

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/140367/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Thompson, Sharon 2021. Against divorce? Revisiting the charge of the Casanova's charter. *Child and Family Law Quarterly* 193 (3) , 193.

Publishers page:

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



AGAINST DIVORCE?

REVISITING THE CHARGE OF THE CASANOVA'S CHARTER

Sharon Thompson*

Abstract: The article reassesses feminist challenges to the Divorce Reform Act 1969, and in particular Edith Summerskill's notorious charge that divorce without consent represented a Casanova's charter. It argues that Summerskill did not simply oppose divorce, but instead focused on giving voice to a demographic that was virtually invisible in Parliament at that time – deserted wives. The article reveals new accounts of backroom deals and underlying tensions behind the passage of the Divorce Reform Act 1969, based on a study of previously unexplored archival documents, interview data and letters Summerskill received from deserted wives. This close inspection of an individual's role within a much larger network of reformers can help provide alternative historical understandings of family law reform from a feminist point of view. Furthermore, the article facilitates unique appraisal of the current legal landscape, as reform of the financial consequences of divorce is being considered following the new Divorce, Dissolution and Separation Act 2020. It is argued that Summerskill's view can be used to determine the focus of future reform of this area.

Keywords: *Divorce; Dissolution; Marriage; Civil Partnership; Financial Consequences of Relationship Breakdown; Edith Summerskill; Divorce Dissolution and Separation Act 2020; Divorce Reform Act 1969; Matrimonial Causes Act 1973.*

To say the subject of divorce law is divisive is an understatement. Views are often simplified as falling within one of two camps:

those who believe that divorce is an evil thing, destructive of family life and accordingly of the life of the community – and those who take the 'humanitarian' view that when a marriage has irretrievably broken down should it be dissolved.¹

* Reader, School of Law and Politics, Cardiff University, Cardiff, Wales. I would like to thank Professor Russell Sandberg for his helpful feedback on an earlier version of this paper, and the anonymous reviewers for their invaluable and insightful comments.

¹ Sir Charlton [Charles] Hodson in evidence to the *Royal Commission on Marriage and Divorce*, 1956, *Minutes of Evidence*, p 771, as cited in S Cretney, *Family Law in the Twentieth Century* (OUP 2003) 321.

This characterisation arguably applies to some of the recent debates about the Divorce Dissolution and Separation Act 2020. In the press, arguments against the Act removing fault from the divorce process have tended to be based on concerns about divorce becoming too easily accessible.² Such arguments can be challenged in light of the academic evidence showing the damage and acrimony a fault-infused process can generate.³ These two views provide examples of the two camps noted by Cretney. Yet perceiving arguments about divorce reform in this simplified manner is problematic. This is because the views of those sitting in *neither* of these camps are overlooked, and consequently the history of divorce reform is distorted.

This article looks between these camps. It is an article about opposition to divorce reform, but opposition that is not about the sanctity of marriage per se. It focuses on Edith Summerskill's charge that the last landmark divorce reform before the 2020 Act – the Divorce Reform Act 1969 – represented a 'Casanova's Charter', encouraging husbands to leave their 'innocent, middle-aged' wives 'against their will' for younger women.⁴ This argument resurfaced as the Divorce, Dissolution and Separation Bill was debated, but was readily rejected by the Ministry of Justice.⁵ With the dismissal of this claim, one might assume Summerskill's similar refrain would have no current relevance. But this article contends otherwise.

First, part one argues that the conventional story of Summerskill's view that the Divorce Reform Act was a Casanova's Charter simplifies her criticism as an irrational concern that reform would trigger masses of philandering husbands to desert their wives. Part two provides

² See e.g. A Austin, 'Lords warn new divorce rules could be "counterproductive"' *Financial Times*, 6 February 2020, accessed at <https://www.ftadviser.com/pensions/2020/02/06/lords-warn-new-divorce-rules-could-be-counterproductive/?page=1>.

³ See EJ Trinder, D Braybrook, C Bryson, L Coleman, C Houlston, M Sefton, *Finding Fault? Divorce Law and Practice in England and Wales*. (2017) Nuffield Foundation.

⁴ *Hansard, Lords Debates*, vol 286, cols 427-428 (8 November 1967).

⁵ 'We have not found any evidence that this risk will be affected by the proposed changes'. *Reducing family conflict: Reform of the legal requirements for divorce*, Equality Statement, Ministry of Justice, para.27, accessed at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839995/divorce-bill-equalities-statement.pdf.

an alternative analysis of Summerskill's intervention in this debate which focuses less on her moral objections to divorce reform and more on her pragmatic concerns. For her, married women's property rights were wholly inadequate, and the 1969 Act risked leaving many women economically vulnerable. This alternative analysis applies a feminist legal historical lens, as advocated by Rackley and Auchmuty,⁶ Batlan,⁷ and others, by using non-legal sources to provide an account that does not simply sit alongside existing accounts⁸ of the Divorce Reform Act, but instead forces family lawyers to confront the inequalities to which Summerskill was drawing attention. Drawing on a range of previously unexplored sources, including data from interviews between Summerskill's son and her contemporaries, and archival material such as Summerkskill's private correspondence, unique insight is gleaned into her role in divorce reform. Still, these sources alone do not provide a complete picture of why her role was so important. To truly understand who Summerskill was advocating for in her work, the lived experiences of the women she advocated for must also be explored. For this reason, letters written to Edith Summerskill about divorce reform are analysed to ascertain the views of deserted wives. Developing the feminist methodological tradition explained further below, this approach changes how the story of the 1969 Act is told by focusing on the perspectives of women directly affected by divorce instead of Law Commissioners, judges, religious leaders and politicians, most of whom were men. By bringing women back into this historical account, as scholars like June Purvis⁹ and Rosemary Auchmuty say we should,¹⁰ a more complete picture of the Divorce Reform Act is uncovered, which other conventional accounts considered to be unimportant. After part two investigates Summerskill's argument through these alternative sources, part three assesses the overall significance of Summerskill's intervention in divorce reform, arguing that closer inspection of her ideas can provide useful insights into current legislative developments in family law as the Divorce Dissolution and Separation Act 2020 comes into force and financial provision is under the microscope once again.

⁶ E Rackley and R Auchmuty, 'The Case for Feminist Legal History' (2020) 40(4) *Oxford Journal of Legal Studies* 878.

⁷ F Batlan, 'Engendering Legal History' (2005) 30(4) *Law and Social Inquiry* 823.

⁸ Rackley and Auchmuty, n 6 above, 903.

⁹ M Maynard and J Purvis (eds), *Researching Women's Lives from a Feminist Perspective* (Routledge 2013).

¹⁰ R Auchmuty, 'Whatever Happened to Miss Bebb? Bebb v The Law Society and Women's Legal History' (2011) 31(2) *Legal Studies* 199.

By homing in on Summerskill's role in divorce reform, this article does not place her in the camps championing or opposing divorce, nor does it suggest that she, as a feminist, fits within established narratives and templates of feminist thinking at that time.¹¹ Instead, this article investigates the spaces between dominant discourses surrounding the 1969 Act. This in turn uncovers the richness and variety of ways in which competing ideas and beliefs about divorce, women and feminism are negotiated.¹² It also illuminates the delicate balance of advocating for protection for married women without reinforcing gendered stereotypes of vulnerable housewives. While this article does not show that Summerskill managed this balancing act effectively, it does uncover the importance of her role in advocating for deserted wives, which became a catalyst for the core tenets of financial remedies law to be reassessed.

Part 1 – Against Divorce?

The Divorce Reform Act 1969 is a landmark in legal history because for the first time in English law it enabled spouses to divorce on the basis of irretrievable breakdown instead of requiring a matrimonial offence.¹³ Yet in 1973, Leo Abse MP wrote in his memoirs that it was a 'real wonder...that the Divorce Bill ever reached the statute book'¹⁴ at all. This was because of the grievances levied against it by Summerskill, who at that time was a life peer in the House of Lords and had previously been a Labour MP.¹⁵ As a leading advocate of the Act, Abse's frustration in his memoirs is palpable: 'No one was more successful in delaying its passage, and in arousing hostility to its objectives, than...Summerskill', he said.¹⁶ This section focuses on Summerskill's opposition, and how her Casanova's Charter refrain turned her into a caricature within the history of divorce reform.

¹¹ This is not to suggest there was and is feminist consensus on divorce. For a helpful overview of different feminist perspectives on divorce (though in the US context), see J Carbone, 'A Feminist Perspective on Divorce' (1994) 4(1) *The Future of Children* 183.

¹² A Green, 'Individual remembering and 'collective memory': Theoretical presuppositions and contemporary debates (2004) 32(2) *Oral History* 35.

¹³ Pursuant to section 1 of the consolidating Matrimonial Causes Act 1973.

¹⁴ L Abse, *Private Member* (Macdonald, 1973) 180.

