is not to challenge any version of consequentialism as a political theory, which of course cannot be done by a counting of hands, but simply to identify for anyone drawn to that outlook its potential implications not only for *parens patriae* but also for treatment of autonomous persons. People can be pluralist in their ethical outlooks, applying consequentialist reasoning in some policy contexts and a deontological (or other) normative framework in other contexts, but it would be odd and require defense to switch normative frameworks—for example, from deontological to consequentialist—within the same area of life simply because a different group of human beings is under discussion.

Moving to the affirmative case for state involvement in Private Matters for nonautonomous persons, we should ask what moral basis the state has in the first place for exerting control over central aspects of their lives. The deontological view at least demands such justification, and modern social contract theories with deontological underpinnings make this burden of justification explicit.[63]

The state's affirmative justification for assuming control in some fashion of Private Matters for nonautonomous persons is straightforward. They have important needs they cannot satisfy themselves, and the state is best positioned to make certain decisions on their behalf, whether by making final choices directly or by choosing private surrogates to do so. As expressed by England's High Court of Chancery in 1827, the power to intervene in the family life of children "belongs to the King as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them."[64] Nonautonomous persons of any age need to enter into nurturing relationships with protected legal status, to be removed from relationships that prove damaging, and to be ensured daily care and treatment when ill or injured. Children need education, and many adults with intellectual disabilities

63 See Scanlon, *What We Owe to Each Other*; and Rawls, *Political Liberalism*, ix.

64 *Wellesley v. Beaufort*, 38 Eng. Rep. 236. See also *Durham Children's Aid Society v. BP*, O.J. No. 4183, § 29 (2007) (Ontario); *Re Eve* [1986] 2 SCR 388 (Canada) § 73 ("The *parens patriae* jurisdiction is … founded on necessity, namely the need to act for the protection of those who cannot care for themselves"); *Re F.* [1990] 2 AC 1 (invoking the common law "doctrine of necessity" to justify medical treatment of an incapacitated adult without consent); and Hall, "The Vulnerability Jurisdiction, 191 ("Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised").

can have much more flourishing lives if provided habilitation services. The state therefore aims to ensure these things for nonautonomous persons. Its doing so is supported by—rather than an insult to—the foundational value of human dignity. State respect for nonautonomous persons actually entails breaching the metaphorical wall of integrity around them to address their needs and, when possible, facilitate their maintaining or developing toward autonomy.[65] This seems a complete justification and the best, perhaps sole, one available from a deontological perspective. From a contractarian standpoint, we might characterize the warrant for state action in at least some nonautonomous persons' Private Matters as resting on their hypothetical consent. If able to make a rational choice, they would agree to state intrusion into their lives for this purpose.[66] Indeed, there is arguably actual consent in the case of those who have transitioned from autonomous to nonautonomous and while in the former condition endorsed their state's legal rules for treatment of them in the latter condition.

A final step in the analysis, enabling us to select between the fiduciary and subgroup conceptions of *parens patriae*, if operating from the deontological outlook, would be to recognize that because of the background universal right against intrusion into private life, the power the state exerts in nonautonomous persons' Private Matters must not outrun its justification.[67] A *least restrictive means* condition applies: intrude only so far as necessary to serve the aim that warrants your intruding at all.[68] That the state has *some* warrant for assuming control to *some* degree over nonautonomous persons' private life does not license the state to then use its control for any and all purposes it might choose, including treating these persons instrumentally to serve interests of other persons or collective entities. That would be contrary to respect.

65 Schapiro, "What Is a Child?"

66 Vallentyne, "Libertarian Perspectives on Paternalism," 182–93 (reserving the notion of hypothetical consent to persons who have had some degree of autonomy). We might imagine representatives of future persons in Rawls's "original position" agreeing to such a regime.

67 Smith, "Parenthood Is a Fiduciary Relationship," 428: "When a person, the fiduciary, acquires powers not for her own benefit but, rather, to allow her to attend to the interests of her beneficiary, then the fiduciary must use those powers in what she perceives to be the best interests of the beneficiary. That is what the powers are for; that is the basis on which and the purpose for which they are acquired; and that is how they must be used. Any other use is a misuse." See also *Re Eve* [1986] 2 SCR 388 (Canada) § 77: "It must be exercised in accordance with its underlying principle. . . . The discretion is to be exercised for the benefit of that person, not for that of others."

68 See Department of Health (UK), "Mental Health Act 1983," 23; and the webpage "Guardianship: Less Restrictive Options" from the Elder Justice Initiative (US Department of Justice), https://www.justice.gov/elderjustice/guardianship-less-restrictive-options (updated September 30, 2024; accessed February 28, 2025).

