

*'So Foul A Deed':
Murderous Mothers in Early Nineteenth Century Montreal*

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Yesterday morning the bodies of two infants, supposed to be twins, were found in the Canal firmly enveloped in a linen bag, in which were also two bricks. There was also a shawl round the bodies, which it is to be hoped may lead to the discovery of the unfeeling mother. The Police are on the alert, and we are confident that no exertions on their part will be wanting to discover the perpetrator of so foul a deed. The bodies were interred, and the shawl may be seen at Police Station B.¹

The above narrative is, in many ways, illustrative of the complex and contradictory phenomenon of infanticide in Montreal during the first half of the nineteenth century. Appearing in no fewer than three local newspapers, including the conservative and somewhat stodgy *Montreal Gazette*, that article itself was unusual. While notices regarding the finding of infant bodies in Montreal were far from infrequent, discovery of twin infant bodies was exceptional. The article was also unconventional in the stridence of its tone. Lacking the usual sterile, matter-of-fact narration so typical of newspaper coverage of that topic, this account cried out for the apprehension of the perpetrator of "so foul a deed." While the call for justice might have appeared strong, infanticides that resulted in prosecution were rare, and convictions were rarer still. And while the prevalent view might have been to characterize the person responsible for such an act as an "unfeeling mother," the reality surrounding infanticide was altogether more complicated yet fully as tragic.

¹ *The Montreal Herald* (28 May 1840). See also *The Montreal Gazette* (28 May 1840) (citing *The Montreal Herald*); *L' Ami du Peuple* (30 May 1840).

This article will analyze infanticide in the judicial district of Montreal in the period 1825 to 1850, examining coroners' reports, judicial records and newspaper accounts to better understand the social and legal dimensions of that phenomenon.² Coroners' reports provide information on the frequency with which infant bodies were discovered in Montreal, as well as the incidence of infanticide. Judicial records illustrate the legal response to those murderous mothers, and allow for more detailed examination of the social realities and issues surrounding those events. Newspaper accounts will be used to supplement missing archival sources as well as to provide contemporary commentary. I will argue that the phenomenon of infanticide, and the legal and social responses thereto, were afflicted by a deep sense of ambivalence, in that conflicting sentiments, realities, and paradigms battled for supremacy. As a result, the actions of defendants, prosecutors, judges and jurors--not to mention the public at large--were characterized by contradictory motives and countervailing sympathies. The issue of infanticide therefore presents a fascinating study in early-Victorian contrasts. Part I

² The first conceptual difficulty encountered in studying infanticide is one of definition. The contemporary terms used, besides infanticide, included "wilful child murder" and other variations. See Cathy Sherill Monholland, "Infanticide in Victorian England, 1856-1878: Thirty Legal Cases" (Rice University, M.A. thesis, 1989) 83. Infancy may have a variety of legal definitions, reflecting the fact that the common law did not historically distinguish between murder of adults and that of newborns or adolescents. In this study, infanticide will be defined as the unlawful killing of a newborn through acts of commission or omission. For other definitions of infanticide, see *e.g.* William Boys, *A Practical Treatise on the Office and Duties of Coroners in Ontario, With an Appendix of Forms* (Toronto: Hart & Rawlinson, 1878, 2nd edition) 48 (defining it as the "murder of the child after birth."). See also Marie-Aimée Cliche, "L'infanticide dans la région de Québec (1660-1969)," 44 *Revue d'histoire de l'Amérique française* 31 (1990) at 34 & note 8; William L. Langer, "Infanticide: A Historical Survey," 1 *Hist. of Childhood Q.* 353 (Winter 1974); Wheeler, *supra* note 39 at 415-416 note 1; Mary Ellen Wright, "Unnatural Mothers: Infanticide in Halifax, 1850-1875," *Nova Scotia Hist. Rev.* 13 (1987). Other scholars--when they have chosen to define the parameters of the crime at all--have used different age limits. Compare Peter C. Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England, 1558-1803* (New York University Press: New York, 1981) at *xiii* (using the Tudor definition of an infant as a child aged eight years or younger); Judith Knelman, *Twisting in the Wind, The Murderess and the English Press* (University of Toronto Press: Toronto, 1998) 146 note 2 (using definition of infant as under one year of age).

will discuss infant abandonment, the frequency with which infant bodies were discovered in and around the city, and the mechanics of coroners' inquests in Montreal. Part II will set out the legal regime governing infanticide and related offenses, while Part III will analyze the legal system's response to those crimes.

I.

In the winter of 1826, a group of boys skating on the creek made the macabre discovery of a female fetus lying under the bridge "carelessly wrapped in a cloth."³ On average, every year saw a number of infant corpses discovered in and around the city of Montreal. Most often, the body recovered was that of a fully-developed newborn. Some of the bodies bore frightful marks of violence and had been unceremoniously dumped in garbage heaps and sewers, thrown into privies and wells, tossed into canals and rivers, and left in alleyways and fields. Others appeared to have been respectfully--even lovingly--dressed in baby clothes and buried in coffins of polished wood. As such, even their interments were suggestive of a plethora of differing circumstances surrounding their births and deaths.

An unmarried woman facing an unwanted pregnancy in early-Victorian Montreal had limited options. As an unwed mother, she faced a life of obloquy, social ostracism, and privation. To the Victorian mind, adoption was an unattractive option given the importance placed upon blood lineage, as well as legal impediments.⁴ Unwed

³ *The Montreal Gazette* (27 November 1826).

