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Aboriginal Protection and *parens patriae*: Indigenous Youths, Juvenile Delinquents, and the Reformatory Principle in Australia and England | 37–72

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Aboriginal Protection and *parens patriae*: Indigenous Youths, Juvenile Delinquents, and the Reformatory Principle in Australia and England*

1. Introduction: Problem youth, protection and the law

On November 9, 2022, the Supreme Court of the United States heard *Haaland v. Brackeen*, a case brought by the states of Louisiana, Texas and Indiana together with some individual plaintiffs, who sued the Federal Government arguing that the Indian Child Welfare Act of 1978, a law regulating adoptions of Native American children, violates the Constitution. Prior to 1978, as part of a long history of (often forced) Indigenous child removal, a significant number of children were taken from their families to be adopted by non-Native custodians.[1] Recognising how disruptive these adoptions were to Native Nations, the Indian Child Welfare Act set federal standards for the placement of Indigenous youths with the purpose of fostering Native adoptions and thereby keeping the children connected with their culture. In deeming the Act unconstitutional and a violation of equal protection, the three aforementioned states, Brackeen and others are doing much more than just taking a position on the adoption of Native children, however important that issue is. Rather, they are promoting a different interpretation of the relations of the United States with Native Nations, which since the Constitution of 1789 have been under the centralised authority of Congress. At stake in the decision of *Haaland v. Brackeen* are, therefore, crucial issues of sovereignty and equal protection, which are, in turn, deeply intertwined

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1 Ellinghaus (2006).

with jurisdiction over Indigenous children and still ongoing attempts at subjecting them to assimilation policies.[2]

This article explores the connections between childhood and protection by examining the legal history of the British settler empire. Christina Twomey has recently argued that "a comprehensive genealogy" of the origins and rationale of British imperial protection still needs to be written.[3] This essay aims to contribute to reconstructing this genealogy by interrogating the legal foundations of Aboriginal protection through the lens of 18th- and 19th-century imperial practices of rehabilitation of "problem youth". In particular, this work centres on two case studies related to England and colonial Australia. The first case study concerns the reformatory established by the charitable association, the Philanthropic Society, in London in 1788 to rehabilitate juvenile delinquents and the children of vagrants and convicts; the second concerns the residential working school for Indigenous youths promoted by Assistant Protector of Aborigines, Edward John Eyre, at his protective station in Moorundie, South Australia, in the early 1840s.[4] After outlining the history and principles of Aboriginal protection in the early 19th century in section 2, section 3 discusses the treatment of Indigenous and criminal youths within the context of Eyre's Protectorate and the Philanthropic Society's institution. Section 4 locates these experiments in juvenile rehabilitation within the same comparative framework by examining the legal justification for reformatories in both the metropole and its colonies, whereas section 5 investigates the ancient English legal doctrine of *parens patriae* and its late 18th-century developments, proposing that this doctrine is one of the sets of legitimations underpinning the policy of Aboriginal protection in the British colonial "Antipodes". Finally, section 6 concludes by contextualising the interplay between *parens patriae* and Aboriginal protection within the wider framework of legal transfer in the common law world.

2 Reed/Singer (2022); Armitage (1995) 41.

3 Twomey (2018) 11.

4 The term "Aborigines" was imposed during colonisation to refer to First Nations peoples and is therefore outdated and problematic to describe current events. It is used here only because it is commonly employed in the historical sources discussed.

2. For whose protection? Saving Aboriginal peoples and defending settlement in colonial Australia

Legal historians are increasingly investigating protection as a broad and flexible legal framework historically used to describe and justify both "external" relations among empires, states and other polities in the international context and a distinctive "internal" means of promoting social order in a community.[5] The Protectorates of Aborigines represent this latter internal variety of protection.[6] In 1835, outraged by the violence perpetrated by European colonists and the high death rate of Indigenous peoples across the British settler empire, the abolitionist MP Thomas Fowell Buxton called for the establishment of the parliamentary Select Committee on Aborigines.[7] The Committee's significant work product, the Report of the House of Commons Select Committee on Aboriginal Tribes (British Settlements) issued in 1837, addressed the problematic legal status of the Australian continent, where British sovereignty had been declared without invoking the right of conquest or negotiating any treaty or cession; consequently, Indigenous Australians maintained an "incontrovertible right to their own soil" and had to be considered "within the allegiance of the Queen and entitled to Her protection".[8] The main characteristics of this "protection" were identified in the Report: alongside official recognition of Indigenous peoples' land rights and the assimilation of their condition to that of British subjects, protection entailed the primacy of the executive government (a power vested in the Governor, who was responsible before the Crown) over colonial legislatures (which represented the interests of white settlers); the illegitimacy of private land sales, and the duty of the Crown to oversee land transactions between settlers and Indigenous peoples; the invalidity of treaties between Europeans and local tribes, given the "entire disparity" of the contracting parties; and the importance of fostering the alleged improvement and "civilisation" of Aboriginal peoples.[9]

5 Benton et al. (eds.) (2017) 1–9.

6 Dussart / Lester (2014); Curthoys / Mitchell (2018); Furphy / Nettelbeck (eds.) (2020).

7 Elbourne (2003); Nettelbeck (2019) 13.

8 Select Committee on Aborigines (1837) 4,126; Evans Grimshaw / Philips / Swain (2003); Evans (2005) 38; Edmonds / Nettelbeck (eds.) (2018); Nettelbeck (2019) 92; Furphy / Nettelbeck (eds.) (2020) 7; Ford / Rowse (eds.) (2013).

9 Nettelbeck (2019) 30–42; Select Committee on Aborigines (1837) 116–126.

In terms of concrete outcomes, the Report inspired the founding of the Aborigines Protection Society in 1837 and, from 1839 onwards, the establishment of Protectorates of Aborigines across the British colonial Antipodes. The Report also sketched the duties of Protectors, Crown-appointed officials tasked with ameliorating the condition of Aboriginal communities and safeguarding them against despotic and arbitrary practices by providing them with legal advice and promoting their conversion to Christianity and training in labour; being often empowered as magistrates, Protectors were also expected, as noted by Amanda Nettelbeck, to bring Indigenous peoples both under the protection and "within the pale" of colonial laws.[10] Shortly after the Report issued, Protectorates of Aborigines, staffed by Chief and Assistant Protectors, were opened in Port Phillip (from 1851 in the colony of Victoria), South Australia, Western Australia and New Zealand. Scholars of Aboriginal protection have recently noted how, in practice, to "protect the Aborigines" meant reforming them as "governable colonial subjects", with the ultimate purpose of reconciling the European settlement of those territories with the survival of Indigenous peoples, whose extermination was not only morally disturbing to metropolitan administrators but also economically unfruitful for fledgling colonial societies.[11] After all, the very same Report of 1837 had stressed the urgency of finding "some outlet for the superabundant population of Great Britain and Ireland" and deemed the violence perpetrated against Indigenous peoples "an impediment in the way of successful colonization"; as "savages" were "dangerous neighbours and unprofitable customers" for the colonial state, it was in its own interest to deal with "civilized men rather than with barbarians".[12] The safeguarding of Aboriginal peoples against abuses and extinction and the defence of the material security of settlers were two faces of one and the same project of protecting the peace of colonial society and promoting its expansion.[13]

The colony of South Australia occupies a special position in the history of Aboriginal protection. With the aim of practically implementing the plan of

10 Belmessous (2013) 98–100; Nettelbeck (2019) 4–6, 11–13, 30–32; Laidlaw (2021) 1, 32; Ford (2017) 176. On the role and duties of Protectors, see: Cannon (ed.) (1978) 373–375 (Lord Glenelg to George Gipps, 31.01.1838).