Imagining ourselves one day losing our self-governing faculties lends intuitive support to this conclusion. We would not now assent to the proposition that such an eventuality would create a legitimate opportunity for the state, without prior authorization by us while competent, to use us instrumentally in ways currently (while we are competent) impermissible without our consent—for example, to subject us to medical experimentation or organ harvesting or to empower a particular family member to dictate our treatment solely in order to placate that family member or to enable them to act on a religious command they believe themselves under. We would not assent to that even if we recognize that we will in that situation need the state to assume some authority over our personal lives for the sake of our own basic welfare. Nor even if the proposition were qualified with a side constraint such as that the medical experimentation, organ harvesting, or guardian appointment must not cause us *grievous* harm, or that the benefit to others must clearly and substantially outweigh the cost to us.[69] We might or might not believe we have a positive entitlement to state solicitude for us in our vulnerable situation, but we would expect that *if* the state chooses to breach the normative wall around us in reaction to our loss of autonomy and to exert power over our person, it will do so only in order to effectuate what it reasonably deems beneficial for us or to carry out wishes we expressed while competent. From another angle, we would say that losing our mental faculties does not amount to forfeiting our personhood, human dignity, or right against the state's treating us instrumentally in connection with central aspects of our lives. Rather, we would say, "Leave us alone except insofar as you are going to try to benefit us or carry out our prior choices." The state must act solely for the purpose that is the *raison d'être* of its power in these personal aspects of life. Presumptively, we should say the same of persons who have not previously possessed autonomy.

69 See Smith, "Parenthood Is a Fiduciary Relationship," 442–43: "In 1934, when the Dionne quintuplets were four months old, the Ontario government took them from their parents. . . . They were put into a kind of zoo, which millions of people paid to visit. . . . At the time, this might have seemed justifiable to some." See also Payton, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons": "Were it not for the fiduciary nature of this custody, which gives the ward rights against his custodians, the incompetent's disappearance as an empowered legal person would work a forfeiture exceeding any punishment imposed under the criminal law. . . . The fiduciary nature of the *parens patriae* jurisdiction over formerly competent incompetents therefore is critical to the legitimacy of the state's exercise of power over them, since the state . . . would otherwise in effect confiscate the body and property of an incompetent human being, on the sole ground of his incompetence" (617). Further, "the King became the servant, not the master, of persons whom he brought under his protection. The powers of the state over the incompetent are tolerable only if fiduciary in nature and if administered in good faith out of fiduciary motive" (641).

The deontological view thus appears, again, from this different angle, to point to the fiduciary conception of *parens patriae* as best among the three identified—indeed, as the only acceptable conception. It is improper, within that normative framework, for the state, in making decisions about Private Matters in nonautonomous persons' lives, to choose on its own to benefit *any* other persons, even though others take an interest in the situations and will be affected in some way by the decisions. The state acts solely as agent for the nonautonomous individuals whose lives are at issue, with a duty of undivided loyalty.

As emphasized above, this assessment of connections between normative outlooks and *parens patriae* is not exhaustive and does not aim to establish a "truth of the matter." Its conclusion is simply that from the particular normative outlook underwriting the widespread conviction among competent adults that the state should not intrude into our own Private Matters, as among the three conceptions identified as distinct from each other and coherent, one should endorse the fiduciary conception of the state's role in nonautonomous persons' Private Matters. From a utilitarian outlook, in contrast, one might endorse extension of police power into some or all Private Matters, but then one should be prepared to accept that there is no in-principle obstacle to doing that with respect to our lives as autonomous persons as well. Further, it would presumptively be apt as to all nonautonomous persons, not just children, and it would entail consideration of all third-party interests, not just those of parents or other caretakers (whose interests might easily be outweighed by broader societal interests in most instances). But a utilitarian outlook, depending on the version of it deployed, might be indeterminate; it could conceivably also recommend the fiduciary conception, at least as to some types of decisions.

Still other normative perspectives might yield one or another definite conclusion or might also be indeterminate. It seems unlikely that any perspective would point toward the subgroup conception. Regardless of outlook, one should apply any perspective's fundamental principles consistently across persons, absent demonstration that they should not apply to some, and avoid ad hoc assertion and *sui generis* thinking about any group of nonautonomous persons. The fiduciary conception of *parens patriae* appears most consistent with the regime of individual rights that autonomous adults in liberal Western societies have come to expect and demand for themselves.

6. IMPLICATIONS

If any legal system were unambiguously to adopt the fiduciary conception of *parens patriae*, its scope would be limited to Private Matters. Legal actors would not refer to *parens patriae* in connection with state efforts to prevent

nonautonomous persons from harming others, as in juvenile delinquency proceedings; police power would be appropriate in those cases. In Private Matters, police power would be inappropriate, and state actors, when appropriately exerting control, would do so solely based on a nonautonomous person's welfare. As to rights of a constitutional nature, the state would be bound by none in connection with its control of Private Matters except those of the nonautonomous person. In essence, the state would act as an agent or surrogate for those private individuals, stepping into those persons' shoes, not in its usual role as agent for society as a whole.[70] The state would owe duties solely to the nonautonomous persons in question, and those would include duties (1) not to assume and exert power over those persons' lives beyond what their needs justify and (2) not to misuse its power by deploying it to serve others and thereby treat the nonautonomous persons instrumentally.[71]

