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All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases

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ALL'S FAIR IN LOVE AND WAR: BUT WHAT ABOUT IN DIVORCE? THE FAIRNESS OF PROPERTY DIVISION IN AMERICAN AND ENGLISH BIG MONEY DIVORCE CASES

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"A lot of people have asked me how short I am. Since my last divorce, I think I'm about $100,000 short."[1]
—Mickey Rooney

ABSTRACT

Eyebrows have recently arched not only at the high sums involved in big money divorce cases, but also at the amount of ink spilled on this relatively small subset of divorce cases. Yet, it is precisely in big money cases, wherein judges have discretion over resources that significantly exceed the needs of the parties, that fairness acquires substantial haziness. The question of fairness is particularly acute in short marriages, as well as when one spouse is at fault for the divorce or when one spouse contributes extraordinarily to the marriage. Courts in both England and the United States have been encountering these issues with increasing frequency and differing results. The majority of American courts have employed the principle of equitable distribution, resulting in a disproportionate property division between spouses, particularly when the marital estate grew because of one spouse's extraordinary efforts. England, on the other hand, has recently implemented a yardstick of equality that aims for near equal property division between spouses, representing a major shift in English case law and a doctrinal break from American law. This article examines these

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1. ROBERT ANDREWS, THE COLUMBIA DICTIONARY OF QUOTATIONS 248 (1993).

changes in the comparative context, underscoring the consequences of each country's interpretation of fairness in post-divorce property division.

I. INTRODUCTION

Although divorce bears the brunt of many jokes, the high stakes involved in big money marriages is no laughing matter. Beatle Paul McCartney reportedly settled with Heather Mills for $64 million, nearly $1800 for every hour of their marriage.[2] Sumner Redstone, at the helm of media giant Viacom, settled with his ex-wife for approximately one billion pounds in 2002.[3] Princess Diana's settlement reportedly totaled £17.5 million.[4] However, the record for the most expensive divorce may be set by actor Mel Gibson's recently announced divorce: he stands to lose half of his $1 billion fortune.[5] Indeed, newspapers are rich with stories of big money divorces because, while marriage may be for richer or poorer, separating spouses are far less financially indifferent.

Eyebrows have arched not only at the high sums involved in big money cases, but also at the amount of ink spilled on this relatively small subset of divorce cases.[6] Critics contend big money cases lack social justice issues[7] and it is therefore preferable to focus on financially ruined, fragmented families.[8] Yet, it is precisely in big money cases the words "justice" and "fairness" acquire significant haziness.[9] For example, is it fair for a high-wage earner to pay an ex-spouse half of all future profits? Or, would it be

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2. Jennifer Conlin, *Divorce: Money Changes Everything*, N.Y. TIMES, Feb. 9, 2007, http://www.iht.com/articles/2007/02/09/yourmoney/mdivorce.php?page=1.

3. Michael Moran, *The 20 Most Expensive Divorces of All Time*, TIMES ONLINE, March 16, 2007, http://www.timesonline.co.uk/tol/news/most_curious/article1516355.ece.

4. *Id.*

5. Jill Brooke, *Do You Really Think Mel Gibson Is Bothered by Giving His Wife $400 Million?*, THE HUFFINGTON POST, Apr. 14, 2009, http://www.huffingtonpost.com/jill-brooke/do-you-really-think-mel-g_b_186801.html.

6. *See, e.g.*, Patrick Parkinson, *The Yardstick of Equality: Assessing Contributions in Australia and England*, 19 INT'L J.L. & POL'Y & FAM. 163, 172 (2005). There is certainly no shortage of divorce cases on which to focus; in 2003, there was one divorce for every two marriages. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *National Vital Statistics Reports*, Vol. 52, No. 22 (June 10, 2004), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf.

7. Parkinson, *supra* note 6, at 172.

8. Unfortunately, even the average divorce case can leave parties financially ruined. In 1993, for example, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1996). *But see* Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 J. HUM. RESOURCES 411 (2004) (arguing that divorced women live in households with more income per person than never-divorced women).

9. In the average divorce case, few assets remain post-division over which to fight, mooting most questions of fairness. Another significant grey area in divorce law occurs when the only assets are tied up with future earning capacity.

fairer for the lower income earner to receive a smaller portion of the ex-spouse's net worth, which still totals millions of dollars? Such questions are particularly acute in short marriages or when one spouse is at fault for the marital breakdown.

While American state courts have been encountering these problems with increasing frequency in recent years, English courts have been resolving them rather controversially, emerging as "the Harrods, as it were, for those shopping for divorce jurisdictions."[10] This honor of sorts is surprising given that both the American and English legal systems share the goal of fairness in property distribution. Indeed, the commonalities between the two systems peak in the average divorce case, when a divorcing couple's assets are just sufficient to meet the needs of both spouses.[11] In such cases, each spouse receives enough to cover reasonable needs, with little surplus over which to litigate. However, it is in big money cases, often when only one spouse contributes an extraordinary amount of money to the marriage, that English and American divorce law diverge, particularly since the House of Lords' 2000 landmark decision in *White v. White*.[12]

Importantly, the English approach has practical, direct consequences for American divorcing couples—jurisdiction for divorce requires only the domicile of one party.[13] If one American spouse becomes domiciled in England, it is conceivable the divorce may occur there. Therefore, many divorce battles begin over which jurisdiction is the appropriate forum, assuming the availability of several. This is particularly true in the European Union, where member states' boundaries do not pose citizenship or mobility barriers.[14]

The English treatment of big money divorce cases offers significant lessons for the American legal system, particularly on the meaning of fairness in property division. Specifically, the English experience raises questions of whether there should be a distinction among divorcing couples based on their financial situation, and if so, what that distinction should be. While American law currently lacks any clear legal distinction between big

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10. Conlin, *supra* note 2.

11. *See Fact Sheet*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/ACSSAFFFacts?_submenuId=factsheet_1&_sse=on (last visited Sept. 27, 2010). The mean income for an American household is $46,242, usually insufficient to generate sums that would result in a surplus after the spouses' basic needs were met. *Id.*

12. [2001] 1 A.C. 596 (H.L.) (appeal taken from Eng.).

13. *See, e.g.*, J. Thomas Oldham, *What if the Beckhams Move to LA and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the United States*, 42 FAM. L.Q. 263, 274 (2008).

14. *See, e.g.*, *id.* at 264.

money divorce cases and the rest,[15] English case law occasionally explicitly addresses big money couples. Even the relevant terminology is lacking in the United States, although there has been some reference to the "prodigious spouse" or the "wealthy wage earner" to describe the spouse who contributed more to a marriage financially.[16]

This article endeavors to compare the American and English approaches to post-divorce property division, probing the meaning of fairness in each jurisdiction. Part II begins by briefly surveying American divorce law on property division, focusing on the equitable distribution principle used by the majority of states. Part III examines the English legal approach to big money divorces, which rests on the yardstick of equality approach. Finally, Part IV extracts the lessons from a comparison of these legal systems, underscoring the consequences of each country's interpretation of fairness in post-divorce property division.

II. THE AMERICAN MAJORITY PRINCIPLE: EQUITABLE DISTRIBUTION

Divorces in the United States are governed by state law, and any generalization is difficult.[17] However, post-divorce property division often proceeds in two stages. The first is determining the assets. This is generally governed by statutory law in all states,[18] as well as contract law, if the parties entered into a premarital agreement. The second stage is the division of assets, which is also typically defined by statute.[19] The principle that governs this second stage in the majority of states is equitable distribution, which seeks an equitable, but not necessarily equal, division between the spouses. A minority of states, however, utilize community

15. The treatment of professional degrees may be an exception. *See* discussion *infra* Part II.D.

16. *See* Debra DiMaggio, *The "Prodigious Spouse": Equitable Distribution and Wealthy Wage Earner*, 91 ILL. B.J. 460, 460 (2003).

17. *See* Lehr v. Robertson, 463 U.S. 248, 256 (1983) ("Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships.").

18. The details of these statutes vary among the states. For example, the relevant Illinois statute subjects only marital property to division. 750 ILL. COMP. STAT. 5/503(a)-(b) (1993). Furthermore, there is a rebuttable presumption that property acquired during the marriage is marital property that is divisible upon divorce. *Id.* Finally, property gained before marriage or by gift does not qualify as marital property in Illinois. *Id.*

19. The relevant Illinois statute is typical in providing a list of factors courts should consider when dividing marital property, which is to be equitably divided regardless of who holds title to the property. 750 ILL. COMP. STAT. 5/503(a)-(b).

property, which favors a more equal property division between the spouses.[20]

The well-established nature of equitable distribution in most jurisdictions, however, has hardly slowed the debate regarding the most appropriate post-divorce property division. Instead, disagreement on this issue has fueled litigation, challenging the proper division of property upon divorce.

