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(2022) Equality arguments, contemporary feminist voices and the matrimonial causes act 1923. *Journal of Legal History*, 43 (2). pp. 210-235. ISSN 1744-0564 doi: <https://doi.org/10.1080/01440365.2022.2092944> Available at <https://centaur.reading.ac.uk/105289/>

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To link to this article DOI: <http://dx.doi.org/10.1080/01440365.2022.2092944>

Publisher: Taylor & Francis

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To cite this article: Frances Hamilton (2022) Equality Arguments, Contemporary Feminist Voices and the Matrimonial Causes Act 1923, The Journal of Legal History, 43:2, 210-235, DOI: [10.1080/01440365.2022.2092944](https://doi.org/10.1080/01440365.2022.2092944)

To link to this article: <https://doi.org/10.1080/01440365.2022.2092944>



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Published online: 28 Jun 2022.



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Equality Arguments, Contemporary Feminist Voices and the Matrimonial Causes Act 1923

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ABSTRACT

The Matrimonial Causes Act 1923 equalized the grounds for divorce for men and women, removing the prior existing double standard. Before this reform whilst husbands could divorce wives on the basis of adultery alone, wives had to prove additional aggravating factors. This author by analysis of primary sources from the National Union of Societies for Equal Citizenship archive, Hansard and the Royal Commission on Divorce and Matrimonial Causes Report 1912 demonstrates that some contemporaneous actors were persuaded by the symbolism of equality arguments and considered these convincing reasons for reform. This led to the enactment of the legislation in question. Yet in critical evaluation other feminists already recognized limitations with the reform achieved. Namely, that it distracted from other agendas, took too long, that poverty remained a barrier to reform and the reform achieved did not go far enough as the grounds for divorce were not reformed and there was no genuine commitment to equality for women within marriage. Others were prepared to adopt any strategy which led to reform seeing this as pragmatic first step.

KEYWORDS Matrimonial Causes Act 1923; divorce; double standard; equality; feminism

1. Introduction

The Matrimonial Causes Act 1923 (MCA 1923) equalized the grounds for divorce for men and women, removing the then existing double standard.¹ This was not the first major reform to divorce law, which had already occurred in the Matrimonial Causes Act 1857 (MCA 1857). Prior to then divorce was prohibitively expensive and involved a lengthy tripartite procedure including going to the civil courts, ecclesiastical courts and via an Act of Parliament. The MCA 1857 for the first time made it possible to obtain a divorce by civil court order, thereby avoiding the ecclesiastical courts. Yet men and women were not treated equally. A double standard

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¹Matrimonial Causes Act 1923 (13 & 14 Geo. V, c. 19).

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prevailed. Whilst a husband could divorce a wife on the basis of adultery alone, a wife could only apply for divorce on the basis of adultery together with an aggravating offence. In addition to the already existing aggravations of incest and bigamy, the MCA1857 included new aggravations of cruelty and desertion. This made it easier for women to obtain a divorce. Following the 1857 Act forty per cent of petitioners were women, compared to the one per cent pre-reform.² However, the continued existence of the double standard meant that adultery by a woman was treated more harshly by the law.³ This was justified by some as necessary because a wife's adultery affected the legitimacy of the offspring.⁴ Women found to have committed adultery were punished by the law which had the power to forfeit child custody rights.⁵

In terms of analysing the reasons for the divorce law reform enacted in 1923, many published works feature detailed analysis of the legal and political manoeuvrings prior to divorce law reform.⁶ For example, Cretney in his work *Family Law in the Twentieth Century* focuses on proposals of law reform brought forward by Professor Hunter in 1892, Earl Russell in 1902 and the work of the Divorce Law Reform Union.⁷ Yet such concentration on legal and political reform has attracted criticism as being 'narrow' and not analysing 'personal and family experience of divorce'⁸ resulting in 'an almost entirely male perspective and voice'.⁹ In contrast feminist authors have analysed not just law and legislation but also lived experiences¹⁰ and women's involvement in changes to family policy considering the dynamics of political process and the importance of pressure group tactics.¹¹ None of

²Penelope Russell, 'Matrimonial Causes Act 1857', in Erika Rackley and Rosemary Auchmuty, eds., *Women's Legal Landmarks, Celebrating the History of Women and Law in UK and Ireland*, Oxford, 2018, 63 at 69 referring to Roderick Phillips, *Untying the Knot*, Cambridge, 1991 at 66.

³See *Seddon v Seddon and Doyle* [1862] 2 Sw. & Tr. 640.

⁴See *The First Report of the Commissioners Appointed by Her Majesty to Enquire into the Law of Divorce, and More Particularly into the Mode of Obtaining Divorces A Vinculo Matrimonii*, House of Commons Parliamentary Papers, 1852–1853, Cd. 1604, Vol. 40, p. 267 discussed by Henry Kha and Warren Swain, 'The Enactment of the Matrimonial Causes Act 1857: The Campbell Commission and Parliamentary Debates', 37(3) *Journal of Legal History* (2016), 303 at 318. See also contemporary articles, for example John MacQueen, 'A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council, Together with the Practice on Parliamentary Divorce', *The Times*, 28 Sept. 1842, p.6.

⁵Per Sir Creswell Creswell in *Seddon v Seddon and Doyle* [1862] 2 Sw. & Tr. 640.

⁶See Stephen Cretney, *Family Law in the Twentieth Century*, Oxford, 2003; Lawrence Stone, *Road to Divorce: England 1530–1897*, Oxford, 1990; Henry Kha, *A History of Divorce Law: Reform in England from the Victorian to the Inter-War Years*, Oxford, 2020; Oliver Ross McGregor, *Divorce in England*, London, 1957; Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*, Cambridge, 2009 and Rebecca Probert, *Tying the Knot: The Formation of Marriage 1836–2020*, Cambridge, 2021.

⁷Cretney, *Family Law*.

⁸Paul Thompson, 'Review, Lawrence Stone Road to Divorce: England 1530–1897', 32 *History Workshop* (1991), 197 at 198.

⁹Jennifer Aston, 'Review, A History of Divorce Law: Reform in England from the Victorian to Interwar Years, Edited by Henry Kha', 35(1) *International Journal of Law, Policy, and the Family*, (2021), 1 at 5.

¹⁰See for example Sybil Wolfram, 'Divorce in England 1700–1857', 5(2) *Oxford Journal of Legal Studies* (1985), 155; Hilary Golder, *Divorce in Nineteenth Century New South Wales*, Sydney, 1985 and Dorothy Stetson, *A Woman's Issue: The Politics of Family Law Reform in England*, High Wycombe, 1982.

¹¹Stetson, *A Woman's Issue*.

this work investigates the question posed in this piece. Here I question why contemporary feminists moved to stressing equality as a concept in the context of the enactment of the MCA 1923, and analyse the limitations of the reform achieved. I set out the emergence of equality arguments in the specific context of reform of the double standard. I look first at the role of feminist campaigning groups¹² obtained through primary records.¹³

I have chosen to examine and comment primarily on the National Union of Societies for Equal Citizenship (NUSEC) as its Equal Moral Standards Committee originally drafted the bill which became the MCA 1923.¹⁴ By necessity, I also refer to other feminist groups active during the period, for example the Six Point Group, Women's Freedom League and Women's Cooperative Guild. I analyse the limitations of the reform achieved. I conclude that some contemporary actors were persuaded by the symbolism or practicality of equality arguments and that this marked a shift from previous campaigns which had concentrated on arguments relating to justice. This led to many more women successfully petitioning for divorce. Whilst in 1921 forty-one per cent of petitioners for divorce were wives, by 1924 this had risen to sixty-two per cent.¹⁵ However, ultimately as understood by contemporary actors, the enacted reform had many limitations, not least wider-ranging concerns about lack of socio-economic equality resulting in continued lack of access to divorce.

II. The Emergence of Equality Arguments in Relation to Marital Law Reform

Equality arguments had no place in the reforms introduced by the MCA 1857 which for the first time made it possible to obtain a divorce by civil court order, therefore, avoiding the ecclesiastical courts, yet which retained a double standard. The significance of the MCA 1857 is debated by historians. Some see it as procedural in nature.¹⁶ Others comment that it legalized divorce enabling secular divorce for the first time and moving away from the previous regime which had made divorce practically inaccessible.¹⁷ Campaigning for reform prior to the 1857 reforms has been described as 'muted'.¹⁸ However a couple of 'important

¹²I understand feminist campaigns to be those 'who support gender equality for women'. See Shannon Houvouras and J. Scott Carter, 'The F Word: College Students Definitions of a Feminist', 23(2) *Sociological Forum* (2008), 234 at 234.

¹³Namely the NUSEC Archive held at the Women's Library, evidence given to the Royal Commission on Divorce and Matrimonial Causes 1912 as well as records of parliamentary debates.

¹⁴Women's Library, NUSEC Archive, 'Annual Report', 1923 at 8.

¹⁵Colin Gibson, *Dissolving Wedlock*, Oxford, 1994, 85.

¹⁶See Wolfram, 'Divorce in England 1700–1857', at 157.

¹⁷Griselda Rowntree and Norman Carrier, 'The Resort to Divorce in England and Wales, 1858–1957', 11(3) *Population Studies* (1958), 188.