⁴ See generally Malcolmson, *supra* note 38 at 187. For discussion of adoption in the nineteenth century United States, see Michael Grossberg, *Governing the Hearth, Law and the Family in Nineteenth-Century America* (Chapel Hill & London: University of North Carolina Press, 1985) 268-280.

mothers therefore faced a desperate situation and, hence, desperate choices.⁵ It is not surprising, therefore, that three of the most common alternatives were abortion, abandonment, or infanticide.⁶

Abortion, although hardly unknown, was an illegal procedure and required that the mother disclose her situation to at least one other person.⁷ Besides not always being efficacious, abortion procedures could result in the mother's death. For those reasons, child abandonment and infanticide were generally more attractive options.⁸

Abandonment, or "dropping," consisted of leaving the child in a public space such as in front of a church, in the market, or on the stoop of a prominent citizen's home.

⁵ Some women were driven to suicide as a result. For a contemporary newspaper account of such an occurrence, see *The Vindicator* (3 July 1829):

Suicide--On Saturday last a woman named Ellen Brasil, a native of Ireland, put an end to her existence by hanging herself with a Silk Handkerchief. The Verdict of the Coroner's Inquest--felo de se. We learn that this unhappy female had for some time previous to her death, been cohabitating with one Patrick Shiels, a huckster, in this place, who, it would seem, had seduced her under promise of marriage. The wretched woman becoming pregnant, and finding no probability of Shiels performing his promise, formed the dreadful resolution of destroying herself in the manner above stated. The deceased having left a quantity of clothing and some money, any information respecting her relatives will be thankfully received by the Coroner of this District.

⁶ Compare Jarvis, *supra* note 39 at 132. But see R. Sauer, "Infanticide and Abortion in Nineteenth-Century Britain" (March 1978) 32 *Population Stud.* 81 at 84-85 (stating that infanticide arising from illegitimate births was a rare occurrence in Victorian Scotland); *ibid* at 89 (stating that infanticide was rarely practiced by nineteenth century Irish emigrants in England). No differences among ethnic groups is readily apparent in this study, unlike that of socio-economic class. Irish defendants do feature prominently in this study, but they reside alongside French-Canadian, Scottish and English defendants.

⁷ See generally Malcolmson, *supra* note 38 at 187-188. For discussions of nineteenth century abortion, see e.g. Constance Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth-Century Canada" (1983) 3 *Windsor Yrbk. of Access to Just.* 61; Malcolmson, *supra* note 38; Sauer, *supra* note 51; W. Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada" (1981) *Communications Historiques/Historical Papers* 34-56. For an example of an abortion prosecution in Montreal, see Archives nationales du Québec à Montréal [hereinafter A.N.Q.M.], Records of the Montreal Gaol [hereinafter MG], Donald McLean committed for "administering poisonous drugs for the purpose of creating primitive abortion"; defendant acquitted (30 September 1842).

⁸ Compare Malcolmson, *ibid.* at 188.

Dropping was a strategy employed in a variety of jurisdictions during many different eras. If left in an appropriate place and quickly recovered, the child's chances of survival were probably good.⁹ In many other cases, however, the child died of exposure and related factors, and hence abandonment may be seen as a coherent adjunct to infanticide. Indeed, abandonment may often have been a passive form of that crime: if the child was discovered alive, then well and good; but if the child died before discovery, the mother might have consoled herself with the rationalisation that she was not directly responsible for his or her demise.¹⁰ Abandonment was usually the preserve of a mother who had given birth out of wedlock, although not exclusively so.¹¹

⁹ See generally Cliche, *supra* note 47 at 36-37 (seventeenth to twentieth century Quebec City); Malcolmson, *ibid.* (eighteenth century England); Sauer, *supra* note 51 at 82 (nineteenth century England). In the context of nineteenth century Toronto, Jarvis noted:

The children, both male and female, were usually left where someone was sure to find them, such as on the doorsteps of churches, or the homes of prominent people. Usually they were well dressed, and in good health, cradled in a basket, sometimes complete with a nursing bottle of milk, a note telling the name, or instructions suggesting a possible name or requesting baptism. Often, it was noted, they came with rather expensive clothes, far beyond the means of poor parents, leaving the suspicion that this was not just a lower class phenomenon. Such deserted children generally survived and were sent to an orphanage or the House of Industry.

Jarvis, *supra* note 39 at 132-133.

¹⁰ Wright, *supra* note 47 at 18, observed that abandonment was probably a rationalisation as it was theoretically possible that the infant could be rescued.

¹¹ As pointed out by Gossage, *supra* note 14 at 1-2:

In a nineteenth-century city such as Montreal, abandoned children could result from a number of social and familial circumstances. Most often, illegitimacy produced abandoned children, although the conjuncture between poverty or desertion could also make abandonment an appropriate survival strategy for a struggling family economy. In all events, child-abandonment in the nineteenth century suggested personal and/or economic desperation.

See *supra* note 10, and generally Gossage's article, "Les Enfants Abandonnés à Montréal au 19e Siècle: La Crèche d'Youville des Soeurs Grises, 1820-1871" (1986-87) 40 *Revue d'Histoire de l'Amérique Française* 537.

