IN THE MATTER OF A (CHILDREN) (AP) ENGLISH JURISPRUDENCE THROUGH AMERICAN EYES: A CONVERGENCE

I. INTRODUCTION

In 1977, the English jurisprudential scholar H.L.A. Hart gave a talk in which he described how American jurisprudence looked to an outsider, an Englishman.[1] His contention was two-fold: first, he said that Americans were obsessed with judicial reasoning and its proper place in the governing structure of their country;[2] and secondly, that there are two overriding strands to American analysis of judicial reasoning, which he called the "Nightmare and the Noble Dream."[3] The Nightmare view of the reasoning of American judges holds that when American judges see indeterminacy in the law they are applying in a case, they legislate from the bench, applying their own prejudices and political presumptions to determine outcomes.[4] This line of thought is associated with the Legal Realists.[5]

By contrast, the Noble Dream strand of American jurisprudence holds that when American judges see indeterminacy in the particular rules in front of them, they apply overarching principles, standards, and values that channel judicial discretion.[6] In this way, they argue, contrary to the

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1. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1976–77). This Article is based upon a speech that was given as the third John A. Sibley Lecture in Law for the academic year 1976–77, delivered at the University of Georgia, School of Law on April 14, 1977. *Id.* at 969.

2.

> I . . . characterise American jurisprudence, that is, American speculative thought about the general nature of law, by telling you in unqualified terms that it is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases.

Id.

3. *Id*. at 971.

4. *Id.* at 972.

5. He associates this view with Supreme Court Justice Oliver Wendell Holmes, and even more directly with federal judge Jerome Franks. *Id*. at 974.

6. *Id.* at 978.

> Like its antithesis the Nightmare, it has many variants, but in all forms it represents the belief, perhaps the faith, that, in spite of superficial appearances to the contrary and in spite even of whole periods of judicial aberrations and mistakes, still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide.

Id.

Nightmare view, that there is much less discretion than the Realists suppose and much more predictability in outcomes.[7]

Hart maintains that because of these widely divergent possibilities in judicial reasoning, American legal philosophers have an increased interest in the reasoning process that judges use.[8] Implicit in Hart's analysis, however, is a comparison to the reasoning process of judges in other countries. In particular, he compares the role of judges in America to the role of judges in England and the American fascination with the judicial reasoning process to the lack thereof in England.[9] English judges, he says, do not stray into either end of the continuum between the Nightmare and the Noble Dream.[10] Their role is more limited, and they simply declare what the law is from the statutory or common law source in front of them.[11]

Although this may have been true as an historical matter, this dichotomy between American and English judicial reasoning is collapsing. In the case of *In the matter of A (Children) (AP)*[12] *("Matter of A"),* the Supreme Court of the United Kingdom demonstrated both ends of the continuum between the Nightmare and Noble Dream.

On the one hand, the hard facts of the case strongly pointed in the way of a desired outcome, in line with a legal realist outcome. On the other hand, the Court's reasoning took into account ancient British customs, principles, and values, providing a measure against which the judges were to reason, in line with Hart's Noble Dream approach.[13] Further, this case is not the first from Britain's High Court to demonstrate such a lapse into American jurisprudential methods.[14]

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7. Hart cites Karl Llewellyn as an example of this type of thinking. Llewellyn was a proponent of Noble Dream jurisprudence when he called for a "grand style" of judicial decision making. He attacked as blinding error the assumption that if the outcome of a case was not "foredoomed in logic," then the outcome could only be the unconstrained will of the decision maker. *Id.* at 979 (footnote omitted). To so assume, in Llewellyn's words, was "due to a failure to give proper weight to the fact that legal decision making does not proceed *in vacuo* but always against a background of a system of relatively well established rules, principles, standards, and values." *Id*. at 979.

8. *Id*. at 969–70.

9. *Id*. at 970.

10. *Id.* at 972.

11. "But for conventional thought, the image of the judge, to use the phrase of an eminent English Judge, Lord Radcliffe, is that of the 'objective, impartial, erudite, and experienced declarer of the law,' not to be confused with the very different image of the legislator." *Id.* at 972. (footnote omitted).

12. [2013] UKSC 60 [hereinafter Matter of A].

13. The discussion of jurisdiction in relation to the doctrine of *parens patriae* is one example. *See infra* Part II.C.3 and accompanying notes.

14. Another is *B v. H. (Habitual Residence: Wardship)* [2002] 1 FLR 388, which is discussed in

This Comment argues that the main impetus behind this change is the evolving power of the British judiciary relative to Parliament. Since at least the Glorious Revolution at the end of the 17th century, it had been the case that Parliament was irrefutably and absolutely superior to all other political authority in the British Isles.[15] But with British ascension to the European Union and myriad international human rights treaties, there are now other claims on British sovereignty, especially when British law conflicts with international norms.[16] This trend looks likely to continue and a convergence between judicial reasoning between American and British judges seems likely to relegate Hart's thesis to history.

Part II of this Comment discusses the judgment given in this particular case. Part III details how the reasoning of the judgment relates to Hart's analysis of American jurisprudential thought. And finally, Part IV gives some context for the emerging changes in English jurisprudence that accounts for the convergence with American judicial reasoning, and argues that this trend is almost certain to continue.

II. THE JUDGMENT

Matter of A involves important international law concepts of jurisdiction and family law and a fight between two court systems thousands of miles away. But it also involves the fate of a young child in Pakistan, separated from his mother in England, and involved in an international legal dispute with wide-ranging ramifications. Apart from the compelling facts of the case, however, the jurisprudential interest in this case derives from the fact that the outcome and the reasoning of the judges demonstrate both Nightmare and Noble Dream characteristics.