11 Dussart / Lester (2014) 90–92; Nettelbeck (2019) 4, 30–31; Laidlaw (2021) 176.

12 Select Committee on Aborigines (1837) 104–105, 59.

13 Ford (2017) 186; Dussart / Lester (2014) 34; Buti (2004) 49–50.

systematic colonisation of Edward Gibbon Wakefield and concurrently fulfilling the wishes of the late Jeremy Bentham, in 1834 the South Australian Association successfully lobbied Parliament into passing an act opening the South Australian territory, which was described as "waste and unoccupied land", to European settlement.[14] In 1836, the South Australia Company, which had replaced the Association, took charge of promoting emigration and land sales in the new colony, and their initiative soon drew the attention of those British administrators influenced by Evangelical principles and who wished that South Australia would become the site of a colonising process not incompatible with the survival and welfare of Indigenous peoples.[15] As early as 1835, the Undersecretary of the Colonial Office had requested that the South Australian Colonization Commission, established by authority of Parliament, implement measures aimed at ensuring justice for and promoting the safety of Aboriginal peoples, thereby inducing the Commissioners to include the office of Protector in the establishment plan for the colony.[16] The optimism that the colonisation of South Australia could result in a benevolent settlement, not infringing on the rights and survival of Indigenous peoples, has to be contextualised within the peculiar history of the colony, the only one which never officially received convicts and where, therefore, Indigenous Australians were regarded by settlers as a potential workforce.[17]

The first issue of the *South Australian Gazette*, published in June 1836 to provide would-be settlers with useful information regarding the physical features of the territory, the regulations concerning emigration and the form of government of the new colony, included virtually no mention of the Indigenous population, except for a short piece entitled "Government and Protection of the Colony". After reassuring readers that "the protection of the colony has not been overlooked", the article informed them that, on the one hand, a Protector of Aborigines would be appointed to "cultivate the good-will of the natives, and improve their social condition" and, on the

14 Attwood (2020) 65–95; Laidlaw (2021) 211–212. On Bentham and colonial Australia, see: Llewellyn (2021); Schofield (2022).

15 Curthoys / Mitchell (2018) 48–102.

16 Nettelbeck (2017) 32; Nettelbeck (2019) 60–62; Nettelbeck (2020) 80–84; Laidlaw (2021) 211–215; Belmessous (2013) 96–97; Evans (2005) 17–18.

17 Mitchell (2011) 29. On the need for labourers in South Australia, see: Dare (2008).

other, "a sufficient force" would provide settlers with "whatever protection is necessary" against the "natives" themselves.[18] The purpose of "protection" was, therefore, twofold: Indigenous Australians had to be safeguarded against the destructive effects of European colonisation and, at the same time, they represented a threat against which colonists had to be defended. Six months later, the first Governor of South Australia, John Hindmarsh, proclaimed the birth of the newly founded colony before the first group of settlers in Holdfast Bay. As reported by the second issue of the *South Australian Gazette*, Hindmarsh declared that Indigenous persons were under "the same protection as the rest of His Majesty's subjects".[19] It was thereby under the auspices of protection that the experimental colony of South Australia was inaugurated.

3. London and Moorundie, 1788–1844: Reformatories and residential schools

In 1839, to comply with the requests of the Colonial Office, the first Permanent Protector, Matthew Moorhouse, was sent to South Australia.[20] Shortly after, to serve under and assist Moorhouse, Edward John Eyre (1815–1901) was appointed Assistant or Sub-Protector of Aborigines and Resident Magistrate at the station of Moorundie, along the Murray River 130 kilometres from Adelaide, an area which had recently witnessed bloody clashes between Indigenous peoples and European pastoralists.[21] Notorious in British imperial history for the massacre following the Jamaican Morant Bay Rebellion in 1865, Eyre – an English emigrant to Australia who initially farmed sheep in New South Wales, subsequently became explorer, and was known for his friendly intercourse with Aboriginal Australians and his humanitarian concerns regarding their rapid extinction – started his imperial administrative career in this frontier locality, having been tasked by the then Governor of South

18 Anonymous Contributor (1836) 4.
19 Hindmarsh (1837) 1.
20 Nettelbeck (2019) 119–120. Moorhouse immediately issued the instructions for the new Protectors; see: Moorhouse (1839) 4.
21 Hall (1996) 137–142; Hall (2002) 23–41; Evans (2005) 20–21; Nettelbeck (2016) 34.

Australia, George Grey, with creating the conditions for peaceful settlement by Europeans and the social "amalgamation" of Indigenous peoples.[22]

The core of the protective governance that Eyre established in Moorundie was the system of rationing, which entailed the periodic distribution of flour rations to the Indigenous population and would be systematically implemented throughout the Australian continent during the 19th century.[23] Unlike some of his contemporaries, who claimed that rations should be contingent on labour, Eyre stressed the duty of Europeans to "compensate" Indigenous peoples gratuitously for having dispossessed them of their lands and resources.[24] Even if the 1837 Report recommended that Aboriginal peoples be exempted from the colonial application of the 1824 British Vagrancy Act, Indigenous Australians were indeed equated with vagrants by European missionaries and administrators, their "vagrancy" being the result not only of their nomadic mode of subsistence but also of the temptations of robbery and crime resulting from European dispossession.[25] The system of rationing would redeem them from their alleged vagrancy by, on the one hand, tying them to the rationing station and inducing them to settle and, on the other, pauperising and making them dependent on the colonial government for survival and therefore obliged to reciprocate white philanthropy by complying with the laws of settler society.[26] After being induced to abandon their supposedly vagrant lifestyle, these "native" paupers would be progressively instructed to become "deserving", meaning industrious, and thus increase the population of the Indigenous labouring poor representing "an additional inducement [for colonists] to locate" by "sav[ing] [them] in great measure the expense of European servants".[27] As Eyre proudly

22 Lester (2015); Nettelbeck (2017); eadem (2019) 120–123; Eyre (1985) 10–11 (Grey to colonial secretary, 30.10.1841). On Eyre's earliest years in Australia, see: Eyre (1984).

23 Dickey (1986); Rowse (1998).

24 Eyre (1985) 21 (Eyre to colonial secretary, 10.01.1842); Eyre (1845) vol. I, 40–41 and vol. II, 316; Foster (1989); Evans (2005) 48–49.

25 Select Committee on Aborigines (1837) 118; Nicolazzo (2020) 3–14, 179; Twomey (2002) 97–99; Nettelbeck (2019) 30.

26 Eyre (1845) vol. II, 460–463, 483–485; Mitchell (2004); Rowse (1998) 4–8, 19–26, 31–32; Mitchell (2011) 109–121; Evans (2005) 49; O'Brien (2008) 151–163; Dussart/Lester (2014) 20–21; Foster (1989) 73–74.