To better deal with that phenomenon, foundling hospitals were established in major European and North American cities in the nineteenth century. In Montreal, the Grey Nuns founded a hospital for foundlings as early as 1754.¹² Those institutions were often met with controversy, as critics argued that they rewarded promiscuity on the part of unmarried women. When Thomas Coram opened the London Foundling Hospital in the first half of the eighteenth century, for example, a contemporary engraving advertising the Hospital depicted a young woman dropping an infant into a ditch as she wept into a handkerchief.¹³ That representation itself exemplified the paradox inherent in this phenomenon: was the viewer's sympathy to reside with the infant, or with the mother? Were her tears promoted by joy at the possibility of personal redemption, relief that her child would be received at the Hospital, or by grief at abandoning her child?

The University Lying-in Hospital was founded as an extension of the Medical Faculty of McGill College in 1854 to provide care for pregnant women.¹⁴ In its annual reports published in the local press, the directors of the Lying-in Hospital consistently emphasized that their institution was not meant to foster immorality, but rather played an important part in preventing infanticide:

¹² See generally Gossage, *supra* note 14, *ibid.* As he pointed out, the Grey Nuns served “desperate mothers unable or unwilling to raise a young child,” essentially acting as a “depository for children that could not be raised in a traditional family unit for a number of reasons, the most common of which was illegitimacy.” *Ibid.* at 10. For discussion of child abandonment in other jurisdictions, see John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York: Pantheon Books, 1988); Rachel Ginnis Fuchs, *Abandoned Children: Foundlings and Child Welfare in Nineteenth-Century France* (New York: State University of New York Press, 1984).

¹³ See Lionel Rose, *The Massacre of the Innocents: Infanticide in Britain, 1800-1939* (London: Routledge and Kegan Paul, 1980) 2-3; Krueger, *supra* note 32 at 271.

¹⁴ *The Pilot* (12 September 1846).

The same document shows that the admissions of unmarried women form a very large proportion of the whole, some of whom also paid their board. While every Christian and benevolent mind must deplore this fact, it will be some satisfaction to the public to know, that the cases by no means all belong to this city, but very many were strangers and emigrants, who fled from their homes to conceal their disgrace, and who were, generally speaking, in a most destitute condition. The Ladies of the Committee [of Management] humbly believe, that, through the medium of this Institution, many an unfortunate and guilty creature, has been preserved from being hurried prematurely into the presence of an offended Maker, from adding sin to sin, or perhaps from the commission of infanticide--and that many have been spared to repentance and restored to usefulness and happiness.¹⁵

As that passage makes clear, supporters of the Lying-in Hospital believed they were protecting unwed mothers from “vicious courses and eternal ruin”--most notably, suicide and infanticide.

The final irony might have been that while such institutions were founded to counter the pernicious phenomenon of infanticide, in reality they may have been counter-productive.¹⁶ Indeed, the staggering mortality rates of these institutions essentially reduced them to glorified mortuaries for the very young.¹⁷ It was the very youth of these infants that played a determinant factor in whether they would survive.

¹⁵ *Ibid.* Similarly, their annual report two years later stated that “no unmarried person has ever presented herself a second time, and they trust, that whatever objections may exist with some regarding the Institution, will be removed by these facts.” They continued by noting that they “have the happiness of firmly believing, that so far from this Institution having been the cause of inducing immorality, it has been the means of saving numbers from vicious courses and eternal ruin.” *Ibid.* (14 October 1848).

¹⁶ Gossage, *supra* note 14 at 11, states that:

By providing mothers with a “legitimate” outlet for unwanted or supernumerary children, [foundling institutions] encouraged a practise which more often than not led to the deaths of the infants. Mothers were less reluctant to abandon their children in institutions which had the blessing and support of lay and religious authorities than in fields or street-corners--though the results may have been the same.

¹⁷ The mortality rate for the Grey Nuns’ Foundling Hospital, while horrifically high, was not unusual for this period. For the period 1820 to 1840, 86.9% of the children in this institution died. *Ibid.* at 116. ‘Baby farming’ resulted in similarly lethal consequences, although in many instances was much more premeditated. For discussion, see *e.g.* Knelman, *supra* note 47 at 157-180.

The preponderance of children abandoned to the Grey Nuns were less than a year old, and most were under a week of age.¹⁸ Such was the privacy with which children could be deposited with the Grey Nuns that only one reference to this practice was found in the popular press of this period, in which it was disclosed that on a Monday night in March of 1846:

A police man who was not far away from the Grey nun's convent heard the cries of a child, all along the wall that surrounded the building. After searching, he found a small new born, wrapped in a few sheets. He brought it to the convent and the charitable sisters of this institution took it under their care.¹⁹

The fact that the infant was left so close to the Grey Nuns' convent suggests that the mother in question might have had a lapse of courage in the final moments when dropping her child.

It is unassailable that child abandonment was common. Older children were often left to fend for themselves by parents who were unable or unwilling to provide for them, and younger children were abandoned with the hope that Christian charity would induce someone to take care of them:

Yesterday evening a female child apparently about six weeks old, was left in the passage of the house in Craig Street occupyd (sic) by Mr. McLean, Tailor, Mr. D.A. Smith, and others. The servant girl having been out on an errand saw, as she was returning, some woman leave the house in a great hurry and pull the hood of her cloak over her head. The servant supposed she had been stealing something, and immediately acquainted her master with what she had observed --when on

¹⁸ For the period 1820 to 1840, 2,385 children were abandoned with the Grey Nuns; of these, the ages of 1,690 were recorded. The statistics reveal that 91.7% were less than a year old; 71.5% were less than a month old; and 51.2% were less than a week old. Gossage, *ibid.* at 106. For the later part of this period, 1835 to 1840, sixty percent of the infants were a week old or less; seventeen percent were abandoned the day of their birth; and twenty percent were a day old at the time of their abandonment. *Ibid.* at 112.