The Nightmare portion derives from the sense that the outcome of the case mattered, and the judges needed to find a manner to get there. This is suggested by the fact that the judgment of the UK Supreme Court in this case turned on the narrowest of grounds. The Court deferred on the toughest jurisdictional question of whether "habitual residence"[17] can exist without physical presence in England or Wales under Regulation 8 of

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infra Part II.A. It is also discussed at length in *infra* note 40.

15. Historically, Parliamentary sovereignty was absolute because it had the right to make or unmake any law, whatever. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION, 42 (10th ed. 1961).

16. See *infra* Part IV and accompanying notes for discussion of the specific treaties and other sources of international law that implicate this thesis most directly.

17. *See infra* Part II.C.2. This phrase is a legal term of art and is defined and explained in detail.

"Brussels II."[18] The Court remanded the case to the trial court for a determination of whether *parens patriae* jurisdiction is appropriate.[19]

The trial court has significant discretion to apply the doctrine of *parens patriae*.[20] This ancient doctrine allows for wide discretion on the part of the judge, in line with Legal Realist assessments of the indeterminacy of the law.[21] The very fact that the court referred to *parens patriae* jurisdiction-an often forgotten, ancient concept—shows how desirable the final outcome was.[22]

On the other hand, the manner of decision is consistent with the Noble Dream method: indeterminacy in the applicable law led to a consideration of principles and values, and these were based on long-standing English law.[23] Thus, the discretion of the judges was, in Justice Holmes' famous words "interstitial"[24] not complete.

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18. Council Regulation (EC) No 2201/2003. The realist portion of Lady Hale's judgment shows through in the following portion of the judgment where she discusses the appropriate test for habitual residence. Approaching what would be the logical conclusion of her reasoning, she backs down. This seems to be because of the undesirable outcome that such a result would have.

> So which approach accords most closely with the factual situation of the child- an approach which holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer? In my view, it is the former. . .[however] I would not feel able to dispose of this case on the basis that Haroon was not habitually resident in England and Wales on 21 June 2011, without making a reference to the Court of Justice.

[2013] UKSC 60 ¶¶ 55, 58.

It was the very undesirability of following through on the logical consequences of strict interpretation of European Union case law and the Family Law Act of 1986 that made the court consider the little-used legal phenomenon of *parens patriae* jurisdiction in the first place. That is, the hard facts of the case dictated a normative outcome that the court had to jump through legal hoops to achieve, given existing case law and statutes. This is indicative of Hart's assessment of realist American judges.

19. [2013] UKSC 60 ¶¶ 64, 65. *Parens patriae* is an old English common law concept by which the King held certain duties and rights over those of his subjects who were not capable of defending their own interests. He held these duties and rights as "father of the country" and could act on behalf of these citizens. This type of jurisdiction could extent to cases of incompetent subjects, or infants. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972). *See also supra* note 68 and accompanying text. Importantly, in the scenario at issue in *Matter of A*, this concept would allow British courts to exercise jurisdiction over the case even where other grounds failed.

20. *Id.* ¶ 60.

21. *See infra* Part II.C.3.

22. See *infra* Part II.C.3 and accompanying notes for an introduction to the principles of *parens patriae* jurisdiction and its role in this case.

23. *See infra* Part III.B.

24. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J. *dissenting*) ("I recognize without hesitation that judges do and must legislate, but they can only do so interstitially; they are confined from molar to molecular motions. A common-law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.'").

A. Case Facts

The specific legal question at issue was whether the High Court of England and Wales had jurisdiction to order the return to England of a child who had never been physically present in Britain on the basis that he either (1) had been "habitually resident" there, or (2) had British nationality (meaning that the court had jurisdiction via the ancient common law doctrine of *parens patriae*).[25]

The child (called Haroon in the case) was born in October 2010 in Pakistan.[26] His father was born in England in 1973 and his mother was born in Pakistan in 1978, but the couple lived in England since 2000, and the mother had indefinite leave to remain there.[27] The couple had three children other than Haroon, all of whom were born in England.[28]

With the passage of time, the husband began to spend more and more time in Pakistan and the marriage deteriorated.[29] The wife complained of abusive behavior and moved out of the house, into a refuge.[30] In October 2009, the mother travelled to Pakistan to visit her father. Once there, her father, as well as members of the husband's family, insisted that the couple reconcile.[31]

The mother felt that she had no choice but to do so because of physical and emotional coercion.[32] She remained in the country and was forced to give up her and her children's passports.[33]

In February 2010, she became pregnant with Haroon and gave birth to the boy in October 2010. During this time, she attempted to leave Pakistan, making phone calls to the refuge back in England where she had previously stayed.[34]

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25. [2013] UKSC 60 ¶ 1.
26. *Id.* ¶ 2.
27. *Id*. Lady Hale points out the foregoing facts are the only ones that are uncontested. *Id*. There was a fact-finding hearing in front of Judge Parker in the High Court. *Id* ¶ 3. But the father did not participate in the proceedings. He remained in Pakistan, never made a witness statement, and was not represented at the hearing. *Id.* ¶ 8.

The facts that followed were disputed, and the father's version of the events was represented by his brother. The father was ordered to participate in the fact-finding session via telephone, but he could not be reached. *Id*. ¶ 3. The judge found that the phone number at which he was to be reached had been "deliberately turned off." *Id*.

28. *Id* ¶ 2.
29. *Id*. ¶ 4.
30. *Id*.
31. *Id*. ¶ 5.
32. *Id*.
33. *Id*. ¶ 5.
34. *Id.* ¶ 6.