Before turning to this debate, it is helpful to define terminology at the outset. This article combines American and British semantics throughout: the term "big money" refers to those divorce cases wherein the resources significantly exceed the financial needs of the parties, and the term "higher income spouse" will describe the spouse that financially contributes to the marriage through exceptional efforts. Although in many big money cases it is difficult to isolate one spouse as the higher income spouse because of the equal or extraordinary nature of both parties' contributions to the marriage, this article mostly restricts its analysis to those big money cases that result from the exceptional efforts of a higher income spouse.

A. THE DEBATE REGARDING EQUITABLE DISTRIBUTION

By definition, the principle of equitable distribution requires the courts to divide property between divorcing parties equitably. However, such a division does not necessarily mean an equal split between the parties;[21] even a 95-5 division can be equitable.[22] The generally accepted theory of equitable division likens the division of property upon divorce to that of partnership dissolution.[23] While each partner has a stake in the partnership, all shares are not equal. Thus, upon dissolution of the partnership, each partner only receives the share that corresponds to his contribution. In the marital context, however, contributions are not limited to the assets that

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20. *See* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. L. REV. 359, 370 (2005-2006). *See also, e.g.*, CAL. FAM. CODE § 2550-56 (2007). In the community property system, each spouse has an interest in the community property, as opposed to separate spousal property holdings. Ira Mark Ellman, O'Brien v. O'Brien*: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949, 951 (2007).

21. *See, e.g.*, Alston v. Alston, 629 A.2d 70, 79 (Md. 1993). The Alston court stated:

> Where one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property after the parties have separated and after the marital family has, as a practical matter, ceased to exist, a monetary award representing an equal division of that particular property would not ordinarily be consonant with the history and purpose of the statute.

Id.

22. *See, e.g.*, Bean v. Bean, 115 S.W.3d 388, 393 (Mo. Ct. App. 2003). For a useful analysis of judicial discretion in equitable distribution divisions, see generally Sanford N. Katz, 73 NOTRE DAME L. REV. 1251 (1998).

23. BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:1 (3d ed., vol. 2 2005).

each spouse brings, but also extend to those contributions made to the marriage generally, such as child care.

In determining a particular division under the equitable distribution approach, courts consider several legislated factors, such as the length of marriage, the causes for the dissolution of the marriage, the age and health of the parties, and the amount and sources of income, as well as the vocational skills, liabilities, and needs of each party.[24] In these states, the courts, therefore, have significant discretion in property division, and the resulting decisions are often fact-specific. However, equitable distribution has triggered substantial litigation on the proper division of assets following a divorce. The debate regarding the meaning of "equitable" is particularly acute in the subset of divorce cases involving wealthier couples. In these cases, property divisions are often significantly disproportionate in order to reflect one partner's significant financial contribution to the marriage, an outcome that has been vigorously challenged in the courts. In such challenges, lower income spouses[25] have primarily argued that nothing short of an *equal* division can be equitable—an argument embraced by the American Law Institute (ALI) Principles.[26]

B. MODEL STATUTES AND EQUITABLE DISTRIBUTION: THE ALI PRINCIPLES AND UMDA

The ALI Principles, which cover many different areas of American law, generally inspire some debate from the legal community.[27] These principles, although influential, do not become the law in any jurisdiction until legislative or judicial action implements them. On the issue of post-

24. *See, e.g.*, CONN. GEN. STAT. §§ 46b-81 to -82 (1958); 750 ILL. COMP. STAT. 5/504 (1993).

25. The wives of corporate executives, occasionally referred to as "corporate wives," comprise one category of big money plaintiffs in the United States who are fueling litigation on the meaning of the term "equitable." *See, e.g.*, Wendt v. Wendt, 757 A.2d 1225, 1230-31 (Conn. App. Ct. 2000); McMackin v. McMackin, 651 A.2d 778, 781 (Del. Fam. Ct. 1993); *In re* Marriage of Nesbitt, 879 N.E.2d 445, 447 (Ill. App. Ct. 2007); *see also infra* note 35. Homemakers are another category of big money divorce plaintiffs. However, the stereotypical household of a patriarchical order is no longer necessarily true, with many women outperforming their husbands in the workplace. DiMaggio, *supra* note 16, at 470*; see also* Whispell v. Whispell, 534 N.Y.S.2d 557, 558 (1988) (justifying the ex-husband's low share of the marital property based on his "negative contribution to the marriage"). Thus, it is important to underscore that the equitable distribution principle is gender-neutral: all people who contribute an unusual amount of property to their marriage are allowed a share that reflects their extraordinary efforts.

26. *See* discussion *infra* Part II.B.

27. *See, e.g.*, Lynn D. Wardle, *Introduction to the Symposium on the American Law Institute's Principles of the Law of Family Dissolution*, 4 J.L. FAM. STUD. 1, 1 (2002); Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (referring to ALI's criticism of the best interests of the child standard).

divorce property division, the ALI Principles[28] adopt the minority American view of property division, rejecting equitable distribution in favor of a strong presumption of equal division.[29] There are limited exceptions, such as if one spouse commits financial misconduct.[30]

Despite the strong preference of the ALI Principles for equal division, however, most states have enacted equitable distribution statutes.[31] These parallel another model statute, the Uniform Marriage and Divorce Act of 1970 and 1973 (UMDA). The UMDA, promulgated by the National

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28. For an excellent background and commentary on the drafting of the ALI Principles in Family Law, and on property division in particular, see Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119, 123 (2001). "Although the American Law Institute is best-known for its Restatements of the Law, 'the current disarray in family law' led the Institute to opt, in this Project, for principles that would 'give greater weight to emerging legal concepts' than would a Restatement." *Id.* (quoting Geoffrey C. Hazard, Jr., *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft 1997)).

29. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.15(1) (Proposed Final Draft 1997) [hereinafter PRINCIPLES]. Section 4.15(1) in the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* states, "In every dissolution of marriage, the presumption arises that marital property shall be divided so that the spouses receive marital property equal in value, although not necessarily identical in kind." *Id.* The presumption can be rebutted when: (1) it is equitable to compensate a spouse for a "loss recognized," in whole or in part, with an enhanced share of the marital property; or (2) one spouse is entitled to an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it. *Id.* § 4.15(2)(a)-(b). *See also* Craig W. Dallon, *The Likely Impact of the ALI of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 892 (2001). Professor Dallon also noted the ALI Principles distinguish themselves from the majority of jurisdictions by rejecting the discretionary factors used in equitable distribution cases and by proposing a recharacterization of separate assets to marital assets over the course of a long marriage. *Id.*

30. PRINCIPLES, *supra* note 29, § 4.15(2) (Proposed Final Draft 1997). Specifically, unequal division is permitted when:

> (a) the court concludes . . . that it is equitable to compensate a spouse for a loss [that would otherwise result in an alimony award under] Chapter 5, in whole or in part, with an enhanced share of the marital property; or (b) the court concludes under § 4.16 that one spouse is entitled to an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it; or (c) marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses' financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.

Id.

31. *See, e.g.*, COLO. REV. STAT. § 14-10-113 (2001); 13 DEL CODE ANN. tit. 13, § 1513 (2001); 750 ILL. COMP. STAT. 5/503 (2001); MD. CODE ANN., FAM. LAW § 8-205 (2001); NEV. REV. STAT. ANN. § 125.150 (2001); N.H. REV. STAT. ANN. § 458.16 (2000); N.Y. DOM. REL. LAW § 236 (Consol. 2001); N.C. GEN. STAT. § 50-20 (2000); OHIO REV. CODE ANN. § 3105,171 (2001); 23 PA. CONS. STAT. ANN. § 3502 (West 2001); R.I. GEN. LAWS § 15-5-16.1 (2001); TENN. CODE ANN. § 36-4-121 (2001); VT. STAT. ANN. tit. 15, § 751 (2001); VA. CODE ANN. § 20-107.3 (2001). For a discussion of the impact of the ALI Principles on equitable distribution, see JOHN DEWITT GREGORY, JANET LEACH RICHARDS & SHERYL WOLF, PROPERTY DIVISION IN DIVORCE PROCEEDINGS: A FIFTY STATE GUIDE, 2006 SUPPLEMENT 1-32-38.1 (2006).

Conference of Commissioners on Uniform State Laws,[32] advocates equitable distribution of marital property at divorce, which often results in disproportionate property divisions that trigger litigation by lower income spouses.[33] Thus, the position of the ALI Principles on post-divorce property division remains the minority American approach.

C. THE INTERPRETATION OF EQUITABLE DISTRIBUTION IN CASE LAW: *WENDT V. WENDT*

Although American law does not distinguish among divorce cases based on financial stakes, the division of property in high net divorce cases has the most potential to result in a disproportionate division, especially in equitable distribution states. Specifically, the higher income earner typically receives a larger amount to reflect a higher marital contribution. However, this outcome has often been vigorously challenged in American state courts by lower income spouses.