¹⁸Rebecca Probert, 'The Double Standard of Morality in Divorce and Matrimonial Causes Act 1857', 28 *Anglo-American Law Review* (1999), 73 at 74.

figure[s]¹⁹ did emerge. In 1854 Caroline Norton published a pamphlet entitled *English Laws for Women in the Nineteenth Century* which detailed 'injustices against women' including the 'inaccessibility of divorce'.²⁰ In the same year Barbara Leigh Smith's published work was also critical of the expensive inaccessibility of divorce, which in her view 'must lead to much injustice'.²¹ Probert considers that such campaigns did not attract great support, as the public were more concerned with property rights.²² Consequently the 1857 reform was driven forward by 'all male parliamentarians' who in Russell's analysis when passing reform had no 'ideals of equality' and instead were motivated by 'efficiency and enabling easier access to divorce for their male constituents'.²³ The retention of the double standard can be put down to 'political expediency'.²⁴ The prevailing view in Victorian times was that marriage was not 'widely conceptualised as a partnership of equals'.²⁵ Even radicals such as Bentham argued that in relation to marriage men and women should be treated differently.²⁶

The Married Women's Property Act 1882 which reformed coverture²⁷ by making a 'married woman capable of holding and disposing of any real or personal property as her separate estate, as if she were a feme sole and without the intervention of a trustee'²⁸ was also not driven forward by demands for equality.²⁹ Shanley argues that in the 1880s Parliament was not concerned with making men and women equal due to concerns that this would 'profoundly alter the structure and conduct of familial and political life alike'.³⁰ Consequently feminist campaigners at the time responded not by demanding full equality but by highlighting the injustices of the then law to women³¹ which often left wives in very difficult financial

¹⁹Kha and Swain, 'The Enactment of the Matrimonial Causes Act 1857', at 306.

²⁰Caroline Norton, *English Laws for Women in the Nineteenth Century*, privately printed, London, 1854.

²¹Barbara Leigh Smith, *A Brief Summary, in Plain Language, of the Most Important Laws Concerning Women: Together with a Few Observations Thereon*, London, 1854. Discussed by Kha and Swain, 'The Enactment of the Matrimonial Causes Act 1857', at 307.

²²See Rebecca Probert, 'The Controversy of Equality and the Matrimonial Causes Act 1923', 11(1) *Child and Family Law Quarterly* (1999), 33 at 34.

²³Russell, 'Matrimonial Causes Act 1857' in Rackley and Auchmuty, eds., *Women's Legal Landmarks*, at 65.

²⁴Kha and Swain, 'The Enactment of the Matrimonial Causes Act 1857', at 318.

²⁵*Ibid.*

²⁶Mary Sokol, *Bentham Law and Marriage*, London, 2011, at 126–127 discussed by Kha and Swain, 'The Enactment of the Matrimonial Causes Act 1857' at 318.

²⁷Coverture can be defined by the eighteenth-century jurist Sir William Blackstone, *Commentaries on the Laws of England, in Four Volumes*, Oxford, 1765, repr., New York, 1978 vol. 1 at 442 in his statement that 'the husband and wife are one person in law'. These laws started to be removed by the Married Women's Property Act 1870 (33 & 34 Vict., c 93) and the Married Women's Property Act 1882 (45 & 46 Vict., c. 75).

²⁸Married Women's Property Act 1882 (45 & 46 Vict., c. 75) s.1(1).

²⁹Norton, *English Laws for Women in the Nineteenth Century*, at 183.

³⁰Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850–1895*, Princeton, 1989, at 17.

³¹See Rosemary Hunter 'Introduction', in Rosemary Hunter, ed., *Rethinking Equality Projects in Law: Feminist Challenges*, Oxford, 2008 and Ben Griffin, 'Class, Gender and Liberalism in Parliament 1868–1882: The Case of the Married Women's Property Acts', 46(1) *Historical Journal* (2003), 59.

circumstances. Stories were publicized of husbands who had taken every penny, failed on their duty to support their wives, but yet the wife had no recourse because husband and wife were considered to be one person by the law and so could not sue each other.³² Holcombe considers that the roles played by key advocates and politicians in the lead up to the 1882 reform sowed the seed of future development of women's citizenship and forged important connections which led to future victories such as suffrage.³³ However, equality was not one of the points stressed. Yet in the campaign prior to the 1923 reforms, women moved from arguments around justice to advancing equality arguments. Women were not passive recipients in terms of law reform but active campaigners.³⁴

1. The influence of feminist campaigning groups

Feminists highlighting legal equality in relation to marriage first came to prominence in advance of the enactment of the MCA 1923. Following obtaining suffrage for women over thirty in 1918,³⁵ feminist groups were operating in a novel political environment created by obtaining the vote and 'drawing on ideas and ideals of citizenship forged during the suffrage struggle to do so'.³⁶ Some commentators argue that following obtaining suffrage women's campaigns stalled.³⁷ For example, Vera Brittain remarked in 1928 that feminists were often portrayed as 'spectacled, embittered women, disappointed, childless, dowdy and generally unloved'.³⁸ After review of contemporaneous materials this interpretation seems unfounded. In fact for many the struggle was not over, but rather the 'perception [was] that the struggle would change'.³⁹

New organizations, based on women as active citizens in change, were set up in order to tackle the next phase in the campaign. The Six Point Group was established in 1921. Lady Rhondda writing in *Time and Tide* in its

³²Rosemary Auchmuty, 'The Married Women's Property Acts: Equality was not the Issue', in Hunter, ed., *Rethinking Equality Projects in Law: Feminist Challenges*, at 13.

³³Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England*, Toronto, 1983, at 185. See also Nicoletta F. Gullace, *The Blood of Our Sons: Men, Women, and the Renegotiation of British Citizenship During the First World War*, New York, 2002 and Susan Kingsley Kent, 'The Politics of Sexual Difference: World War 1 and the Demise of British Feminism', 27(3) *The Journal of British Studies* (1988), 232.

³⁴Erika Rackley and Rosemary Auchmuty, 'The Case for Feminist Legal History', 40(4) *Oxford Journal of Legal Studies* (2020), 878 look at the importance of examining women's activism in driving forward legal change.

³⁵Representation of the People Act 1918 (18 & 19 Geo. V, c. 12).

³⁶Sue Innes, 'Constructing Women's Citizenship in the Interwar Period: the Edinburgh Women Citizens' Association', 13(4) *Women's History Review* (2004), 621 at 621.

³⁷See for example Vera Brittain, *Manchester Guardian*, 13 Dec. 1928.

³⁸*Ibid.*

³⁹Innes, 'Constructing Women's Citizenship in the Interwar Period' at 623 referring to Johanna Alberti, 'A Symbol and a Key? The Suffrage Movement in Britain, 1918–1928', 267, in June Purvis and Sandra Holton, eds., *Votes for Women*, London, 2000.

12th January 1921 edition explained that '[w]e have recently passed the first great toll-bridge on the road which leads to equality, but it is a far cry yet to the end of road, ... we have in a fact achieved the half way position ... and that is never a position which makes for stability'.⁴⁰ Newly enfranchised women were seen as now having a greater responsibility to ensure change.⁴¹ The National Union of Women's Suffrage renamed itself in order to expand its remit to cover a wide range of political, social and economic rights for women.⁴² Henceforth they would be named the National Union of Societies for Equal Citizenship. In terms of demonstrating commitment to equality arguments the title of this organization is telling in itself. No nineteenth-century organization would have used the title 'equal'. The NUSEC archive documents that 1919 (the first year of the existence of the organization) was 'not altogether unexpectedly one of some difficulty' with recruitment 'among the younger generation [sometimes] not being very brisk'.⁴³ Yet by the following year, women began to recover from the war and recognize that despite the fact that suffrage had been won, the battle was far from over. NUSEC 1920 annual report states that 'the most formidable of the difficulties encountered during the past two years appears to have been solved and that [there were] evidences of fresh life and vigour'.⁴⁴ During the years 1918–19, grass roots organizations for women were also set up across the country, including for example the Edinburgh Women Citizens' Association and the London-based National Council of Women Citizens' Associations.⁴⁵ These joined longer-standing organizations such as the Women's Freedom League⁴⁶ and the Women's Cooperative Guild.⁴⁷

These groups often had broad agendas of reform, although arguments stressing equality can be seen throughout as the groups focused on 'the perceived power of women's votes in forwarding gender equality and social reform'.⁴⁸ The Women's Cooperative Guild for example ran a prominent national campaign for statutory maternity benefit and divorce law reform between 1910 and 1914,⁴⁹ which included a large consultation with their membership about divorce law reform.⁵⁰ The Women's Freedom League

⁴⁰Lady Rhondda, *Time and Tide*, 12 Jan. 1921. For discussion see Angela John, *Turning the Tide: The Life of Lady Rhondda*, Cardigan, 2014, at 387.

⁴¹Margaret Walters, *Feminism: A Very Short Introduction*, Oxford, 2005.

⁴²Catriona Beaumont, 'The Women's Movement, Politics and Citizenship, 1918–1950s', in Byna Zaeiniger-Bargielowska, ed., *Women in Twentieth-Century Britain, Social, Cultural and Political Change*, London, 2001.

⁴³Women's Library, NUSEC Archive, 'Annual Report and Balance Sheet' 1918 at 25.

⁴⁴*Ibid.*, 'Annual Report' 1920 at 25.

⁴⁵Innes, 'Constructing Women's Citizenship in the Interwar Period'.

⁴⁶Founded in 1907.