27 Eyre (1845) vol. II, 464, 488–489; Eyre (1985) 20, 45–47, 68, 75 (Eyre to colonial secretary, 10.01.1842; 7.12.1842; 20.01.1844; 28.02.1844); O'Brien (2008); Foster (1989) 73; Nettelbeck (2020) 86.

reported to Grey in December 1842, "the way is now paved for a quiet occupation by the settlers".[28]

According to Eyre, rationing had to be established alongside another system specifically focused on Indigenous youths, which he implemented in 1843.[29] Like many of his contemporaries, he thought children were more vulnerable to corruption but also more teachable; therefore, through "industrial education", they could be directly turned into "useful" poor labourers, without needing to pass through the degradation of indigence to which their adult parents were fated.[30] Eyre wanted to remove these children from their families and confine them to boarding or residential working schools, with separate lodgings for boys and girls, where they would be instructed in Christianity, the English language, the techniques of agriculture, various trades (from tailoring to shoemaking and carpentry) and menial tasks according to a sexual division of labour. Therefore, Eyre opined that their education should "consist in a very small part of reading and writing" in order to check and contain the emancipatory effects of schooling. Moreover, a system of rewards would be implemented as a beneficial "stimulus to exertion".[31] Most interestingly, Eyre repeatedly stressed the necessity of severing connections between schoolchildren and their families, believing that adults exercised a "contagious" influence over their offspring, from which British colonial authorities had to "reclaim" them.[32] For this reason, he distributed extra flour rations to those Indigenous persons who let their children be boarded and lodged, and he sought to prevent parents from removing their sons and daughters from school after agreeing to let them attend and from camping in their vicinity where they could maintain contact. Parents were only rarely entitled to visit their children under the strict supervision of a schoolmaster. Once their schooling was over, young Aboriginal peoples were to be hired by settlers as apprentices and, at the end of their indenture, would be encouraged to marry among themselves.[33] Eyre

28 Eyre (1985) 45 (Eyre to colonial secretary, 7.12.1842).
29 Evans (2005) 49–50; Eyre (1845) vol. II, 436–437.
30 Eyre (1845) vol. II, 422; Swartz (2019) 11, 59; Twomey (2002) 106–110. Protector Moorhouse also established a "native location" where he introduced the monitorial system implemented in English schools; see: Barry (2008) 41.1.
31 Eyre (1845) vol. II, 436–438, 441–443, 489–492; Evans (2005) 46–49; Swartz (2019) 2, 23.
32 Eyre (1845) vol. II, 489–491.
33 Eyre (1845) vol. II, 481, 488–490; Evans (2005) 49; Mitchell (2011) 119–121.

believed that these colonial boarding schools would thus function as social laboratories for the creation of a compliant Indigenous workforce of labourers and domestic servants.[34]

As argued by Jamie Scott, the precedent for the residential industrial schools for Indigenous youths established across the British settler empire, from North America to the Australian colonies, can be found in the metropole and, more particularly, in the debates around juvenile delinquency which surrounded the founding of the Philanthropic Society in London by social reformer Robert Young in 1788.[35] The Society's central aim was to sever connections between young vagrants and delinquents and their families' criminal life by relocating and confining the youths to what Young called the "Reform" or "School of Practical Morality", where they would be trained in useful labour and transformed into industrious and compliant poor workers.[36] During its earliest years, the Society rented several cottages, which were turned into workshops for spinning, shoemaking, tailoring and carpentry; here, the young "wards" were entrusted to masters and mistresses in charge of overseeing their training. Girls were accommodated in separate lodging and trained to become menial servants and housewives. The Reform thus became a fledgling village of industry.[37] Young's initial plan to admit only children up to 5–6 years old was soon reconsidered in light of the need for labour, and his ambition to make the facility self-supporting led him to raise the age of the wards to 14–15 years old.[38] Everyday life within the Reform was characterised by order, discipline, cleanliness, hard work, religiosity and rewards for merit to foster emulation as well as "badges of disgrace" to deter bad examples. Disobedience, idleness and attempts to escape were punished through isolation and whipping. In terms of mental improvement, Young remarked, the wards were not to be taught to read and write but were rather to be induced to "unlearn" the pernicious habits which they had been inculcated by their families.[39]

34 Swartz (2019) 4–10, 239.
35 Scott (2005) 114.
36 Young (1790c) 14; Whitten (2010) 29; Sanna (2020).
37 Young (1789) 26–34; Whitten (2010) 113; Sanna (2020) 95–98.
38 Young (1790a) xiii; Sanna (2020) 92, 100.
39 Young (1789) 34–35, 49; Young (1790a) 52–56, 61; Sanna (2020) 117–129, 155, 161–165.

The writings of Robert Young and the reports of his Society featured the same discourse of "reclamation" of children from the "contagion" of their vicious parents that would later inform the plans for industrial schools for Indigenous youths promoted by Eyre and other colonial administrators across the British Empire.[40] Indeed, the Philanthropic Society coincided with the new late 18th-century institution of the reformatory: combining aspects of a school, a workshop and a prison, here, the rhetoric of education overlapped with a reality of hard labour and punishment.[41] For Young, the combination of industry, reward and discipline amounted to a veritable "system of moral government", which would accomplish the "metamorphosis" of the inmates "from highway robbers into diligent apprentices".[42] This system would, moreover, initiate a process of reformation that would progressively extend to the entire poor population. By "reclaiming" those children who were "the natural inheritors of vice", the Reform would also indirectly exert a beneficial influence on their natural parents, who would be allowed to visit their sons and daughters from time to time, provided they became industrious and respectable and were equipped with a "ticket" certifying good conduct; nonetheless, parents would never be left alone with their children.[43] For these adult vagrants and convicts, in turn, Young devised a system of agricultural colonies, which he called the "British Settlement" or the "Asylum for Industry", where these people, whom he considered the "waste of society", would be employed on the "waste" lands of the country.[44]

Therefore, confinement of the wards to the Philanthropic Reform was not an end in itself but was instrumental to their socialisation, with the aim of making them fit for society. Their labour was not only important as a productive exertion to make the institution self-supporting but also as a reforming and moralising activity *per se*.[45] Moreover, this project of social rehabilitation would, according to Young, play a crucial preventive function by delivering British society from crime by destroying its "seeds". Notably, he

40 Young (1790a) 39, 63; Shore (1999).
41 Rothman (1971); Schlossman (1995); Scott (2005) 119; Schlossman (2005) 22–30.
42 Young (1790d) 2; Young (1790a) xiv.
43 Young (1790a) 25.
44 Young (1789) 32–34.
45 Sanna (2020) 92–93.

wrote that his Reform was established upon "principles of police [rather] than of charity".[46] In the late 18th century, especially with Patrick Colquhoun (a supporter of the Philanthropic Society), the "police" referred no longer only to the preservation of order but also, and more importantly, to the prevention of crimes.[47] Having been created to reform children who were otherwise doomed to become "the most important object of police" as "enem[ies] to those laws on which the general good depends", the Reform amounted to a "plan of preventive police"; it was meant to "save" young delinquents from a criminal life and ensure a "saving" to the public sphere by reforming *in nuce* thieves and prostitutes.[48] Interestingly, the Philanthropic Society soon established semi-official cooperation with police stations, jails and courts, as police officers and magistrates began placing young offenders in the Society's custody as an alternative to incrimination, incarceration or transportation.[49] However, despite this alliance with the representatives of law and order, the legal justification for confining youths to the reformatory was far from unquestioned.