¹⁹ *La Minerve* (19 March 1846) (author's translation). See also *The Pilot* (20 March 1846) (citing *The Montreal Herald*).

going into the passage with a candle the infant was discovered. The child has a small bruise on the left temple, and laid so still that they thought it was dead. On being touched, however, the little innocent moved --as it did not at all cry, the family conceive that some sleepy potion had been administered.²⁰

References to children being dropped near private homes were rare; it was much more usual for infants to be found near markets, churches, and other public venues.

Particularly to a fragile infant life, dropping was a hazardous undertaking, and the distinction between active and passive infanticide in many instances was no doubt a fine one. From a mother's perspective, dropping was also not without its attendant risks. Dropping an infant could lead to discovery and recriminations, including prosecution for abandonment, although such cases were decidedly rare.²¹ Many women, seeking to avoid the social stigmatization of bearing a child out of wedlock, might therefore have considered dropping to be an unattractive option. Indeed, many women would not have been favorably disposed towards the child they bore, seeing it as the mark of their shame as well as its cause.

All too often, infanticide presented itself as the best option. Infanticide could consist of an affirmative act of violence against the infant, passive acts such as neglect,

²⁰ *The Montreal Transcript* (13 June 1837). See also *The Montreal Transcript* (1 April 1845) (detailing practice of parents' abandoning older children to fend for themselves in the streets); *The Montreal Transcript* (8 August 1846) ("a young female child, abandoned by its parents, was found on Wednesday last on the market. There was on her person, a paper indicating her Christian name and age.").

²¹ For discussion of such a prosecution, see *infra* at 94. A newspaper account dealing with abandonment that also identifies one of the putative parents appeared in *La Minerve* (3 April 1845) (author's translation):

Abandoned children—the *Transcript* reports that for some time several children have been found in the streets, abandoned by their parents. Last Friday, it claims, three children from the same family, the eldest of which was only eleven years old, were brought to the police, having been found on the road without shelter or parents. They belong to the widow of a soldier named Pocock. This unfortunate girl was arrested but escaped and was never seen again.

or include dropping an infant under circumstances that resulted in the infant's death. Regardless of the method chosen, "[a] distraught and desperate mother might, with luck, save herself and her reputation but her baby was almost always destined for an early death."²² Not only did infanticide not entail the same risk to the mother's health as abortion, but also her chances of escaping discovery, prosecution, and conviction were high.²³ The stealthy nature of the offence worked to shelter the murderer, and infants were readily disposed of, metaphorically and otherwise.²⁴ Easily hidden, they also decomposed quickly,²⁵ and there were generally no third parties to report the child's disappearance.²⁶ Thus, the bodies of many murdered infants were undoubtedly never ferreted out, and hence many culprits never identified.

When an infant body was discovered, it fell under the authority of the coroner for the District of Montreal. Coroners' inquests were quasi-judicial inquires whose purpose was to determine a cause of death when circumstances were deemed to warrant investigation.²⁷ For that purpose, a jury of inquest consisting of twelve men from the District was convened, whose purpose was to hear medical testimony as to the cause of death, and any relevant eyewitness testimony that was deemed to shed light on the

²² Malcolmson, *supra* note 38 at 188.

²³ See generally Jarvis, *supra* note 39 at 133-134.

²⁴ See generally James M. Donovan, "Infanticide and the Juries in France, 1825-1913" (1991) 16 *J.Fam.Hist.* 157. at 159.

²⁵ See Donovan, *ibid.* at 160.

²⁶ See Wheeler, *supra* note 39 at 407.

²⁷ Outside of the city limits, it was not unusual for other officials to preside over inquests, such as the Captain of Militia. See *infra* at 43.

matter at hand. The jury then issued a verdict on the supposed cause of death. If the verdict was one of wilful murder, for example, the coroner could issue a warrant for the apprehension of the culpable party. As one historian has written, “the inquest system as employed by a handful of Victorian coroners became a lantern that uncomfortably illuminated the dark recesses of society’ guilt over infanticide.”²⁸

The records of coroners’ inquests are often of limited utility to historians. Many coroners had little or no formal medical training,²⁹ and their verdicts were often inconclusive given the limitations of medical science. An infant body that was found in the river, for example, would often leave little evidence of whether the child had died of natural causes, was killed and then dropped into the water, or had drowned either as the result of accident or intention. As shown in *Figure 1*, the coroner for the District of Montreal held an inquest on the bodies of at least fifty-seven infants during the period 1825 to 1850, as compiled from coroners’ reports and newspaper accounts.³⁰

Due to the spotty nature of existing sources, these figures are no doubt inaccurate representations of the actual number of infant bodies found in Montreal

Verdicts of Coroner’s Inquests on Found Infants, 1825-1850

²⁸ Rose, *supra* note 58 at 57.

²⁹ See generally *ibid.* at 57-58.