⁴⁷Founded in 1883.

⁴⁸Innes, 'Constructing Women's Citizenship in the Interwar Period', at 624.

⁴⁹Gillian Scott, *Feminism and the Politics of Working Women: The Women's Co-operative Guild, 1880s to the Second World War*, London, 2005, at 72.

⁵⁰*Ibid.*, at 99.

through their publication *The Vote* published between 1919 and 1933 reported regularly on the role of women appointed Justices of the Peace.⁵¹ The Six Point Group created a list of new demands including satisfactory legislation for widowed and unmarried mothers and children, equal guardianship rights for married parents and equal pay for teachers and civil servants. As the 1920s progressed these specific aims amorphized into equality-based principles regarding women's political role, women's occupations and women's moral, social economic and legal roles. During this period they campaigned on equality-based principles which ultimately led in part to the League of Nations passing an Equal Rights Treaty. The Edinburgh Women Citizens' Association (EWCA) also stressed citizenship stating that its objectives were 'to organise and educate women so as to foster a sense of citizenship' and 'to ensure greater representation of women'.⁵²

The NUSEC constitution sought 'real equality of ... status ... between men and women'⁵³ and NUSEC looked to achieve all necessary economic, legislative and social reforms. NUSEC members argued that the professions should be open to women who should receive equal pay. NUSEC enumerated a number of reforms which they were specifically targeting. From 1920 onwards each annual NUSEC report listed in its opening cover, reforms requiring 'immediate' attention. In 1920 this included 'equal guardianship, widows' pensions, women as solicitors barristers and judges, equal moral standard, candidates of women for Parliament and proportional representation and equal pay for equal work'.⁵⁴ Specifically in relation to divorce law reform, whilst in the 1919 annual report 'moral standard' had been restricted to reform of solicitation laws,⁵⁵ from 1920 onwards reform of the equal moral standard included not only solicitation law reform, but also 'equality in divorce law'.⁵⁶ In the 1920 annual report NUSEC specifically declared itself 'in favour of an alteration of the divorce laws such as will establish equality between men and women'.⁵⁷ Whilst earlier campaigning groups had looked at changing the grounds for divorce, NUSEC campaigned in relation to divorce for removal of the double standard alone. In NUSEC's annual report 1921 they explain that when discussing the draft matrimonial bill '[in] neither case was it felt to be within the scope of NUSEC to put forward any views as a Union as to the grounds on which Divorce should be granted. The national union does however ask that whatever these

⁵¹ Anne Logan, *Making Women Magistrates: Feminism, Citizenship and Justice in England and Wales 1918–1950*, thesis submitted for the degree of Doctor of Philosophy, University of Greenwich, London, 2002, at 231.

⁵² Innes, 'Constructing Women's Citizenship in the Interwar Period,' at 625.

⁵³ Women's Library, NUSEC Archive, Rule II of the NUSEC Constitution.

⁵⁴ Women's Library, NUSEC Archive, 'Annual Report' 1920, at 2.

⁵⁵ *Ibid.*, 'Annual Report' 1919, at 17.

⁵⁶ *Ibid.*, 'Annual Report' 1920, at 13.

⁵⁷ *Ibid.*, at 14.

grounds are they should be the same for men and women and it is therefore supported the principle of equality'.⁵⁸

In reform of the double standard NUSEC stressed equality. This can be seen from the NUSEC 1919 publication entitled *The Common Cause of Humanity* including a programme for reform involving promoting equality in the divorce laws.⁵⁹ NUSEC's Executive Committee Meeting Notes from 4th March 1920 as documented in the *Common Cause* quotes Mrs Hubback stating that in terms of the scheme for divorce law reform, this had to include the point '(a) that the causes for which a divorce may be granted should be the same for men and women'.⁶⁰ NUSEC's Equal Moral Standard Committee, therefore, drafted the bill on the basis of strict equality between men and women on grounds of divorce with adultery being the sole ground.⁶¹ Other evidence of NUSEC's commitment to equality can be seen from contemporaneous newspaper reports such as the *Guardian* and *Observer* from 1st March 1923 who quote NUSEC as saying that the present law is 'notorious ... [in] that a double moral standard prevails ... Infidelity is thus condemned in a wife and condoned in a husband ... There is a unanimity of opinion among those who usually oppose any extension of divorce that it is a matter of elementary justice that the grounds should be the same for men and women'.⁶² Other publications issued by NUSEC directly also demanded immediate reform of the divorce law.⁶³ This included a full-page poster published in the *Common Cause for Humanity* in October 1919 which listed equality in divorce law as one of the NUSEC demands.⁶⁴ *Time and Tide*, the periodical issued by the Six Point Group, also campaigned for reform in relation to equality of grounds in divorce law and did this by monitoring MPs' voting practices. On this basis they placed Dennis Herbert MP on their Blacklist, and the Six Point Group urged women to vote against him (regardless of their political persuasion), because of his opposition to divorce reform.⁶⁵

Yet what did these feminist groups understand about the content of equality? Right from the beginning of NUSEC, there was a divide between those campaigning for formal equality and those who were concerned that this would be too limited a reform.⁶⁶ Some feminists emphasized difference, or

⁵⁸Ibid., 'Annual Report'1921, at 7.

⁵⁹NUSEC Journal, *The Common Cause of Humanity*, Oct. 1919.

⁶⁰Women's Library, NUSEC Archive, 'NUSEC Executive Committee Meeting, The Common Causes', 4 March 1920, at 4.

⁶¹Women's Library, NUSEC Archive, 'Annual Report'1923, at 8.

⁶²*Manchester Guardian*, 1 March 1923, 'The Matrimonial Causes Bill: An Equal Law for Man and Woman'.

⁶³See Russell, 'Matrimonial Causes Act 1923', in Rackley and Auchmuty, eds., *Women's Legal Landmarks*, at 189.

⁶⁴See *ibid.*, at 192.

⁶⁵See *ibid.*, at 190. See also Dale Spender, *Time and Tide Wait for No Man*, London, 1984, at 172.

⁶⁶In this text I refer to 'equalitarians' and '(d)ifference feminists'. Whilst equalitarians were campaigning for strict equality before the law regardless of gender, difference feminists argued that intrinsic differences between men and women should be recognized.

‘a wider conception of feminism’ which was distinguished by ‘its attempt to be proactive and to aim beyond demands for equality, because equality could not account for the exigencies of motherhood’.⁶⁷ Rathbone writing in 1918 when evaluating the NUSEC constitution reference to ‘real equality’ was already discussing whether ‘equality ... was too narrow a thing to aim at’.⁶⁸ She explained that this did not mean that women were intending to assimilate with men, whose position was unsatisfactory, and explained that “equality” was not a synonym for “identity” as if that was meant it would have been stated’.⁶⁹ In her view she considered that ‘[i]t should be possible to make the status and opportunities of women “equal to” those of men, without making them in the least the same’.⁷⁰ This demonstrates that members of NUSEC such as Rathbone were deeply conscious of different types of feminism and the limitations of formal equality, before she labelled them ‘old’ and ‘new’ in 1925.⁷¹ When Rathbone became President of NUSEC she argued that women should demand, not equality with men, but ‘what women need to fulfil the potentialities of their own natures and to adjust themselves to the circumstances of their own lives’.⁷² Members of the Six Point Group were also conscious of different types of feminism and the limitations of formal equality. Before identifying itself as the Six Point Group in 1921 *Time and Tide* had already run features⁷³ considering ‘much needed reforms’ some of which were specifically connected to women’s status as ‘mothers, including unmarried and widowed mothers’.⁷⁴

Some ‘equalitarians’ within NUSEC, such as leading figure Millicent Fawcett were deeply committed to equality as an argument as demonstrated by her campaigning for equal rights and removal of the double standard.⁷⁵ In their 1923 annual report, the passage of the Matrimonial Causes Act was listed as a ‘triumph’.⁷⁶ It should be considered whether arguing for equal access to divorce says anything positive about women’s position in marriage, but arguments in favour of equal access to divorce were also favoured by those supporting a ‘contractarian’ view of marriage and thus the equal status of women within marriage. David McLellan explains ‘that those who wish to push the liberal individualistic aspects of Mill (and Locke)

⁶⁷Maria DiCenzo and Alexis Motuz, ‘Politicizing the Home: Welfare Feminism and the Feminist Press in Interwar Britain’, 27(4) *Women: A Cultural Review* (2016), 378 at 389.

⁶⁸Eleanor Rathbone, ‘The Future of the National Union’, *The Common Cause of Humanity*, 15 Feb. 1918, at 573.

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹See DiCenzo and Motuz, ‘Politicizing the Home’, at 387.

⁷²Walters, *Feminism a Very Short Introduction*, at 70.

⁷³*Time and Tide*, 19 Nov. and 3 Dec. 1920.

⁷⁴See DiCenzo and Motuz, ‘Politicizing the Home’, at 386.

⁷⁵See Millicent Fawcett speaking in 1910 when giving evidence. *Royal Commission on Divorce and Matrimonial Causes, Minutes of Evidence*, House of Commons Parliamentary Papers, 1912, vol. II, Cd. 6480, p. 371, q. 21,732.

⁷⁶Women’s Library, NUSEC Archive, ‘Annual Report’ 1923–24, at 3.

argue that marriage should become a contractual relationship like any other'.⁷⁷ Equal access to divorce was also necessary to allow men and women equal access to court-based orders on divorce, such as maintenance payments.⁷⁸ Members of NUSEC when campaigning for election to the NUSEC Executive Committee in 1927 continued to be divided about the content of equality arguments.