One of the most famous cases challenging equitable distribution is *Wendt v. Wendt*,[34] where the wife demanded exactly half of the marital estate that she valued at $100 million.[35] After Mrs. Wendt rejected her ex-husband's $8 million settlement and $250,000 in annual alimony, a Connecticut court awarded her approximately $20 million in one of the largest divorce rulings in American history.[36] She appealed the decision, seeking half of his future earnings, based on the argument that only an equal distribution is an equitable one.[37]

Mr. and Mrs. Wendt were high school sweethearts and married on July 31, 1965, in Wisconsin.[38] The plaintiff wife, Mrs. Lorna Wendt, was a public school music teacher early in their marriage, earning modest wages.[39] After quitting her employment, she had been a mother,

32. *See* UNIF. MARRIAGE & DIVORCE ACT § 307 alternatives A-B (amended 1973), 9A U.L.A. 288 (1998); Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. DET. MERCY L. REV. 307, 310 (2007).

33. *See* discussion *supra* Part II.A.; *infra* Part II.C.

34. No. FA96 0149562 S., 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998), *aff'd*, 757 A.2d 1225 (Conn. App. Ct. 2000).

35. *See* Betsy Morris, *It's Her Job Too Lorna Wendt's $20 Million Divorce Case is the Shot Heard 'Round the Water Cooler*, CNNMONEY.COM, Feb. 2, 1998, http://money.cnn.com/magazines/fortune/fortune_archive/1998/02/02/237198/index.htm. *Wendt* generated much commentary on the role of a corporate wife. *See, e.g.*, Paul Barett, *Wendt Divorce Dissects Job of "Corporate Wife,"* WALL ST. J., Dec. 6, 1996, at B1, B17.

36. *See* Morris, *supra* note 35.

37. *Wendt*, 1998 WL 161165 at *42.

38. *Id.* at *1.

39. *Id.*

homemaker, and corporate wife.[40] The defendant's husband, Mr. Gary C. Wendt, was the Chairman, President, and Chief Executive Officer of GE Capital Services, Inc.[41] The couple had two daughters who were grown and self-sufficient at the time of the divorce in 1995.[42]

Mrs. Wendt claimed her contributions to Mr. Wendt's career entitled her to half of all his worth because she was his equal partner during the marriage.[43] Specifically, throughout his career, she discussed his work with him.[44] She entertained guests at their multi-million dollar home in Stamford, Connecticut, and accommodated invitations "to parties in New York City, out-of-town dinners or a golf engagement."[45] She would occasionally accompany Mr. Wendt on expensive and exotic corporate trips.[46] At trial, she described herself as the "ultimate hostess"[47] and a "corporate wife."[48] Additionally, Mrs. Wendt argued that her homemaking marital contributions entitled her to an equal share of the marital estate.[49] She thus introduced evidence of her care for the children, duties of cooking, and general maintenance of the household, albeit with hired help.[50]

Mrs. Wendt's homemaking contributions were undisputed, as was the quality of those services.[51] However, the court found her view of the contributions she made to Mr. Wendt's career to be exaggerated.[52] Mr. Wendt's contributions to GE and the family finances, however, were extraordinary.[53] During his time at GE Capital, the company's earnings surged from $271 million to $2.8 billion.[54] After hearing testimony on Mr.

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40. *Id.* However, at trial, "The plaintiff offered an expert witness to support her claim that she is entitled to a substantial distribution in the tens of millions of dollars by reason of giving up her career as a public school music teacher." *Id.* at *21.

41. *Id.* at *11.

42. *Id.* at *6.

43. *Id.* at *19. Mrs. Wendt summarized her view of the legal issues: "Marriage is a partnership, and I should be entitled to 50%. I gave thirty-one years of my life. I loved the defendant. I worked hard and I was very loyal." *Id.* at *1.

44. *Id.* at *5.

45. *Id.*

46. *Id.* at *13-*14.

47. *Id.* at *14, *16.

48. *Id.* at *5.

49. *Id.* at *1, *19.

50. *Id.* at *5, *12.

51. *Id.* at *7.

52. *Id.* at *16. For example, during a business trip to Poland, "[w]hile the defendant had meetings and lunches with the Polish Ministry of Finance, a representative of the Polish Center Bank, the President of the Gdansk Solidarity Bank and other executives, the plaintiff had a 15 minute tour of the city, watched a 20 minute movie in the historical museum and spent from 9:30 a.m. to 1:00 p.m. shopping." *Id.*

53. *Id.* at *8.

54. *Id.* at *11.

Wendt's extraordinary vision for GE and his exceptional leadership skills, the court found that Mr. Wendt made the most substantial contributions to GE of all its employees.[55]

The court ultimately accepted the value of Mrs. Wendt's non-monetary contributions to a marriage, stating:

> It is widely recognized that the primary aim of property distribution [under the equitable distribution principle] is to recognize that marriage is, among other things, "a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute-directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."[56]

Nonetheless, the court recognized that there are multiple factors to property division, only one of which is contributions. Other potential factors include the dissipation of assets, the duration of the marriage, and any premarital agreement between the parties regarding the distribution of the property.[57] In Illinois, another state adhering to equitable distribution, the courts may consider the quality of the homemaker's contributions and whether the homemaker had been frugal or extravagant. The courts may also quantify the homemaker's contributions.[58] The Connecticut Superior Court endorsed this approach in *Wendt*:

> The court must consider all of the statutory criteria in determining how to divide the parties' property in a dissolution action. A trial court, however, need not give each factor equal weight; or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor.[59]

In so doing, the Connecticut Superior Court rejected section 4.15 of the ALI Principles on Family Dissolution[60] and the equal division presumption, noting it cannot become law "until the legislature sees fit to change the statutes."[61] The court also confirmed the principle of equitable distribution does not mean equal division. On the contrary, an equitable distribution often requires an unequal division of marital property, particularly in those cases where the marital estate grew significantly because of the

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55. *Id.*

56. *Id.* at *27 (quoting JOHN DEWITT GREGORY ET AL., THE LAW OF EQUITABLE DISTRIBUTION § 1.03, at 1-6 (1989)).

57. DiMaggio, *supra* note 16, at 462. *See also infra* Part IV.D.

58. DiMaggio, *supra* note 16, at 463.

59. *Wendt*, 1998 WL 161165 at *28.

60. *See supra* Part II.B.

61. *Wendt*, 1998 WL 161165 at *115. *See also id.* at *87.

extraordinary contributions of the higher income spouse.[62] The appellate panel in *Wendt* affirmed the lower court's judgment of an unequal property division, confirming that equitable distribution does not necessarily mean equal distribution.[63]

D. PROFESSIONAL DEGREES AS SUBJECT TO PROPERTY DIVISION

Although American courts do not separately address big money divorces as their English counterparts do, their treatment of professional degrees typically implicates big money couples.[64] Many graduate degrees in business, law, and medicine, which generate significant income for their holders, are subject to intense, big money court battles in the United States.[65] American cases involving professional degrees are, therefore, somewhat akin to English big money cases in this way.

Section 4.07 of the ALI Principles, which favors equal division of property between the spouses, does not consider occupational licenses and educational degrees as subject to division upon divorce.[66] This reflects the viewpoint of most American jurisdictions, which refuses to treat such assets as marital property instead of as personal attainment. This view is buttressed by a degree's characteristic lack of value, nonassignability, and personal nature.[67]

New York is, therefore, in the minority in treating professional licenses as marital assets, dividing their value between spouses as appropriate.[68] Other jurisdictions may grant the nonprofessional spouse certain relief in limited circumstances. If, for example, the husband single-handedly supported the household during his wife's law school years, he may receive reimbursement alimony.[69]

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62. *See generally, e.g.*, Young v. Young, No. CA 07-540, 2008 WL 588601 (Ark. Ct. App. 2008); Culver v. Culver, Nos. 2002-CA-001109-MR, 2002-CA-001221-MR, 2004 WL 103024 (Ky. Ct. App. Jan. 23, 2004); McHargue v. McHargue, 162 N.C.App. 722 (N.C. Ct. App. 2004); Lambert v. Lambert, No. 2004-P-0057, 2005 WL 1075737 (Ohio Ct. App. May 6, 2005).

63. Wendt v. Wendt, 757 A.2d 1225, 1230 (Conn. App. Ct. 2000).

64. *See* Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 93 (1997).

65. Such a battle seems of increasing importance for women with professional degrees. Professor Robin Fretwell Wilson recently released a study showing that women with business, law, or medical school degrees are twice as likely to get divorced or separated as their male counterparts. Sara Schaefer Munoz, *Study Finds Women's MBAs Hazardous to Marital Health*, WALL ST. J., Apr. 2, 2008, http://blogs.wsj.com/juggle/2008/04/02/study-finds-womens-mbas-hazardous-to-marital-health/?mod=WSJBlog#comment-40588.

66. PRINCIPLES, *supra* note 29, § 4.07.

67. *See, e.g.*, Simmons v. Simmons, 708 A.2d 949, 955 (Conn. 1998).