¹⁵ Edith Summerskill was a doctor, politician, and feminist activist. She became an MP in 1938 and when she joined the House of Lords in 1961 she was one of the earliest female life peers.

¹⁶ Abse, n 14 above.

A Casanova's Charter

Summerskill's charge that the Divorce Bill would be a Casanova's Charter was based on what became section 2(e) of the 1969 Act,¹⁷ which enabled a spouse to establish the irretrievable breakdown of the marriage without reference to the conduct of the other, and without their consent, after a period of five years' separation. In Summerskill's view, this provision discriminated against deserted wives, whose husbands would be empowered to leave their wives, marry younger women, and financially support their new family instead of their old one.

Summerskill's opposition on this basis was not new. She had a record of speaking against such reform throughout the 1960s. In the debates on the earlier Matrimonial Causes and Reconciliation Bill 1963, introduced by Leo Abse, Summerskill condemned it for being a 'husband's Bill, drafted by a man who doubtless means well but has failed to recognise that marriage has different values for men and women'.¹⁸ Her Casanova's Charter position could be summarised, therefore, chiefly as opposition to divorce without consent because it would discriminate against married women. This view was dismissed by some at the time who retorted 'Casanovas do not bother with charters',¹⁹ because an individual's decision to desert their spouse was not thought to be influenced by changes to divorce law. As a result, Summerskill's charge was considered 'illogical' by those who disagreed with her.²⁰ Her feminism also did not align with that of other feminists who were in support of an easier divorce process that would allow women to be liberated from unhappy marriages.²¹

After all, Summerskill was opposing legislation that many viewed as being ultimately *good* for women.²² The Divorce Bill sought to remove the concept of the matrimonial offence, which had historically reinforced unequal standards of sexual morality between husband and wife and punished women for violating those standards.²³ Summerskill's arguments also did not follow

¹⁷ Now Matrimonial Causes Act 1973, s 1(2)(e).

¹⁸ *Hansard, Lords Debates*, vol 286, col 401 (22 May 1963).

¹⁹ Lord Stow Hill, *Hansard, Lords Debates*, vol 303, col 296 (30 June 1969).

²⁰ Abse, n 14 above, 180.

²¹ D Stetson, *A Woman's Issue: The Politics of Family Law Reform in England* (OUP, 1982) 250.

²² Abse, n 14 above.

²³ Stetson, n 20 above, 149. See also R Probert, 'The Controversy of Equality and the Matrimonial Causes Act 1923' [1999] 11 CFLQ 33; Cretney, n 1 above, 352.

the direction of feminist debate at that time, with Abse accusing her of advocating an ‘odd brand of feminism’.²⁴ This, he said, had:

on the conscious level, little in common with the women’s liberation movement: women, she implies, need constant protection from marauding aggressive philandering men, and indeed her concern to protect the female from the bad man has led to her association with at least one useful and constructive piece of legislation; but simultaneously she makes a loud assertion of the independence value and equality of woman. It is difficult in the face of such contradictory attitudes not to ask whether her strident affirmations spring less from a genuine belief in the equality of women than a pressing need to deny and overcome her own doubts.²⁵

Abse’s critique is ostensibly damning, even verging on accusations of insincerity. He views Summerskill’s stance as ‘contradictory’ because she had fought for reform to make marriage a partnership of equals her entire career,²⁶ yet that equal status was tempered by the assumption of women’s economic dependency through her opposition to divorce reform. This bemusement at Summerskill’s apparent reinforcement of women’s inequality was shared by Lady Gaitskell in Parliament:

I am shocked and surprised at my noble friend Lady Summerskill, who is a great feminist and who has done so much for the women of this country...She wants that woman to sit there, to sit in the house, to sit in her home and to wait for her pension. Surely any woman with spirit would hate to do that.²⁷

Gaitskell powerfully conjured up the image of a woman left in her a ‘gilded cage with an unloving husband’,²⁸ trapped by Summerskill’s failure to treat women as economic equals to their husbands. From Gaitskell’s point of view, Summerskill’s opposition was getting in the way of urgent and significant reform.

²⁴ Abse, n 14 above.

²⁵ Ibid.

²⁶ For an account of her work with the Married Women’s Association, see S Thompson, ‘Married Women’s Property Act 1964’ in E Rackley and R Auchmuty (eds), *Women’s Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Hart, 2018).

²⁷ *Hansard, Lords Debates*, vol 303, col 1289 (10 July 1969).

²⁸ Ibid.

Gaitskell arguably had a point. The reform introduced by the Divorce Reform Act 1969 *was* significant because it enabled the dissolution of thousands of unhappy marriages, which has been considered a positive development by many feminist commentators.²⁹ Before the 1969 Act, divorce required proof of a matrimonial offence by the party petitioning for divorce.³⁰ If the husband petitioned for divorce on the ground of his wife's desertion (a matrimonial offence under the law³¹) he would be barred from divorce if he had committed adultery (another matrimonial offence), even if this had only happened on one occasion.³² This meant that in marriages where both parties were at fault, or indeed where neither party was at fault, divorce was not possible. By the 1960s it was clear that this position had become untenable, as there was widespread consensus that it was not in the public interest to keep a marriage in existence in law when it had broken down in actuality.

Summerskill's concerns also appear to be unfounded when looking at the statistics. In the decade following the 1969 Act's introduction in 1971, divorce petitions by wives increased by 85.5 per cent, while those by husbands only increased by 5.5 per cent.³³ It is therefore unsurprising that for many, 'Casanova's Charter' has seemed an inappropriate or even strange label for legislation utilised more by wives. Many were not persuaded by Summerskill's argument that the new law would inspire swathes of philanders to desert their wives. As Jonathan Herring noted in his *Family Law* textbook: 'with a five-year wait between marriages, a Casanova would require patience!'³⁴

Nevertheless, even if considered irrational, Summerskill's resistance was effective. As the Bill was making its way through Parliament, debates were prolonged, thanks in large part to the Casanova's Charter charge.³⁵ However, it is important to note that while the Casanova's Charter opposition was arguably the most powerful impediment to the Divorce Reform Act,

²⁹ See R Auchmuty, 'Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women' (2012) 20(2) *Feminist Legal Studies* 71.

³⁰ Except for petitions relying on incurable insanity pursuant to the Matrimonial Causes Act 1937.

³¹ Pursuant to the Matrimonial Causes Act 1937.

³² Probert, n 22 above.

³³ And in 1978, the five years separation ground was relied upon in only 9.34% of petitions: Judicial Statistics, Annual Report 1979; J Eekelaar, *Family Law and Personal Life* (OUP, 2006) 142.

³⁴ J Herring, *Family Law* (Pearson, 9th edn 2019) 155.

³⁵ Cretney, n 1 above 133.

those pushing for reform were not apathetic about the financial consequences of divorce for the non-moneyed spouse either.³⁶ Proponents of the Bill argued that the hardship of the existing law for wives made reform of divorce all the more urgent, with the Law Commission and Archbishop of Canterbury's group both emphasising the harsh consequences of the law for the more economically vulnerable spouse.³⁷ This concern filtered into the provisions preventing divorce without consent if it would cause 'grave financial or other hardship' and 'would in all the circumstances be wrong to dissolve the marriage' and facilitating postponement of the decree absolute (the legal end of the marriage) so that financial provision for the non-moneyed spouse could be arranged.³⁸

In addition, the implementation of the Divorce Reform Act 1969 was delayed until the Law Commission had fully investigated the financial consequences of divorce, and the Casanova's Charter controversy is credited as having contributed to this delay.³⁹ The recommendations in the Law Commission's report⁴⁰ sought to ameliorate the concerns of those opposed to divorce because of the potential consequences for married women. These were enshrined in the Matrimonial Proceedings and Property Act 1970 and subsequently consolidated in the Matrimonial Causes Act 1973. The effect of the Act was transformative in that where the court previously made maintenance and lump sum orders on a discretionary basis which operated to penalise the spouse 'at fault',⁴¹ the new legislation gave the court wide-ranging discretionary powers to make financial orders regardless of fault, which included redistribution of property. This redistributive power was a turning point in family law, because it marked a shift in emphasis away from making the wife dependent on maintenance towards helping her become economically independent by providing her with property and therefore 'purchasing power'.⁴²

³⁶ C Smart, *The Ties that Bind* (Routledge 1984), 70.

³⁷ Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cmd 3123, 1966); Church of England. Archbishop of Canterbury's Group on the Divorce Law, and M Ramsey. *Putting Asunder: A Divorce Law for Contemporary Society* (SPCK, 1966).

³⁸ See now Matrimonial Causes Act 1973, ss 5 and 10.

³⁹ See e.g., Abse, n 14 above, 180; Cretney, n 1 above, 133.

⁴⁰ Law Commission, *Financial Provision in Matrimonial Proceedings* (Law Com No 25, 1969).

⁴¹ There was no rationale for such orders and there was a clear lack of consistency in case law, on which see G Douglas, *Obligation and Commitment in Family Law* (Hart, 2018) 118.