As noted, some people have an intuition that certain family members have special claims in connection with decision-making for nonautonomous persons. The intuition appears largely confined, though, to parents raising minor offspring. For reasons theorists have not explored, it finds little expression in connection with family members caring for or concerned about incompetent adults. As to the latter, there is general acceptance that family members have no *entitlement* regarding state appointment of guardians or direction of particular decisions such as receipt of medical treatment, no matter how intense family members' feelings are about such things, and courts have taken that view.[72] Yet in connection with child-rearing, a common view, at least in the United States during the past century, is that parents themselves have moral rights—specifically, a right of biological parents to the state's making them legal parents and a right of legal parents to the state's conferring extensive legal

70 See Blokhuis, "Whose Custody Is It Anyway?" 207, citing *Young v. Young*, 4 SCR 3 (1993): "when a Canadian court issues custody and access orders in disputes between former spouses and domestic partners, it is not 'state action' subject to Charter scrutiny." See also Brief Amicus Curiae of the Ohio Association of Juvenile Court Judges, in *Gault* 1966 WL 100788, 8: "It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy are unable to take care of themselves … and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise."

71 Criddle, "Liberty in Loyalty," 995, explaining that the duty of loyalty guards against domination "by ensuring that a fiduciary's actions are legally required to track the terms of her mandate and the interests of her beneficiaries."

72 See note 33 above.

powers and privileges on them.[73] The analysis above of *parens patriae* presents another way of assessing those claims, which to be coherent must be predicated on parents' own interests and thus effectively call for deployment of either the special heed/no-distinction conception or the subgroup conception of *parens patriae*.[74] The fiduciary conception categorically rules out the state's considering parents' interests for their own sake when it decides on behalf of children such Private Matters as with whom they will have legal family relationships, as among available and willing persons, or what types of education are permissible or compulsory for them. It also rules out controlling those aspects of their lives to serve collectivist interests.

Looked at another way, defense of parental *rights* (to be chosen as legal parents or to have certain legal powers), as opposed to parental *authority* imbued solely for the sake of and only so far as warranted by children's welfare, seems to require rejecting deontological views as bases for defining the limits of state power generally, in favor of some other view. Then one should also accept the broader implications of such an alternative view both (1) for the law governing nonautonomous persons' lives, including the possibility that persons other than parents also have rights to control children's lives, or at least a right to have their interests factor into decision-making and (2) for state intrusion into the private lives of *autonomous* persons.

Alternatively, that defense might rest on a demonstration that state decisions concerning parentage and legal-parent authority are actually Public Matters because denying what biological or legal parents demand would constitute harm to them. But this would require allowing that some nonparents might also be able to allege harm from decisions made regarding children—for example, infertile couples who wish to raise children who are not their biological offspring or taxpayers who are forced to bear the costs of bad state parentage decisions or bad parental child-rearing decisions. And it would require according the same treatment to, or somehow distinguishing, state decisions concerning appointment and empowerment of guardians for incompetent adults, because in that context as well, a family member (offspring, parent, sibling) might claim to be "harmed" if denied the opportunity to serve and control. It would further

73 For a contrary view in the United Kingdom, see *R. v. Gyngall*, 2 QB 239, stating that *parens patriae* is "not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction … in virtue of which the Chancery Court was put to act … in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent. On the absence of parental-rights thinking in early America, see Shulman, *The Constitutional Parent*.

74 On the incoherence of arguments for parental rights (as distinct from parental authority) that appeal to children's interests, see note 5 above.

require articulating a definition of harm that one is prepared to deploy consistently across all one's ethical views, including views as to one's own moral rights in making self-determining choices, which might mean others can correctly claim to be harmed by your personal choices (e.g., as to religion or intimate partner) and so constrict your rights.

7. CONCLUSION

It disserves persons in need of special solicitude to continue using *parens patriae* loosely to refer to any form of state attention to nonautonomous persons. Clarification of the role is long overdue. This article has initiated a more rigorous examination of the practice. It has identified three distinct and coherent conceptions of this state function, and it has shown how choice among them depends on normative assumptions regarding limits of proper state involvement in private life generally. Further, it has shown that the fiduciary conception, in which the state is subject to a duty of undivided loyalty, is the only one consistent with the prevailing understanding of why autonomous persons have a right of self-determination in connection with intimate aspects of their lives. This demonstration incidentally suggests need to reorient philosophical debate over parental rights so that it begins with focus on the nature and limitation of the state's role when the state presumes to render decisions about intimate aspects of children's lives and, at the same time, so that it examines this through a broader lens that encompasses all nonautonomous persons and all others with interests at stake in how their lives go.

William & Mary
jgdwye@wm.edu

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