68. *See, e.g.*, O'Brien v. O'Brien, 489 N.E.2d 712, 751 (N.Y. 1985).

69. *See, e.g.*, Mahoney v. Mahoney, 453 A.2d 527, 536 (N.J. 1982) (holding where one spouse received financial contributions from the other, which were used in obtaining a

Nonetheless, American courts' general refusal to divide the value of a professional degree underscores their reluctance to apportion marital assets between the spouses equally. The view that the spouse who earned the degree solely receives its benefit is, therefore, consistent with the American philosophy that the contributing spouse keeps his or her contribution, particularly if it is a remarkable one. Such a result, typical in the United States, makes English divorce law the envy of American lower income spouses seeking divorces.

III. THE ENGLISH YARDSTICK OF EQUALITY

The English statutory framework on post-divorce property division, rooted in the Matrimonial Causes Act 1973, gives courts significant discretion on the issue.[70] Although judges initially used this discretion to award spouses their reasonable needs and requirements, courts recently began to favor an equal property division. In 2001, this preference culminated in *White v. White*, which articulated the yardstick of equality against which judges now measure their awards.

A. THE STATUTORY BASIS FOR ENGLISH DIVORCE LAW

The English courts' power to divide marital property upon divorce has historically been statutorily prescribed.[71] Originally, a judge's ability to order varying settlements between spouses was found in the Matrimonial Causes Act 1859, which replaced the old ecclesiastical courts and established the Court for Divorce and Matrimonial Causes.[72] Owing to its patriarchical Victorian roots, however, the 1859 Act limited the courts' ability to award fair settlements to women.[73] Under the 1859 Act, women also lacked men's ability to exercise claims against a spouse for adultery, cruelty, or desertion that led to divorce.[74] These limitations on the English judiciary led the Law Commission to eventually seek reform, resulting in the current legal regime under the Matrimonial Causes Act 1973, which provides judges with significant discretion in developing an approach to post-divorce property divisions.[75]

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professional degree or license with the expectation of deriving material benefits for both spouses, the supporting spouse may be reimbursed for the amount of such contributions).

70. Matrimonial Causes Act, 1973, c. 18.

71. For a brief but useful history of English statutory divorce law on property division, see White v. White, [2001] 1 A.C. 596 (H.L.) [17-20] (appeal taken from Eng.).

72. *Id.* at [17].

73. *Id.*

74. *Id.*

75. Matrimonial Causes Act, 1973, c. 18.

1. *The Matrimonial Causes Act 1973*

The Matrimonial Causes Act 1973 (Act) constitutes the primary legislation underpinning divorce law in the United Kingdom. The most clearly articulated principle in the Act is the due regard courts must have for the children of the marriage. Specifically, section 25(2) provides that children must be placed in the financial position they would have enjoyed had the marriage not ended.[76] In big money cases, this provision is less relevant because of the abundance of money involved.

The Act is not as lucid, however, on the financial arrangement of the spouses following divorce.[77] Sections 23 and 24 allow the courts to make financial provision and property adjustment orders. The Act also contains a checklist guiding the court's power in dividing the property between divorcing spouses.[78] However, the Act does not provide any guidance on the objectives of post-divorce property division; the section of the Act that

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76. *Id.* § 25(3). The relevant provisions consider:

> (a) the financial needs of the child;
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> (b) the income, earning capacity (if any), property and other financial resources of the child;
>
> (c) any physical or mental disability of the child;
>
> (d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained . . . .

Id. § 25(3).

77. As Judge Lord Nicholls declared, "The Matrimonial Causes Act 1973 confers wide discretionary powers on the courts over all the property of the husband and wife." *White*, 1 A.C. 596 at [2].

78. *Id.* at [21]. The exact checklist in the Matrimonial Causes Act 1973 guiding property division is:

> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future . . .
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by looking after the home or caring for the family;
>
> . . . .
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit [for example, a pension] which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Matrimonial Causes Act 1973, c. 18, § 25(2).

originally provided such guidance was removed.[79] That section had mandated that judges exercise their discretion so:

> [A]s to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.[80]

With the deletion of this provision, no explicit objective of post-divorce property division exists within the Act. Its closest indication is another section of the Act, section 10, which requires that "the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances."[81] Courts have also read section 25A as advocating a clean break between the parties.

Although the Matrimonial Causes Act 1973 mentions fairness in property division, it is not mandated as the lone or even primary goal of property awards.[82] Nonetheless, the English courts have particularly valued fairness as an objective of property division in the absence of explicit statutory guidance. As Judge Nicholls opined:

> Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses . . . . The powers must always be exercised with this objective in view . . . .[83]

Despite its ambiguities, the Act is the primary statutory element to English divorce law. As one English judge declared, "Matrimonial Causes 1973 . . . rules the day. And despite the endless judicial gloss which is applied to it year in and year out at every level it is always best to start and end in that familiar section."[84] Given the significant judicial discretion allowed by the Act, however, much divorce law has evolved through the case law. Not wholly in favor of the consequent direction of English divorce law, the Law Commission has proposed legislative changes through the Family Act 1996.

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79. *White*, 1 A.C. 596 at [23].

80. *Id.* (quoting the Matrimonial Proceedings and Property Act, 1970, c. 45, § 5(1) [repealed]).

81. Matrimonial Causes Act, 1973, c. 18, § 10(3)(b).

82. *Id.*

83. *White*, 1 A.C. 596 at [23] (citation omitted).

84. Charman v. Charman, [2006] EWHC (Fam) 1879, [58] (appeal taken from Eng.).

2. *The Family Act 1996*

Drafted by the Law Commission, the Family Act 1996 (Family Act) was delayed in its complete enactment.[85] Nonetheless, the Commission, a catalyst and guiding force for legal change in England, has often influenced the divorce law. Thus, it is prudent to be mindful of its recommendations in considering English divorce law today.

Specifically, Part II of the Family Act introduces new divorce law.[86] Part III focuses on publicly-funded mediation, a topic less relevant to ancillary relief.[87] Importantly, however, Part I of the Family Act establishes several principles, the lack of which had characterized divorce law since 1973, when the Commission formulated the Matrimonial Causes Act. These principles are found in section 1 of the Act and direct the courts to execute all divorce law in light of these principles.[88]

Most notably, the overarching principle is the institution of marriage must be supported. Stated differently, "[D]ivorce law must not undermine the institution of marriage."[89] The courts, therefore, gain the obligation to apply divorce law so as to respect and support marriage. Accordingly, the Family Act includes provisions designed to hinder divorces, such as cooling off periods before a divorce can be granted.[90]

Commentators have noted that the principle of respect for marriage conflicts with some of the incentives provided by a divorce law that favors equal property division, as English law currently does. First, in big money

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85. Family Law Act, 1996, c. 27; GILLIAN DOUGLAS, AN INTRODUCTION TO FAMILY LAW 184 (2d ed. 2004).

86. *Id.*

87. *Id.*

88. The exact principles are as follows:

> (a) that the institution of marriage is to be supported;
>
> (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counseling or otherwise, to save the marriage;
>
> (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end—
>
> (i) with minimum distress to the parties and to the children affected;
>
> (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
>
> (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
>
> (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

Family Law Act, 1996, c. 27, § 1.

89. DOUGLAS, *supra* note 85, at 185.

90. Family Law Act, 1996, c. 27, § 1(b).

cases, an equal property division creates a disincentive for the higher income spouse to marry, not only because of the risk of losing significant assets upon divorce, but also because the laws governing marriage may unpredictably shift again, as illustrated by the dramatic changes in English divorce law that resulted in a preference for an equal division[91]—and premarital agreements are hardly a perfect solution.[92] Second, if married, people's incentive for professional productivity may be reduced by the prospect of equal property division upon divorce.[93] Moreover, a promise of equal division incentivizes spouses' litigiousness because the lower income spouse will not settle for less than an equal division, while higher income spouses may view such a division as unfair.[94] Finally, any formulaic division, even if creating dissatisfaction, simplifies the divorce process, perhaps easing a couple's decision to divorce. In any case, however, the English statutory framework continues to provide judges with significant discretion in property divisions, allowing judges to formulate divorce law relatively unfettered.[95] Accordingly, the courts' interpretation of the statutory framework is the most determinative factor of English divorce law today.

B. JUDICIAL DEVELOPMENT OF ENGLISH DIVORCE LAW

One of the consequences, and perhaps advantages, of vesting discretion in the English judiciary instead of Parliament is that legal change might be easier to accomplish.[96] Judicial discretion has indeed allowed the courts to

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91. As one embattled higher income spouse commented, "There is a genuine sense of grievance among rich husbands that they married, in this case in 1976, with the law as it then was, and are now facing a sea-change wrought in 2000." Frances Gibb, *"I Didn't Want to Take Him for Every Penny—I'm Not Greedy,"* THE TIMES (London), May 25, 2007, at News 5. On the other hand, the prospect of an equal property division may discourage the higher income-earner from divorcing.