⁴² As noted by Douglas, *ibid*, and in *Trippas v Trippas* [1973] Fam 134, CA; *O'D v O'D* [1976] Fam 83, CA.

While Summerskill's concern for deserted wives is sometimes acknowledged in accounts of divorce and financial provision reform, it is not interrogated and understood. Conventional top-down accounts of the Divorce Reform Act focus primarily on the role of the Law Commission and the established Church⁴³ – both of which had encouraged reform – and tend to underplay the significance of those who *resisted* reform, such as Summerskill. Similarly, institutional accounts tend not to explore what the views and experiences of deserted wives *actually were* – they simply register that opponents of reform were anxious about how these women would be affected by it. To glean an alternative understanding of the 1969 Act, a feminist perspective is used as a method of historical legal analysis in the sections that follow. As part two will explain further, this approach is important when seeking to challenge traditional legal history,⁴⁴ because placing gender at the centre of analysis can change one's perspective of the past.

Part 2 – Revisiting the Charge of the Casanova's Charter

Following Rackley and Auchmuty,⁴⁵ Batlan⁴⁶ and others who seek to make the gendered dimensions of legal history more apparent, the approach taken in this article is feminist for two reasons: the perspective taken, and the sources used. As feminist legal historians like Auchmuty explain, perspective is important when taking a feminist approach because it requires a shift in focus away from law's formal development, law's makers, and law's institutions,⁴⁷ and takes an alternative approach to the politics of legal change.⁴⁸ The account in textbooks can at times 'obliterate the historical context which had contributed to legal decisions and developments'.⁴⁹ According to Rackley and Auchmuty, this means the 'jumbled reality of law reform – the setbacks, compromises and failures' are lost.⁵⁰ This is why adopting an alternative, feminist perspective is important. It requires broadening the lens through which law has traditionally been seen to be reformed, while considering who was demanding change and why.

⁴³ See R Auchmuty, 'Legal History', in R Auchmuty (ed), *Great Debates in Gender and Law* (Macmillan, 2018).

⁴⁴ Batlan, n 7 above.

⁴⁵ Rackley and Auchmuty, n 6 above.

⁴⁶ Batlan, n 7 above.

⁴⁷ Auchmuty, n 41 above.

⁴⁸ Rackley and Auchmuty, n 6 above, 881.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 882.

This approach also means emphasis is placed on different sources too, for as Batlan argues, looking ‘beyond traditional legal sources’ allows one to find ‘new legal actors’ and to locate ‘how some [women] sought to transform law as part of a broader and potentially radical agenda for social change’.⁵¹

Methodology

This article is an example of feminist legal history in action because it seeks to do this. It confronts textbook accounts of divorce reform that suggest such reform was inevitable because those at the top – religious leaders and reformers – had finally broken the deadlock and agreed there should be change. With this institutional narrative, the campaigns of Summerson and her networks (and the women they sought to represent) disappear. Instead, this article focuses mostly on non-legal sources to uncover these accounts and to, as Rackley and Auchmuty advocate, ‘present women’s own stories of their encounters with law’, providing insight into ‘not only what was going on but...*what it was like* for women then’.⁵² To find this out, the following sections draw on archival interviews between Summerson’s son Michael and her contemporaries,⁵³ in addition to Summerson’s private correspondence. By adopting this biographical approach and comparing these sources with her words recorded in *Hansard*, a more nuanced and detailed understanding of her views is garnered. This section also presents results from a thematic analysis of 283 letters written to Edith Summerson by women about the Divorce Reform Act.⁵⁴ These letters are archived in closed files (comprising approximately 1900 pages) in the Women’s Library⁵⁵ because of their sensitive and confidential content, and so the individuals referred to are anonymised in references below. Although the files examined contained more than 283 letters, the sample studied focused on letters written by women exclusively about divorce reform.

Access to these previously untapped resources is a valuable way of gaining a deeper understanding of why Summerson opposed the Divorce Reform Act 1969. Perhaps most interestingly, the sources examined in this section reveal a range of different and often

⁵¹ Batlan, n 7 above., 847.

⁵² Rackley and Auchmuty, n 6 above, 892.

⁵³ Records of the Women’s Library, SUMMERSON/1/46.

⁵⁴ Records of the Women’s Library, SUMMERSON/1/98, 1/99, 1/100 and 1/102.

⁵⁵ Located at the London School of Economics, London.

conflicting accounts of Summerskill and her views on divorce. This could be because Summerskill's views *are* complex and often contradictory, yet this does not mean that an understanding of her views is not worthwhile or that they should be disregarded by history.

Understanding Summerskill's View

Summerskill had a record of fighting for women's rights throughout her life and was an active member in the House of Lords.⁵⁶ The Married Women's Property Act 1964 was her Private Member's Bill, which gave wives a one-half share of housekeeping savings⁵⁷ and she was the driving force behind the Matrimonial Homes Act 1967, which gave deserted wives the right to occupy the matrimonial home. Underpinning her activism was a belief that the institution of marriage could be strengthened by improving the economic and legal status of married women, as seen through her prominent roles in pressure groups such as the Married Women's Association, which sought to reform the financial consequences of marriage so that women's work inside the home could be valued equally to men's work outside it. Her views did not always align with other feminists, who decried her talk of housework as women's work.⁵⁸ But she was of the firm belief that women's economic vulnerability in marriage was inextricably linked to issues like equal pay. She believed that the 1969 Act could be disastrous for women if the financial consequences of divorce were not reformed too,⁵⁹ given that the Act allowed the possibility for women who had sacrificed their own earning power for the welfare of the family to lose their source of financial support because of their husband's unilateral decision to divorce.

Summerskill's intervention in the story of divorce reform goes far beyond her Casanova's charter soundbite and is significant for two reasons. First, she brought attention to the

⁵⁶ According to Hansard, Edith Summerskill applied herself to nearly 300 topics in five Parliamentary years from October 1968 to October 1973 (by which time she was 72 years old).

⁵⁷ Summerskill had fought for this reform since the early 1940s as President of the Married Women's Association and first introduced legislation to reform the issue of housekeeping savings in the Women's Disabilities Bill 1952. Records of the Women's Library, 5/MWA/1/3/1.

⁵⁸ 'Woman's Work: Dr. Summerskill Differs from Early Feminists' *Manchester Guardian*, 18 February 1950, 17, in Records of the Women's Library, SUMMERSKILL/1/33.

⁵⁹ *Hansard, Lords Debates*, vol 286, cols. 427-428 (8 November 1967).

experiences of deserted wives both in the press⁶⁰ and in Parliament and secondly, she drew attention to what she saw as the shortcomings of the Matrimonial Property and Proceedings Act 1970. Both reasons allow for Summerskill's view to be considered differently and provide an alternative perspective on current reform, considered in the final section of this article. In short, while Summerskill did seek to preserve marriage and did claim to oppose the 1969 Act on moral grounds, such moral opposition has defined her historically as anti-divorce, or even puritanical. By instead looking to alternative sources, this section focuses on her other core – and often marginalised – financial argument. This is supported by her son's comment when interviewing Lord Denning: 'it was not a kind of moral statement that marriage must be indissoluble – it was more a practical one that she said [the wife] would never get the right financial support'.⁶¹

Although Summerskill has been pilloried in conventional accounts for the Casanova's Charter charge, this section will discuss how her arguments are misrepresented. First, letters from the demographic of women she was concerned about are considered. This provides important context to the following section, which goes on to examine how these women's experiences were reflected in Summerskill's arguments about reform of family property law. Finally, the section concludes by investigating how reform of divorce and financial provision did not, in her view, go far enough to protect deserted wives from economic hardship.

Experiences of Deserted Wives

The sample of letters studied for this article reveal that middle-aged women, who otherwise felt invisible in the eyes of law and politics, viewed Summerskill as their advocate. 'I do want to write and say how much I appreciate all you are doing to help women of my age' wrote one woman, with another writing 'I have such faith in you as our best ally' and another: 'we rely on you'.⁶² Dozens of letters in her records revealed similar messages to Summerskill, who

⁶⁰ See eg 'Baroness Summerskill slams Divorce Reform Bill, *Evening Standard*, 30 June 1969, in Records of the Women's Library, SUMMERSKILL/1/99.

⁶¹ Interview by Michael Summerskill with Lord Denning, Records of the Women's Library, SUMMERSKILL 1/46. Lord Denning was also concerned with the plight of the deserted wife and worked closely with Summerskill on the Matrimonial Homes Act 1967, as shown by their correspondence in the Records of the Women's Library, SUMMERSKILL/1/61.

⁶² Records of the Women's Library, SUMMERSKILL/1/100 and 1/102.

aimed to give voice to women typically over the age of 40 when their stories and experiences would likely otherwise be unheard.⁶³

There are hundreds of letters in Edith Summerskill's papers from women frightened of what the Divorce Reform Act would mean for them. Many share similar fears: loss of financial support, loss of home and loss of pension are typical examples, as this example illustrates:

'I am a terrified elderly lady of 67 years. My husband (now 70) left me some years ago for someone younger. On several occasions he has returned to me but has gone back to "the other woman" when she has called him...He is of course now retired on pension... He has no other means, nor capital.