In December 2010, the father brought proceedings for custody of the children in Pakistan, while the mother's father brought proceedings "essentially for habeas corpus" of the mother and four children.[35] In May 2011, the mother's father negotiated with the father's family to allow the mother to leave the country, ostensibly to visit relatives. With that help, she was able to flee to England. She then brought proceedings in English courts in 2011 in an attempt to get custody of the children.[36]

Initially, a freezing order was obtained, in an attempt to sequester the husband's funds in England and Wales.[37] This was done in an attempt to get the husband to comply with the orders of the Court.[38] Because of the sequestration of the funds, the husband's brother was brought into the actions as a co-owner of property under the court order.[39]

At the trial court level, Judge Parker ordered the return of all four children to England because (1) the elder three children had retained their habitual residence in England, and (2) Haroon was habitually resident in England, on the basis of *B v. H. (Habitual Residence: Wardship)*.[40] There,

35. *Id.*
36. *Id.*
37. *Id.* ¶ 8.
38. *Id.*
39. *Id.*
40. *B v H (Habitual Residence: Wardship)*. 1 FLR 388 [2002]. In this case, a couple living in England made what the woman believed was a temporary trip to Bangladesh. *Id.* ¶ 80. In reality, the father had deceived his wife, never intending to return. *Id.* ¶ 47. Upon getting to Bangladesh, he seized the wife's passport and that of the children. The couple had another child there, and when the woman eventually fled back to England (without the children), she filed for an injunction requiring their return. *Id.* ¶¶ 47–52.

Lord Charles ruled for the mother, holding that the baby was and remained habitually resident in England even though she had never been to England. *Id.* ¶ 146. A child could not acquire a habitual residence until he or she was born and became an independent being; at birth the habitual residence of a baby was that of the people who had parental responsibility for the baby. Although it was possible for individuals to have no habitual residence, a baby had a habitual residence if its parents had an habitual residence. The mere fact that a baby was born abroad did not of itself force a conclusion that the baby was not habitually resident in England; it was not the case that a baby could not be habitually resident in England until he or she had physically been to England. The father's unilateral decision to remain in Bangladesh, albeit made and communicated before the birth, did not change the baby's habitual residence at birth, which remained that of the mother and the siblings. As with the siblings, habitual residence in England had not been lost as a result of the extended stay in Bangladesh. *Id.*

This case is also an important one in two other respects. First, it demonstrates one end of the continuum between Hart's Nightmare and Noble Dream. This case seems to be evidence of the legal realist proposition that judges (in this case, English judges) will take indeterminacy in the law and apply their own desires to get outcomes. Here, the desperate facts of the case called out for exercising jurisdiction to help the child.

The second way that this case is important concerns its treatment in *Matter of A*. Lord Charles' reasoning was overruled in the course of appealing the lower court's decision in *Matter of A*. [2013] UKSC 60, ¶ 47. The reasoning of the majority was that acquiring the status of habitually present requires an actual physical presence in the country. In other words, the rule that a recently born child

Justice Charles found that where a mother had been tricked into leaving England, and forced to stay abroad, when she gave birth, the mere fact that the child had not visited England was not dispositive of habitual residence.[41] The English courts thus had jurisdiction to return the children to England.[42] The judgment was appealed.

B. The Judgment

The ultimate holding of the Supreme Court was the English courts had "inherent jurisdiction" to make the orders in this case on the basis of Haroon's nationality (*parens patriae*), not "habitual residence;" however, the case was remitted to the lower courts for a determination in the first instance of whether the court *should* exercise that extraordinary basis for jurisdiction.[43]

The Supreme Court of the United Kingdom began its analysis by setting forth two pieces of legislation that it thought controlled the case.[44] These were the Family Law Act of 1986,[45] and the modifications to this legislation laid down by European Union Council Regulation (Brussels II).[46]

The Court held that it was not bound by the jurisdictional provisions of the Family Law Act of 1986, but had to look to whether there was jurisdiction under Brussels II.[47] This provision applies in cases such as this where only one state is a signatory to the Regulation.[48]

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was presumed to have the same habitual residence as the mother was a "legal construct divorced from fact" and inconsistent with the approach of the Court of Justice of the European Union. This seems to demonstrate the limits of results-oriented jurisprudence and push back on the claims of the legal realists in this case. It also shows how the Supreme Court of the United Kingdom considers international law to be an important constraint on English law. This is an example of the eroding sovereignty that will be further discussed in Part IV, *infra*.

41. [2013] UKSC 60, ¶ 9
42. *Id.*
43. *Id.* ¶ 57.
44. *Id.* ¶ 12–13.
45. Family Law Act, 1986, c. 55 (U.K).
46. Council Regulation (EC) No 2201/2003. 2003 O.J. (L338) (EC).
47. [2013] UKSC 60, ¶¶ 27–29.
48. *Id.* ¶ 29.

C. Reasoning

The reasoning of the Court began with an analysis of the principle of habitual residence. After deciding upon that issue, the court took up *parens patriae* jurisdiction.

1. The Background Legislation

Jurisdiction concerning children in the United Kingdom is governed by two main pieces of legislation:[49] The Family Law Act of 1986 ("1986 Act"),[50] and Council Regulation (EC) No. 2201/2003 ("Brussels II").[51] A court in the United Kingdom can exercise jurisdiction under either law.[52] In this case, the order of the trial court was not issued under Part I of the 1986 Act; therefore, the 1986 Act was not the basis for jurisdiction.[53] The court then looked to whether there was jurisdiction under Brussels II. Under §8 of that regulation, jurisdiction exists if a child is "habitually resident" in the country.[54] Thus, the ultimate questions were two-fold: (1) was the child "habitually resident" in England, and if not, (2) was there an alternative basis to assert jurisdiction, such as the child's nationality, which would be an exertion of *parens patriae* jurisdiction?

2. Habitual Residence

After holding that Part I of the 1986 Act did not confer jurisdiction, the Court looked to Brussels II, which was applicable. Under Article 8 of that regulation, jurisdiction exists where the child is "habitually resident."[55]

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49. 2013 [UKSC] ¶ 12.