³⁰ Adjusted figures in Figure 1 are derived by omitting cases for which verdicts were unknown. Many bodies of children came before inquests, but I have excluded them, under the assumption they were not infants. For figures in other jurisdictions, compare Ann R. Higginbotham, “‘Sin of the Age’: Infanticide and Illegitimacy in Victorian London” (1989) 32 *Vict. Stud.* 319 at 319 (by the 1860s 150 infant bodies a year were found in London); Jarvis, *supra* note 39 at 135 (in 1860s Toronto fifty to sixty infants were examined by the coroner); Wright, *supra* note 47 at 17 (124 infant bodies found in Halifax in 1850 to 1875).

Year	Dead/Drowned Stillborn	Murder Unknown	Visitation of God	No Finding
1825 n=2		1		1*
1826 n=2			2	
1827 n=0				
1828 n=1			1	
1829 n=1				1
1830 n=2		1*		1
1831 n=3	2	1		
1832 n=1	1			
1833 n=0				
1834 n=4	3		1*	
1835 n=2	1		1	
1836 n=2	2			
1837 n=0				
1838 n=2	2			
1839 n=1				1

1840 n=6	1	4**				1
1841 n=1	1					
1842 n=2		1			1*	
1843 n=0						
1844 n=3	1	1				1
1845 n=1		1*				
1846 n=2	1	1*				
1847 n=6	1	1	3		1*	
1848 n=2		1	1			
1849 n=5	2	1*	2			
1850 n=6	2	2*	1*		1	
TOTAL n= 57	20	16	8	4	5	4
% of Total	35.1%	16.0%	14.0%	7.0%	8.8%	7.0%
Adjusted %	37.7%	30.2%	15.1%	7.6%	9.4%	

Figure 1.

during this period. The number of infant bodies identified among the sources as being found in Montreal ranged from zero to six per year. The juries of inquest were to reach a

conclusion of willful murder in nearly a quarter of their verdicts,³¹ but the mothers were identified in only fourteen cases.³² In 1840, for example, the jury of inquest returned a verdict that a domestic servant's illegitimate child had died due to her "negligence and ignorance," but she was not prosecuted.³³ In seven other instances in which the inquest determined that the infant was murdered, the mother was also identified.³⁴ One such account, in which the mother was arrested on a coroner's warrant, was immortalized in the local press:

Infanticide – the jury convened last Monday to inquire into the body of a child found in the ditch near Campeau Street and rendered a verdict of voluntary murder. Sarah Fairservice, the mother of the child was put in prison yesterday upon a coroner's warrant accusing her of "infanticide."³⁵

In yet another case, the mother was not prosecuted as the jury of inquest found that she was insane at the time of the offense.³⁶

³¹ Compare Janet L. McShane Galley, "'I Did It To Hide My Shame': Community Responses to Suspicious Infant Deaths in Middlesex County, Ontario, 1850-1900" (University of Western Ontario, M.A. thesis, 1998) 33 (eight out of eleven inquests on infants between 1842 and 1850 resulted in murder verdicts).

³² Compare Cliche, *supra* note 47 at 35, Table I (for the period 1820 to 1849, there were forty-three inquests on infants in Quebec City, of which nine led to verdicts of murder. The mother was identified in seventeen of these, leading to nine prosecutions); Galley, *supra* note 76 at 14 (of eighty-two inquests involving suspicious infant deaths in late-nineteenth century Ontario, twelve percent made it to trial).

³³ A.N.Q.M., Coroner's Inquests [hereinafter CR] no.233 (1 June 1840) (child of Zoa Lorrain). For further discussion of that case, see *infra* at 101-103.

³⁴ Cases in which mothers were identified are denoted in Figure 1 by an asterisk.

³⁵ *La Minerve* (24 July 1845) (author's translation). See also *The Pilot* (24 July 1845); *infra* at 87 (case of Sarah Fairservice).

³⁶ A.N.Q.M., CR no.2058 (1 February 1850) (Marie Dufull (?), verdict that she was "suffocated by her mother being deranged."). Those were not the only instances in which coroners' verdicts implicated murder and the mother was identified, but other accounts were more ambiguous with respect to the role the mother might have played in the infant's death. For examples, see *infra* note 131 at 61.

Most commonly, however, no verdict was returned other than that the infant had been “found dead.”³⁷ In some instances, the jury of inquest was simply unable to arrive at any finding. Indeed, such verdicts obviated the need to identify the mother, and many coroners and juries of inquest may have been reluctant to make findings of murder. As Rose has suggested, that inertia may have been motivated by a sense of futility given the very low prosecution and conviction rates,³⁸ as well as by more chivalrous and charitable motives.³⁹ That contrasts with the depictions of infanticide as “so foul a deed” committed by “unfeeling mothers,”⁴⁰ or similar depictions:

A newborn’s body was found Thursday morning by a small stream that crosses Bleury Street; it was buried by the police and an investigation is being conducted into the matter. It is cruel to have to think that there could exist mothers so unnatural as to commit such an act.⁴¹

While it may prove tempting to extrapolate infanticide rates from primary sources, it should be emphasized that, similarly to rates of criminality in general, the actual frequency of infanticide in Montreal during this period is an unknowable statistic.⁴² No doubt many infant bodies were never recovered, and the limitations of

³⁷ For similar experiences in Victorian England, see Rose, *supra* note 58 at 59-60. Note that Figure 1 reveals that nearly all findings of “died by visitation of God” occurred for the years 1848 to 1850. Furthermore, twelve of fifteen findings of murder took place between 1840 and 1850. Those facts suggest that the findings were the result of a difference in techniques or philosophies, most likely due to a change of coroner.