To provide for "the other woman" he now wishes to divorce me under the [Divorce Reform] Act [1969] so that the widow's pension will go to her – his admitted sole reason for seeking a divorce...

I make ends meet by working in a full-time job – not well paid because I am untrained and started late when I was left alone. It has no pension. In due time, because of my age, my employers will put me out to grass. When that time comes the widow's pension will pay my ever-rising local rates and provide warmth and necessities. Without it I must give up my home and I am terrified at the prospect of being without a roof when I shall need it most...

To have this linchpin abruptly removed, as it will be by the [Divorce Reform Act] is surely against all justice for the elderly wife. We are now too old to make alternative plans and, without these pensions, sufficient means to keep our homes will vanish.'⁶⁴

Many of the women writing to Summerskill had similar concerns. They were anxious about being divorced without their consent and losing any share in their husband's pension, at an age when retraining and employment was unlikely, and spending old age in destitution without a pension of their own. As one woman wrote: 'since my allowance will remain static and the cost of living rises rapidly, I shall find myself much less well-off and at the age of 65 not inclined to supplement a living by working'.⁶⁵ Several women writing to Summerskill similarly

⁶³ Ibid.

⁶⁴ Records of the Women's Library, SUMMERSKILL/1/102. Letter to Edith Summerskill dated 27 June 1969.

⁶⁵ Records of the Women's Library, SUMMERSKILL/1/101.

expressed anger at the prospect of losing all widow's pension while the second wife is protected, for example: 'On his death the whole of the widow's pension goes to the second wife...The first wife is left penniless...She has to apply to national assistance.'⁶⁶ Many women were too old to build up their own pension and faced old age in much less financial comfort than their former spouse.

Throughout her career, Summerskill had been influenced by women's experiences as she saw them,⁶⁷ and so these letters are crucial when seeking to understand her view.⁶⁸ Importantly, however, she was not alone in being aware of the impact of reform on deserted wives. There is evidence that Lord Jocelyn Simon of Glaisdaile, who was at that time President of what is now known as the Family Division of the High Court,⁶⁹ worked with her to campaign against the 1969 Act. In April 1968, he wrote to Summerskill:

A rumour has reached me that an attempt is being made to re-introduce the Divorce Reform Bill and in the Lords this time. I was told that Frank Stow Hill had been approached and was considering the matter. If there is any truth in this, it is not too soon to start mobilising the women's organisations. Married women are in grave danger; and after all the disreputable agitation in favour of the Bill, the promoters are likely to be held in restraint only if it is seen that the passage of the Bill is likely to be highly unpopular.⁷⁰

This concern that wives were in grave danger – a claim repeated by Summerskill in the press⁷¹ – appears to have been a strong influence on her resistance to reform. 'Marriage means much more to a woman than to a man',⁷² she said. Understandably, some feminists have been critical of this perception of marriage. Many feminists have located marriage as a site of oppression for women,⁷³ yet Summerskill believed in the institution of marriage. She fought for economic

⁶⁶ Ibid, emphasis in original text.

⁶⁷ See e.g., E Summerskill, 'Party Political Broadcast: Why I Am a Socialist' *The Listener*, 8 April 1948, 582.

⁶⁸ Summerskill's replies to each of these letters are noted in her papers.

⁶⁹ It was then known as the Probate, Divorce and Admiralty Division of the High Court. This became the Family Division in 1970.

⁷⁰ Records of the Women's Library, SUMMERSKILL/1/102. Letter to Edith Summerskill dated 5 August 1968

⁷¹ As shown by numerous press clippings in Summerskill's papers, such as M Romilly, 'Ministers accused – "cruel trickery"' Records of the Women's Library, SUMMERSKILL/1/99.

⁷² *Hansard, Lords Debates*, vol 286, col 422 (8 November 1967).

⁷³ See Auchmuty, n 28 above.

equality within marriage but did so without acknowledging that marriage as an *institution* was part of the problem, as other feminists did. For Summerskill, inequality between spouses could be dealt with practically and constructively, such as through law reform ensuring women's entitlement to a share in the family assets.

In addition to Summerskill's defence of marriage, some feminists have also castigated her essentialism, in that she tended to assume women shared particular characteristics simply because of their sex. It is easy to see why. In *Letters to my Daughter* she suggests that having children is women's true desire and that there are certain roles that men are better equipped to do.⁷⁴ Smart argues that Summerskill's failure to recognise the problem of not only marriage, but women's traditional role within it, meant that Summerskill's view reinforced women as a class of dependants 'who then could hardly survive outside marriage'.⁷⁵ Other contemporary feminists of Summerskill's recognised this too, as Barbara Castle noted, she 'had some curious blind spots, did Edith'.⁷⁶ Yet it would be unfair to assume that such essentialism meant that her opposition to the Divorce Reform Act was immaterial, or that she believed women's place was in the home and men's place was outside it.

First, she was adamant that women's emancipation depended upon men taking up historically gendered roles like cleaning. Her former secretary Suzanne Knowles recalled that in a confrontation with an aggressive man at a Labour Party meeting Summerskill's retort was: 'Why don't you go home and help your wife with the washing up?'⁷⁷ And so, she asserted that husbands should support their wives' professional success in the public sphere through taking on some of the domestic labour, arguing that this was essential for women's success outside the home.⁷⁸

Second, it is important to remember that, as Summerfield has put it:

⁷⁴ E Summerskill, *Letters to my Daughter* (Heinemann, 1957) 118.

⁷⁵ Smart, n 35 above, 71.

⁷⁶ Interview by Michael Summerskill with Barbara Castle, Records of the Women's Library, SUMMERSKILL 1/46.

⁷⁷ Interview by Michael Summerskill with Suzanne Knowles, Records of the Women's Library, SUMMERSKILL 1/46.

⁷⁸ E Summerskill, *A Woman's World* (Heinemann 1967).

In spite of her essentialist view that women were motivated above all by the desire to have children, Summerskill...was unusual among feminists of the 1930s and 40s for fighting simultaneously for both sets of goals: welfare and equality.⁷⁹

In other words, Summerskill campaigned for both the removal of barriers to equality and for women's welfare and protection in recognition of their *inequality*. This again underscores her pragmatism and undermines the characterisation of Summerskill as someone who tended to philosophise about the innate qualities of men and women.⁸⁰ Indeed, she wrote in her memoirs that she had little interest in theory or philosophy,⁸¹ but instead was focused on the realities and experiences of others. Perhaps then, by appealing against divorce without the consent of the deserted wife, she was arguing that the Government had not properly acknowledged the different experiences of husbands and wives.⁸² That the experience of spouses was gendered in the 1960s is clear. Letters to Summerskill corroborate the very different ways in which men and women were affected, with the problem in every letter identified as being financial: 'Middle-aged wives should be given proper financial consideration. It is disgraceful to talk about them having to go to public authorities for money' writes one woman.⁸³ Another woman wrote informing Summerskill⁸⁴ that she had written to *The Times* and Leo Abse to say: 'it's about time the wife's point of view was listened to',⁸⁵ and: 'when this Bill is Law and my husband divorces me, my little girl and I will probably end up like "Cathy come home" with nowhere to live'.⁸⁶ This shows that in many ways Summerskill was correct, as many of the women writing to Summerskill *did* appear to be impacted by marriage and divorce differently from their husbands.

⁷⁹ P Summerfield, "'Our Amazonian Colleague": Edith Summerskill's Problematic Reputation' in R Toye and J Gottlieb (eds), *Making Reputations: Power, Persuasion and the Individual in Modern British Politics* (IB Tauris, 2005) 141.

⁸⁰ When interviewed by Michael Summerskill, Barbara Castle described Edith Summerskill as 'a bit Hampstead' meaning she saw her as an elite and privileged politician who enjoyed philosophy: Interview by Michael Summerskill with Barbara Castle, Records of the Women's Library, SUMMERSKILL 1/46.

⁸¹ Summerskill, n 76 above. She also admits in her memoirs that she identified as a socialist but found Marx inaccessible and did not read or engage with such texts as many of her Labour contemporaries did.

⁸² See C Gilligan, *In a Different Voice* (Harvard University Press, 1993).

⁸³ Records of the Women's Library, SUMMERSKILL/1/101.

⁸⁴ 18 December 1968, Records of the Women's Library, SUMMERSKILL/1/101.

⁸⁵ Copy of letter to *The Times*, 18 December 1968, Records of the Women's Library, SUMMERSKILL/1/101.

⁸⁶ Copy of letter to Leo Abse, 18 December 1968, Records of the Women's Library, SUMMERSKILL/1/101.