50. Family Law Act, 1986, c. 55 (U.K). This law in turn was based on recommendations from the Law Commission and Scottish Law Commission: *Family Law: Custody of Children-Jurisdiction and Enforcement within the United Kingdom* (1984, Law Com No 138, Scot Law Com No 91). Its principle purpose was to establish uniform law on jurisdiction of these matters within the United Kingdom; but its rules also apply when dealing with jurisdictions outside of the United Kingdom.

51. Council Regulation No 2201/2003 2003 O.J. (L338) (EC). This law concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, otherwise known as the Brussels II revised Regulation ("the Regulation"), and is directly applicable in United Kingdom law.

52. Part I of the Act is only applicable to "Part I orders." [2013] UKSC 60 ¶ 14. Brussels II jurisdiction exists (regardless of whether alternative grounds for jurisdiction exist) where the order pertains to "parental responsibility" and the child has been "habitually resident" in the country. *Id.* ¶¶ 13, 34.

53. *Id*. ¶¶ 27–28.

54. *Id*. ¶ 21.

55. *Id*.

The Court then wrestled over the test to be used for "habitual residence." The court acknowledged that that term has been inconsistently and somewhat unclearly used, both in United Kingdom law, and more broadly in international law. Moreover, the Court of Justice of the European Union had interpreted it differently from courts in the United Kingdom.[56]

In determining the test for habitual residence, Lady Hale, delivering the main judgment, said "it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice."[57]

The Court of Justice of the European Union (CJEU) has ruled that habitual residence corresponds "to the place which reflects some degree of integration by the child in a social and family environment."[58] This depends on numerous factors including the reasons for the family's stay in the country.[59]

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56. *Id*. ¶ 34 (citing Albert Venn Dicey et al., on *The Conflict of Laws*, Rules 17(2) and 18(2) (15th ed. 2012), Clarke Hall, L. Morrison on *Children*, ¶¶ 234, 236 (1991).

57. *Id*. ¶ 35. This is largely because the term "habitual residence" is one that is familiar in international law and has been widely used in conventions. Thus the purpose of both the 1986 Act and Brussels II was to "adopt a concept that would apply across the board." *Id*. Also, habitual residence was supposed to be distinguishable from the English concept of "domicile." Thus, this fact-laden inquiry would be governed by similar principles throughout the United Kingdom and European Union Member States. *Id*. ¶ 36 (quoting ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION 66 (1982)).

58. [2013] UKSC 60, ¶ 48, (citing *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, ¶ 2). In making this determination, particular mention should be made of the "conditions and reasons for the [child's] stay on the territory of a member state, and . . . the child's nationality." *Id*. Further, in addition to the physical presence of the child in a member state, other factors must ensure "that the presence in that state is not . . . temporary or intermittent." *Id*. ¶ 49 (quoting Mercredi v Chaffe (Case C497/10PPU) [2011] Fam. 22, ¶ 47). Further factual inquiry when evaluating a mere presence in a Member state as grounds for finding habitual residence includes steps taken to make the move permanent. Such actions as buying or renting accommodations can be helpful in determining the intent to transfer habitual residence status. *See* [2013] UKSC 60, ¶ 80 (quoting Mercredi v. Chaffe (Case C497/10PPU) [2011] Fam. 22).

In *Mercredi*, Ms. Mercredi, a French national, moved to England in 2000 while working as a crew member for an airline company. She began an involvement with Mr. Chaffe, a British national, and the two began to live together in England as an unmarried couple. The relationship produced a daughter named Chloe, a French national, in August of 2009. Within a week of her birth, Mr. Chaffe had moved out of the residence that the two shared, and the relationship broke up. On October 7, 2009, Ms. Mercredi left England for the French territory of Reunion the next day. The father began proceedings in English courts that day to attempt to gain custody of the daughter. Ms. Mercredi did the same in French courts. By the time that the case got to the Court of Justice, one question of law was the test to be used by national courts in adjudicating questions of habitual residence. In the end, the Court remanded the case to the national courts for determination of the question of habitual residence, in light of the test articulated by the court. *See generally Mercredi v Chaffe* (Case C497/10PPU) [2011] Fam. 22.

59. [2013] UKSC 60, ¶ 54. The question of habitual residence is one which runs through

At this point, there were two more questions to ask. First, was this concept of habitual residence a legal or factual determination, and second, does habitual residence require any instance of prior presence in the country asserting jurisdiction?

The justices agreed that habitual residence is not a legal question (such as domicile) but a factual question, to be determined upon an assessment of all the factors listed above.[60] Second, the majority of the justices agreed that physical presence is a necessary prerequisite to habitual residence in England.[61]

Having gone so far, however, Lady Hale acknowledged that such a holding was not *explicitly* necessary to decide the case. This is because she wanted to harmonize the test for habitual residence as between the United

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European family law, and is familiar to many conventions. Specifically, the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1981) Cmnd 8155; and the Hague Child Abduction Convention, *available at* http://www.hcch.net/upload/conventions/txt28en.pdf. Thus, the Law Commission which passed the 1986 Act recommended adoption of the same test for habitual residence as that used by the Court of Justice. *See* Law Com No 138, ¶ 4.15.

One of the advantages of that test was that it was fact bound. This has traditionally been a problem with the tests used in England and Wales, which-along with many other courts-"have been unable to resist the temptation to 'legali[z]e' the concept." *See Habitual Residence of Children under the Hague Child Abduction Convention-theory and practice*, 13 CFLQ 1, at 4. Indeed, the English courts have supplied their own test, derived from the test of "ordinary residence" regarded by the House of Lords in *R v. Barnet London Borough Council, ex p Shah* [1983] 2 AC 309 as settled law, itself derived from taxation statutes. In that test, Lord Scarman defined the test this way:

> Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.

Id.

Another example of how English courts have overlaid the factual concept of habitual residence with legal constructs is the "rule" that where two parents have parental responsibility for a child, one cannot change the child's habitual residence unilaterally. See *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, at 572 and *In re S (Minors) (Child Abduction: Wrongful Retention)* [1994] Fam. 70.