³⁸ *Ibid.* at 62.

³⁹ *Ibid.* at 59.

⁴⁰ See *supra* at note 46.

⁴¹ *L’Ami du Peuple* (25 May 1839).

⁴² Compare Malcolmson, *supra* note 38 at 191; Sauer, *supra* note 51 at 82; Wheeler, *supra* note 39 at 407. Wheeler, however, did attempt to reconstruct infanticide rates in his study. *Ibid.*

nineteenth century forensic procedures would not have resulted in accurate findings in many cases. Still, the results of coroners' inquests allow for some additional detail as to the circumstances of infant deaths. In most cases, the autopsy yielded no clues as to the guilty party. The following coroners' inquest is typical in that regard:

The Inquisition taken at PointClaire by James Glassford, Captain of Militia... on view of the body of an infant child found in a hole in the ice tied to a large stone with a piece...of Gingham and Callico tied together which made the string that fastened the child to the stone, the said child was found by Etienne Ragué...and carried into the house of Gabriel Pillon where the jury assembled [and declare] on view of the body of the said deceased and according to such testimony of evidence and to such circumstances as were brought before them they find that the said deceased was willfully murdered by some person or persons, Wherefore the said jurors afforesaid on there oath afforesaid do say and declare that the said infant child was willfully murdered by some person or persons unknown to the jurors....⁴³

The fact that a child had not been interred in a more orthodox fashion naturally could lead to suspicions of foul play. At least one contemporary jury of inquest reached just such a conclusion following the discovery of an infant cadaver floating in a coffin on the river, reaching a verdict that the infant had been "maliciously destroyed by some person or persons unknown." That conclusion was not reached due to any marks of violence, but because the corpse had been "ruthlessly thrown into the creek" rather than being accorded a customary burial.⁴⁴

While some of the infant bodies discovered in and around the city were the result of instances of dropping that had ended tragically, it appears that the preponderance of those infants had been secreted after their death, while others were disposed of in such a

⁴³ A.N.Q.M., CR no.498 (4 April 1825).

⁴⁴ *The Montreal Gazette* (31 March 1848) (citing *The Montreal Transcript*).

fashion as to guarantee the child's demise. Scholars have argued that the very fact that children were found in a sewer, buried in a garden, or submerged in a river points to the conclusion that they had been the victims of passive or active infanticide.⁴⁵ Indeed, in some instances the circumstances surrounding the discovery of infant bodies were highly suggestive of murder.⁴⁶ In many other cases, however, the truth was much more evasive and it is far from certain that most of those infants had been victims of neonaticide. A newspaper account from 1842 hints at the ambiguity of one such discovery:

On Sunday morning a Coroner's Inquest was held on the body of a male infant, about six weeks old, which was found floating in a box near that part of the Quay between Cringan's Wharf and the Barracks. From its appearance, it could not have been dead above 24 hours. It was dressed in decent, though not handsome, attire. There being no external marks of violence, the body was opened by the medical attendant, who declared that it could not have come to its death by disease; and the Jury being of opinion that it must have been drowned in the box, brought in a verdict of wilful murder against some person or persons unknown. There is in this more mystery than usual in such occurrences; for, if the child had been illegitimate and that it was intended thus to conceal its birth, one would think that it would have been destroyed immediately after its entrance into the world. The infant was a remarkable fine boy.⁴⁷

⁴⁵ See e.g. Malcolmson, *supra* note 38 at 191-192 ("When a dead baby was found in a pond, a barn, an outhouse, a box or buried in a garden, there is little reason to doubt that it had probably been murdered, or at the least deliberately not kept alive."). *But see* Wheeler, *supra* note 39 at 407 ("Yet even when people found infant bodies in creeks or outhouses, they could not be certain they had uncovered an infanticide.").

⁴⁶ See e.g. *The Vindicator* (29 May 1829):

Mysterious Discovery--Two little children playing in the garret of a certain house in this city, discovered between the roof and lathing, a bundle, the outside wrapper of which consisted of a piece of carpeting; on opening this was found the skeleton of an infant, dressed in the usual manner; the flesh under the clothes was eaten away by the moths. That part of the dress covering the chest was of a bloody colour, from whence it is conjectured that the child had its throat cut. It is remarkable that last summer a Military Gentleman of the 71st Regiment had rented the house, but from the offensive smell, which he attributed to the cellar, he was obliged to abandon it, after a month's residence.

⁴⁷ *The Montreal Transcript* (12 July 1842) (citing *The Montreal Courier*).

It was only in rare cases that the parents were identified.⁴⁸ As such, the circumstances surrounding most such infant deaths must remain a mystery.

However two cases may go far towards explaining the reasons that some infants were buried so ignobly. In March of 1830, a carter observed a small coffin being thrown into the St. Lawrence River. Upon the coffin being retrieved, it was found to contain a “male infant neatly dressed in a white muslin frock, cap, etc.”⁴⁹ A boy standing nearby identified it as his brother, whom he alleged had been stillborn the previous day. His father was confronted about the incident and acknowledged that he had paid a third party to deposit the coffin in the river. As his son was stillborn, he reasoned that it did not matter where he was buried. An inquest was held, and a local midwife identified the corpse by a birthmark on the infant’s body and further corroborated the claim that the child had been stillborn. As the evidence therefore supported the conclusion that the child had died of natural causes, the courts could not take cognizance of the incident. Accordingly, the father was reprimanded by the coroner, ordered to pay the costs of the inquest, and required to provide for the child’s proper interment.⁵⁰

By way of another example, during the summer of 1825 an infant was found in a box in a Montreal street. A coroner’s inquest eventually was able to identify both the

⁴⁸ See generally David Jones, *Crime, Protest, Community and Police in Nineteenth-Century Britain* (London: Routledge and Kegan Paul, 1982) 110.