A New Matrimonial Property Law

Summerskill's goal went much further than opposing divorce reform. Since becoming an MP and joining the Married Women's Association in 1938, she had actively pressed for equal partnership in marriage. The doctrine of separate property treated spouses as discrete individuals in contrast with the community and dependence of family life. And so separate property often was not appropriate when applied to the expectations of married couples, given it was more likely that families would intermingle assets and use them jointly rather than strictly dividing their own property. Treating the husband's property as belonging to him while denying the wife any claim to it not only produced harsh outcomes in practice, but also diminished the unpaid contributions primarily being made by married women. Summerskill spoke about this in Parliament:

There is a tendency in many quarters to disregard the fact that men can earn their income and accumulate capital only by virtue of the division of labour between themselves and their wives...Sir Jocelyn Simon, President of the Divorce Court... [has] said: 'The cock bird can feather his nest precisely because he is not required to spend time sitting on it'. This being so, a separation of goods between married people cannot be said to do justice to the wife...

My purpose to-day is simply to try to persuade the Government, before they embark – or before a Private Member embarks – on legislation calculated to undermine the institution of marriage as we understand it in Britain, to change the policy. However, if they find that a Private Member is persuaded to draft a Casanova's Charter, then they must incorporate...a matrimonial property law which includes community of goods, in order to protect the discarded wife.⁸⁷

This shows Summerskill was demanding a new matrimonial property law that recognised both women's unpaid labour in economic terms during marriage and enabled spouses to share the financial fruits of the marriage when it dissolved. She was clear that divorce reform should not go ahead unless and until this happens. This argument was at the heart of Summerskill's opposition to divorce reform and was the central theme of the letters she had been receiving at this time. In these letters, women described a range of personal and individual experiences, but the fundamental problem in each of them was financial. As one letter objecting to divorce reform put it: 'The money question is SERIOUS – for a woman with children to bring up

⁸⁷ *Hansard, Lords Debates*, vol 286, cc 427-428 (8 November 1967).

alone...this Bill will create a new poor in our welfare state.’⁸⁸ For this reason, the significance of the delay of the Divorce Reform Act 1969 to facilitate sweeping reform of financial remedies should not be underestimated.

Interestingly Summerskill’s specific demands for economic spousal equality are rarely associated with the Casanova’s Charter soundbite. Her rationale for financial provision mirrors the modern rationale underpinning the redistribution of assets on divorce, which is not just about protection, but is also about entitlement generated by financial *and* non-financial contributions. The gendered division of labour in the marriage meant that the wife,⁸⁹ as Summerskill put it, ‘must be able to count on her share of the goods accumulated through the marriage’.⁹⁰ She went on to explain that the wife has earned this share by bearing and rearing the children and in tending the home, leaving the husband free for his economic activities. This language of entitlement is important as it denotes a broader context in which Summerskill had been fighting for property rights for married women throughout her political career. She must have known that arguing for financial remedies far beyond maintenance and lump sum orders was controversial, but as former Conservative politician and editor of the *Daily Telegraph* Bill Deeds noted: ‘I don’t think she was a lady who was very easily pushed off her point of view. She stuck to it.’⁹¹ So, instead of framing wives’ property rights in terms of need, in the context of divorce reform Summerskill argued instead for recognition of wives’ entitlement. Family lawyers will be familiar with this terminology from the House of Lords case *White v White*⁹² in 2000, and therefore it is interesting to see Summerskill framing financial provision in a similar way more than 30 years previously.

For Summerskill at this time, the most radical and straightforward way to reflect the equal importance of financial and non-financial roles in marriage was ‘community of goods’ or community of property; a matrimonial property regime whereby spouses’ assets and debts

⁸⁸ Records of the Women’s Library, SUMMERSKILL/1/101 emphasis in original text.

⁸⁹ See A Oakley, *Housewife* (Penguin, 1976); F Zweig, *Women’s Life and Labour* (Gollancz, 1952).

⁹⁰ *Hansard, Lords Debates*, vol 286, col 426 (8 November 1967).

⁹¹ Interview by Michael Summerskill with Bill Deeds, Records of the Women’s Library, SUMMERSKILL 1/46.

⁹² [2000] UKHL 42.

automatically go into a pot that is divided in half on divorce.⁹³ Though property in marriage has been owned by spouses separately in England and Wales since the Married Women's Property Act 1882, the Royal Commission on Marriage and Divorce in 1956 and the Law Commission in 1988 *did* consider the idea of community of property, deciding against introducing this matrimonial property regime because it would be too complex.⁹⁴

Correspondence with Edward Bishop MP reveals Summerskill had been involved in efforts to introduce community of property, provided for in Bishop's Matrimonial Property Bill in 1969.⁹⁵ But he agreed not to pursue it so that the Law Commission's recommendations for financial provision reform could be introduced by the Government. He reflected on this deal in a letter to Summerskill in May 1970: 'We had no alternative but to co-operate to get the [Matrimonial Proceedings and Property Act 1970] through, and we should have been very worried had it not done so.'⁹⁶ It should be noted that Summerskill had not campaigned throughout her life for community of property. Rather, she had argued as part of the Married Women's Association for equal partnership in marriage, which included co-ownership of income and the matrimonial home, but did not go as far as community of property.⁹⁷ It could be argued, therefore, that Summerskill's demand for 'community of goods' at this time was opportunistic, as this was what Edward Bishop's Bill was seeking to introduce at the time to slow the progress of the divorce reform.⁹⁸

In spite of these failed attempts, it could be argued that Summerskill's hopes for equal partnership in marriage were eventually realised in part, even if her desire for reform of

⁹³ *Hansard, Lords Debates*, vol 286, cols 427-428 (8 November 1967). It is not clear what form of community she preferred, though the Bishop Bill she supported (see below) was based on deferred community, or equal division of property acquired during the marriage.

⁹⁴ *Report of the Royal Commission on Marriage and Divorce* (Cmnd 9678, 1956); Law Commission, *Family Law: Matrimonial Property* (Law Com no 178, 1988). See also E Cooke, A Barlow and T Callus, *Community of Property: A Regime for England and Wales?* (Nuffield Foundation, 2006).

⁹⁵ For detailed analysis of this Bill see S Cretney, 'Community of Property' (1969) 113(7) SJ 116.

⁹⁶ Records of the Women's Library, SUMMERSKILL/1/101.

⁹⁷ The Married Women's Association did not want a system of community of property, but instead drafted their own Bill which provided for joint ownership of specified assets, such as spousal income and the matrimonial home. For more information on this group, see S Thompson, *Family Law Reformers: The Story of the Married Women's Association* (Hart, forthcoming).

⁹⁸ See Cretney, n 1 above, 134.

property ownership *during* marriage was not.⁹⁹ This evolution in common law was only possible because of the broad discretion accorded to the judiciary by the 1970 reforms consolidated in the Matrimonial Causes Act 1973. As explained in part one, this discretion – and the property orders that could be made pursuant to it – transformed financial provision for women because it opened up the possibility for divorcing women to become economically independent through property rights instead of indefinitely dependent on maintenance. Delaying the Divorce Reform Act 1969 enabled this legislation to be introduced. And looking behind the catchphrase ‘Casanova’s Charter’ makes the importance of Summerskill’s role in this delay evident. Indeed, Summerskill’s campaign is an example of what Rackley and Auchmuty claim can be uncovered by feminist legal history – the rules and doctrines ‘fought for but watered down, or never adopted in the first place’.¹⁰⁰

Deserted Wives’ Financial Protection

As well as proposing reform of married women’s property rights during marriage, Summerskill remained critical of the efforts implemented to protect the economically vulnerable spouse. She argued that a man with obligations towards a second family would not be able to support those from his first marriage, and that the law could not provide proper protection to the wife and children left behind:

Surely few men can keep two families...If a law is not enforceable it is a bad law, and if a law is so framed that only wealthy men can take advantage of it is a bad law.¹⁰¹

As noted above, the Government included a safeguard stipulating that if one spouse petitioned for divorce based on five years’ separation, the respondent could defend the petition if they

⁹⁹ Cretney has even contended that the twenty-first century shift towards ideas of sharing and entitlement in marriage indicates that financial provision on divorce has moved closer to community of property: S Cretney, ‘Community of property imposed by judicial decision’ (2003) 119 LQR 349. However, research also indicates that the ‘clean break culture’ is still prevalent: J Miles and E Hitchings, ‘Financial remedy outcomes on divorce in England and Wales: Not a “meal ticket for life”’ (2018) 31(2) *Australian Journal of Family Law* 43.

¹⁰⁰ Rackley and Auchmuty, n 6 above, 882. Notably, the authors’ example of this is the feminist campaigns of the 1960s for either community of property (in some form) or joint ownership of marital property. Reform of this kind is what Summerskill and the Married Women’s Association had been demanding since the late 1930s.