60. [2013] UKSC 60 ¶ 54.

61. Lady Hale expounded upon this reasoning, saying:

> It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been.

[2013] UKSC 60, ¶ 55.

Kingdom and the Court of Justice of the European Union.[62] That court had not so held, and had not confronted a case with facts as *Matter of A*.[63]

Seeing as the Court did not *explicitly* reach the conclusion of whether a child can obtain habitual residence without being physically present, it became necessary to determine whether jurisdiction under Article 14 of Brussels II could exist. This Article is only to apply where Articles 8–13 do not.[64] By Article 14 of Brussels II, the common law rules as to inherent jurisdiction of the High Court continue to apply if a child is not habitually resident in a Member State. For most types of orders, this *parens patriae* jurisdiction was removed by the 1986 Act.[65] That Act, however, did not remove this ground for jurisdiction in this type of order.[66] Thus, the High Court would have to address that ground next, even though the court below did not consider it.[67]

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62. *Id.* ¶ 35.

63. She gave at least four reasons for not reaching such an explicit holding, even though much of her reasoning suggested that she might. First, the Court of Justice had not done so, and she wanted the tests to be harmonious. Second, the facts were extreme, and she thought that the child would not have been conceived or born and kept in Pakistan but for the fact that the father was holding Haroon's mother there against her will. Third, there would be idiosyncratic factual situations where the Hague Child Abduction Convention would be implicated if the child had no country of habitual residence because of the rule. Fourth, "there is judicial, expert and academic opinion in favour of the child acquiring his mother's habitual residence in circumstances such as these." Of course Lord Hughes's concurring judgment is a perfect example of this opinion. Hence, cumulatively, Lady Hale considered it more appropriate to withhold an explicit judgment on the rule against habitual residence requiring at least some presence in the country. *Id.* ¶¶ 56–58.

64. *Id.* ¶ 59. In such a case, "the jurisdiction of England and Wales is determined by the laws of England and Wales." *Id.*

65. *Id.* ¶ 60.

66. *Id.*

> [W]e have already established that the prohibition on section 2 of the 1986 Act does not apply to the orders made in this case. The common law rules as to the inherent jurisdiction of the High Court continue to apply. There is no doubt that this jurisdiction can be exercised if the child is a British national.

Id.

The child is a British national within this meaning of the concept because his father was born in England. For this proposition, see Lord Cranworth LC, in *Hope v. Hope* (1854) 5 De GM & G 328, at 344–45 ("it is established by statute that the children of a natural born father born out of the Queen's allegiance are to all intents and purposes to be treated as British born subjects . . . it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown, as parens patria").

67. *Id.* ¶ 68.

3. Parens Patriae Jurisdiction

All parties agreed that *parens patriae* jurisdiction could theoretically exist in this contest.[68] The question was whether it should be exercised in this particular case, because of the extraordinary nature of that basis for jurisdiction.[69] Upon remand, Judge Parker is to consider several factors in deciding whether to use this "extraordinary" jurisdictional claim.[70]

The degree of discretion left to the trial judge in this instance is quite large. If Judge Parker decides that exercising *parens patriae* jurisdiction is not appropriate, then a holding on the issue of habitual residence without physical presence becomes necessary.[71] If that is the case, then the court will refer the question to the Court of Justice of the European Union on the issue of habitual residence.[72]

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68. This concept derives from the ancient notion that a child owed allegiance to the Crown by virtue of being born a subject. In return, the Crown could exercise protective (*parens patriae*) jurisdiction over the child wherever he was in the world. It was first considered in the case of *Hope v. Hope*, [1854] De GM & G 328. Lord Cranworth LC said:

> [I]t is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.

Id.

69. Despite its ancient nature, the power of jurisdiction under *parens patriae* was not considered outdated or useless. In promulgating the 1986 Family Law, the Law Commission "recognized its continued existence." [2013] UKSC 60, ¶ 61. At the same time, however, the notion had recently been called an "exorbitant jurisdictional" claim based on nationality by Lord Justice Thorpe in *al Habtoor v. Fotheringham* [2001] EWCA Civ 186. It has only been used in the most extreme cases, such as that of *Re B; RB v. FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436 (Fam), [2008] 2FLR 1624.

There, *parens patriae* jurisdiction was exercised over a fifteen-year-old Pakistani girl who had never touched foot in England or Wales, but who had joint Pakistani and British citizenship. Mrs. Justice Hogg said that the facts of the case and the forced marriage of the girl constituted sufficiently dire and grave circumstances that use of the extraordinary jurisdictional grant was appropriate. *Id.*

70. *Id.* ¶ 65. Lady Hale pointed out several factors that should be considered at paragraph 65 of the judgment, including (1) the practicality of the mother litigating in Pakistani Courts, (2) the circumstances by which the children came to be in Pakistan, including the level of coercion of the mother, and (3) the fact that the other three children are already habitually present in England and Wales.

There are also factors militating against the use of *parens patriae* as a basis for asserting jurisdiction over Haroon. These include the fact that it is:

> inconsistent with and potentially disruptive of the modern trend toward habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident.

Id. ¶ 64.

71. *See* [2013] UKSC 60, ¶ 67.

72. Should she decide not to exercise jurisdiction on the basis of his nationality and allegiance, it

III. THE ENGLISH NIGHTMARE AND NOBLE DREAM

H.L.A. Hart made several propositions in his seminal 1977 lecture entitled "The Nightmare and the Noble Dream"[73] that are applicable to the outcome and the reasoning of this United Kingdom Supreme Court case. The first among them is the existence of legal realist reasoning in English jurisprudence.[74] Second is the existence in English judicial reasoning of concentric circles of appeals to principles, standards, and values in the face of indeterminacy, that are familiar to American judges.[75] This latter characteristic disproves the most extreme claims of the legal realists and is reminiscent of Hart's Noble Dreamers.