92. For one, they are not legally enforceable in England. *See infra* Part IV.D.

93. *See* Rebecca Bailey-Harris, *The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales*, 19 INT'L J.L. & POL'Y & FAM. 229, 235 (2005). An objective valuation of spouses' marital contributions may alleviate this problem. *See infra* notes 176-79 and accompanying text.

94. On the other hand, significant judicial discretion may also fuel litigation if the parties perceive the award as unfair, particularly when the property division is very disproportionate. *See supra* Parts II.A., II.C.

95. *See generally* Burgess v. Burgess, [1996] 2 F.L.R. 34; Calderbank v. Calderbank, [1976] Fam. 93; Dart v. Dart, [1996] Fam. 607; Daubney v. Daubney, [1976] Fam. 267; Fitzpatrick v. Sterling Hous. Ass'n Ltd., [1999] UKHL 42, [2001] 1 A.C. 27 (H.L.) (appeal taken from Eng.); O'Donnell v. O'Donnell, [1976] Fam. 83; P v. P, [1978] 1 W.L.R. 483; Page v. Page, [1981] 2 F.L.R. 198; Piglowska v. Piglowski, [1999] UKHL 27, [1999] 3 All E.R. 632 (H.L.) (appeal taken from Eng.); Preston v. Preston, [1982] Fam. 17; Trippas v. Trippas [1973] Fam. 134; Haldane v. Haldane, [1977] 2 NZLR 715 (P.C.).

96. *But see* Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting) ("I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than

develop and calibrate divorce law, albeit at the expense of predictability. In any divorce case before the courts, however, "[o]ne question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other."[97] This problem becomes especially complex in big money cases.

Endowed with statutorily prescribed discretion,[98] English judges have therefore formulated the objectives of divorce law and selected the appropriate model of property division.[99] Guided by fairness, English judges have also developed the legal standards by which to divide property following divorce, although their jurisprudence recently developed in favor of equal division.[100] This preference arises not only in average divorce cases where such a division is unavoidable by virtue of limited assets, but also in big money cases, wherein one spouse far out-contributed the other and the lower income spouse's needs are comfortably met by a smaller fraction of the assets.[101]

1. *Reasonable Needs and Reasonable Requirements*

Prior to *White* in 2001, English courts frequently awarded lower income spouses only their reasonable needs and reasonable requirements, which no doubt often overlapped. *Page v. Page*[102] articulated the factors to be considered in both a "requirements" and a "needs" division: "In a case such as this 'needs' can be regarded as equivalent to 'reasonable requirements', taking into account the other factors such as age, health, length of marriage and standard of living."[103] The interpretation of needs and requirements was tweaked over the years as English judges sought fair property divisions.[104] For example, the phrase "reasonable requirements"

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state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.").

97. White v. White, [2001] 1 A.C. 596 (H.L.) [1] (appeal taken from Eng.).

98. *Cf.* Matrimonial Property Act 1976 (N.Z.) (prescribing detailed instructions for the division of property following divorce).

99. *See also* discussion *infra* Part IV.B.

100. *See* discussion *infra* Part III.B.2.

101. *See id.*

102. [1981] 2 F.L.R. 198.

103. *Id.* at 201. The view that reasonable requirements equaled reasonable needs was acknowledged in White v. White, [2001] 1 A.C. 596 (H.L.) [30] (appeal taken from Eng.) (quoting *Preston v. Preston*, [1982] Fam. 17) ("[T]he word 'needs' in section 25(1)(b) [of the Matrimonial Causes Act] in relation to the other provisions in the subsection is equivalent to 'reasonable requirements,' having regard to the other factors and the objective set by the concluding words of the subsection . . . .").

104. *See* FRANCES BURTON, FAMILY LAW 159 (2003) (discussing the meaning of reasonable needs and requirements under English law).

was employed in *O'Donnell v. O'Donnell*,[105] where the wife received more than she strictly needed. *Dart v. Dart*[106] also permitted courts to award spouses more than their strict needs. In *Dart*, Lord Justice Thorpe reiterated the factors to determine property division included available assets, the household's former standard of living, the spouses' health and age, each party's contributions to the marriage, and the length of the marriage.[107]

In big money cases, however, lower income spouses were often able to receive a significant windfall by claiming, as reasonable requirements, massive awards for exorbitant clothing stipends and other matters extending well beyond necessity.[108] Nonetheless, the reasonable requirements approach in effect capped the amount a spouse could receive, to the dissatisfaction of the House of Lords. Specifically, the lower income spouses could not easily share in the marital assets because they were limited by their reasonable requirements. According to Lord Nicholls, "This seems then to have led to a practice whereby the court's appraisal of a claimant wife's reasonable requirements has been treated as a determinative, and limiting, factor on the amount of the award which should be made in her favour."[109]

The reasonable requirements standard, therefore, began to encounter criticism in English law. For example, Lord Nicholls suggested in *White* that the standard departed from the statutory language of the Matrimonial Causes Act.[110] In another case, however, the reasonable requirements standard was practically scorned as being too generous:

> The husband is genuinely bemused that the wife should regard his £20m offer as anything other than reasonable, even generous [given that the wealth was generated entirely by his efforts] . . . . In the narrow, old fashioned sense that perspective is understandable if somewhat anachronistic. Nowadays it must attract little sympathy.[111]

Without an accepted standard of property division, however, English courts lacked guidance in such cases. The House of Lords provided renewed

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105. [1976] Fam. 83.

106. [1996] Fam. 607.

107. *Id.* These factors are similar to those requiring consideration under the American equitable distribution principle in states such as Illinois and Connecticut. *See supra* note 24 and accompanying text.

108. In the highly emotional context of divorce, some spouses may avenge a divorce by claiming exorbitant requirements. *See, e.g.*, Katherine A. Kinser & R. Scott Downing, *Family Law Issues That Impact the Professional Athlete*, 15 J. AM. ACAD. MATRIM. LAW. 337, 361 (1998).

109. White v. White, [2001] 1 A.C. 596 (H.L.) [31] (appeal taken from Eng.).

110. *Id.* at [35].

111. Charman v. Charman, [2006] EWHC (Fam) 1879, [19] (appeal taken from Eng.).

direction in *White v. White*, which adopted a yardstick of equality in property division.

2. *Adoption of the Yardstick of Equality:* White v. White

White is the landmark recent case that introduced a strong preference for equal property division in English divorces. The facts of the case were relatively straightforward: Mr. and Mrs. White married in 1961.[112] They both had farming backgrounds and throughout their marriage ran a successful dairy farming business in partnership.[113] Their farm, Blagroves Farm, generated marital assets of £3.5 million through its live and dead stock, machinery, and milk quota.[114] Mr. and Mrs. White also farmed Rexton Farm, located ten miles away from Blagroves Farm and worth £1.25 million, as part of their partnership business.[115] Additionally, the couple had three children.[116] The marriage broke down in 1994, and the spouses divorced in 1997.[117] At the time of divorce, the net worth of Mr. and Mrs. White's assets totaled £4.6 million, £193,300 of which was owned solely by Mrs. White and mostly in the form of pension provisions, and £193,300 of which was owned solely by Mr. White and mostly in Rexton Farm.[118]

The lower court proceeded on a "clean break basis," in accordance with section 25A of the Matrimonial Causes Act 1973, as well as with due regard for Mrs. White's reasonable needs.[119] Mrs. White had argued her reasonable needs included sufficient money to start her own farm.[120] However, the judge deemed this request to be unreasonable, determining it unjustifiable to fragment the existing, successful farming business so that Mrs. White could begin her own farm without any guarantees.[121] Calculating the wife's reasonable needs without her requested capital for a new farm, the judge granted her a fifth of the £4.6 million marital assets.[122]

Mrs. White appealed, and the court of appeal increased her share to two-fifths because she had been Mr. White's equal partner in the farming business.[123] In the course of its judgment, the court of appeal opined the

112. *White*, 1. A.C. 596 at [4].
113. *Id.* at [5].
114. *Id.* at [6].
115. *Id.* at [7].
116. *Id.* at [4].
117. *Id.*
118. *Id.* at [8].
119. *Id.* at [9] (internal quotations omitted).
120. *Id.* at [10].
121. *Id.*
122. *Id.* at [8-9].
123. *Id.* at [11].

starting point should be to divide the assets according to partnership principles—here, the spouses were equal business partners.[124] Additionally, the court noted there should be an increase in Mrs. White's share to account for her contributions as a wife and mother.[125] Both spouses appealed: Mrs. White demanded exactly half of the marital property, and Mr. White sought the reinstatement of the lower court's award.[126]

The House of Lords accepted the appeal and handed down its watershed decision, which altered the direction of big money cases. Lord Nicholls first rejected the necessity of detailing the partnership stakes between the spouses, instead underscoring that a broad review of their financial situation was more appropriate.[127] Second, and more importantly, Lord Nicholls declared a principle of equality between husband and wife that was independent of their exact shares in the business.[128]

However, the House of Lords stopped short of creating a presumption of equality in property division so as to refrain from offending the intentions of Parliament, whose members had not included such a presumption in the legislation,[129] as their Scottish counterparts had.[130] Instead, Lord Nicholls formulated a yardstick of equality against which judges should check their property division decisions.[131] This represented a break from the previous reasonable needs and requirements standard.