4. Separation, confinement, reclamation: By what authority?

As argued by several legal historians, it was in England that the juvenile delinquent was "invented" as a distinct legal figure.[50] Robert Young's Philanthropic Society played a pioneering role at both the theoretical and practical levels in fostering this innovation by stressing for the first time the necessity of creating an *ad hoc* institution specifically devoted not to preserving the lives of poor children and promoting their employability, as other societies had done, but rather to rehabilitating actual and potential lawbreakers.[51] While delinquent juveniles had previously been kidnapped and transported to the colonies as convicts or impressed into the Army or Navy, the establishment of the reformatory entailed the optimistic expectation that a combination of isolation, education, industrial training and punishment

46 Young (1790b) 3; Young (1789) 2.
47 Andrew (1989); Neocleous (2000); Whitten (2010) 65.
48 Young (1789) 22; Philanthropic Society (1792) 4; Young (1790c) 27.
49 Young (1790c) 10; Philanthropic Society (1797) 17; Owen (1964) 120–121.
50 Radzinowicz/Hood (1986) 133–229; Magarey (1978); Shore (1999); Shore (2011a).
51 Philanthropic Society (1792) 5; Rothman (1971) 206–212; Schlossman (1995) 363–365.

could transform them into hard-working and law-abiding subjects.[52] However, when these youths were not orphaned or deserted, or when it was not their parents who voluntarily placed them in the Philanthropic Society's custody, their "reclamation" could be legally problematic. According to Young, any subscriber to the Society could select prospective wards by undertaking "painful researches" in the slums and dragging recalcitrant children into the reformatory; the Society started electing specially appointed "visitors" in 1790.[53] However, as an anonymous commentator in the press pondered, "by what authority is it that they exert any power, or is it merely by persuasion that they take away the children from their parents?"[54] Before 1806, when it was incorporated by Act of Parliament, the Philanthropic Society lacked legal personality, and the youths were, in turn, legally the property of their parents, no matter how indigent they were.[55]

Robert Young was aware of this legal predicament. He knew that parental authority represented a "most serious obstacle […] apprehended to the present undertaking" and that, in order to "attach [the youths] to the Society's protection", the Philanthropic Reform had to step in with its own forcible "interposition of authority". If parents refused to comply with the confinement of their children to the Reform, Young suggested that "the sword of justice" be employed "to sever the cords of parental authority, which are only used to drag the child to ruin", by means of "an inquiry into the conduct [of such parents] [which] will not fail to subject them to legal penalties as vagrants, if not as criminals".[56] What Young wished was to make a "blank" of the youths, an experimental field completely cleared of any "interruption from custom […] or from law": being "not under parochial jurisdiction, […] [and therefore] not bound by its laws and customs", the children should also be considered liable to be "separated from parents who had no means of supporting them but dishonest ones".[57] As a "collective body", the state should act as the "common parent" of these "unprotected youth[s]", a "parent at once affectionate and wise, [who], while it supplies the

52 Suranyi (2015) 132–159; Sanna (2020) 7–15, 91–92; Andrew (1989) 59, 110–122, 183–195; McGillivray (2004) 53.
53 Young (1789) 49–51; Whitten (2010) 59; Sanna (2020) 195–198.
54 Anonymous Contributor (1789a) 3.
55 Whitten (2010) 117; Sanna (2020) 189, 205, 212–215, 238.
56 Young (1789) 31–32.
57 Young (1790a) 22–23, 63.

wants of its child, […] compel[s] it, to perform its duty too";[58] in turn, once confined to the Reform, the youths would become the "children of the state" to be "receive[d] in trust" by the Society.[59] As veritable disciplinarian trustees, in 1792 the Society's managers erected a three-and-a-half-meter-tall wall around the Reform to both isolate the inmates from any external intercourse and prevent their increasingly frequent attempts to escape.[60]

The activities of the Philanthropic Society broke new ground in the history of juvenile justice in Britain. The *Report of the Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis*, published in 1816, recommended the opening of "public establishments" for the reformation of young offenders.[61] It was in the second half of the 19th century that reformatories proliferated and were officially recognised as part of the British criminal justice system. In 1847, the Juvenile Offenders Act provided that delinquents under 14 were to be tried summarily for lesser offences in a special court. In 1852, the House of Commons Select Committee on Criminal and Destitute Children was appointed, whose discussions led to the passing of the Reformatory School Act of 1854 (also known as the Youthful Offenders Act), which stated that offenders under 16 would be eligible for a pardon, provided they were allocated to a reformatory (certified by the Inspector of Prisons) for a period of 2 to 5 years. In 1857, the Industrial Schools Act allowed magistrates to order the consignment of neglected youths to a boarding school.[62] The extent to which parental consent had to be sought or could be overlooked was still an open issue. In 1861, the Select Committee on the Education of Destitute Children created the category of "children in need of care and protection" and sanctioned the idea that the state was empowered to act *in loco parentis* with children of "unfit" parents.[63] Official debates and statutory enactments were followed by the strengthening of the reform school movement. At mid-century, social activist Mary Carpenter campaigned for the recognition of both young offenders and the children of negligent and criminal parents as

58 Young (1790a) 38, 68; Young (1790e) 9.
59 Young (1789) 14.
60 Sanna (2020) 105, 112–113.
61 Committee for Investigating (1816) 19.
62 Whitten (2010) 243–253; Shore (2011b); Godfrey/Cox/Shore/Alker (2017) 28–32.
63 Swartz (2019) 135–136, 203–204.

"children of the state" who should be removed from their families and confined to reformatory and industrial schools, respectively, where a power of "forcible detention" should be legally granted to schoolmasters to prevent the youths from running away.[64] The 1860s witnessed the flourishing of the child rescue movement, whose proponents (most famously, Thomas Barnardo) searched the slums to snatch abandoned and delinquent youths and established "homes" for their segregation and treatment. These "rescuers" promoted child removal as a necessary response to familial failings, which virtually made these youths "worse than orphans"; such a designation substantially weakened their status as parental property.[65] Child rescue was launched by the charity sector (including agents of the Societies for the Prevention of Cruelty to Children established in the early 1880s) before being conducted by government agencies at the end of the century; in 1889, the Prevention of Cruelty to Children Act explicitly allowed for public interference in the parent–child relation.[66]

The practice of child removal was occasionally enforced in Britain during the 19th century, but it was across the British settler empire that it received long-lasting and systematic implementation; in colonial Australia, Indigenous children were forcibly separated from their families throughout the 19th and well into the 20th century.[67] The private seizure of Aboriginal children for sexual exploitation or employment as servants by white colonists characterised the history of the Australian colonies from their very beginnings.[68] But the idea that this practice could be institutionalised "in the best interests" of the youths was probably first expounded in a series of articles signed by the anonymous writer "Philanthropus" and published in the *Sydney Gazette* in 1810; these articles suggested that Indigenous children be "taken from their parents in a state of infancy" and adopted by European families to be instructed in Christianity and labour.[69] According to Anne O'Brien, Philanthropus was the pseudonym of Reverend Robert Cartwright,

64 Carpenter (1851) 342; Yeo (1996) 124–125, 145.
65 Hillel/Swain (2010) 17–35.
66 Swain (2002) 134–136; Swain (2016b) 28.
67 Robinson/Paten (2008) 501–502; Raynes (2009); Swartz (2019) 204; Swain (2002) 133; Haebich (2000).
68 Haebich (2000) 80–87.
69 Philanthropus (1810) 3.