A. The Nightmare in Matter of A

The Legal Realist characteristics of the decision in *Matter of A* are demonstrated at both the trial level and in the Supreme Court's decree. At

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will become necessary to decide whether he is indeed habitually resident here. As already explained, this Court cannot resolve that question without referring it to the Court of Justice. The parties should therefore have liberty to apply to this Court for a reference to be made in the event that a decision on the point becomes necessary. *Id*. ¶ 67.

73. Hart, *supra* note 1, at 969.

74. Here, I am referring to the inability of Lady Hale to take her reasoning to its logical conclusion that I mentioned above. Specifically, she states the undesirability of a determination of habitual residence where the child has never been present in England. But she realizes that to dispose of the case on that ground would allow a bad outcome. [2013] UKSC 60, ¶ 55. Several commentators had recently said, in connection to factually similar occurrences, that such a judicial ruling would go against the purpose of European Union law, and they believe that to allow Haroon to stay in Pakistan would do an injustice when the woman is being oppressed. Reunite International Child Abduction Centre believes that:

> while there should be no rule that a new-born child takes the habitual residence of the mother, the child's place of birth should carry little weight where the only reason that the child has been born in a particular place is because the mother has been deprived of her autonomy to choose where to give birth.

Id. ¶ 57. Lord Hughes, in this very case, would have found habitual residence on the facts, for that very purpose. Intervening NGO Centre for Family Law and Practice argued the same point. *Id*.

As previously mentioned in note 37, however, other examples include the opinion of Lord Charles in *B v. H. (Habitual Residence: Wardship),* [2002] 1 FLR 388. The trial court opinion in *Matter of A* could also be seen as evidence of legal realism. Finally, the opinion of Justice Hogg in *Re B; RB v. FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436 (Fam), mentioned in note 69, *supra*, is another example.

75. Indeed, Lady Hale's opinion can also demonstrate this point. Instead of holding, like Lord Hughes would have done, that habitual residence (which is a factual inquiry) is present on the facts of this case, she admits that such a reading would strain the case law and precedent. Having so held, she considered the principles of justice and fairness afterward. This fidelity to case law and precedent, and then looking to higher levels of principle when ambiguity exists, is the hallmark of the Noble Dream analysis that HLA Hart discusses. We thus see the same characteristics playing out in English jurisprudence.

the trial level, Judge Parker stretched the term *habitual residence* to include a situation where the person had *never been a resident, or even touched English soil*.[76] If *habitual* implies anything at all, it must mean *at least once*. To hold that "habitual" can include "never" ignores any recognized ordinary usage of the word.[77] Because Haroon had never been present in the country, this strongly implies a results-based reasoning process that is consistent with the Nightmare/Legal Realist views of judging.

In the Supreme Court, although the judges rejected the explicit grounds that the trial court relied upon and instructed the court to consider another ground for jurisdiction, the Court still took a roundabout way to get to a result they wanted. *Parens patriae* is not a normal grounds to assert jurisdiction.[78] The usual grounds were laid out in the 1986 Act and the Brussels regulation. The most straightforward course of reasoning would have been to hold that those grounds do not exist in this case, and thus a child who had never touched English soil could not possibly be habitually resident there nor subject to her jurisdiction.[79]

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76. [2013] UKSC 60, ¶ 9. She adopted the approach of Judge Charles in *B v. H (Habitual Residence: Wardship)*, [2002] 1 FLR 388. *Id.* There, Charles said:

> Although it was possible for individuals to have no habitual residence, a baby had an habitual residence if its parents had an habitual residence. The mere fact that a baby was born abroad did not of itself found a conclusion that the baby was not habitually resident in England; it was not the case that a baby could not be habitually resident in England until he or she had physically been to England.

[2002] 1 FLR 388.

77. Lady Hale comes close to this assertion when she says:

> It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him . . . . It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country.

[2013] UKSC 60, ¶ 55.

78. Lord Thorpe, in *Al Habtoor v. Fotheringham* [2001] 1 FLR 951, said, referring to *parens patriae* jurisdiction, courts "should be 'extremely circumspect' and 'must refrain from exorbitant jurisdictional claims,'" founded upon *parens patriae* "because 'such claims were outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations.'" *Id.* ¶ 62.

79. It should be noted that the reasoning in this section is consistent with judgments given at the intermediate court of appeals in this case. There, judges Patten and Rimer wrote that a child who had never physically set foot in Britain could not, as a matter of law, have been habitually present:

> [T]he question of whether a person is habitually resident in a particular country is one of fact. . . . [A]n essential ingredient in the factual mix justifying an affirmative answer is that the person was at some point resident in that country; and that it is not possible to become so resident save by being physically present there. If there has been no residence there, there can be no habitual residence there.

Id. ¶ 84 (judgment of Lord Hughes). Those justices thus demonstrated much less of the legal realist characteristics than the trial court or the Supreme Court. To them, if there was indeterminacy in the

The hard facts of the case made such a result difficult: the three older children and the mother all clearly have a right to remain in England, and an English court has clear jurisdiction over the older three children. The only reason that Haroon is not subject to that court's jurisdiction is because of the coercive and illegal actions of the father to place his wife and children in a situation of quasi-imprisonment. It has long been a feature of European family law that the jurisdictional status of a child cannot be changed unilaterally by the wrongful actions of a parent, such as kidnapping and fleeing the jurisdiction.[80]

In an important sense, that is what happened here: Haroon would not have been born in Pakistan but for the wrongful actions of his father. That is, the English courts would have had jurisdiction but for the wrongful actions of the father. Facts such as these undoubtedly played a role in convincing the Supreme Court to ask the trial court to consider an ancient, seldom-used remedy as justification for reaching a humanitarian ends.[81] This is arguably a strong example of judging in the legal realist tradition.