Notably, *White* is an unusual case to change the direction of English big money cases because it is factually atypical in that there is no higher income spouse. On the contrary, both spouses were nearly equal partners in the business. To begin the farm, each contributed approximately an equal amount of capital.[132] Eventually, Mr. White's father favorably loaned them some additional business capital, although both spouses worked together to expand and farm the land.[133] The whole business was treated as the property of the partnership between Mr. and Mrs. White. In addition to her

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124. *Id.* at [14].

125. *Id.* at [11].

126. *Id.* at [11-12].

127. *Id.* at [11]. *Cf. supra* note 23 and accompanying text (likening equitable distribution to partnership dissolution).

128. *White*, 1 A.C. 596 at [28].

129. *See supra* Part III.A.

130. *White*, 1 A.C. 596 at [27].

131. *Id.* at [25]. Lord Cooke, in his concurring opinion, doubted whether there was much distinction between "yardstick" and "guidelines" or "starting point." *Id.* at [59]. However, the House of Lords was concerned that *White* could create a formal presumption of equality in practice, with the attendant consequences regarding the burden of proof. *Id.* at [26].

132. *Id.* at [5].

133. *Id.*

farming duties, Mrs. White also primarily maintained the household.[134] Nonetheless, this atypical case—with equal income-earning spouses—changed the direction of all big money cases, even when one spouse contributed most, if not all, of the marital wealth. *White* therefore allowed the courts to divide marital assets equally, even if the award exceeded the most imaginative reasonable needs or requirements of the lower income spouse. Therefore, an entrepreneurial high income spouse could no longer provide just for his or her ex-spouse's reasonable requirements, no matter how lavish, but now had to provide the ex-spouse with an equal share of wealth.

Furthermore, despite its particularities, *White* influenced the future of not only big money cases, but also of those involving moderate marital assets.[135] Specifically, Lord Nicholls announced a "principle of universal application" that the Matrimonial Causes Act 1973 authorized:

> In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering . . . the parties' contributions.[136]

Accordingly, the yardstick of equality applies to all divorce cases, not just big money cases. However, its fairness is questioned most by higher income spouses in big money cases, where there is a significant difference

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134. *Id.* at [14].

135. *See generally, e.g.*, Adams v. Lewis, [2001] All E.R. (D) 274; Elliott v. Elliot, [2000] EWCA (Civ) 407. The *Annual Review of the All England Law Reports* noted:

> In a previous edition of this Review, it was suggested that modern marriages may sometimes be described as an equal partnership, but that the Court of Appeal's decision in *White v. White* demonstrated that some marriages are more equal than others. The decision of the House of Lords [in *White v. White*] now establishes a principle of equality for *all* marriages.

Family Law, 2001 ALL ENGLAND LAW REPORTS ANNUAL REVIEW 219, 219 (2001) (citations omitted).

136. *White*, 1 A.C. 596 at [24].

between the lower income spouse's reasonable contributions and half of the marital property.[137]

Unsurprisingly, *White*'s dramatic shift toward equal division has encountered criticism. For one, the court wrote *White* with a broad stroke, not providing many instructive details to practitioners.[138] As a commentator noted, "[S]hould the yardstick apply only to capital division or to future income as well?"[139] Furthermore, the *White* decision threatened to produce unpredictable and confusing case law due to its break from precedent. Notwithstanding these criticisms, the yardstick of equality is favored by the House of Lords as a justification for equal division, transforming England into one of the friendliest divorce forums for lower income spouses and creating a doctrinal split from American divorce law.

3. *The Special Contributions Exception*

To avoid harsh results, the yardstick of equality has a special contributions exception.[140] This doctrine allows courts to take into account one spouse's unique contribution to the marriage, resulting in a higher award to that spouse.[141] However, the doctrine of special contributions is not often used by English courts.

The doctrine is difficult to apply because English judges have become uncomfortable with evaluating the parties' contributions to the marriage. Originally, big money divorce cases were couched in terms such as the exceptional or "stellar" contributions of one party.[142] The use of such terminology eventually decreased because of judges' uneasiness in valuing

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137. *See infra* Part IV.A.

138. *Family Law*, *supra* note 135, at 219 ("The decision of the House of Lords [in *White v. White*] now establishes a principle of equality for *all* marriages. In principle, this is a welcome development. However, in the light of the uncertainty about the implications of the case, Dr. Stephen Cretney asks: 'Was it not a trifle rash for the House of Lords to overrule . . . the hitherto tolerably well-settled practice of the courts?'" (citation omitted)).

139. Bailey-Harris, *supra* note 93, at 234-35. *See also supra* note 9.

140. *Cf.* Wendt v. Wendt, No. FA96 0149562 S., 1998 WL 161165, at *225 (Conn. Super. Ct. Mar. 31, 1998). Short marriages may also justify a disproportionate division in England. "The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property." Miller v. Miller & McFarlane v. McFarlane, [2006] UKHL 24, [2006] 2 A.C. 618 [55] (appeal taken from Eng.).

141. Parkinson explains:

> The doctrine of special contributions provides that a court is justified in evaluating the contributions of spouses during the course of the marriage as unequal where the performance of one spouse in his or her role within the marriage has special features about it, placing that contribution outside of the norm.

Parkinson, *supra* note 6, at 164.

142. *See, e.g.*, Cowan v. Cowan, [2001] EWCA (Civ.) 679, [2002] Fam. 97.

each party's contributions to a marriage, particularly when one spouse was in the corporate world and the other was a homemaker. As one English judge suggested: "But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria?"[143] Thus, the courts' uneasiness with disproportionate property division has, to a certain extent, undermined the special contributions doctrine.

Even when a judge applies the special contribution doctrine, the final property division rarely differs much from an equal split. For example, in one of the most recent big money cases in England, *Charman v. Charman*,[144] the special contributions doctrine failed to produce a substantially proportionate division.[145] In fact, during the course of that lengthy litigation, Mrs. Charman conceded not to pursue a share greater than forty-five percent if a pending case, *Miller*, upheld the special contribution doctrine.[146] Ultimately, the court awarded Mrs. Charman thirty-six percent of the marital assets, totaling a £48 million award—one of the largest in British history.[147] She received this award even after her ex-husband provided her with the marital home, substantial provisions for their sons, and accommodation for her parents.[148]

Furthermore, in *Sorrell v. Sorrell*,[149] an English court similarly narrowed the special contributions doctrine's influence, finding a departure from equality justified by the husband's special contribution to the marriage in the form of exceptional business talent amounting to genius.[150] Despite her husband's brilliant financial contributions to the marriage, the wife was awarded forty percent of the assets.[151] Finally, in *GW v. RW*,[152] the court concluded "some departure from equality in the instant case was justified on the basis of the duration of the marriage."[153] Once again, the wife was

143. G v. G, [2002] EWHC (Fam) 1339, [34], 2 F.L.R. 1143, 1155. *See also* Lambert v. Lambert, [2002] EWCA (Civ) 1685, [2003] Fam. 103 (noting the "breadwinner" does not necessarily contribute more to the household); Norris v. Norris & Haskins v. Haskins, [2003] EWCA (Civ) 1084. *See also infra* Part IV.C.

144. [2006] EWHC (Fam) 1879.

145. *Charman*, [2006] EWHC (Fam) 1879 at [127].

146. *Id.* at [13].

147. Frances Gibb, *Legal Process in Dock as Judges Rule Ex-Wife Is Worth Record £48 Million Payout*, THE TIMES (London), May 25, 2007, at News 4.

148. *Id.*

149. [2005] EWHC (Fam) 1717.

150. *Id.* at [2].

151. *Id.* at [118].

152. [2003] EWHC (Fam) 611.

153. *Id.* at [1].

awarded forty percent, illustrating that post-*White* property division often resembles an approximately equal split despite the special contributions doctrine.[154]

Thus, while the doctrine of special contributions may exempt a higher income earner from an equal division in theory, many English courts have restricted its use. Even if one spouse's special contribution is acknowledged by the courts, the final division does not fall far from an equal division in big money cases, even when such a sum exceeds the most imaginative reasonable requirements held by the lower income spouse. Such a result differs significantly from the previous outcomes produced under the measures of reasonable needs and reasonable requirements. The current state of English law, unfavorable to higher income spouses, provides several important lessons to American courts.