Whilst Rathbone then President stated that 'the work of NUSEC began but must not end with equality'⁷⁹ others reasserted the importance of equality considerations. The Honourable Secretary Lady Balfour of Burleigh stated for instance that 'I desire to reaffirm my adherence to the fundamental principle on which the National Union stands, namely the right of women to Equal Citizenship with men'.⁸⁰ Mrs Helen Fraser added that she was not in sympathy with birth control measures and that she 'had believed for several years that [NUSEC] had taken up questions which are not ones of equality to the detriment of our power and influence in the country'.⁸¹ Mrs le Seur also stated that 'I feel that the Union should do well to concentrate on the fundamentals of freedom'.⁸² Ultimately the divide in NUSEC between equalitarians and difference feminists across a range of feminist issues was one of the reasons leading to the group splintering.⁸³

The adoption of formal equality can almost be traced as a strategy or first step, before seeking wider and deeper reaching reform. Right in the first year of NUSEC the 1919 annual report suggests a flexibility of approaches in order to remedy the many 'disabilities' which women still 'suffered by reason of their sex'.⁸⁴ In terms of the 'best method of proceeding' the introduction sets out that in addressing their future 'open minded experiment should lead to the best method for focussing the demand that undoubtedly exists for complete equality of liberties, status and opportunities between men and women'.⁸⁵ This matches Innes' study of women's citizens associations in Scotland during the period 1918–30 where she suggests that 'divisions between "old" and "new" feminism' should not be overstated as in practical rather than theoretical terms they were not actually a tension for women's organisations'.⁸⁶

⁷⁷David McLellan 'Contract Marriage: The Way Forward or Dead End', 23(2) *Journal of Law and Society* (1996), 234 at 235.

⁷⁸Following the Matrimonial Causes Act 1878 (41 & 42 Vict., c. 19) women could sue for maintenance, although often not paid.

⁷⁹Women's Library, NUSEC Archive, 'Statement of Views on the Immediate Programme by Those Standing for Election to the Executive Committee', at 1.

⁸⁰*Ibid.*, at 1.

⁸¹*Ibid.*, at 3.

⁸²*Ibid.*

⁸³When a number of the group left to form the Open Door Council. See DiCenzo and Motuz, 'Politicizing the Home', at 392.

⁸⁴Women's Library, NUSEC Archive, 'Annual Report and Balance Sheet' 1918, at 25.

⁸⁵Innes, 'Constructing Women's Citizenship in the Interwar Period', at 625.

⁸⁶*Ibid.*, at 623.

Articles published in *Time and Tide* in 1920 stressed ‘comparatively small practical reforms’ that could be effected by legislation and which already had public and/or parliamentary support behind them, distinguishing these kinds of reforms from those ‘which can be achieved only by alteration in public opinion or custom’ or those ‘of such a character as to arouse violent opposition in any other big group of electors’.⁸⁷ Debaters at the time, for example leading difference feminist Rathbone, also specifically referred to the equality argument as being the ‘safer course’.⁸⁸ The six points adopted in the Six Point Group’s programme aimed to strive for ‘circumscribed, achievable goals, underscoring how ambitious measure such as endowment and birth control were by comparison’.⁸⁹ Perhaps the stress on equality arguments prior to removal of the double standard was conscious, as this could be an easy first step to pursue prior to other wider reaching reforms (such as reform of the grounds for divorce) which had previously been rejected. I now investigate what other contemporaneous sources reveal about why feminists chose to emphasize equality arguments.

2. The Royal Commission on Divorce

Other groups were also campaigning for reform of divorce. This included the Divorce Law Reform Union, founded in 1906–07 which campaigned not only for ‘the removal of the double standard but also championed the extension of the grounds for divorce and the establishment of local and inexpensive tribunals’.⁹⁰ At the time there was only one court, (named the Court for Divorce and Matrimonial Causes) which could grant divorces, and this was based in London and so was expensive for those based in the regions.⁹¹ The growing demand for reform led in 1909 to the appointment of the Royal Commission on Divorce and Matrimonial Causes 1912 (hereafter ‘Royal Commission 1912’) led by Lord Gorell to ‘inquire into present state of law of England and administration thereof of divorce’.⁹² The members of the Royal Commission became divided about how reform should take place. Whilst the majority wanted to extend the grounds of divorce on an equal basis to include desertion, cruelty, insanity, habitual drunkenness or imprisonment under a commuted death sentence, the minority refused to agree extending the grounds other than for adultery. Ultimately the only thing all of them

⁸⁷*Time and Tide*, 3 Dec. 1920, at 604.

⁸⁸*Woman’s Leader*, 9 March 1923, at 44.

⁸⁹DiCenzo and Motuz, ‘Politicizing the Home’, at 387.

⁹⁰See Russell, ‘Matrimonial Causes Act 1923’, at 190.

⁹¹See Gibson, *Dissolving Wedlock*.

⁹²*Report of the Royal Commission on Divorce and Matrimonial Causes*, House of Commons Parliamentary Papers, 1912, Cd. 6478 (hereafter ‘Royal Commission 1912’).

agreed on was that the law should treat husbands and wives equally, regardless of what the grounds for divorce were.⁹³

The contemporary evidence demonstrates that the equality argument regarding grounds for divorce was discussed extensively by the many different contributing sources to the Royal Commission's end report, who represented many different social groups and interests.⁹⁴ The Royal Commission conducted seventy-one sittings, fifty-six at which evidence was taken and involved the examination of 246 witnesses. As many concerns had been expressed that the extension of divorce would be contrary to Christian principle, the views of theologians and those of differing principles were canvassed.⁹⁵ Interestingly, whilst many representatives of Christian groups did consider marriage to be absolutely 'indissoluble'⁹⁶ a number of differing religious organizations expressed their support of equality between the sexes with regard to divorce. For example Mr Isaac Sharp, General Secretary to the Society of Friends said that they 'had always proceeded upon the principle of the equality; of the sexes in spiritual matters and in Church government, they should be placed on an equality; as to causes for divorce'.⁹⁷ The Primitive Methodist Church expressed the opinion that there should be equality as between the sexes in relation to the grounds of divorce,⁹⁸ with the General Assembly of the Presbyterian Church of Wales saying they did not want to lessen the sanctity of marriage but 'that legal and moral liability should be the same for both sexes',⁹⁹ as adultery was equally sinful. Contemporary actors were also aware that other jurisdictions had already introduced access to divorce on the basis of equality with the *Manchester Guardian* commenting that '[i]t is not a matter of congratulation that England and Wales should lag behind the rest of the civilised world'.¹⁰⁰ The Royal Commission 1912 report referred to many jurisdictions which permitted divorce on the basis of equality at this time and listed fourteen jurisdictions in this regard.¹⁰¹

Yet where the equality argument seemed to be most convincing was in relation to the witnesses interviewed, demonstrating the symbolic nature and persuasiveness of this argument. The Royal Commission 1912 report

⁹³See Russell, 'Matrimonial Causes Act 1923', at 191.

⁹⁴Cretney, *Family Law*, at 206 referring to Royal Commission 1912.

⁹⁵Majority Report of the Royal Commission 1912, (hereafter 'Majority Report') at 30.

⁹⁶See for example the Right Reverend, the Bishop of Birmingham, Dr Gore (now Bishop of Oxford), Majority Report, at 30.

⁹⁷Majority Report, at 34.

⁹⁸*Ibid.*, at 35.

⁹⁹*Ibid.*

¹⁰⁰*The Manchester Guardian*, 1 March 1923, 'The Matrimonial Causes Bill: An Equal Law for Man and Woman'.

¹⁰¹Majority Report, at 87 referring to Austria (for Protestants); Bulgaria; Denmark; France; German Empire; Hungary (for Protestants, Greeks and Jews); the Netherlands; Norway; Romania; Russia; Cape Province; Natal; New Zealand, and New South Wales.

stated that '[n]othing has been more striking in our inquiry than the agreement amongst the great majority of the witnesses, who dealt with the question, in favour of equality'.¹⁰² The witnesses included some notable figures such as Margaret Llewelyn-Davies, General Secretary of the Women's Co-operative Guild representing 26,000 artisans' wives. When she gave evidence to the Royal Commission in 1910 she explained that 'feeling was extremely strong' in fact 'unanimous' [apart from five or six members] as regards an equal standard for men and women.¹⁰³ NUSEC also stressed equality, which can be seen by the evidence given to the Royal Commission by Millicent Fawcett in 1910 where she stated that 'I urge most strongly that the difference between the sexes which now exists in divorce law should be put an end to'.¹⁰⁴ The Royal Commission 1912s' report concluded that there was 'no evidence of difference of opinion among women on this matter'.¹⁰⁵ Where women were concerned, including 'women of all classes and all shades of religious and political opinion [they were] unanimously in favour of equality of remedy in matrimonial causes'.¹⁰⁶ Holmes' analysis of the Minutes of Evidence taken by the Royal Commission revealed that out of the ninety-four witnesses who answered a version of the question '[D]o you think that the grounds for divorce should be the same for both men and women ... [seventy-six] replied affirmatively that they would favour granting a woman the right to divorce her husband on the ground of his adultery alone'.¹⁰⁷ Although a minority of witnesses did continue to be in favour of the double standard.¹⁰⁸ Once again the evidence taken before the Gorell Commission would seem to suggest that whilst some did have a genuine commitment to equality arguments favoured by the symbolism of such points, others had adopted the equality argument on the basis of pragmatism, it being the only point on which reform could be agreed and therefore a practical first step.