⁴⁹ *The Canadian Courant* (28 October 1829). See also *The Montreal Gazette* (4 March 1830).

⁵⁰ *Ibid.* Wright made reference to a similar case in Halifax, where the parent was oblivious to the propriety of burying a stillborn child. Wright stated that such instances support the inference, at least at the lower rungs of Halifax society, that there was a “callous disregard for the sanctity of the human body and the necessary proprieties connected with its death and burial.” Wright, *supra* note 47 at 25.

mother and father of the child (who, it transpired, had been stillborn) as well as the circumstances surrounding the child's discovery. As *The Canadian Courant* disclosed:

It appears that a female (the mother of the child) being without a husband sent to the reputed father for some pecuniary assistance, to enable her to have the infant interred; which request, the man refused to comply with, alleging that he was not bound to furnish any sum for such purpose, denying, at the same time, that he was the father of the child. Upon which some officious woman who was in the confidence of the unfortunate mother, wrapped the corps[e] up, and placing it in a box, sent it as a *present* to the man, with directions to leave the box at his lodgings, if he was not at home. The box was left, and, like Pandora's, it produced curiosity in the landlady of the mansion...[and] she therefore opened the lid, and was horror struck on beholding the contents. She then resolved upon casting the whole into the street; an altercation took place between her and her husband, but the woman's arguments prevailed, and the box, and the child, were both committed to the pavement. At this moment a gentleman was passing who, on viewing the box, discovered an arm of the infant; he immediately enquired into the circumstance, and prevailed on the woman to permit the child to be returned to the house until he went for the Coroner. He also traced the maternal parent, and also the woman, whose inhuman and unfeminine behaviour casts so great a portion of obloquy upon her....⁵¹

As those two situations amply illustrate, every body of an infant found buried in a box, lying in the street, or fished out of the river was not necessarily evidence of murder. Some of those were likely legitimate births who had died of natural causes, or illegitimate stillbirths. A variety of reasons could account for such disposals: parties may have been unwilling or unable to pay for more traditional and costly interments.⁵² Still others may have denied responsibility for providing for the infant's burial, or acted out

⁵¹ *The Canadian Courant* (25 June 1825) (emphasis in original). The coroner's inquest concluded that the infant was a "female bastard still born" of Bridget McKane, and that a Mrs. Barker had delivered the body to the putative father, who denied responsibility. The jury further concluded that "the body remained in the said street but without any criminal intentions on the part of Mrs. Barker in exposing the said body in the said street." A.N.Q.M., CR no.514 (22 June 1825).

⁵² By way of example, the gravedigger who interred the female infant of Bridget McKane and John McKee found in the city street received the sum of five shillings for burial expenses from the city coroner. CR no.514, *ibid*. See also Cliche, *supra* note 47 at 36.

of panic, guilt, or a desire to prevent discovery. All such cases, however, share the commonality of being disrespectful of the integrity of an infant body, emblematic of a view that the child had been something less than fully human. Such a view was no doubt a common one, and was also reflected in the failure of the law to treat children (especially newborns) as deserving of equal, let alone heightened, legal protection.

But it also should be noted that the circumstances attendant to the discovery of infant bodies were not always suggestive of irreverence. Infants were also found interred in coffins at various points around the city other than in public cemeteries. Those coffins were often products of considerable craftsmanship, and the children not infrequently had been buried respectfully, perhaps even lovingly, in linen shifts or baby clothes. Numerous examples of such burials were found for the period 1825 to 1850, such as the female infant found in the city common in a coffin “made with fine wood, and decently covered with a piece of linen;”⁵³ the male child found “thrust in a wooden coffin with handles” in a meadow outside the city;⁵⁴ or the baby found buried in a “very decent coffin” in the government garden.⁵⁵ Those cases suggest that the parties might have wished to avoid the ignominy of public scrutiny that would inevitably follow from burying an illegitimate child.⁵⁶ While no such examples were found in Montreal,

⁵³ A.N.Q.M., CR no.1039 (10 June 1834) (jury’s verdict of “found dead”).

⁵⁴ A.N.Q.M., CR no.1213 (27 August 1836) (same verdict).

⁵⁵ A.N.Q.M., CR no.1202 (10 October 1836) (same verdict).