¹⁰¹ *Hansard, Lords Debates*, vol 286, col 427 (8 November 1967).

could prove it would cause ‘grave financial hardship’ and that it would be wrong in all the circumstances to dissolve the marriage. For Summerskill, this protection was insufficient:

This woman has to plead that she is suffering very grave hardship. How can she prove to a judge that she is suffering very grave hardship? Hardship is not going to be enough; it has to be grave hardship.¹⁰²

Summerskill had a point. Since it was introduced, section 5 has only been successful in a small number of cases,¹⁰³ indicating courts’ unwillingness to apply it. Even before it came into effect, the Law Commission recognised that the provision would only apply in exceptional circumstances:

[I]t is much to be hoped that resort to it could be infrequent: it is offensive to decency and derogatory to respect for family ties to preserve the legal shell of a dead marriage for purely monetary consideration. Moreover, a rich husband can easily make satisfactory financial provision for his wife and get his divorce; a poor man cannot, and it will be argued that it would be discriminatory for the law to refuse him a divorce on that account.¹⁰⁴

Put simply, a husband should be able to divorce his wife regardless of whether he can provide adequate financial provision or not. This did not mean the Law Commission viewed wives’ poverty as irrelevant, but they did make it clear that divorce should not be means tested and dependent upon a husband being able to maintain two households. Instead, as noted above, the Law Commission looked outside the Divorce Reform Act to develop a separate law on financial remedies. This meant divorce was a separate but connected issue to financial provision, making divorce possible without the financial aspects necessarily being finalised.¹⁰⁵ However, the non-moneyed spouse would not be made destitute if her ex-spouse had the means

¹⁰² *Hansard, Lords Debates*, vol 303, col 1295 (10 July 1969).

¹⁰³ See e.g., *Reiterbund v Reiterund* [1974] 1 WLR 788 and *K v K* (Financial Provision) [1996] 3 FCR 158. Both cases involved the wife’s loss of pension rights on a scale that could not be compensated by state welfare.

¹⁰⁴ Law Commission, above n 37, para 40.

¹⁰⁵ It is standard practice for financial remedies to be resolved before the divorce is finalised pursuant to the decree absolute but in some cases, financial redistribution has taken place decades after the divorce (see for example, *Wyatt v Vince* [2015] UKSC 14).

to support her, because the courts were given wide-ranging discretionary powers to make financial provision, being directed 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.¹⁰⁶

This objective, known as the minimal loss principle,¹⁰⁷ placed the onus on the moneyed spouse (usually the husband) to continue to provide for his former spouse financially, unless she remarried. The minimal loss principle was removed in 1984,¹⁰⁸ four years after Summerskill's death, but it could be argued that while it was in existence it endorsed what Summerskill had fought for, in that it directed the court to protect the ex-wife who continued to be dependent on her ex-husband. As Douglas notes, it stemmed from the concept of financial provision as 'repudiation of the marriage tie' whereby the first husband must 'pay for his freedom'.¹⁰⁹

One would have thought that this sweeping reform of financial provision ostensibly placing the financially vulnerable ex-wife at the centre of proceedings was a huge victory for Summerskill and her Casanova's Charter campaign. But for Summerskill, this was still not good enough. In one of her personal letters, she wrote that she was 'losing faith' in the Law Commission.¹¹⁰ This is because it did not properly address the issue of pension provision for wives, which was at the forefront of Summerskill and her supporters' concerns. Furthermore, while the financial and property consequences of divorce had been reformed, property rights during marriage had not. As seen above, Summerskill was receiving many letters from women who were worried about being divorced without their consent and losing their rights to a widow's pension. These were legitimate and serious anxieties, yet even though the 1970 Act significantly improved the financial impact of divorce for women, the issue of pension sharing

¹⁰⁶ Matrimonial Proceedings and Property Act 1970, s 5, consolidated in Matrimonial Causes 1973, s 25.

¹⁰⁷ Douglas notes that John Eekelaar coined this term (n 39 above, 117), citing J Eekelaar, *Family Law and Social Policy* (Weidenfeld and Nicolson, 2nd edn 1984) 109.

¹⁰⁸ Pursuant to the Matrimonial and Family Proceedings Act 1984.

¹⁰⁹ Douglas, n 39 above, 117.

¹¹⁰ Records of the Women's Library, SUMMERSKILL 1/99.

was not dealt with comprehensively until 1999.¹¹¹ Summerskill was also receiving letters from women who had been deserted but not divorced by their husbands and who had little or no financial support, suggesting reform of property rights during marriage was needed too.

Summerskill therefore remained ambivalent about divorce reform. She predicted that husbands could not financially support two households, even if legislation said that they should. In many ways, Summerskill was correct. The minimal loss principle arguably *was* ‘bad law’ because, according to members of the judiciary,¹¹² most husbands could not support two households. Research published in 1977 indicated that the principle had been virtually abandoned in practice.¹¹³ By 1984, it had been replaced by the clean break principle, and ever since then research has consistently indicated that women take longer to recover financially from divorce than men do.¹¹⁴

On the other hand, Summerskill’s argument could be countered by asking *why* a husband should have to maintain two households when the first marriage has been dissolved. Leo Abse argued that it was an unfair financial burden on the husband, did not enable the parties to move on properly, and implied that the wife was necessarily a needy supplicant.¹¹⁵ Importantly however, Summerskill was arguing *against* dependence, suggesting that the antidote was equal partnership in marriage. She contended that recognising housework and childcare in economic terms would help level the financial playing field outside the home too, where women also lacked equal opportunity. The women in employment writing to Summerskill were mainly employed in low-paid or part-time work but also undertook all the domestic labour. Ever the pragmatist, Summerskill acknowledged this reality and the fact that domestic and caregiving roles were gendered, maintaining that these roles should be valued in economic terms. As a result, closer inspection of Summerskill’s argument reveals that while her argument for protection of the first wife could be seen as reinforcing the vulnerabilities, dependencies and

¹¹¹ Pursuant to the Welfare Reform and Pensions Act 1999.

¹¹² See Ormrod J in *Wachtel v Wachtel* [1973] Fam 72, at 77.

¹¹³ W Barrington Baker, *The Matrimonial Jurisdiction of Registrars* (SSRC Centre for Socio-Legal Studies, 1977), cited in Douglas, n 37 above, 118.

¹¹⁴ See eg H Fisher and H Low, ‘Recovery from Divorce: Comparing High and Low-Income Couples’ (2016) 30 *IJLPF* 338.

¹¹⁵ As argued in press clippings in Summerskill’s papers, such as “‘When kisses start again’ changes planned in divorce law’, Records of the Women’s Library, SUMMERSKILL/1/99.

inequalities stemming from traditional marriage, it would be a mistake to dismiss her views on this basis because she was – importantly – arguing that women’s caring and domestic work should be valued economically.

Part 3 – The Relevance of Summerskill’s Stance Today

It is important to note that Summerskill was not the only feminist lobbying for greater financial protection for married women. Just as the history of any legal reform cannot be accredited to one individual, one group, one case, or one report, Summerskill was only one of many contributing factors behind the delay in the implementation of the Divorce Act 1969 and the sweeping reform of financial provision on divorce following this delay. But this does not mean she was insignificant either. Combined with other pressure groups,¹¹⁶ her steadfast opposition was instrumental in pushing for the introduction of a system of financial provision that could safeguard the deserted wives who wrote to her. Instead of viewing Summerskill’s intervention on behalf of deserted wives as reinforcing the idea of married women as needy supplicants, her intervention could be seen as part of an important step towards emancipation for women. A wife is much better placed to contemplate divorce if her economic position is safeguarded. If she is in a financially strong position inside the home, she is better equipped to compete with men in the public sphere too. This is why Summerskill, as the ‘lone wolf’ in parliament,¹¹⁷ the ‘odd’ feminist¹¹⁸ or, as her supporters saw her, the fighter of ‘the finest battle to protect innocent wives’,¹¹⁹ should be credited as having a significant role in the history of family law.

As well as providing an alternative historical viewpoint to the Casanova’s Charter debate, this section argues that exploring her perspective also sheds new light on the Divorce Dissolution and Separation Act 2020 and its wider context. First, the similarities in discourse between opposition to the 2020 Act and the 1969 Act are compared, showing that objecting to divorce without the consent of both spouses remains controversial in some circles. Secondly, Summerskill’s evaluation of section 5, considered in the previous section, is revisited as it has

¹¹⁶ For example, the Married Women’s Association, the Council of Married Women, the National Council of Women and the Six Point Group, which were all groups she was connected to.

¹¹⁷ Interview by Michael Summerskill with Barbara Castle, Records of the Women’s Library, SUMMERSKILL 1/46.

¹¹⁸ Abse, n 14 above.