IV. LESSONS FROM A COMPARATIVE PERSPECTIVE

American federalism is often praised for creating the experimental conditions that advance the most efficient solutions.[155] The commonalities between English and American divorce law, which readily facilitate comparison, also create the experimental conditions that invaluably illuminate the various approaches to family law. The similarities between England and the United States in property division are striking. First, both systems routinely resolve divorce cases with similar fact and issue patterns. Second, each jurisdiction's statutory divorce law is fundamentally similar to the others. Third, both judicial systems are bound by divorce legislation providing a substantial amount of judicial discretion, which is particularly true in the majority of American states that utilize equitable distribution as the default property regime. Finally, both jurisdictions strive toward the shared goal of fairness in property division.

Despite these fundamental similarities, however, English courts have diverged from the majority of American states by embracing equal division. The result of this doctrinal divergence is most noticeable in big money cases, heightening the opportunity for a comparison of the two approaches, as well as their merits and consequences. Such a comparison is indeed revealing. First, the English courts' preference for equal division offers a different judicial interpretation of fairness. Second, isolating the reasons

154. *Id.*

155. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'") (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

for England's equal distribution scheme—the courts' apparent discomfort in evaluating the spouses' contributions to a marriage—suggests alternatives for achieving property divisions that better reflect the parties' contributions to a marriage. Finally, these issues necessarily implicate the acceptance and use of premarital agreements in the United States, as well as in England, where such agreements are currently undergoing added scrutiny in preparation for potential legislative changes.

A. THE MEANING OF FAIRNESS

A comparison of the American and English approaches to post-divorce property division immediately reveals that, in this context, no universal definition of fairness exists. The mere fact that different statutory approaches exist in the United States,[156] and an entirely different system has developed in England, illustrates the elusive nature of fairness, as well as the differing meanings of fairness across jurisdictions.[157]

Although the articulated goal of English property division may be fairness, the courts have continued searching for the best method to achieve it. As Lord Nicholls noted, "fairness, like beauty, lies in the eye of the beholder."[158] Divorce law has, therefore, changed as quickly as the concept of fairness, inherently jeopardizing fairness by increasing the law's unpredictability despite people's reliance on it.

Furthermore, the English courts' separate classification of big money divorce cases may conflict with a fundamental understanding of fairness. It is difficult to think of another area of law where the definition of fairness depends on the amount of money involved, which would generally be considered unfair. Nonetheless, as one English court noted:

> There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties' needs. That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties' respective financial needs and any need for compensation.[159]

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156. *See supra* note 31 and accompanying text. *See also supra* Part II.B.

157. In the case of mobile couples, this has many implications in the field of conflicts of law, or the problem of which law to apply when more than one jurisdiction is involved.

158. White v. White, [2001] 1 A.C. 596 (H.L.) [1] (appeal taken from Eng.).

159. Miller v. Miller & McFarlane v. McFarlane, [2006] UKHL 24, [55], [2006] 2 A.C. 618 (appeal taken from Eng.).

In other words, the courts' perception of fairness plays a lesser role in the average divorce case because there is no use for discretion with limited assets. However, while big money divorce cases may certainly present particular challenges to English courts, it may be inherently unfair to treat them differently than the remainder of divorce cases.

Finally, the yardstick of equality approach of the English courts produces property awards that highly depend on the amount of money at stake, which may produce unfair results. Under the English approach, for example, a homemaker married to an average-earning spouse will receive a tiny fraction of a wealthy homemaker's award, even though they both performed the same work.[160] Therefore, what may be a fair settlement for an average-earning couple becomes an unfair award if applied to a big money case. It may be fairer across divorce cases, however, to use a more objective valuation of each spouse's marital contribution.[161]

In practice, many of these issues of fairness implicate only big money cases. In the average English divorce case, applying the yardstick of equality to property division would have a result similar to that under a reasonable needs approach because of the modesty of the divisible assets—half of these would not exceed the spouse's reasonable needs. In big money cases, however, there is necessarily a significant difference between the lower income spouse's reasonable needs and half of all divisible property—raising the important question of which approach produces a fairer result.

This same observation applies to the American system, which remains split between the community property and equitable distribution approaches. In the average American divorce case, there may not be much practical difference between community property and equitable distribution. However, when the assets are sizable, the results differ greatly depending on which approach the court uses in dividing the property. In sum, fairness acquires different meanings depending on the amount of money at stake and the particular court's approach. The English courts have been laboring in recent years to more precisely develop these nuances of fairness, but the emerging question for the American judicial system is whether the English approach produces fair results.

B. THE VARIETY OF PROPERTY MODELS

In the United States, while courts aim to achieve fairness in property divisions, they must work within the legislative framework mandating

160. This assumes the two homemakers contributed equally to their households.

161. *See infra* notes 176-79 and accompanying text.

either equitable distribution or community property.[162] English courts, meanwhile, must determine which property model to utilize, within *White*'s framework. Therefore, in addition to divergent perceptions of fairness, the choice of property model or regime influences the results of the property division because each model compensates the lower income spouse differently.[163]

Adopted by a minority of American states and many European civil law systems, one possible property regime is community property.[164] This model rests on the assumption that marriage is a partnership of equals,[165] resulting in relatively equal shares upon divorce.[166] As Lord Nicholls of Birkenhead opined, "The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary."[167]

Another option is equitable distribution, wherein the equality between spouses does not necessarily result in an equal sharing of assets at divorce, but property division must be equitable.[168] Specifically, the shares are determined by factors such as the particular needs of one party or the children.[169] The majority of American states have a statutory default of equitable distribution.

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162. *See supra* Parts II, IV.A.

163. "Property models" will also be referred to as "property regimes" in this Part.

164. France, Italy, and Poland are examples of European countries wherein the default property division is some form of community property. KATHARINA BOELE-WOELKI, MATRIMONIAL PROPERTY LAW FROM A COMPARATIVE LAW PERSPECTIVE 5 (2000); Elzbieta Skowronska-Bocian, *Family and Succession Law*, *in* INTRODUCTION TO POLISH LAW 85, 96-98 (Stanisław Frankowski ed., 2005). Community property is the default approach in only a minority of American states, which currently consist of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See generally* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEVELAND L. REV. 359, 370 (2005-2006) (discussing the community property regime in the nine community property states). *See also, e.g.*, CAL. FAM. CODE § 2550-56 (West 2007).

165. *See* DOUGLAS, *supra* note 85, at 191-92.

166. *See* WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2d ed. 1971).

167. Miller v. Miller & McFarlane v. McFarlane, [2006] UKHL 24, [16], [2006] 2 A.C. 618 (appeal taken from Eng.).

168. *See supra* Part II.A. As one higher income spouse's attorney argued, "The most important principle which emerges is the identification of the function of the court as being to ascertain the reasonable requirements of the claimant. If the needs of both parties are satisfied and there is a surplus it should lie where it falls." White v. White, [2001] 1 A.C. 596 (H.L.) [1] (appeal taken from Eng.).

169. *Miller*, 2 A.C. 618 at [142]. *See also* H v. H, [2007] EWCH (Fam) 459, [2007] All E.R. (D) 88. However, *White* emphasized equal division of marital assets is both feasible and fair in many situations today. *See Burgess v. Burgess*, [1996] 2 F.L.R. 34 (allowing a doctor and a lawyer to equally share marital assets because both parties had sufficient incomes to supplement their halves of the assets); *White*, 1 A.C. 596 at [143].

A compensation model of property division aims to compensate spouses for their contributions to the marriage, as well as their opportunity costs of doing so.[170] For homemaking spouses, their child-rearing work usually composes a substantial amount of total compensation.[171] Property division may also be driven by the reasonable needs or requirements of the parties.[172] This model is rooted in the idea marriage generates needs for one party that ought to be met by the other party. This is a common approach to property division when there is no financial surplus after the parties' needs are considered.

English big money divorce cases occasionally exhibit a mixture of these two latter models, as *McFarlane v. McFarlane*[173] illustrates. In that case, the House of Lords affirmed the lower courts' awards, determining Mr. McFarlane must meet his ex-wife's annual needs of £128,000, pay her compensation for the marriage-generated disadvantage she incurred by quitting her job as an attorney to focus on the family, and pay any surplus because she was entitled to share it. This judgment illustrates the complications arising in big money property divisions, where the courts must untangle vast assets and marital contributions.

C. VALUATING THE SPOUSAL CONTRIBUTION

Notably, judicial views on fairness, as well as determinations regarding property regimes, are often seemingly driven by a reluctance to value spouses' contributions to a marriage in monetary terms. English courts in particular have been recently troubled by evaluating the homemaker's contribution to the household.[174] According to one such judge, "It has . . . meant that the court has been asked to examine closely aspects of the psychological dynamic of the marriage partnership in a way nowadays almost unheard of."[175] The frequent result of such a view has been that property

170. DOUGLAS, *supra* note 85, at 191. *See also* Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 750 (1993).

171. Under this approach, spousal support is based "on the advantages and disadvantages flowing from the actual relationship between the parties, rather than from the fact of marriage per se. It attributes financial value to the reasonably held expectations by the spouse who made the preponderance of non-monetary contributions or sacrifices that helped the couple achieve their marital lifestyle." Claire L'Heureux-Dube, *Equality and the Economic Consequences of Spousal Support: A Canadian Perspective*, 7 U. FLA. J.L. & PUB. POL'Y 1, 12 (1995).

