The most comprehensive opinions, written by Lord Nicholls and Baroness Hale of Richmond, agreed on both the result and most points, save for a small difference in their view about business assets, addressed below. Lord Hoffmann and Lord Mance concurred with Baroness Hale, while Lord Hope of Craighead concurred with both. They all agreed they should provide more certain standards than the statute itself offered. They were also unanimous that neither a spouse's conduct, nor an assessment of his or her contributions, should affect the judgment, exceptional cases aside. The Court of Appeal had believed it appropriate to penalise Mr Miller for ending his marriage "without any remotely sufficient reason" (at [50]). But this conduct "fell far short" of the "obvious and gross" behaviour Baroness Hale believed the statute required (at [145]), a standard echoed by Lord Nicholls ("gross", at [64]–[68]) and Lord Mance ("egregious" at [164]). As for contribution, Baroness Hale (at [146]) pointed out that the Act does not refer to the contributions made to the parties' accumulated wealth, but to contributions to the welfare of the family, and in that respect each should be seen as doing their best in their own sphere. Only if there was such disparity in their contributions that it would be inequitable to disregard it should they be taken into consideration. Contribution in this broad sense is but the "other side of the coin" from conduct (Lord Mance, at [164]) and would therefore require for its routine consideration an impractical and inappropriate "minute examination" of the marital life (Lord Nicholls, at [67]).

In all these features the Lords adopted views very similar to those of the American Law Institute ("ALI") (*Principles of the Law of Family Dissolution* (2002)), although the ALI reserves no exceptions for gross misconduct or highly imbalanced contribution. The Lords' formulation as to conduct seems close to New York's, which allows its consideration in only "egregious cases that shock the conscience". In practice New York never considers misconduct short of serious felonies such as rape and attempted murder (Ellman *et al*., *Family Law: Cases, Text, Problems* (4th edn, 2004), at pp.294–295), exceptions sufficiently rare to be limited in importance. As for contribution, the appropriate rule is related to the distinction between marital and separate property, the one point on which Baroness Hale and Lord Nicholls partially parted. He would include all assets earned during the marriage, while she would exclude business assets from the marital pot unless both spouses worked at the enterprise. But their difference may be semantic rather than real, as illustrated by their agreement on the judgment in *Miller*, in which the only question was the wife's claim on the husband's business assets.

Baroness Hale explained that the short marital duration in *Miller* justified a downward adjustment from the benchmark of equal division, but not to zero (at [151]–[152], [158]). So in practice her exclusion of business assets is really the reservation of greater discretion to depart from

equality (her starting point) in their allocation. Lord Nicholls, by contrast, allowed Mrs Miller's claim *because of*, not despite, the contribution of Mr Miller's labour *during marriage* to the assets' increased value (at [71]). So he starts by excluding all separate property, including the business assets Mr Miller had before the wedding, but then adding back the appreciation in their value that results from his marital labour. It thus seems that Lord Nicholls and Baroness Hale start from opposite ends of the field but meet in the middle, a meeting made easier by the fact that neither insisted on a precise location, allowing both to accept the trial judge's choice as within acceptable bounds.

Lord Nicholls' reasoning follows the standard community property approach, which is now also followed in many American common law states. It offers consistency in applying the principle that both spouses share the fruits of all labour that either performs during marriage, even when that labour is applied to a separate asset—which will in consequence now have both separate and marital components. This is well down the path toward thinking about property allocation at divorce in property law terms. By contrast, Baroness Hale seems more inclined to frame the allocation question in equitable terms: the issue for her is not so much the nature of the property, as the guideposts for the court's exercise of its equitable power to redistribute it, and one such guidepost is the need to be cautious in reallocating business assets. If the American experience is any guide, this difference in framing the question reflects two different points in the evolution of marital property law from the common law system to a fully developed system of equitable distribution—the American term for the marital property reforms begun in the 1960s and 1970s. In the decades since those reforms began, American law has trended away from "equity-thinking" and towards "property-thinking", with compensation remedies increasingly confined to maintenance payments. Much more recently, this trend in marital property law has been followed by increasing interest in the use of presumptions and guideposts to secure more predictability and consistency in maintenance awards.

Is this pattern in the development of American marital property law a guide to the English law's future? Americans have been at this longer because our reforms came sooner. Virtually all American states, for example, have for decades included pensions earned during marriage in the pot of property that must be divided at divorce, facilitated by federal legislation that requires pension administrators to honour "qualified domestic relations orders" requiring them to pay directly to a former spouse his or her share of the employee-spouse's annuity. But Americans may also be more hospitable to community property concepts. Eight American states, including California and Texas, have always had community property, owing to their Spanish or (in the case of Louisiana) French legal heritage. In those states the wife has always had equal

ownership in a car, or shares, or land, or a business that the husband buys with his earnings during marriage, even if he takes it titled in his name alone. So many American lawyers have always been familiar with such rules. While the other 42 states initially followed the English marital property system, they all moved to equitable distribution by the late 1970s. Most had statutes that distinguished marital and separate property at the outset, with definitions that mimic community property rules. Others, like the English law, made no distinction, and gave their courts equitable authority to allocate all property. Over time, however, the number of true "all property" states has declined to a handful. Some changed their statutes, while most of the rest accepted judicially-developed allocation rules that effectively replicate the marital-separate property distinction. This was possible because all the new statutes, like the English Matrimonial Causes Act 1973, gave judges wide leeway in exercising their new equitable power, whether it applied to all property or just marital property.

While general characterisations of these 42 reformed common law state systems are inherently hazardous, it is fair to say that despite some notable exceptions, the trend favours rules that presume equal division of marital property at divorce, with separate property left with its owner (*ALI Principles*, Reporter's Notes to §4.09, Comment *b*). More importantly, the common law states have increasingly come to treat property claims of divorced spouses as *property* claims, rather than as appeals to the court's equitable conscience. They trace assets to their origins in marital or separate funds, but treat as marital the increased value of separate property arising from marital labor. (*ALI Principles,* Reporter's Notes to §4.05, Comment *b* and §4.06, Comment *b*). They do all this even though they recognise no marital property interest during the intact marriage, nor at the death of either spouse, as do the eight true community property states. But at divorce they act as if, at that moment and that moment alone, a kind of community property interest exists. While they all once regarded themselves as exercising a new equitable power to give one spouse a share of property that really belonged to the other, an increasing number now think like community property states, regarding themselves as dividing between the spouses property in which both have ownership. That change in mindset transforms the property claim from a plea for charity ("can you please allow me some of my spouse's property?") to a claim of entitlement ("as the partnership has ended, I'll take my share now, thank you"). Lord Nicholls seems to favor this shift in thinking (at [9]), but it is not clear if the other Lords are comfortable with it. What the American experience teaches, however, is that this shift is necessary to achieve horizontal justice (consistency across cases) in property allocations.

It seems Baroness Hale may believe such a shift in judicial thinking is not possible in English law as it now stands. She observed that it