who in the late 1810s advanced a plan for a "native establishment" in Cowpastures, New South Wales, centred around a school for the training of Indigenous children.[70] To turn these children into "the most useful instruments in this work of civilizing their savage kindred", it was necessary, in Cartwright's view, to keep them separated from the "bad example" of their families, "similar to what it has done *[sic]* for our Orphan Institution".[71] In 1814, the first industrial school for Indigenous youths, the Parramatta Native Institution, was opened in New South Wales, which also engaged, albeit often unofficially, in child removal.[72] At his protective station in Moorundie in the early 1840s, Assistant Protector Edward Eyre also advocated the systematic separation of young Aboriginal peoples from their parents. Although he never explicitly demanded *forced* child removal, Eyre nonetheless argued that no "real or permanent good will ever be effected, until the influence exercised over the young by the adults be destroyed, and they are freed from the contagious effect of their example"; otherwise, "the good that is instilled one day is the next obliterated", resulting in several Indigenous youths "return[ing] to their savage life" after many years spent working for settlers as servants.[73]

The industrial schools that Eyre promoted were *de facto* reformatories, being specifically aimed at "protect[ing] the school-children from the influence of their relatives, who are always encouraging them to leave or to practise *[sic]* what they have been taught not to do", by "placing them under the guardianship of the Protectors".[74] Just like Robert Young, Eyre maintained that the educational mission of his reformatory was to "undo" and "disassociate [the children] from their natural ideas, habits and practices".[75] This was why he wanted Indigenous parents to be denied any recourse were they to later change their minds after letting their children attend school; otherwise, the youths would never drop "their natural taste for an indolent and rambling life".[76] Missionaries to South Australia similarly advocated the

70 O'Brien (2008) 157.
71 Watson (ed.) (1917) 264–265 (Robert Cartwright to Lachlan Macquarie, 6.12.1819).
72 Robinson/Paten (2008) 506; Mitchell (2011) 10. For a chronology of institutions for Indigenous children, see: Haebich (2000) 229–230.
73 Eyre (1845) vol. II, 422, 430, 440.
74 Eyre (1845) vol. II, 440, 492.
75 Eyre (1845) vol. II, 454; Haebich (2000) 146.
76 Eyre (1845) vol. II, 436, 489.

"entire separation" of Indigenous children from their parents as essential to advancing the "moral and spiritual welfare of the Aborigines". They recommended that "native" orphans be placed under the "absolute care" and "permanent control" of the Missionary Society, and maintained that the consent of youths older than 10 was enough for them to be removed from their families, and that once parents had agreed to the separation of children under that age, their authorisation could not be withdrawn. In light of the supposed "low state of moral feeling possessed by the natives", missionaries were positive that this measure "would not involve […] the infraction of any essential law of humanity".[77] But adult Aboriginal peoples were of course outraged by this practice; as Eyre himself reported, "I have often heard the parents complain indignantly of their children being thus taken; and one old man who had been so treated […] used vehemently to declare, that if taken any more, he would steal some European children instead, and take them into the bush".[78]

It was within this context that, in 1844, Governor George Grey passed the Ordinance to Provide for the Protection, Maintenance, and Up-Bringing of Orphans and Other Destitute Children of the Aborigines (SA), which empowered Protectors to remove not only orphaned and abandoned youths but also every Indigenous or so-called "half-caste" child whose parents agreed to their separation and tie them to settlers with apprenticeship contracts; the Ordinance also turned Protectors into the "legal guardians" of these children.[79] Also in 1844, the Aboriginal Girls Protection Act (WA) made it an offence to remove Indigenous girls from school or service without the consent of a Protector or their employer.[80] These were the first of a series of infamous measures allowing for the non-consensual separation and forcible detention of Indigenous youths in colonial Australia.[81] In 1865, a few years after one "Philanthropist" had recommended to "take the native whilst young – let him be no longer subject to those pernicious influences […] – give him an industrial education" in the *Moreton Bay Courier*,[82] the Industrial

77 South Australian Missionary Society (1842) 3.
78 Eyre (1845) vol. II, 438.
79 Grey (1844) 1–2; Robinson / Paten (2008); Price (2020).
80 Swain (2016a) 196.
81 Haebich (2000) 149–150.
82 Philanthropist (1860) 2.

and Reformatory Schools Act (QLD) equated the offspring of Aboriginal mothers with children of criminal parents and juvenile offenders, allowing for their removal merely on the ground of their Indigenous descent.[83] In 1869, the Aborigines Protection Act (VIC) established a Central Board for the Protection of Aborigines and empowered the Governor to approve regulations for, among other issues, the custody and education of Indigenous children.[84] In 1874, the Industrial Schools Act (WA) equated Indigenous youths with orphaned and "necessitous" children and institutionalised the practice of child removal (subject to parental consent, at least in theory).[85] Western Australia had recently been the site of the educational experiment of Annesfield, the institution founded by the teacher Anne Camfield, who had repeatedly stressed the importance of a plan of "compulsory education" of Indigenous children. To counteract the reluctance of parents in "giv[ing] up their children for civilization", Camfield advocated "a law obliging" them to send their children to school, by means of which "compulsion" would be "made lawful"; after all, she wondered, "where is the unlawfulness of compelling them to be civilized?"[86] In 1886, two Aborigines Protection Acts (WA and VIC) allowed for, respectively, the indenture of youths of 21 years old (or of an undefined "suitable age") and the removal of "half-castes" to Aboriginal missions and reserves.[87] In 1897, the Aboriginals Protection and Restriction of the Sale of Opium Act (QLD) authorised the removal to reserves of "any Aboriginal" regardless of their age, thereby equating all Indigenous persons with children under guardianship.[88] In 1905, the Aborigines Act (WA) made the Chief Protector the legal guardian of all Indigenous children and empowered authorities to confine them to "Aboriginal institutions" and, in 1907, the State Children Act (WA) equated neglected children with children of the state.[89] Most of these acts were subsequently replicated in other colonies (later states).[90] Similar to the British metropole,

83 Swartz (2019) 214; Robinson / Paten (2008) 507–508.
84 Nettelbeck (2019) 166; Buti (2004) 52.
85 Swartz (2019) 211–217.
86 Camfield (1863) 306–307; Camfield (1864) 390; Swartz (2019) 180–184.
87 Robinson (2016) 133; Swartz (2019) 218; Buti (2004) 52; McMillan / McRae (2015) 233–244.
88 Robinson / Paten (2008) 512; Buti (2004) 59; Haebich (2000) 171–172.
89 Swartz (2019) 218; Haebich (2000) 220–225, 231–233.
90 Buti (2004) 60.

therefore, in colonial Australia commonalities between orphaned, neglected, deserted, vagrant and criminal children were emphasised, with "Aboriginality" becoming a synonym for all of these conditions.[91]

5. *In nomine patriae*: Protection and the reformatory principle

The legal justification for reform schools (and their prerequisite, the practice of child removal) rested upon the doctrine of *parens patriae*. This medieval principle, an outgrowth of royal prerogative applied and developed by the chancery courts, held that the Crown, as a common custodian for its subjects and all matters of public concern, was vested with the constitutional power of guardianship over all property subject to charitable trusts as well as that belonging to persons with a disability, such as orphans, minors and insane or incompetent persons.[92] Included in this doctrine was also the notion that the Crown, by virtue of its prerogative, could interfere in familial relations when the welfare and property of minors were jeopardised.[93] Therefore, in its medieval and early modern formulation, the tutelage granted by *parens patriae* specifically addressed those orphaned and propertied children whose estates had to be protected against usurpers, and did not extend to the children of the poor, who, under the 1562 Statute of Artificers, could be separated from their parents to be apprenticed and put to work in a trade (and thereby compelled to support themselves instead of being provided for).[94]