3. Equality arguments made in parliamentary debate

At the time of the 1857 divorce law reform, the distinction between men and women regarding grounds for divorce was supported by 126 to sixty-five in the House of Commons.¹⁰⁹ However in the debates prior to the enactment of the MCA1923 the 'rejection of the double standard was

¹⁰²Majority Report, at 88.

¹⁰³Royal Commission 1912, *Minutes of Evidence*, Vol. III, Cd. 6481, p.150, q.36,983.

¹⁰⁴Royal Commission 1912, *Minutes of Evidence*, Vol. II, p.371, q. 21,732.

¹⁰⁵Majority Report, at 214.

¹⁰⁶*Ibid.*

¹⁰⁷Anne Summer Holmes, 'The Double Standard in English Divorce Laws, 1857–1923', 20(2) *Law and Social Inquiry* (1995), 602 at 602 referring to Royal Commission 1912. 1.

¹⁰⁸Majority Report, at 214.

¹⁰⁹Holmes, 'The Double Standard in English Divorce Laws. 1857–1923', at 602 referring to *Parliamentary Debates*, series 3, vol.147, col. 1283, 7 Aug. 1857 (HC).

over-whelming¹¹⁰ passing the House of Commons by a vote of 257 to twenty-six.¹¹¹ Previous bills in the shape of the Matrimonial Causes Bills of 1920 and 1921 (following the Royal Commission 1912 majority report recommendation) had attempted to reform the grounds for divorce which subsequently become known as a 'stubborn controversy'.¹¹² It was only when the Act became solely concerned with equality and removal of the double standard that the bill passed through Parliament. Ultimately the Act, drafted by NUSEC in their Moral Standards Committee¹¹³ was phrased as follows '[b]y this Act ... a wife is at last given the right to divorce her husband on the ground of adultery alone'.¹¹⁴ This would point to equality as a driving factor because of the pragmatism of the argument, being a first step in reform and comparatively simpler to enact than reform to the grounds of divorce. When the Matrimonial Causes Bill was introduced into Parliament by Major Cyril Entwistle MP he minimized debate on the second reading, by referring to the equality argument. He did this by saying '[t]he sole object of this Bill is to give equality to the sexes in the matter of divorce, and it has no other purpose whatsoever'.¹¹⁵ The same strategy was followed by Lord Buckmaster in the House of Lords.¹¹⁶ Unlike earlier attempts to add further grounds for divorce the bill passed smoothly through Parliament. The stress on the equality argument in the House of Lords debate on 23rd June 1823 can be seen as the word equality was mentioned on seventeen different occasions. However, some speakers in the House of Lords were persuaded by the symbolism of the equality argument seeing this as more than a pragmatic tool. Lord Buckmaster stressed the importance of equality between the sexes by stating that '[w]hat is there in social justice or expediency that can warrant the continuance of a system which involves such marked injustice?'¹¹⁷ Lord Parmoor opined that 'equality of the sexes, so far as the grounds of divorce are concerned, is one of the great Christian rules of our moral conduct'.¹¹⁸ The MCA 1923 was just one of a number of bills concerning equality which passed through Parliament in this era.¹¹⁹ Not all speakers saw the concern as lack of rights for women. Interestingly the Earl of Birkenhead stated that he saw the purpose of the bill to be 'equality between the sexes' however he raised a 'deep' concern that

¹¹⁰*Ibid.*, at 602.

¹¹¹*Ibid.*, referring to *Parliamentary Debates*, series 5, vol. 164, col. 2658, 8 June 1923 (HC).

¹¹²Lord Buckmaster *Parliamentary Debates*, series 5, vol. 56, cols. 636–675, 11 March 1923 (HL).

¹¹³Women's Library, NUSEC Archive, 'Annual Report' 1923, at 8.

¹¹⁴Matrimonial Causes Act 1923 (13 & 14 Geo. V, c. 19).

¹¹⁵*Parliamentary Debates*, series 5, vol. 160, col. 2355, 2 March 1923 (HC).

¹¹⁶*Parliamentary Debates*, series 5, vol. 54, col. 573, 26 June 1923 (HL).

¹¹⁷*Ibid.*, at col. 576.

¹¹⁸*Ibid.*, at cols. 601–602.

¹¹⁹See Maya Takayanagi, 'Sacred Year or Broken Reed? The Sex Disqualification (Removal) Act 1919', 29 (4) *Women's History Review* (2020), 563 and Maya Takayanagi, 'The Sex Disqualification (Removal) Act', in Rackley and Auchmuty, eds., *Women's Legal Landmarks*, at 33.

as women now possessed the vote, and were in the majority, that there was going to be lack of 'equality from the masculine point of view ...' leading to a 'disadvantage to the sex to which the members of this House belong'.¹²⁰ Whilst some believed the bill did not go far enough,¹²¹ many speakers refused in 1923 to contemplate extending the grounds for divorce, with Lord Parmoor stating that this was 'the only reason' which could induce [him] to support this bill.¹²² The Archbishop of Canterbury also stated that any extension to the grounds of divorce was in his view 'deplorable'¹²³ explaining that he voted for this measure 'simply because it confines itself to a dissolution of marriage on the one specific ground of adultery ... and [if it had attempted] to extend and multiply the grounds of divorce I should have felt bound to do all I could to prevent its becoming law'.¹²⁴

Adultery was seen as particularly heinous, described by Lord Buckmaster as striking at 'the very foundation of matrimonial relationships'.¹²⁵ In Holmes' view condemnation of adultery was at least as much a motivator as concerns about equality, there being a 'belief that male adultery contributed to such social problems as prostitution, illegitimacy, and the spread of venereal disease'.¹²⁶ and she considered that this argument 'was as significant as the desire to relieve the hardships imposed by the double standard'.¹²⁷ Whilst some saw equality as a method for reform as this was a pragmatic first step on which the majority should agree, this should not however detract from how important the symbolism of equality arguments were to some contemporaneous actors in the passage of the MCA 1923.

III. Criticisms of the Reform Achieved by the Matrimonial Causes Act 1923

1. *Not concentrating on the right agenda*

Not all feminist campaigners actually supported divorce law reform. Some feared to champion divorce in case it 'jeopardised other causes'.¹²⁸ For feminists who agreed with writers such as Mill who in 1869 depicted marriage as 'the only legal bondage known to our law',¹²⁹ whilst reform of the double standard in marriage was seen as possibly producing some benefits, it was also be seen as counter-productive and distracting from other campaigns

¹²⁰*Parliamentary Debates*, series 5, vol. 54, col. 590, 26 June 1923 (HL).

¹²¹Lord Birkenhead, *ibid.*, at col. 587.

¹²²*Ibid.*, at col. 600.

¹²³*Ibid.*, at col. 594.

¹²⁴*Ibid.*, at col. 595.

¹²⁵*Ibid.*, at col. 576.

¹²⁶*Ibid.*, at col. 601.

¹²⁷*Ibid.*, at col. 619.

¹²⁸Probert, 'The Controversy of Equality', at 34.

¹²⁹J. S. Mill, *The Subjection of Women*, 2nd ed., London, 1869, at 158.

which they saw as particularly needed by women including birth control, housing and social welfare for families.¹³⁰ Rathbone, inspired by a brand of 'new feminism', looked at the role of women at home and warned of the dangers of economic dependency on husbands. She launched a campaign for family allowances to be paid directly to married mothers.¹³¹ Although some organizations such as the Mothers Union (influenced by conservative and religious groups) resisted these reforms, the campaign for women's economic and social welfare, including provision of information about birth control and healthcare was also joined by other feminist campaigning including townswomen's guilds such as the Women's Cooperative Guild and the National Union of Townswomen's Guilds.¹³²

Equalitarian feminists campaigning in the 1920s for liberal equality before the law including reform of the double standard, responded to the criticisms brought forward by the new feminists. They argued that the reforms stressed by new feminists encouraged the view of women's work being at home, thereby limiting access to outside employment.¹³³ Interestingly feminists on both sides of the divide had a great commitment to women's citizenship but had differing concepts of what this meant. Lucy Vickers explains Rathbone's stance by stating that she was also a strong supporter of equal citizenship but understood this in a different way. For her citizenship had to recognize the harsh realities of women's lives, encourage them to seek work outside the home whilst also recompensing them for their unpaid labour at home.¹³⁴ Ultimately both campaigning groups achieved some success on particular points. Perhaps because of the simplicity and symbolic value of the equality argument, or its use as a practical first step, the double standard was reformed in 1923. Rathbone's campaign for payment of welfare support, non-means tested directly to the mother for the care of children was also successful, although this did take until 1945 to achieve.¹³⁵

2. It took too long

A further criticism of the MCA 1923 is that it took too long to achieve. Probert argues that equality arguments were not the 'major motivation' for reform in 1923 as she states that actually the courts were primarily concerned with removing inconsistencies which had developed in the common law.¹³⁶

¹³⁰See Beaumont, 'The Women's Movement', at 261–262.

¹³¹Eleanor Rathbone, 'The Disinherited Family', 35(1) *International Journal of Ethics* (1924), 94.