B. The Noble Dream in Matter of A

On the other hand, the Supreme Court did not go all the way to the legal realist position. In fact, they overruled the most egregious incarnation of outcome-based jurisprudence when they abrogated Lord Charles' reasoning from *B v. H. (Habitual Residence: Wardship).* On facts "very similar" to the ones in that case, the Supreme Court rejected the proposition of habitual residence.[82]

They did not, as a superficial realist position would assert, "push aside [their] law books and proceed to legislate" in the face of indeterminacy.[83] Instead, the judges recognized the indeterminacy. They determined that to

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term "habitual resident" it did not extend to a context where someone was *never* resident.

80. "[W]here two parents have parental responsibility for a child, one cannot change the child's habitual residence unilaterally . . . . Recognizing a unilateral fait accompli would be a 'charter for abduction.'" *Id.* ¶ 39 (quoting *Re M (Abduction: Habitual Residence)*, [1996] 1 FLR 887, ¶ 52).

81. *Id.* ¶ 67.

82. *Id*. ¶ 42.

83. Hart, *supra* note 1, at 981. The indeterminacy that I am talking about here is the provision of the Brussels Regulation upon which the majority judgment and the separate judgment of Lord Hughes disagree. For his part, Lord Hughes would have held the child was habitually resident in England:

> The only difference between the elder children and the youngest is the accidental fact that he has not yet reached the shores of his homeland. The reason why he has not done so is because he has been wrongly detained elsewhere by coercion. In my view, he is, like them, a member of the family unit which is firmly based in England and when born into it he was like the rest of its members habitually resident there.

[2013] UKSC 60, ¶ 93.

assert jurisdiction on the grounds of habitual residence at this point was unwise, and proceeded to consider principles that should guide them as they resolved the indeterminacy. This is the claim of the moderate noble dreamers.[84]

The chain of reasoning that Noble Dreamers advocate can be followed in this case.[85] First, the Supreme Court looked to the explicit language of the statutes at issue. Judge Parker's order did not fall into the straightforward terms of Part I of the 1986 Act. That meant the existence of indeterminacy.

Then, in discussing *parens patriae* jurisdiction, Lady Hale appealed to the ancient principles upon which that doctrine is based. She considered the facts in light of these principles and appropriately found *parens patriae* to be a defensible ground for jurisdiction. And finally, she followed one of the most important characteristics of Noble Dreamers: instead of simply legislating from the bench and imposing that "extraordinary" basis for jurisdiction, she remanded the case for further factual development relevant to that doctrine.[86] This incrementalist approach demonstrates that judges in fact are constrained in their discretion, in spite of the existence of indeterminacy, in accordance with Hart's theory.

IV. THE CONTEXT FOR THE CONVERGENCE

The reasoning employed by the Supreme Court judges demonstrates a convergence in the judicial reasoning process, at least in some cases, between American and British judges. Strict application of statutory interpretation and the uncontroverted supremacy of Parliament have given way to a more robust statutory interpretation. This in turn is because of the increasing power of the European Union and the blurring of lines of sovereignty, at least around the edges.[87] British constitutional reform, such

84. Hart, *supra* note 1, at 978–89.

85. Hart describes the process that Llewellyn details, which is a fairly standard Noble Dream jurisprudential method. This requires looking first at the written rules. If indeterminacy exists, the successive considerations within the concentric circles of analysis are rules, principles, standards, and values. *See id.* at 979. There are no definite boundaries between the various levels, but in general, as one moves from rules toward values, one is affected by considerations of successively increasing generality.

86. [2013] UKSC 60, ¶¶ 64–65, 68.

87. Ascension to the European Union is one example of transferred sovereignty. Also, the United Kingdom is signatory to several Europe-wide human rights treaties. These treaties necessarily limit the ancient superiority and sovereignty of Parliament within the British system. Some commentators have stated that the increased independence of the judiciary in the United Kingdom, and in particular, the emergence of the new United Kingdom Supreme Court, are required in order to police these new limits

as the Constitutional Reform Act of 2005, which increased judicial independence and eliminated any legislative involvement by the Law Lords, is further driving this phenomenon.[88]

These two general phenomena will make the British judiciary more powerful institutionally relative to Parliament, thus driving a similar increased concern for judicial operations and reasoning similar to that which exists in the United States.

A. International Commitments and English Courts

With British commitments to the European Union and European-wide treaties, Parliament's unique, exclusive, and unparalleled supremacy over British law is fraying.[89] The new U.K. Supreme Court reflects a reaction to the growing importance of European law in the legal system of member states.[90] Indeed, the very creation of its court, with its stronger, more independent judiciary, is probably due to the requirements of international treaties.[91] And in the very case of *Matter of A*, Lady Hale remarks that further clarification on the issue of habitual residence will be referred to the European Court of Justice should it become necessary.[92] This important legal determination will not be made at the national level, but

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on Parliamentary power. *See* Alyssa King, *A Supreme Court, Supreme Parliament, and Transnational National Rights*, 35 YALE J. INT'L L. 245 (2010).

88. *See infra* note 93, specifically the discussion of the Constitutional Reform Act of 2005.

89. There is much commentary and controversy on the extent of sovereignty that has slipped away from traditional British institutions such as Parliament. For a general introduction of this topic in the context of the judiciary of England and Wales, see James Hyre, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of* 1998, 73 FORDHAM L. REV. 423, 425 (2004) (noting that the Human Rights Act of 1998 obligated the domestic courts to apply international human rights law); Michael Skold, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?* 39 CONN. L. REV. 2149 (2007); Monica A Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEMP. INT'L & COMP. L.J. 279 (2008); Judith Maute, *English Reforms to Judicial Selection*: *Comparative Lessons for American States*? 34 FORDHAM URB. L.J. 387 (2007); King, *supra* note 87.