As scholars like George Curtis have noted, however, *parens patriae* underwent a significant rethinking in the late 18th century. The notion originally related to dependent and not delinquent classes, but at that time, concurrently with the establishment of reformatories, the application of *parens patriae* was extended to include criminal classes, encompassing no longer only orphans with property but also all poor children of criminal and allegedly "unfit" parents as well as juvenile delinquents.[95] The "bending" of the

91 Schlossman (1995) 365; Swain (2016a) 199; Haebich (2000) 136–137.
92 Schlossman (1995) 366; Curtis (1976); McGillivray (2004) 40–44; Swain (2016a) 194; Custer (1978).
93 Schlossman (2005) 8–9.
94 Carter (1697) i–ii; Blackstone ([1768] 2016) 426–427; Swain (2016a) 195.
95 Curtis (1976) 898–901.

doctrine of *parens patriae* to incorporate troublesome youths had two main implications: first, the protection granted by the Crown as the "parent of the country" no longer implied only guardianship but also reclamation and reform; second, "those to be protected" were not only the children in question but also other members of society and their possessions, which had to be guarded against the machinations of criminal youths once they reached adulthood. Thus, in the late 18th century, the application of *parens patriae* expanded: the Crown – and, by extension, the state – was no longer in charge of only the endangered classes but also, and more importantly, of the (potentially) dangerous classes, with the ultimate purpose of promoting the safety of society that their existence jeopardised.[96] The "best interests" of society, now equated with those of the child, had to prevail over the rights of parents over their offspring.[97] Once these youths were removed from their families and confined to a reformatory, the doctrine of *parens patriae* was complemented by the authority provided by the system of apprenticeship, by virtue of which parents transferred their *patria potestas* to a master, who was thereby empowered to both teach and punish their young apprentices, who were in turn bound to obey and serve their master until the expiration of their indenture.[98]

As stated in an article advertising the activities of the Philanthropic Society in 1789, the reformatory would introduce the inmates into "a new life, in which it is difficult to say, whether themselves, or the community at large, are the most interested".[99] Neglected children were wronged by their parents as much as they were potential wrongdoers; they were victims of their families as well as embryonic threats to social order.[100] According to the author of *Inferior Politics; or, Considerations on the Wretchedness and Profligacy of the Poor* (1786), the "public" had the "duty" to "save" and take "under [its] protection" these "wretched" youths, by standing in lieu of all those vicious parents "who violate the trust reposed in them" by society and "pervert […] that authority which the laws have too long allowed them to abuse".[101] A few years later, the advocate of the "rights of the poor", Thomas Bentley, called for

96 Grossberg (2003) 213, 219, 233.
97 Buti (2004) 4–18.
98 Sanna (2020) 239–244; Wallis (2020) 247–281.
99 Anonymous Contributor (1789b) 1.
100 Swain (2016b) 37.
101 Luson (1786) 68; Grossberg (2003) 216.

"an act of government" by which "all poor children" not raised "in an industrious, honest, quiet, well-behav'd manner" would be "taken away from [their] parents", committed to some "places provided by the government", and there "instructed […] at the public expence *[sic]*"; their negligent parents, in turn, should be either "immediately punished" or – like Aboriginal parents in Moorundie – "afterwards remembered in the distribution of parish rewards or allowances".[102] Similar ideas would later re-emerge in discourses related to Indigenous (often understood as synonymous with troublesome) youths across the British settler colonies. For example, in 1847, in Upper Canada (where the establishment of residential schools for Indigenous youths was enthusiastically promoted by the colonial government), the Superintendent of Education, Reverend Egerton Ryerson, after praising "education" as "the most effectual preventative of pauperism […] and crime", remarked that, if parents were not able or willing to provide their children with such teachings as "will fit [them] to be honest and useful member[s] of the community", "the State is bound […] to protect" both "the child against such a parent's […] inhumanity" and "the community at large against any parent […] sending forth into it an uneducated savage, an idle vagabond or an unprincipled thief". Negligent parents, Ryerson continued, "wrong[ed] their child" but even more seriously "wrong[ed] society, by inflicting upon it an ignorant or vicious barbarian".[103] Hence, against parental neglect, the government should protect both children and society.

As noted by Shurlee Swain, among others, the legal doctrine of *parens patriae*, appropriately complemented by the restraints of the system of apprenticeship, also represented the legitimation of the practice of child removal and the segregation of Indigenous youths into industrial schools in colonial Australia.[104] Indigenous parents were considered not only unsuited to prepare their children for the duties of colonial society (similar to vagrant and criminal parents in Britain) but also to be perpetual children themselves; with their suitability for the parental role being thus discredited, their sons and daughters were implicitly reduced to neglected or "worse than orphaned" youths.[105] Assistant Protector Eyre infantilised Indigenous peo-

102 Bentley (1791); Sanna (2020) 205.
103 Ryerson (1847) 9–10, 181; Scott (2005) 116–117.
104 Swain (2016a) 206–208.
105 Swartz (2019) 12.

ples by repeatedly describing them as "children of the wilds"; similar to inconsiderate minors, he wrote, they were "improvident in preparing for the necessities of the morrow" and completely "unaccustomed to impose the least restraint upon their appetites".[106] Likewise, teacher Anne Camfield maintained that "adult natives are like children, they do not consider the future" and were "as babies in comprehending the advantages of education".[107] In their view, then, the colonial government should arrogate to itself the right to act *in loco parentis* to "rescue" their offspring. Notably, similar to metropolitan developments, Indigenous youths were considered in need of protection as well as potentially troublesome; being perceived simultaneously as endangered and dangerous, they required not only tutelage but also reformation. The practice of Indigenous child removal entailed, therefore, not only the purposes of preservation and conservation but also those of rehabilitation and correction, as young Aboriginal peoples had to be "reclaimed" to be made "fit" for colonial society to ensure that, once grown up, they would not jeopardise the security of settler property and the unfolding of European colonisation. Once again, the tutelage of Indigenous peoples and their welfare was of secondary importance to the protection of the peace of colonial society.[108]

But the relevance of *parens patriae* appears to extend beyond the practice of child removal and the establishment of colonial reformatory schools. This chapter suggests that this notion can, perhaps, also represent a lens through which to reconsider the entire policy of Aboriginal protection in colonial Australia. According to Annabel Brett, the language of protection derived from the Roman private law concept of *tutela* or guardianship and, in medieval England, was a function of the Crown associated with the attainment and preservation of the King's peace.[109] In British imperial history, the first official formulation of protection in relation to colonised peoples dates to 1763 and describes the Crown's responsibility to "protect" Native American Nations and their territories.[110] In 1824, Protectors of Slaves were appointed in Trinidad, tasked with supervising relations between slaveowners and the enslaved and shielding the latter from the personal discretion and arbitrary

106 Eyre (1845) vol. I, 93, 107, 278, 288, 389 and vol. II, 156; Hall (1996) 144.
107 Camfield (1863) 307; Camfield (1865) 489.
108 Ford (2017) 186; Nettelbeck (2019) 81.
109 Brett (2017) 93–95.
110 Benton/Ford (2016) 86; Fenge/Aldridge (eds.) (2015).

violence of the former by adjudicating disputes between them and administering punishments.[111] As recently demonstrated by Christina Twomey, this institution was inspired by the legal precedents that Britain found as it conquered new colonies from the Spanish, the French and the Dutch during the Napoleonic wars.[112] The earliest imperial predecessor of British West Indian Protectors was the Protector de Indios appointed in the Spanish American colonies in the early 16th century. Midway between a religious and a legal officer, the Protector should shelter vulnerable Indigenous peoples from abuse and hear their complaints; according to Charles Cutter, this office was descended from a medieval Iberian appointee tasked with watching over the interests of orphans and poor children, and thereby it implicitly equated colonised populations with legal minors.[113]