¹³²Beaumont, 'The Women's Movement', at 267.

¹³³See Susan Pederson, *Eleanor Rathbone and the Politics of Conscience*, New Haven, 2004, at 183.

¹³⁴Lucy Vickers, 'Family Allowances Act 1945', in Rackley and Auchmuty, eds., *Women's Legal Landmarks*, 227 at 229.

¹³⁵Family Allowances Act 1945 (8 & 9 Geo. VI, c. 41).

¹³⁶Probert, 'The Controversy of Equality', at 33. See also Holmes, 'The Double Standard in English Divorce Laws, 1857–1923'.

However, it can be argued that these inconsistencies had primarily developed as judges sought to assist women burdened by the double standard. Perhaps the issue was that the equality argument took too long to come to fruition as it had been left in place following the last major divorce reform in 1857¹³⁷ and then as evidenced above only came to the forefront in advance of the MCA 1923. This resulted in many inconsistencies being left in the common law, as judges used increasingly lenient conceptions of grounds, including the new aggravations inserted by the MCA 1857 of cruelty and desertion to assist women to 'allow [more] women to procure divorces'.¹³⁸

The lengths which the courts were prepared to go to assist female petitioners can be seen in relation to the case law on desertion. For example in *Yeatman v Yeatman*, when considering whether the husband had a 'reasonable cause'¹³⁹ to desert his wife, the husband had to have a 'grave and weighty reason' and could not rely on 'mere fault of temper and habits'.¹⁴⁰ Constructive desertion was also found to include a case where a wife was held to have been deserted where her husband refused to give up his adultery.¹⁴¹ Gibbons explains that this led to 'increasingly apparent and embarrassing manipulation of the existing divorce law'.¹⁴² Following the Matrimonial Causes Act 1884 if a wife petitioned for a decree of restitution of conjugal rights (even if she did not actively wish this), and the husband refused her entreaty, then this would allow her to petition for divorce from her adulterous husband, thereby bypassing the two-year waiting period otherwise needed.¹⁴³

A more expansive definition of cruelty was also developed by the common law to no longer include actual violence.¹⁴⁴ In previous case law in order to satisfy the definition of cruelty there had to be 'reasonable apprehension of danger of life or health'.¹⁴⁵ Case law found that husbands who 'quarrelled and used improper language' or were 'frequently intoxicated or had failed to communicate that they suffered from a sexually transmitted infection' had not inflicted behaviour on their wives that fulfilled the definition of cruelty.¹⁴⁶ However, by 1869 in the case of *Kelly v Kelly* the court stated that whilst the 'just and paramount authority of a husband' should not be disparaged, cruelty would be found if it included not only physical violence but force 'physical or moral' for such a length of time to 'break down her

¹³⁷See Rackley and Auchmuty, 'The Case for Feminist Legal History'.

¹³⁸Wolfram, 'Divorce in England 1700–1857', at 157.

¹³⁹*Yeatman v Yeatman* (1868) LR 1 P & D 489.

¹⁴⁰*Ibid.*

¹⁴¹In *Sickert v Sickert* (1899) P. 278. See Probert 'The Controversy of Equality' for discussion at 36.

¹⁴²Gibson, *Dissolving Wedlock*, at 85.

¹⁴³Matrimonial Causes Act 1884 (47 & 48 Vict, c.20)

¹⁴⁴Probert 'The Controversy of Equality', at 36.

¹⁴⁵*Evans v Evans* (1790), 1 Hag. Con. 34 at 38.

¹⁴⁶Kha and Swain, 'The Enactment of the Matrimonial Causes Act 1857', referring to *Kenrick v Kenrick* (1831), 4 Hagg. Eccl. 114, *Chesnutt v Chesnutt* (1854) 1 Sp. 196 and *Ciocci v Ciocci* (1853) 1 Sp. 121.

health and render a malady imminent'.¹⁴⁷ The judge ordinary stated that a 'wife is not a domestic slave, to be driven at all cost, short of personal violence into her husband's demands'.¹⁴⁸ In addition whilst previously forgiveness of adultery with full knowledge of the facts, known as 'condonation' if then followed by the resumption of marital relations would have been an 'absolute bar to a petition for divorce'¹⁴⁹ in later case law if the 'condoned offence' was committed again, this would lead to grounds for divorce.¹⁵⁰

The result of the developments in the common law meant that following the MCA 1857 many more petitioners for divorce were women.¹⁵¹ Historical writing such as that by constitutional lawyer Dicey writing in 1905 on his assessment of the MCA 1857 commented that this Act and subsequent common law developments had resulted in women standing in law 'substantially on an equality with men'.¹⁵² Other turn of the century commentators also argued that women had made very great progress.¹⁵³ Montgomery, writing in 1897 for instance stated that compared to thirty years previously, '[o]ne might almost now say, inverting Rousseau's famous phrase: woman was born in chains, and behold now on every side she is free'.¹⁵⁴ It can be argued that this was part of a wider social climate as for example judges during the late-Victorian period onwards, when examining wife-killing formed a parallel process, coming in the view of Wiener to impose 'rising court room hurdles' when examining defences of provocation.¹⁵⁵

It would be inaccurate to describe judges as motivated by concerns for equality. As previously discussed women were commonly not regarded as the equal of men within marriage.¹⁵⁶ Whilst judges may have been moving towards a 'more companionate model [of marriage] which demanded restraint and forbearance from husbands'¹⁵⁷ with the husband's role in marriage being one of chivalry and 'protection' and the wife's duty was submission¹⁵⁸ this was not equality. A valid criticism of the MCA 1923 was that it took too long to achieve. Lack of reform of the double standard and

¹⁴⁷*Kelly v Kelly* (1869) 2 LR P & D 31.

¹⁴⁸*Ibid.*

¹⁴⁹Probert, 'The Controversy of Equality', at 36.

¹⁵⁰*Newsome v Newsome* (1871) LR 2 P & D 306.

¹⁵¹Russell, 'Matrimonial Causes Act 1923', referring to Philips, 'Untying the Knot', at 130 who explains that following this reform forty per cent of petitioners for divorce were women, as opposed to one per cent pre reform.

¹⁵²A. V. Dicey, *Lectures on the Relationship Between Law and Public Opinion in England During the 19th Century*, London, 1905, at 43.

¹⁵³J. E. G. De Montmorency, 'The Changing Status of a Married Woman', 1 *Law Quarterly Review* (1877), at 192.

¹⁵⁴*Ibid.*

¹⁵⁵Martin J. Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, Cambridge, 2004, at 241.

¹⁵⁶See Probert, 'The Controversy of Equality'.

¹⁵⁷James Hamerton, *Cruelty and Companionship: Conflict in Nineteenth Century Married Life*, London, 1992, at 118.

¹⁵⁸See Probert 'The Controversy of Equality', at 36.

the length of delay resulted in many complexities in the common law. These could in fact only be rectified by removal of the double standard and provided an additional reason for the 1923 reform.

3. Poverty was actually the main barrier to divorce

A further criticism of the reform achieved by the MCA 1923 is that equalization of the grounds of divorce was meaningless given that poverty was the barrier for many.¹⁵⁹ The Women's Co-Operative Guild, representing working class women, when discussing the need for equality in divorce, stressed two points, not only equality in the grounds, but also 'women's inability to pay for divorce, and the frequent failure of men to maintain wife and children after separation'.¹⁶⁰ Logan further explains that for the first half of the twentieth century divorce was expensive and difficult to obtain.¹⁶¹ The stigma of divorce, lack of education and employment opportunities for women, meant on divorce that many women could be left destitute. Due to these concerns, Pankhurst believed that 'women were best protected through tightening, rather than relaxing, the divorce laws'.¹⁶² Whilst married women could hold separate property legally,¹⁶³ following the Married Women's Property Act 1882,¹⁶⁴ this in no way meant that women had any access to her husband's property. If the wife had no property of her own, in Lord Denning's words the husband could throw her on to the street 'more like a piece of his furniture than anything else'.¹⁶⁵ Following the Matrimonial Causes Act 1878 women could sue for maintenance through the courts, but this was not always regularly paid.¹⁶⁶ A pre First World War survey in Liverpool by women's organizations showed that only a small proportion of maintenance orders were carried out¹⁶⁷ and among the women Justices of the Peace who spoke out about this were Eleanor Rathbone and Margaret Wyne Nevinson arguing that wives were not being paid maintenance.¹⁶⁸

¹⁵⁹For example, *ibid.*, and also Cretney, *Family Law*.

¹⁶⁰Scott, *Feminism and the Politics of Working Women*, at 100, referring to the Women's Co-operative Guild's Central Committee Minutes 5th and 6th May, 2nd June, 4th June and 8th and 9th Sept. 1910.

¹⁶¹Logan, *Making Women Magistrates*.

¹⁶²Probert, 'The Controversy of Equality' with quote from B. H. Harrison, *Prudent Revolutionaries*, Wotton-under-Edge, 1987, at 76.

¹⁶³Married Women's Property Act 1870 (33 & 34 Vict., c. 93) and the Married Women's Property Act 1882 (45 & 46 Vict., c. 75).

¹⁶⁴The Married Women's Property Act 1882 (45 & 46 Vict., c. 75) s.1(1) made 'married woman capable of holding and disposing of any real or personal property as her separate estate, as if she were a feme sole and without the intervention of a trustee'.