¹¹⁹ Records of the Women’s Library, SUMMERSKILL 1/100.

been repealed by the new 2020 Act. It is argued that the 2020 Act could change the context of section 10 of the Matrimonial Causes Act 1973, by increasing its importance as a safeguard for financially vulnerable spouses. Furthermore, it is suggested in this section that Summerskill's demands for financial provision reform could be useful now too. Investigating her aim of equal partnership serves as a reminder that this has not yet been achieved, more than 40 years after her death.¹²⁰

Divorce without consent

Like the Divorce Reform Act 1969, the 2020 Act was a landmark reform. It removed fault from the divorce process entirely;¹²¹ an important and radical development in family law since the concept of the matrimonial offence has overshadowed secular divorce ever since it was first introduced in 1857.¹²² In doing so, it also removed the option for one spouse to defend the divorce petition. In other words, a spouse wishing to unilaterally divorce their partner no longer needs to wait for a period of five years' separation to elapse before this is possible.¹²³ When the 2020 Act was a Bill before Parliament, the Ministry of Justice noted: 'A concern raised in some consultation responses was that these changes have the potential to make it easier for older men to abandon their wives in favour of younger women'.¹²⁴

This concern plainly echoes Summerskill's stance more than 50 years previously. Opposition to the 2020 Act has come primarily from Conservative and DUP MPs, whose dissent appears to align closely with Summerskill's view that a more accessible divorce process could threaten the sanctity and stability of marriage.¹²⁵ Importantly, however, the controversy of divorce without both spouses' consent is overcome relatively easily today. Research shows that to

¹²⁰Summerskill died in 1980.

¹²¹ The Act removes the requirement to establish facts. Either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably: Divorce, Dissolution and Separation Act 2020, s 1.

¹²² Pursuant to the Matrimonial Causes Act 1857.

¹²³ Pursuant to the Divorce, Dissolution and Separation Act 2020, s 1(1), either or both parties can apply for a divorce order.

¹²⁴ Ministry of Justice, n 5 above, para 27.

¹²⁵ See e.g., the view of Lord Farmer: M Farmer, 'Boris Johnson's no-fault "quickie" divorce reform is appallingly insensitive to the national mood' *The Telegraph*, 5 June 2020, accessed at: <https://www.telegraph.co.uk/politics/2020/06/05/boris-johnsons-no-fault-quickie-divorce-reform-appallingly-insensitive1/>

avoid the period of five years' separation, divorce under conduct-based grounds had been happening routinely under the old law,¹²⁶ so it was argued that the new Act simply injected 'intellectual honesty' into existing processes.¹²⁷ It was also contended that divorce should only require the consent of one spouse because this is enough to prove that both parties are no longer consenting to the marriage. As Alex Chalk MP put it: 'When consent disappears [in marriage], so, too, does its legitimacy'.¹²⁸

But, as this article has argued, concern for Casanovas or 'easy divorce' was not Summerskill's main objection. It was the plight of the *financially dependent* housewife divorced without her consent that fuelled her opposition to the 1969 Act, as she makes clear in the following passage:

I was talking about the thousands of ordinary housewives who might be affected. I rather regret that my noble friend sought to ridicule this by illustrating it with the lady with her furs living in a mansion and going to a bed-sitter. I must confess that I had not thought of this particular kind of woman suffering any hardship in any way. That kind of woman can always manage her own life, and the Casanova with her can help her.¹²⁹

This distinguishes Summerskill's view from many of those objecting in 2020, who are not focused on the position of the economically dependent spouse, but instead are objecting to easier divorce *per se*. Indeed, as the dominant housewife/breadwinner stereotype from Summerskill's day now appears to be outdated and of little relevance,¹³⁰ those sharing her specific concerns are unsurprisingly less prevalent in current debates. Yet traces of them do linger. For instance, the Conservative MP Fiona Bruce presented the following vignette in the Commons in 2020:

Can't we just talk about it? Can I just know why?" Silence. Silence because there is no one to answer the young woman with a baby in her arms and a toddler at her feet, who

¹²⁶ Trinder et al, n 3 above.

¹²⁷ See Sir James Munby in *Owens v Owens* [2017] EWCA Civ 182, [94].

¹²⁸ *Hansard*, HC Deb, vol 677, col 126 (8 June 2020).

¹²⁹ *Hansard*, *Lords Debates*, vol 304, col 174 (15 July 1969).

¹³⁰ J Mair, 'The breadwinner, the homemaker and the worker/carer: new stereotypes for old?', in A Griffiths, S Mustasaari and A Maki-Petaja-Leinonen (eds), *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections* (Routledge, 2017).

has just received a notice in the post—a notice that says, “I am divorcing you. I am divorcing you in a few short weeks, and I do not have to give you a reason. I am giving you notice to quit on our relationship.”¹³¹

Highlighting the need for reform of financial remedies law

As the 2020 Act aimed to make relationship breakdown better and fairer for those involved,¹³² discussions surrounding it have also logically reinvigorated calls for reform of the financial consequences of relationship breakdown.¹³³ The Government has since committed to setting up a Lord Chancellor’s working group to conduct a review of the law of financial provision on divorce.¹³⁴

For many reasons, the position of the spouse doing most of the unpaid work in the home is different now from when the Matrimonial Causes Act 1973 was first introduced. Indeed, in *Child and Family Law Quarterly*’s 40th anniversary issue, Carol Smart compared revisiting family law reform in the 1970s and 1980s to travelling through time to a past that was akin to a foreign country, because perspectives about women and their role within marriage have changed so much.¹³⁵ Yet the broader problems of inequality still exist today, albeit in a different social context. There is still a gulf in financial outcomes for spouses on divorce which is divided on gender lines.¹³⁶ And the issue of pension provision still creates and reinforces significant financial inequalities between spouses.¹³⁷ As a result, reviewing the financial consequences of divorce now is both urgent and important. And, just as the Divorce Reform Act 1969 provided Edith Summerskill and her allies with an opportunity to press for financial provision reform, so too the 2020 Act has reopened this question and arguably provided the greatest opportunity

¹³¹ *Hansard*, HC Deb, vol 677, col 117 (8 June 2020).

¹³² Trinder et al, n 3 above.

¹³³ For spouses, but also unmarried cohabitants, as the latter relationship type has little financial protection on separation.

¹³⁴ See written question and answer on Matrimonial Proceedings, Question for Ministry of Justice UIN 69747, tabled on 6 July 2020 accessed at <https://questions-statements.parliament.uk/written-questions/detail/2020-07-06/69747>.

¹³⁵ C Smart, ‘Law and Family Life: Insights from 25 Years of Empirical Research’ [2014] 26 CFLQ 14, 15, quoting LP Hartley, *The Go Between* (Hamish Hamilton, 1963), the first line of which is: ‘The past is a foreign country; they do things differently there’.

¹³⁶ See Fisher and Low, n 112 above.

¹³⁷ See H Woodward and M Sefton, *Pensions on Divorce: An Empirical Study* (2014).

for comprehensive reform of the financial consequences of relationship breakdown since the 1970s.

As is the case with any reform, the purpose of any change must be made clear. Proposals that have come before Parliament in recent years have prioritised certainty, individual autonomy, and independence,¹³⁸ advocating the limitation of periodical payments orders, equal rather than equitable division of matrimonial assets, and strict enforcement of prenuptial agreements.¹³⁹ By prioritising the concept of equal partnership in marriage over values of certainty and individual autonomy, however, Summerskill's point of view draws attention to the potential pitfalls both in these proposals and in the existing law.

For example, Summerskill's assertions encourage fresh analysis of section 5 of the Matrimonial Causes Act 1973. Although section 5 was criticised by Summerskill,¹⁴⁰ the cases in which it was evoked indicate that it was especially important when one spouse potentially lost pension entitlements they would otherwise have if they remained married.¹⁴¹ It highlighted the significance of pensions in the context of divorce, an issue Summerskill and her feminist networks were very concerned with. While the law on relationship breakdown and pension entitlement has evolved considerably since Summerskill was making her demands, lack of pension sharing is still one of the greatest causes of financial inequality on divorce today.¹⁴² This is because when one spouse makes career sacrifices affecting their pension, such sacrifices are often not compensated by pension adjustment on divorce.¹⁴³ The removal of section 5 by the 2020 Act could place considerably more emphasis on section 10 as a safety net for those left financially vulnerable.¹⁴⁴

¹³⁸ See A Heenan, 'Neoliberal autonomy and financial remedy reform: lessons from Sweden' [2020] 32(3) CFLQ 263.

¹³⁹ This would be the effect of Baroness Deech's Divorce (Financial Provision) Bill 2019-2021 if introduced.

¹⁴⁰ See Cretney (n 1 above, 374), who has noted that *Reiterbund* and *K v K* (n 95 above), which involved loss of pension rights, are the only examples where s 5 has had any noticeable effect.

¹⁴¹ The existence of s 5 has also been used to pressurise the petitioner to provide a reasonable financial settlement: see e.g., *Archer v Archer* [1999] 1 FLR 327.

¹⁴² Woodward, n 135 above.