Notably, the 19th-century developments of British imperial protective policies appear to have retraced the same "expansive" trajectory of *parens patriae*, from dependent to troublesome classes and from tutelage to reformation, with a new emphasis on the need for correction alongside the traditional plea for defence against mistreatment. In Trinidad, Protectors of Slaves were also appointed to oversee the work performed by the enslaved in order to "ameliorate" plantation slavery and progressively foster the transition from unfree labour to abolition.[114] If the purpose of Protectorates was to incorporate humanitarian ideals into the apparatus of the colonial state, those ideals were informed by what Thomas Laqueur has referred to as a "sense of property" in the recipients of protection, which called for not only policies of relief and defence from evil but also measures of improvement and the promotion of virtue and welfare.[115] Protection thus became instrumental in reinforcing the legitimacy of the British superpower by recontextualising the empire as a pedagogic enterprise for the benefit of the enslaved and the colonised; this occurred in the same years when, in the wake of the extension of suffrage, a public system of education for the white working classes was being promoted both in Britain and across its settler colonies.[116] Insofar as colonised populations were equated with children, alternately

111 Benton et al. (eds.) (2017); Nettelbeck (2019) 20–21.
112 Twomey (2018) 10–15.
113 Cutter (1986) 6–8.
114 Ford (2017) 179; Dorsett (2014).
115 Benton et al. (eds.) (2017) 1–9; Laqueur (1989) 179.
116 Chesson (1877); Swartz (2019) 5, 19–39, 200–203.

understood as defenceless and potentially troublesome, children themselves were increasingly presented as no longer the property of their parents but as a state responsibility and a vehicle for advancing societal interests.[117] State and empire were expected to propaedeutically prepare these "minors" for their duties as members of society and imperial subjects; their foremost duty was, in turn, the expectation that they would attain the status envisaged by the protectors as their intrinsic potential.

In line with this 19th-century expansion of the meaning of protection, the Aborigines Protection Society maintained that their mission was to "protect the defenceless" and "promote the advancement of the uncivilized" as two complementary faces of one and the same project.[118] After all, as already noted in section 2, since the publication of the 1837 Report, it was ultimately unclear who had to be protected against whom in colonial Australia. Whereas endangered Indigenous peoples, envisaged as "untutored children" afflicted by an intrinsic "incapacity to defend themselves", had to be safeguarded against violence and encroachment by white settlers, conversely, colonists and their properties needed to be defended against "native" trespasses and transgressions.[119] There was, however, a third, narrower object of protection that seems to be relevant for the purpose of this chapter: as stressed by several contemporary observers, those in need of tutelage were particularly the most vulnerable among Aboriginal peoples, namely children and women, who had to be shielded from the violence perpetrated by the adult males of their own families and tribes.[120] This was a common trope to uphold the British "civilising mission" and was likewise cited to justify the treatment of Indigenous Australians.[121] Governor George Grey, for instance, argued that "in the savage state we find the female sex, the young and the weak defenceless" and therefore in need of the protection granted by the British colonial authorities.[122] Similarly, Sub-Protector Eyre repeatedly mentioned cases of infanticide, ill-treated women and "aged and helpless natives" doomed to abandonment;[123] according to Eyre, the supposed lack of com-

117 Schlossman (1995) 363; Swain (2002) 134; McGillivray (2004) 38.
118 Aborigines Protection Society (1838) 12; Rainger (1980) 707.
119 Select Committee on Aborigines (1837) vii, 2–3, 105.
120 Swartz (2019) 214.
121 Stoler (2006).
122 Grey (1841) vol. II, 218.
123 Eyre (1845) vol. I, 40–41, 89 and vol. II, 207–208, 316–324, 378–387, 441.

passion of Aboriginal peoples revealed, through contrast, both the morality of white Victorian manhood and the humanitarianism of the British nation.[124] He maintained that colonial authorities had to "free" the "young and the weak" from the "degrading thraldom" represented by those "harsh and violent customs of their own" and "afford [them] that protection from the oppression of the strong and the old which they so greatly require".[125]

This same aspiration was also behind Grey's and Eyre's persistent calls for the admissibility of Aboriginal evidence in court without the sanction of an oath, which would enable Indigenous persons to let their complaints be heard against not only white settlers but also – and, according to Grey and Eyre, more importantly – other "natives" in *inter se* matters.[126] Despite the glaring abuses regularly inflicted upon Indigenous peoples by colonists, Eyre seemed to think that it was imperative to "protect a native from the violence of his fellows" so that "the younger and the weaker might confidently look to the White Man as a protector – able and willing to shield them from the brutal violence of the elder and stronger".[127] The unsworn testimony of Indigenous peoples was legalised in South Australia in 1844, the same year the Ordinance for the "protection" and training in labour of Indigenous children was passed.[128] The idea that the most vulnerable among the "natives" had to be afforded protection against the older and stronger of their own families was, after all, also the rationale underpinning the system of industrial schooling that Eyre intended to promote for Indigenous youths. Residential schools encapsulated the twin goals of protection, namely preservation and correction: to "protect" Indigenous children meant to amend and reform them in a distinctively parental manner, with Protectors standing in the stead of their "unfit" – when not actively dangerous – natural parents. The removal and reclamation of these youths was integral to the process of assimilation of Indigenous people into colonial society that ranked first among the aims of Protectorates.[129]

124 Eyre (1845) vol. II, 316, 458; Hall (1996) 144.
125 Eyre (1845) vol. II, 384–388; Eyre (1985) 49 (Eyre to colonial secretary, 1.02.1843).
126 Grey (1841) vol. II, 369, 374; Eyre (1845) vol. II, 184, 202, 493.
127 Eyre (1845) vol. II, 500; Eyre (1985) 61 (Eyre to colonial secretary, 5.05.1843).
128 Nettelbeck (2019) 56.
129 Twomey (2002) 141.

This function of reclaiming and rehabilitating can be seen as the first feature connecting Aboriginal protection to *parens patriae*. As discussed earlier, the idea of reformation became attached to the original meaning of both notions between the late 18th and the early 19th centuries: as with *parens patriae*, Aboriginal protection was not limited to the mere tutelage of subjects supposedly affected by some form of incapacitation and threatened by forces beyond their control but was also aimed at preparing classes perceived as simultaneously endangered and dangerous for their social obligations, making them fit for society. Moreover, imperial protection, like *parens patriae*, emanated from the royal prerogative of the Crown. Significantly, the 1837 Report started circulating concurrently with the accession to the throne of Queen Victoria, who soon began being portrayed as the motherly protector of "her" Indigenous subjects across the empire.[130] The Report emphasised the key protective position occupied by the Crown: every policy related to Indigenous peoples and their lands had to issue from or be sanctioned by the monarch, and Protectors of Aborigines embodied transnational values of amelioration and guardianship precisely because they were Crown-appointed officials.[131] In the following years, the child rescue movement at home as well as the several provisions passed by Parliament at mid-century to protect British youths from parental abuse and labour exploitation also became attached to the person of the Queen.[132] In addition, as already mentioned, in its original formulation, *parens patriae* suggested the protection not just of minors and incapacitated persons but also of their possessions.[133] Similarly, to "protect the Aborigines" meant to defend their persons but also watch over their property, namely their lands. In fact, the 1837 Report adopted the humanitarian perspective which viewed Australian lands not as *terra nullius* but rather as the legitimate possession of their original inhabitants, whose property rights had to be guarded against infringement.[134] At the same time, however, these rights had to be overseen from above, as Aboriginal peoples were considered ignorant of how to best use their territories.