¹⁶⁵*Bendall v McWhirter* (1952) QB 406 at 475 per Lord Denning MR.

¹⁶⁶Matrimonial Causes Act 1878 (41 & 42 Vict., c. 19). See for discussion Marjorie Levine-Clark, 'From "Relief" to "Justice and Protection": The Maintenance of Deserted Wives, British Masculinity and Imperial Citizenship 1870–1920', 22 *Gender and History* (2010), 302 at 304.

¹⁶⁷*The Magistrate*, Jan. 1924, at 8.

¹⁶⁸Logan, *Making Women Magistrates*.

Women were expected to work in the home and look after their family which made it much more difficult to work and acquire property than for their husbands. Although women had 'temporarily'¹⁶⁹ taken on men's roles in the First World War with the number of women in employment rising from 2,179,000 in 1914 to 2,971,000 in 1918¹⁷⁰ this was a 'matter of expediency rather than a move towards equality'¹⁷¹ and at the end of the war women left these roles in droves and not always voluntarily.¹⁷² Women remained in low paid jobs and wage structures meant they were mostly dependent on their husbands and divorce continued to be a limited possibility. Beaumont also emphasizes that after the First World War there was a 'desire to return to normality reflected in the ideology of domesticity'.¹⁷³ Posters from magazines strongly proclaimed that 'mother's place was in the home'.¹⁷⁴ The 1919 Sex Discrimination (Removal) Act, the first gender equality legislation, has been criticized as 'disappointing to some'¹⁷⁵ as barriers still existed in the shape of a marriage bar which prevented women remaining or joining professions following marriage. The Six Point Group campaigned on this issue as can be seen from the presentation of Mrs Jellaby to the group on her views regarding the 'psychological dangers in having only unmarried teachers in schools'.¹⁷⁶ This was a long-fought campaign and the marriage bar continued in the civil service for instance until 1946.

It would not be accurate to describe women as without opportunities as many had started to obtain economic independence. Indeed, many women remained or chose to be single. Census records from 1851 revealed that out of a population of twenty million there were 500,000 more women than men and two and half million unmarried women.¹⁷⁷ In the 1921 census, the legacy of the 700,000 deaths in World War One meant that there were 1,158,000 unmarried women compared to 919,000 unmarried men.¹⁷⁸ Whilst some critics derided these women as 'surplus',¹⁷⁹ others responded in their defence. Literary critic Margaret Oliphant in her article

¹⁶⁹Beaumont, 'The Women's Movement', at 266.

¹⁷⁰Arthur Marwick, *The Deluge*, London, 1965.

¹⁷¹Probert 'The Controversy of Equality', at 39.

¹⁷²*Ibid.*

¹⁷³Beaumont, 'The Women's Movement', at 267.

¹⁷⁴Anon., 'Mother's Place is in the Home', *Woman*, July 1937.

¹⁷⁵House of Lords, Library Briefing, *Lifting the Barrier: Gender Equality Legislation 1919*, available at [Lifting the Barrier: Gender Equality Legislation 1919 \(parliament.uk\)](http://Lifting the Barrier: Gender Equality Legislation 1919 (parliament.uk)) referring to presentation by Mari Takayanagi, *The Sex Disqualification (Removal) Act 1919, First Hundred Years*, 10 Sept. 2015.

¹⁷⁶Frances H. Low, 'Mrs Jellaby Addresses the "Six Point Group"', *Saturday Review of Politics, Literature, Science and Art*, 26 Feb. 1927, 304 at 304.

¹⁷⁷See Kathrin Levitan, 'Redundancy, the "Surplus Woman" Problem and the British Census 1851–1861', 17(3) *Women's History Review* (2008), 363.

¹⁷⁸See University of Oxford, *Surplus Women A Legacy of World War One*, available at [Surplus Women: a legacy of World War One? | World War I Centenary \(ox.ac.uk\)](http://Surplus Women: a legacy of World War One? | World War I Centenary (ox.ac.uk)) : referring to Virginia Nicholson, *Singled Out: How Two Million British Women Survived Without Men After the First World War*, Oxford, 2008.

¹⁷⁹See Levitan, 'Redundancy, the "Surplus Woman" Problem'.

'The Anti-Marriage League' published in the *Blackwood Magazine* in 1896¹⁸⁰ criticized Thomas Hardy's portrayal of female characters in *Jude the Obscure* as 'reductive and offensive' and 'defined in the novel by their sexual behaviour'.¹⁸¹ In response Thomas Hardy referred to the 'screaming of a poor lady in Blackwood'.¹⁸² Yet as the Royal Commission 1912 report explained 'the social and economic position of women ha[d] greatly changed ... [with women] engag[ing] freely in business and the professions, and in municipal, educational and Poor Law administration'.¹⁸³

In addition, the First World War had had a 'dramatic' effect on the role played by women in society.¹⁸⁴ The first gender equality legislation in the shape of the Sex Disqualification (Removal) Act 1919 in theory at least 'opened the professions and the civil service to women'.¹⁸⁵ Takayanagi explains that this Act has had much criticism as it 'failed to equalise the franchise, remove the marriage bar or enable women to sit in the House of Lords'¹⁸⁶ but she does reflect on the genuine achievement of the Act.¹⁸⁷ Following 1919 for instance women began to be admitted to the professions, including law and accountancy and to sit as jurors and magistrates for the first time.¹⁸⁸ For women able to take advantage of these opportunities, therefore, poverty was not a complete bar to divorce and for some women equal access to divorce was relevant, necessary and desired. For other women even with the danger of poverty looming, it was important to have access to divorce if they were trapped in abusive marriages. At the time under consideration, husbands could never be found guilty of raping their wives because in law it was considered that the wife consented on marriage and it was never possible to retract that consent (not reformed until 1991).¹⁸⁹ Frances Power Cobbe for instance was most concerned about allowing women to escape marriages to violent husbands.¹⁹⁰

Also for many women, who had been cast off by their husbands, divorce was necessary in order to remarry. Poverty meant that many couples could not afford to pay legal fees to divorce, which was well understood by the Royal Commission 1912 report.¹⁹¹ The *in pauperis* procedure which applied before 1914 had very strict material limits on who could apply for

¹⁸⁰Margaret Oliphant, 'The Anti-Marriage League', *Blackwood's Edinburgh Magazine*, (Jan. 1896) 135, at 159.

¹⁸¹See Joanne Wilkes, *Women Reviewing Women in Nineteenth-Century Britain: The Critical Reception of Jane Austen, Charlotte Bronte and George Eliott*, London, 2010, at 105.

¹⁸²Thomas Hardy, 'Postscript', in Cedric Watts, ed., *Preface: Jude the Obscure*, New York, 2004, at 41–42.

¹⁸³Royal Commission 1912, 87.

¹⁸⁴See Rackley and Auchmuty, 'The Case for Feminist Legal History'.

¹⁸⁵See Walters, 'Feminism a Very Short Introduction'.

¹⁸⁶Takayanagi, 'Sacred Year or Broken Reed?', at 563.

¹⁸⁷*Ibid.*

¹⁸⁸*Ibid.*

¹⁸⁹Sir Matthew Hale, *History of the Pleas of the Crown*, London, 1736, vol. 1, at 629.

¹⁹⁰Frances Power Cobb, *Wife Torture in England*, London, 1878.

¹⁹¹Royal Commission 1912.

legal aid and no assistance in filling in applications which meant that the number of applications was very low and the number of successful applications even lower.¹⁹² Whilst reformed by the introduction of the Poor Persons Procedure in 1914 and further amendments in 1926 to allow applications to ninety regional committees, barriers to obtaining legal aid continued to exist relating to the inaccessibility of the relevant forms and the difficulty of finding solicitors to take on the work.¹⁹³ NUSEC therefore also emphasized that any reforms to divorce law should consider the financial position of female claimants.¹⁹⁴ From 1921 until the outbreak of World War Two Gibson summarizes that the majority of working class people continued to be barred from access to divorce, but reforms did mean that by the 1930s grants of facilities raised the divorce rate by fifty per cent.¹⁹⁵

For those couples unable to afford a divorce, if they did not stay together, the outcome was permanent separation rather than divorce,¹⁹⁶ thereby impacting women's ability to re-marry. Russell's research demonstrates that in the period 1858–68 most women re-married shortly after divorce most likely because of economic circumstances.¹⁹⁷ Similarly in the period under study one of the reasons driving reform was a '[g]rowing realisation that because of restrictive divorce laws, women living in illicit unions' were deprived of financial benefits paid married women.¹⁹⁸ Reform of the double standard needed also to be accompanied by reform of legal aid. The two together led to increasing access to divorce in the 1920s.

4. Reform did not go far enough

Another criticism of the MCA 1923 was that it did not go far enough. In not extending the grounds for divorce, the MCA 1923 approved the minority Royal Commission 1912 report and rejected the Royal Commission 1912 report which had recommended extended grounds (on the basis of equality) to include desertion, cruelty, incurable insanity, habitual and incurable drunkenness and imprisonment under commuted death sentence.¹⁹⁹ Analysis of

¹⁹²In order to be eligible poor petitioners had to be worth less than £25 and with an income of £1.50 or less per week. This meant that in 1911, one quarter of the thirty-nine applications were rejected. Discussed by Gibson, *Dissolving Wedlock*, at 68.

¹⁹³See Gibson, *Dissolving Wedlock*, at 86–87.