For a discussion of traditional British parliamentary sovereignty within the Constitutional structure of Great Britain, see A.V. DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION, 42 (10th ed. 1961). This book also contains a helpful discussion of "Diceyan Theory," the theory of Parliamentary sovereignty was because it had the right to make or unmake any law, whatever. *Id*.

90. King, *supra* note 87, at 246.

91. The British government, under Tony Blair, believed that the Human Rights Act, with its increased focus upon individual rights, required the United Kingdom "to *formally* end the judicial role of the House of Lords in order to enhance the appearance of judicial independence." *See* Hyre, *supra* note 89, at 424 (emphasis added).

92. [2013] UKSC 60 ¶ 67.

instead the supranational.[93] This demonstrates the extent to which sovereignty is increasingly being transferred to supranational institutions.

And when these supranational institutions issue rulings inconsistent with domestic legislation, it will be up to the courts, to some degree, to accommodate the two sides, increasing the relative power of the judiciary.

The erosion of nation-state sovereignty is not unique to the United Kingdom. Belgium and France have given their courts' jurisdiction over international human rights issues, taking it away from national legislatures.[94] An increased emphasis on formal and substantive judicial independence is also in vogue, as the Constitutional Reform Act of 2005 which gave rise to the U.K. Supreme Court demonstrates.[95]

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93. "As already explained, this Court cannot resolve [the definition of habitual residence] without referring it to the Court of Justice. The parties should therefore have liberty to apply to this Court for a reference to be made in the event that a decision on the point becomes necessary." [2013] UKSC 60 ¶ 67.

94. King, *supra* note 87, at 245. "They further empower judges to allow them to speak for the constitution on the belief that judges are 'the mouth of the law.'" *Id*. at 245–46. This statement echoes the American judiciary's responsibility to interpret the law: "it is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). This is another example of courts in countries with a tradition of legislative supremacy acknowledging the expanding role of an independent judiciary. Further, this statement carries with it the implication of at least some type of judicial review power. For the power to say what the law is carries with it the possibility that that determination will be different from the idea of the legislature.

95. *See* Constitutional Reform Act, 2005, c. 4 (UK.). This legislation was a major reform of long-standing British constitutional law. It removed the Law Lords from their place in the House of Lords. They would now be in a structurally independent Supreme Court of the United Kingdom. Further, the Lord Chancellor, as head of the judiciary, would no longer be involved in cabinet politics as a minister. This new Court would also take over some of the jurisdiction of the Judicial Committee of the Privy Council. And to emphasize the Court's independence, it will be housed in a new building, separate from its old home in the House of Lords at Westminster. *Id*.

The change may be as much cosmetic as anything, however, because Law Lords refrained from politics, and political Lords were excluded from the judicial functions of the House. But the symbolism of separation of powers was important to the drafters of the legislation. According to the government, the intention behind the legislation was to "put the relationship between the executive, the legislature, and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system." *See* the government's consultation paper on the proposals: Dep't for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, 10 (2003), *available at*, http://www.dca.gov.uk/consult/supremecourt/supreme.pdf (last visited Feb. 10, 2014). The removal of the Law Lords from Parliament to the U.K. Supreme Court underlines the new independence of the judiciary.

Admittedly, the government says that "there is no proposal to create a Supreme Court on the US model with the power to overturn legislation" *Id*. at 8. But the new structural independence of the court, combined with the responsibilities of the new court to take into account international law where it conflicts with Parliament, will lead to less dramatic versions of the same thing: judicial review.

B. Constitutional Reform, Judicial Independence and Convergence

Structural reforms taking place within the British constitution are another major reason that there is a convergence in English and American jurisprudence. A newly independent Supreme Court, combined with an increased emphasis on separation of powers has led to the judiciary operating in a functional environment much more similar to the American judiciary.[96]

H.L.A. Hart alluded to the position of the American judiciary (in the separation of powers context) as one factor in its increased relative importance and politicization, along with its consequences for American jurisprudence.[97] The Supreme Court of the United Kingdom now enjoys a position that is more similar to its American counterpart than previously.

Thus, we can see how both external and internal forces are combining to close the gap that Hart recognized between American and English jurisprudence. They are working in a synergistic fashion. International commitments to human rights and international law require the British judiciary to accommodate Parliamentary supremacy while accommodating international concerns, where the two differ, thus increasing its power and potentially politicizing it.

Internal changes, such as a desire to put the British judiciary on a modern footing and thus avoid appearances of a politicized judiciary, also militate in favor of separation of powers.[98] And of course, the more separate the judiciary is, the less subordinate it is to Parliamentary supremacy. These two forces show no sign of abating.

V. CONCLUSION

H.L.A. Hart's famous analysis of American judicial reasoning which demonstrated a continuum from legal realist judging to principled and value-based reasoning can now be seen in British judicial philosophy. *Matter of A* demonstrates both the legal realist proposition that outcomes

96. *See, e.g.*, *supra* note 87.

97. Here, Hart notes that the reason for distinctive American obsession with jurisprudential reasoning is "the quite extraordinary role that the courts, above all the United States Supreme Court, play in American government. In de Tocqueville's famous words, 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'" He then attributes this to two overriding considerations: (1) the power of judicial review, and (2) the Due Process clause of the Fourteenth Amendment. *See* Hart, *supra* note 1, at 970–71. As it relates to the new experience of the United Kingdom Supreme Court, structural independence is also important.

98. King, *supra* note 87, at 245.

are determined by the preferences of the adjudicator and that there are over-riding values and standards to which adjudicators appeal when the interstices in the law become apparent. In this case, the hard facts of a woman oppressed by an abusive husband and denied access to her children led the trial judge to exercise jurisdiction on a flimsy (and ultimately rejected) theoretical basis. On the other hand, the Supreme Court of the United Kingdom adhered to the letter of the jurisdictional treaties, appealed to ancient customs and values, and remanded for further consideration by the trial court. H.L.A. Hart would be very familiar with this jurisprudential phenomenon.

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