¹⁴³ *Ibid.*

¹⁴⁴ This was a logical step given this provision related to the old five years' separation fact to establish irretrievable breakdown, which was swept away by the new Act. Extending section 5 would have meant that the

Section 10 of the Matrimonial Causes Act 1973 provides special protection for the respondent in separation cases and can prolong the divorce so that financial provision can be made. Part 1 of the Schedule appended to the 2020 Act extends section 10 to all divorce petitions, facilitating delay to ensure financial provision is ‘reasonable and fair or the best that can be made in the circumstances’.¹⁴⁵ While the wording of section 10 can be interpreted expansively,¹⁴⁶ it could be argued that it does not draw sufficient attention to pension sharing. Before pension sharing was reformed in 1999, section 10 was used to protect spouses at risk of losing pension rights on divorce but since 1999 its utility has waned. With the minimum time between petition and divorce reduced to six months under the 2020 Act, it is likely that many cases will not be satisfactorily resolved in this timeframe, particularly given the complexity involved in the valuation of assets such as pensions.¹⁴⁷ It is too early to know whether in practice parties will need to rely on section 10 more to delay the divorce decree and ensure proper pension valuation. Determining a fair valuation of a complex pension arrangement might get in the way of divorce, but if spouses are not aware of this, there could be insufficient time for such valuation before the decree absolute, which could lead to economic inequality on divorce being exacerbated further. It is possible to divorce without financial matters being finalised, but if financial matters are not resolved at the time of divorce, this can lead to financial hardship.

Taking this into account, further reform of this area is clearly necessary. Summerskill was dubious about the effectiveness of safeguards built into divorce legislation and instead demanded comprehensive reform of family property law. It could be argued that a similar response is appropriate now. A detailed exposition of the form this could take is outside the remit of this article, but Summerskill’s intervention is important to reflect upon in future discussions about reform because of the issues she prioritises. Her perspective highlights the need for further legislation that codifies and extends the common law advances made since

divorce decree could be refused in any case where it could be established that the respondent would experience grave hardship and these cases are now covered by section 10.

¹⁴⁵ Divorce, Dissolution and Separation Act 2020, Schedule of Minor and Consequential Amendments to the Matrimonial Causes Act 1973, Part 1, 10(3)(b).

¹⁴⁶ See for example *Garcia v Garcia* [1992] 1 FLR 256 where the divorce was delayed because the husband owed the wife a substantial amount of child maintenance.

¹⁴⁷ H Woodward, ““Everyday” financial remedy orders: do they achieve fair pension provision on divorce?” [2015] CFLQ 151.

White, paying attention to those made economically vulnerable by caregiving responsibilities in marriage. Years before *White*, her viewpoint also emphasised the equal importance of financial and non-financial contributions to the welfare of the family – a fundamental aspect of her desire for equal partnership in marriage. Though these arguments were made more than 50 years ago, they remain pertinent today.

Conclusion

The debate started by Summerskill's Casanova's Charter comment helped push the Government into introducing legislation on financial provision alongside legislation on divorce because the economic consequences for deserted wives was seen as being a genuine problem in need of reform. Despite this, Summerskill is not credited in institutional accounts as having successfully helped shape modern English family law through her intervention in the divorce debate.¹⁴⁸ While the Casanova's Charter soundbite was a useful tool that captured the attention of the press and public, it arguably misrepresents the importance of Summerskill's role in the Divorce Reform Act 1969. This is because her view of divorce reform is understood historically as being anti divorce per se. In the institutional account, her antidote to the financial crises faced by wives on relationship breakdown was enforced continuation of marriage. As Carol Smart saw it, Summerskill and her supporters were of the view that the 'best a middle-aged wife could hope for was to hang onto her husband, if not in reality, at least in name'.¹⁴⁹

In representing the concerns of deserted wives in the face of divorce reform, Summerskill was treading a delicate balance between advocating for their protection without reinforcing the gendered and stereotypical position of the vulnerable housewife. The women writing to Summerskill knew she understood the reality of their financial situation, which in some cases was dire. Gillian Douglas has noted that at that time it was ill-founded to assume that husbands and wives would leave their marriages on an equal financial footing.¹⁵⁰ Summerskill recognised this and was seen by deserted wives as making their experiences visible in an environment where liberal assumptions of equality between men and women dominated much of the discourse surrounding divorce reform.

¹⁴⁸ Although see Douglas who credits her as advancing the 'modern view' (n 39 above, 116).

¹⁴⁹ Smart, n 35 above, 71.

¹⁵⁰ Douglas, n 39 above, 117.

Taking all of this into account, an accurate depiction of Summerskill's role must be more nuanced than simply labelling her as being against divorce. It would be easy to make obvious comparisons between her concerns and current Conservative and DUP opposition to the Divorce, Dissolution and Separation Act 2020, because both appear to be chiefly concerned with preserving the sanctity of marriage. But doing so misrepresents Summerskill's view. Summerskill *did* identify women's economic vulnerability within marriage but did not identify the institution of marriage as the problem,¹⁵¹ which went against the grain of the second wave feminist thinking emerging at that time. Yet this is one of the reasons why examining her view is important historically. That Summerskill identified as feminist and represented older women typically not involved in the women's liberation movement provides historians with an opportunity to explore the spaces between dominant discourses surrounding divorce reform in the late 1960s.¹⁵² And so it would also be a mistake to dismiss the significance of Summerskill's role because of the criticism levied against her. Through the previously unaccessed sources utilised in this article and by focusing on Summerskill's individual role, an alternative view is therefore possible.

This alternative view, that focuses on the reality of women's structural inequalities in marriage, is something that feminist scholarship has long sought to redress and is not inconsistent with Summerskill's argument. Political and legal rights such as access to divorce can create opportunities for women's integration in society. But to take advantage of such opportunities, women need to be able to access resources.¹⁵³ If a wife's role as homemaker and mother impede her access to opportunities in the public sphere, such as income and/or a pension, she cannot utilise legal rights in the same way her husband can. This experience of structural inequality was pervasive in the letters received by Summerskill. And recognition of the effects of economic vulnerability was evident in Summerskill's fight for reform of financial provision law on divorce too, arguably influenced by these letters and her own feminist activism.

Therefore, a closer and more comprehensive assessment of Summerskill's argument reveals she was doing more than simply opposing divorce. Rather, she was demanding recognition of

¹⁵¹ Summerskill, n 8 above.

¹⁵² Green, n 12 above.

¹⁵³ See V Sapiro, *The Political Integration of Women: Roles, Socialization, and Politics* (University of Illinois Press, 1984).

wives' work in the home. She was arguing that divorce without the consent of one of the parties would be problematic if financial matters had not been resolved. And perhaps most importantly, she was making the struggle and frequent destitution of married women visible in parliament. As Leo Abse (somewhat resentfully) recalled, 'it is to her credit, or discredit, that she succeeded in delaying' the Divorce Reform Act 1969'.¹⁵⁴ Although he believed that 'certainly in the divorce reform battle [he] was her victim'¹⁵⁵ and her opposition constituted 'alarmist clarion calls',¹⁵⁶ the alternative, feminist analysis of Summerskill presented in this article instead reveals her pragmatism and unblinking focus on women's realities and experiences, as evidenced in her speeches and the letters she received. There are lessons to be learned from Summerskill's realism and persistence. Reform that ostensibly furthers equality might not do so in practice for women without financial stability. In other words, reform that ignores economic dependency will only exacerbate inequality along gender lines. Her work also demonstrates that reformers should look to the experiences of those who were not necessarily being heard in parliament when evaluating policy.

Summerskill's lessons continue to resonate today, as the Divorce, Dissolution and Separation Act 2020 comes into effect, financial provision law is on the reform agenda, and the gap between men and women's economic recovery rates on divorce persists.¹⁵⁷ Against this backdrop, contemplating Summerskill's point of view reminds family lawyers how important it is to focus on those left economically vulnerable by divorce, instead of side-lining such concerns in favour of reform that achieves certainty and assumes autonomy. Summerskill's experiences teach us to be sceptical of such assumptions, and to question those who claim equality has been achieved. For she was told by her colleagues that she was 'pushing at a door that's already open', that women had achieved equality with men, and that the inequality she spoke of was 'grossly exaggerated'.¹⁵⁸ So when new legislation is proposed that dismantles maintenance,¹⁵⁹ based on the belief that equality has been achieved and any recognition of

¹⁵⁴ Abse, n 14 above.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Miles and Hitchings, n 97 above; Fisher and Low, n 112 above.

¹⁵⁸ These comments were made by former Labour Minister of Health Kenneth Robinson: Interview by Michael Summerskill with Kenneth Robinson, Records of the Women's Library, SUMMERSKILL 1/46.

¹⁵⁹ See eg proposals to limit the scope of periodical payments under the Divorce (Financial Provision) Bill 2019-2021.

female dependency is infantilising,¹⁶⁰ it is important to do what Summerskill did – look to the research and listen to the experiences of those affected by such reform.

¹⁶⁰ See R Deech, 'What's a Woman Worth?' [2009] 14 *Family Law* 1140.