130 Nettelbeck (2019) 18; Carter / Nugent (eds.) (2016).
131 Mitchell (2011).
132 Clarke Hall (1897) v–viii; Swain (2016b) 27–29.
133 Curtis (1976).
134 Select Committee on Aborigines (1837) 4; Reynolds (1987); Mitchell (2004); Lester (2015) 493.

In the imperial context, the power of guardianship of the monarch, ultimately involving responsibility for the custody and education of their subjects, was passed on to Crown-appointed Protectors as holders of a "power in trust" to be administered "in the best interests" of the colonised.[135] In the words of Undersecretary for the Colonies James Stephen, as veritable "trustees to native peoples", Protectors were tasked with all of the legal duties that, according to Antonio de Paulo Buti, belonged to legal tutors and curators, from representation and defence (in court) to discipline and punishment (by virtue of their magisterial powers) and from maintenance (through the distribution of rations) to education (in the residential industrial schools).[136] Through the authority and the person of the Queen, imperial Britain presented itself as the "guardian" of the colonised and assigned the trusteeship for their amelioration to special protective appointees.[137] In spite of the institutional difference between the two contexts in the public responsibility towards children and other supposedly "incapacitated" subjects – which gradually became the domain of the executive through government boards in Australia, whereas in England it traditionally rested with the chancery courts – both systems appear to be traced back to the same justificatory principle. In fact, even when the Australian colonies were granted representative institutions and responsible governments from mid-century (and Aboriginal affairs and protection were thenceforth transferred from the Colonial Office to settler colonial legislatures and self-governments), the guardianship element of Australian protective policies did not disappear but was instead emphasised.[138] In a process that culminated in the year of the Diamond Jubilee of Queen Victoria with the passing of the Aboriginals Protection and Restriction of the Sale of Opium Act, all Indigenous peoples were progressively reduced to perpetual "wards" of the colonial state, and protection itself was reconfigured into the large-scale application of *parens patriae*.[139]

135 Grossberg (2003) 216.
136 Dussart/Lester (2014) 227; Buti (2004) 28–35.
137 Nettelbeck (2019) 14, 93.
138 Curtis (1976) 899; Belmessous (2013) 101; Nettelbeck (2019) 166; Furphy/Nettelbeck (eds.) (2020) 4.
139 Robinson/Paten (2008) 511–512; Laidlaw (2021) 280–281.

6. Conclusion

In his famous *Lectures on Colonization and Colonies* at Oxford, Herman Merivale contended that the "correlative [of the] protection" of Indigenous peoples was their "acknowledged inferiority, and consequently tutelage", and that while the "existing generation" had to be "abandon[ed]" to its inescapable "fate" of extinction, the laudable effort of "educat[ing] the young" had a hope of success only if "the children [are] rescue[d] from the fortunes of their parents" by "separat[ing] families by violent measures".[140] By referring to Aboriginal protection through the notion of "tutelage" and juxtaposing the optimistic project of "education" with the mission of "rescue" and the unfortunate but seemingly necessary recourse to "violence", Merivale's lecture encapsulates the ways in which protective governance in the British settler empire not only took on diverse and even contradictory justifications, but also revived ancient metropolitan legal notions, reframing them within a newer, humanitarian imperial framework. By proposing that the origins of Aboriginal protection can be traced back to medieval England, this chapter suggests that, after travelling through the time of English legal history (and changing significantly from its original formulation), *parens patriae* travelled across the space of the British Empire, as metropolitan attempts at addressing the issue of juvenile delinquency seemed to offer a precedent for the policies to be implemented to "improve" other groups of supposedly troublesome subjects on the other side of the globe. Also due to the overlapping of personnel between the various philanthropic and humanitarian associations committed to child reformation at home and Aboriginal protection abroad, it is possible that *parens patriae*, back in vogue in late 18th-century England thanks to the reformatory movement, was among the legal resources to inspire the architects of the Antipodean Protectorates.[141] If one assumes *parens patriae* as foundational and constitutive to Aboriginal protection, the boarding schools where Australian boys and girls were segregated and "treated" in the interest of resocialising them as dependent, harmless and "useful" colonial subjects appear as quintessential microcosms of the British imperial protective policy, and the "stolen generations" that they

140 Merivale (1861) vol. I, 522, 525.
141 Whitten (2010) 135, 146–147.

collectively embodied were no aberration to that policy but rather its inevitable by-product.[142]

In 1844, Edward Eyre left South Australia for Britain, bringing two Indigenous children with him. One of them was Warrulan, the 10-year-old son of Tenberry, an Aboriginal chief and crucial ally of Eyre at the Moorundie station who had entrusted the former Sub-Protector with the care of the boy in order for him to receive an education in Britain.[143] At the beginning of 1846, Eyre brought Warrulan (whom he called "my little *protégé*") to Buckingham Palace, where the child was introduced to Queen Victoria and Prince Albert, who appeared very pleased to meet such a well-behaved representative of "their subjects in the Antipodes".[144] This episode can be regarded as the fulfilment of protection rethought through the lens of *parens patriae*, with the intermediary – the former Assistant Protector Eyre, who was also the legal guardian of the boy – presenting the source of every protection – the Crown – with the beneficiary – Warrulan, the living evidence of the presumed success of that policy in colonial Australia.[145] Significantly, when, shortly thereafter, Eyre had to leave Britain having been appointed Lieutenant-Governor of New Munster, New Zealand, Warrulan was transferred to the guardianship of Dr Thomas Hodgkin, the founder and secretary of the Aborigines Protection Society.[146] After years of industrial education in Britain, Warrulan died from pneumonia in Birmingham in 1855, too early to be finally able to go back home to South Australia, as he ardently wished, but soon enough to remain unaware of the communication sent by the new Sub-Protector in Moorundie, Edward Bate Scott:

> I write to tell you, for the information of the native (Warru-loong), who is in England, that his father and eldest brother are dead, and so are all of his uncles, cousins, &c. &c., and every member of his […] tribe […]. I may also add, […] that the tribe beforementioned was once (thirteen years since) a powerful one, and composed of many able warriors. You can also tell Warru-loong that all the native tribes belonging to this portion of the Morray *[sic]* […] are reduced in numbers.[147]

142 Scott (2005) 117; Twomey (2002) 112.
143 Nettelbeck (2019) 149–156; Evans (2005) 67.
144 Anonymous Contributor (1846) 108.
145 Henderson (2014) 67–69; Dussart / Lester (2014) 10.
146 Laidlaw (2021) 252.
147 Aborigines Protection Society (1855) 51–55; Nettelbeck (2019) 148–150.

If it is true, as argued by Anna Haebich, that "child removal was an integral part of the Aborigines' experience of colonization", equally integral to this experience was physical and cultural elimination pursued under the banner of protection.[148] By arguing that the reformatory principle intrinsic to the English doctrine of *parens patriae* and providing a legal justification for child removal might be assumed to be part of the legitimation underpinning Aboriginal protection in colonial Australia, this article contributes to the wider investigation of legal transfers in the common law world.

Abbreviations

QLD: Queensland
SA: South Australia
VIC: Victoria
WA: Western Australia

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