172. DOUGLAS, *supra* note 85, at 191.

173. [2006] UKHL 24, [2006] 2 A.C. 618 (appeal taken from Eng.).

174. American courts do not often exhibit this reluctance when applying the equitable distribution principle. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J. L. & GENDER 1, 35 n.182 (2008).

175. Charman v. Charman, [2006] EWHC (Fam) 1879, [20] (appeal taken from Eng.).

division upon divorce resembles an equal division, even if the spouses contributed varying efforts to the marriage.

The opposite approach would use an economic analysis in divorce judgments. American courts have been exploring this method, utilizing traditional human capital theory, market replacement theory, and opportunity cost theory to reach equitable distribution judgments that reflect spouses' varying efforts.[176] There are particular benefits to evaluating spouses' contributions in economic ways. For one, spouses would be better rewarded and compensated for their marital contributions, providing them with an incentive to contribute to the marriage in good faith.[177] Furthermore, higher income spouses would no longer be compelled into particular jobs solely to meet high alimony payments, which often, as a rule, cannot be reduced upon self-imposed changes in salary.[178] Finally, property awards would be more consistent because they would no longer be determined by the income level of the higher earner, but be established by the valuations of each spouse's marital contributions—whether they be established by the court or by the legislature.[179] If such valuations were publicly available and clear, as well as predictable, then spouses could also weigh the differing choices they have in terms of how to contribute to the marriage. Thus, the advantages of an economic analysis of marital contributions may prompt American courts to continue exploring this approach in order to determine how to achieve the fairest post-divorce property divisions.

D. PREMARITAL AGREEMENTS

If prospective spouses enter into premarital agreements, such agreements have a potentially vital role in post-divorce property division.[180]

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176. *See, e.g.*, Wendt v. Wendt, No. FA96 0149562 S., 1998 WL 161165, at *25 (Conn. Super. Ct. Mar. 31, 1998); Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 734 (2006) ("[D]ivorce proceedings have tended to become more objective over time.").

177. A no-fault divorce property division, on the other hand, provides less incentive to behave within marital norms.

178. American courts in particular base alimony on a formula that combines need and ability to pay, although self-imposed salary changes do not lower the alimony obligation.

179. For example, state legislatures can prescribe formulas, or guidelines, on how to calculate each spouse's marital contribution.

180. For further background on premarital agreements, see generally *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 2075 (2003); Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me"*, 72 MO. L. REV. 793 (2007); Karen Servidea, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535 (2005); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349 (2007). The premarital agreement is also known as the prenuptial or antenuptial agreement.

These agreements essentially allow parties to reduce divorce disputes in the future by contracting around judicial and legislative defaults. Significantly, prospective spouses may utilize premarital agreements to define fairness in their property division[181] and to establish their property model, removing the courts and legislatures from those decisions.[182] Premarital agreements also have the power to predetermine rights and responsibilities not only upon the spouses' divorce or death, but also during their marriage.

However, premarital agreements are hardly the perfect remedy, particularly when their enforceability is in doubt. In fact, such agreements are currently unenforceable in England,[183] although courts may consider them in determining ancillary relief.[184] The Law Commission in England launched a major initiative exploring the status and enforceability of premarital agreements on the subject of property and finances, with a report and draft bill expected in late 2012.[185] In the meantime, the unenforceability of premarital agreements in England may be the reason for their rarity among marrying couples,[186] although such agreements are increasing in popularity.[187]

While premarital agreements are more popular in the United States, they occasionally raise enforceability issues in court upon divorce. Prior to 1970, however, premarital agreements were often considered completely invalid in the United States on public policy grounds, as they were deemed to endanger marital stability.[188] Florida became the first state in the United States to accept such agreements in *Posner v. Posner*.[189] Currently, states have differing positions on the enforceability of such agreements, with some invalidating premarital agreements that are materially unfair to one party[190] and others exhibiting complete deference to the agreements.[191]

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181. *See supra* Part IV.A.

182. *See supra* Part IV.B.

183. For a discussion of premarital agreements in France, Germany, Switzerland, and Poland, see generally Margaret Ryznar & Anna St pie -Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27 (2009).

184. *See, e.g.*, *Pre-nuptial and Post-nuptial Agreements*, LAW COMMISSION, http://www.lawcom.gov.uk/marital_property.htm (last visited Oct. 1, 2010).

185. *Id.*

186. One survey found only two percent of married and divorced people in the United Kingdom had premarital agreements. *Divorce Lawyers Braced for Busiest Week Ever*, TIMES ONLINE, Jan. 5, 2009, http://business.timesonline.co.uk/tol/business/law/article5450552.ece.

187. *More Couples Signing Pre-nuptials*, BBC, Sept. 26, 2009, http://news.bbc.co.uk/2/hi/uk_news/8276018.stm ("Family lawyers say they have seen a tenfold increase in recent years in couples signing pre-nuptial agreements on dividing their assets after divorce.").

188. *See* Ryznar & St pie -Sporek, *supra* note 183, at 30.

189. 233 So.2d 381, 383 (Fla. 1970).

190. The Uniform Premarital Agreement Act advocates a similar approach. UNIF. PREMARITAL AGREEMENT ACT § 6, 9 U.L.A. 36 (1983).

Approximately half of American states, however, have now adopted some variation of the Uniform Premarital Agreement Act (UPAA).[192]

Interestingly, the general theory underpinning premarital agreements may undermine the partnership model of marriage, toward which both England and the United State strive. On the one hand, a court's ability to invalidate a contract entered into by equal partners is problematic because as equals, they should be able to contract.[193] On the other hand, if premarital agreements substantially deprive parties of equal shares, they hinder the spouses' equality. Some commentators have suggested that premarital agreements must move in the direction of dividing property equally, or else the agreements are at odds with the view of marriage as a partnership.[194] Accepting this proposition, however, would defeat the entire purpose of a premarital agreement, which is to provide parties a method of contracting around court defaults.

Therefore, the favorable treatment of premarital agreements in the United States, which permits significant freedom of contract, recognizes spousal equality by acknowledging each spouse's ability to contract.[195] Furthermore, the philosophy pervading American family law acknowledges that different people make differing contributions to marital life, thereby permitting people to enter into premarital agreements reflecting their various contributions. On the contrary, England's approach precludes the acknowledgment of the differing contributions of spouses, without guaranteeing them the contractual freedom to opt-out of such judicial and legislative defaults.

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191. Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990).

192. Charles W. Willey, *Effect in Montana of Community-Source Property Acquired in Another State (and Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate)*, 69 MONT. L. REV. 313, 365 (2008). For examples of various states' UPAA laws, see CAL. FAM. CODE § 1615 (West 2004), 750 ILL. COMP. STAT. 10/1 (1990), and R.I. GEN. LAWS § 15-17-6 (1956).

193. *Developments in the Law—The Law of Marriage and Family*, *supra* note 180, at 2077.

194. *Id.* at 2096. One article provides:

> This section expands on the argument that deference to freedom of contract in antenuptial agreement law is undesirable. It argues that acknowledgment of the partnership conception of marriage demands that parties desiring to execute antenuptial agreements approximate the fifty-fifty division implicit in the partnership approach or stand prepared to prove the agreements' substantive fairness at the time of divorce.

Id.

195. For further background on the American premarital agreement, see Ryznar & St pie - Sporek, *supra* note 183, at Part II.

V. CONCLUSION

Judges in England and the United States have been encountering big money cases with increasing frequency in recent years. While both legal systems have pursued fairness in their division of post-divorce property, each has taken drastically different routes—especially in big money cases. Most American courts have employed the principle of equitable distribution, which frequently results in a disproportionate property division, particularly when the marital estate grew due to the efforts of one talented spouse. England, on the other hand, recently implemented a yardstick of equality in *White* that produces near equal property division in many cases. While this shift does not significantly change the property awards in average divorce cases, lower income spouses in big money marriages receive far more than they would reasonably need or require. Furthermore, this shift has created a significant doctrinal split from American law.

Such recent developments in English law would be equivalent to a move by most American states from equitable division to community property. Although such a change of law has not occurred in the United States, many lower income spouses have challenged their disproportionate shares of marital property in state courts. The English divorce regime would be ideal to such spouses, but the clamor for divorce reform in England provides some support for the American equitable distribution principle.[196] In many big money cases, however, the lower income spouse is already well situated under any approach and an absolutely equal division becomes only a matter of principle. The dispositive question therefore becomes whether a legal system should aim to treat all spouses and contributions equally, or to permit exceptional contributors to retain the financial rewards of their work after providing for their former spouses.

196. *See supra* Part III.A.2.