¹⁹⁴'Women's Library, NUSEC Archive, 'Minutes of the Meeting of the Equal Moral Standard Special Committee', 12 Nov. 1919, at 2.

¹⁹⁵Gibson, *Dissolving Wedlock*, at 80 referring to David V. Glass, 'Divorce in England and Wales', 26 *Sociological Review* (1934), 288.

¹⁹⁶Gibson, *Dissolving Wedlock*, at 70.

¹⁹⁷Penelope Russell, 'Retying the Knot? Remarriage and Divorce by Consent in Mid-Victorian England', 59 (2) *The American Journal of Legal History* (2019), at 258.

¹⁹⁸Gibson, *Dissolving Wedlock*, at 61.

¹⁹⁹Royal Commission 1912.

parliamentary debates as recorded in Hansard has shown that in the 1920s Parliament would have been unprepared to extend the grounds and had rejected such attempts on several previous occasions. Ultimately in 1923 all that Parliament would agree to was equality with regard to reform of the double standard around adultery. Yet this position was short lived. Even whilst celebrating the passage of the MCA 1923 legislation as 'triumphant', NUSEC anticipated criticism '...not from the opponents of Divorce Law Reform, but rather from those who wanted too large a measure and who looked upon the Bill as containing too small an instalment'.²⁰⁰ Only fifteen years later the Matrimonial Causes Act 1937 introduced multiple grounds for reform, including adultery, desertion after three years, cruelty and being of unsound mind.²⁰¹

Another criticism that although the MCA 1923 abolished the double standard in general there was no 'genuine commitment to equality' for women.²⁰² Whilst women over thirty had obtained the right to vote in 1918 it was not until the Representation of the People Act 1928 that women obtained the right to vote on the same terms as men (all individuals over the age of twenty-one).²⁰³ Women also continued to be under-represented in local and national politics 'with only thirty-eight women elected to the House of Commons during the years 1919–1945'.²⁰⁴ Even after the 1923 reform the double standard continued in other areas, as it was not until 1935 that husbands and wives could sue each other in tort.²⁰⁵ Authors also comment that the double standard survived as a cultural assumption²⁰⁶ with a daughter's adultery being treated more seriously than a son's.²⁰⁷ Women's status in marriage also continued to be unequal in many other ways. The doctrine of separate property established in the Married Women's Property Act 1882 still prevailed, which meant that on divorce women were very vulnerable. In response, further feminist campaigning groups were set up in 1938 for example the Married Women's Association, including leading figures such as Vera Brittain and Edith Summerskill to 'promote legislation to regulate the financial relations between husband and wife as between equal partners'²⁰⁸ and to challenge the view under the

²⁰⁰Women's Library, NUSEC Archive, 'Annual Report', 1923–1924, at 9.

²⁰¹Matrimonial Causes Act 1937, (1 Edw. VIII & 1 Geo. VI, c.57). See for discussion Cretney, *Family Law*, at 250.

²⁰²Probert 'The Controversy of Equality', at 39.

²⁰³Representation of the People (Equal Franchise) Act 1928 (18 & 19 Geo V, c. 24).

²⁰⁴Beaumont, 'The Women's Movement', at 264.

²⁰⁵See Holmes, 'The Double Standard in English Divorce Laws', discussing the Law Reform (Married Women and Tortfeasors) Act 1935 (25 & 26 Geo V, c. 30).

²⁰⁶See *ibid.* and Probert, 'The Controversy of Equality'.

²⁰⁷Holmes, 'The Double Standard in English Divorce Laws', at 619 referring to Denis Herbert MP, *Parliamentary Debates*, series 5, vol. 160, cols. 236–267, 2 March 1923 and *Wilson v Wilson*, (1920) 18 Law J. Rep. 17–18 and *Holland v Holland*, (1918) P. 273 at 273–276.

²⁰⁸See 'Summary Page' at 'Records of the Married Women's Association' available at [Records of the Married Women's Association - Archives Hub \(jisc.ac.uk\)](https://records.mwa.org.uk/).

doctrine of separate property that wives had no legal entitlement to their husband's money. Redistribution of property on divorce to compensate women for their role played within marriage would take many decades to achieve²⁰⁹ and is arguably still a work in progress.²¹⁰

IV. Conclusions

This article has interrogated why feminists and their agents chose to emphasize equality arguments in relation to the MCA 1923, together with an analysis of the limitations of the reform once achieved. The MCA 1923 successfully removed the double standard in relation to divorce which had previously required wives to prove aggravating factors in order to achieve a divorce, whereas men did not have to do so. Feminist campaigners such as NUSEC, the Six Point Group and grass route organizations such as the Edinburgh Women Citizens' Association, the London-based National Council of Women Citizens' Associations and the Women's Cooperative Guild all emphasized equality arguments. This was also the topic of much discussion by witnesses before the Royal Commission 1912 and the subject of parliamentary debates. Ultimately the central plank of reform concentrated on the removal of the double standard between men and women regarding access to divorce.²¹¹ Whilst some 'equalitarians' had genuine commitments to equality because of its symbolic value,²¹² others adopted formal equality as a necessary first step prior to other reforms. They achieved an Act of Parliament where more complicated reforms aimed at amending the grounds to reform had failed.²¹³

The success of the MCA 1923 and its chosen emphasis on equality via removing the double standard, has been criticized for multiple reasons including that it distracted from other agendas, that it took too long to achieve leading to complexities in the common law, poverty remained the main barrier to reform and that this limited reform did not achieve enough as further reform of the grounds to reform was subsequently required and there was a lack of a genuine commitment to female equality

²⁰⁹In *White v White* (2001) AC 596 in 2000 the courts finally recognized the domestic role which women put into marriages and regard was had to evolving concepts of 'fairness' and 'non-discrimination' in how to divide assets on divorce.

²¹⁰Hayler Fischer and Hamish Low, 'Who Wins, Who Loses and Who Recovered from Divorce', in Jo Miles and Rebecca Probert, eds., *Sharing Lives and Dividing Assets: An Interdisciplinary Study*, Oxford, 2009, at 54 conclude in their research that on divorce whilst women's income falls by about thirty-one per cent when controlled for household size, men's income increases by twenty-three per cent and the situation continues until a woman repartners and this takes on average nine years.

²¹¹Matrimonial Causes Act, 1923 (13 & 14 Geo. V, c. 19) states '[b]y this Act ... a wife is at last given the right to divorce her husband on the ground of adultery alone'.

²¹²See Millicent Fawcett (See Section II (1)).

²¹³Matrimonial Causes Bills 1920 and 1921.

within marriage. All the criticisms set out are of merit to a certain extent and demonstrate the fact that although the MCA 1923 allowed many more women to obtain a divorce, equality only goes so far in the face of social and economic inequality, a point that NUSEC and other organizations were well aware of. The limitations of the MCA 1923 set out in this article demonstrate that much further (and continuing work) was needed regarding women's status within marriage.

Much of the criticism relates to the debate begun between the different branches of feminism in the 1920s about what types of reform should be pursued. Right from the beginning of the feminist movement as exemplified by NUSEC there were debates between those who supported formal equality and those who saw the limitations and instead preferred difference or 'new' feminism, valuing women for their particular role in society. Some modern day feminists, continue to sympathize with arguments raised by 1920s new feminists that concentrating on reform to marriage is misguided, as marriage itself is seen as part of a hierarchical system of gender and sex.²¹⁴ They argue instead that other more important goals regarding overall female empowerment should be pursued.²¹⁵ Debates about what is meant by equality continue to resound with modern day audiences. Some criticize legal remedies aimed at compensating women for their particular role as mothers (for instance in relation to redistribution of assets on divorce) arguing that these result in 'perpetuating stereotypical assumptions about women'.²¹⁶ Interestingly a major recent reform of marriage, namely the introduction of same-sex marriage in 2013 once again saw agitators for reform stressing arguments based on equality.²¹⁷ For some proponents of same-sex marriage, this represented a symbolic 'gold standard'.²¹⁸ They saw same-sex marriage as necessary for egalitarian treatment, the ultimate recognition of their same-sex partnership and a 'right central to citizenship'.²¹⁹

Disclosure statement

No potential conflict of interest was reported by the author(s).

²¹⁴See S. Scholtz, *Feminism*, Oxford, 2010 and Catherine MacKinnon, *Feminism Unmodified*, Cambridge, MA, 1987, at 40.

²¹⁵Rosemary Auchmuty, 'The Married Women's Property Acts: Equality was not the Issue'.

²¹⁶See Fredman, *Women and the Law*.

²¹⁷Marriage (Same-Sex) Couples Act 2013.

²¹⁸See petitioner Sue Wilkinson's witness statement in *Wilkinson v Kitzinger* (2006) EWHC 2022 (Fam) para. 18.

²¹⁹See Nicholas Bamforth, 'Sexuality and Citizenship in Contemporary Constitutional Argument', 10(2) *International Journal of Constitutional Law* (2012), 477; Jeffrey Weeks, 'The Sexual Citizen', 15 *Theory, Culture and Society* (1998), 38 and David Bradley, 'Comparative Law, Family Law and Common Law', 33(1) *Oxford Journal of Legal Studies* (2003), 127 and Dimitri Kochenov, 'On Options of Citizens and Moral choices of States: Gays and European Federalism', 33(1) *Fordham International Law Review* (2009), 156.

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