⁵⁶ The burial of a child in a well-made coffin suggests that something other than expense was the primary consideration. For an example of an interment of a child in Upper Canada under circumstances that suggest his parents were people of means, see *The Vindicator* (18 November 1831) (citing *The Colonial Advocate*):

Wright has pointed to the abandonment of infant bodies in graveyards in nineteenth century Halifax as signifying concern about the disposal of dead infants by parents who could not afford burial expenses.⁵⁷

The situation involving infant bodies that exhibited signs of violence was often simultaneously more and less ambiguous. On the one hand, many of those infants were disposed of in an especially haphazard and ignominious manner. Surveyors working on the Lachine Canal in 1844, for example, found an infant tossed into a snowbank in a bag. The subsequent inquest concluded that the child had died violently as a result of either bleeding or strangulation.⁵⁸ Yet another newspaper account announced that:

Yesterday afternoon some persons fishing for wood with a boat hook in the river near the foot of the New Market, brought up the body of a male child, apparently about a year old. The body, which seemed to have been two days in the water, was wrapped up in a bag of bed tick, and had a piece of tape tied under its chin. To the bag a stone of about 12 lbs. weight was attached by a rope. The coroner's jury who sat upon the body were unanimously of opinion that the child had been thrown into the river alive, and returned a verdict accordingly.⁵⁹

York, U.C. The murdered body of an infant child of about a month old was yesterday morning found in the Church yard there. It had been buried for about a week, and had on a fine cap on his head. It was laid north and south and three bricks put over the grave. The verdict of the coroner's jury was wilful murder against persons unknown. The child had got a blow on the head, and it is supposed to have belonged to a person of some rank. Suspicion is afloat but no traces of the parent have been found.

⁵⁷ Wright, *supra* note 47 at 18.

⁵⁸ *The Montreal Gazette* (16 March 1844) (account of discovery of body); *The Montreal Gazette* (19 March 1844) (result of coroner's inquest).

⁵⁹ *The Canadian Courant* (4 June 1831) (citing *The Montreal Herald*). For other representative examples, see e.g. A.N.Q.M., CR no.227 (27 May 1840) (account of a "much disfigured" body of male infant "found enveloped in a piece of flannel and a shawl, put into a bag with a fire brick and a stone and thrown into the River St. Lawrence;" verdict that the child "came to his death by being thrown into the River...and drowned."). See also *The Montreal Gazette* (10 June 1834) (citing *The Montreal Herald*) ("[a]n infant was found wrapped in a coarse cloth containing also a stone, yesterday evening, near the Canal, and shewing evident symptoms of having met with an unnatural death." The inquest's verdict was "in accordance with the appearance which this victim of inhuman violence presented.").

What is more inexplicable, however, were those newborns whose appearance pointed to infanticide, but who were nonetheless disposed of in more conventional funeral trappings. In March of 1834, for example, a “neat coffin” containing a male infant was found near the wharf at the Old Market. The child displayed deep bruising on his forehead, leading to the conclusion that “the little innocent has been made away with.”⁶⁰ Was there a more innocuous explanation for the pre-mortem bruising that had taken place, perhaps the result of an inexperienced delivery? Was the coffin a sign of subconscious guilt on the part of the responsible party, or did it illustrate a desire to preserve the integrity of an infant’s body, even one who had been murdered?⁶¹ More chillingly, was it evidence of premeditation? Given the desperate straits in which many mothers would have found themselves, it is not incomprehensible that they may have killed their infants and yet attempted to accord them a burial that would guarantee anonymity. The bodies of such infants were given decent burial in city cemeteries at public expense, thus alleviating parents from both the attendant financial burdens as well as loss of anonymity. Those cases suggest that the circumstances surrounding the disposing of infant bodies were no less multifarious than those leading up to the births and deaths themselves.

In the preponderance of cases, the bodies of infants provided little or no information of use to coroners in ascertaining the cause of death. No findings, or at best

⁶⁰ *The Montreal Gazette* (15 March 1834).

⁶¹ Compare the horror with which vivisection was commonly viewed during the nineteenth century. See e.g. Peter Linebaugh, “The Tyburn Riot Against the Surgeons,” in Douglas Hay & E.P. Thompson, eds., *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975) at 65.

vague findings, were made in many of the coroners' inquests held on infant bodies, even when the bodies had been found under suspicious circumstances. An inquest held on a male child found in St. Elizabeth Street in 1826, described as an "abortive one of five or six months old," resulted in no finding for "how, when, and by what means he came to his death, no evidence thereof doth appear to the jurors."⁶² Indeed, the circumstances under which remains were found often foreclosed the possibility of an accurate medical determination of the cause of death. Readers of the *Montreal Transcript* in 1844 were, no doubt, scandalized to read that the mutilated cadaver of a newborn had been found in Fortification Lane. As the newspaper reported, the remains had "shocking to say, been taken from the jaws of a dog, and nothing but the upper part of the body and two arms remained. The number of cases of this kind which have occurred lately calls for serious attention."⁶³

The inability (or unwillingness) of coroners' inquests to provide firm conclusions as to the cause of infant mortality no doubt resulted in a miscarriage of justice on some occasions. And certainly the failure of inquests to shed light on infant deaths was not without its occasional critics. Charles Dickens in his 1839 masterpiece *Oliver Twist* described a typical English coroner's inquest:

Occasionally, when there was some more than usually interesting inquest upon a parish child who had been overlooked in turning up a bedstead, or inadvertently

⁶² *The Montreal Gazette* (5 April 1826). For other examples, see A.N.Q.M., CR no. 370 (15 June 1822) ("we are ignorant of the cause of death" of naked female infant discovered in well; author's translation); A.N.Q.M., CR no.395 (29 October 1822) (male infant found in Hôtel Dieu, but jury could not determine when and how it died). The Hôtel-Dieu took in abandoned children during the period 1800 to 1850. See Cliche, *supra* note 47 at 39 note 24.

⁶³ *The Montreal Transcript* (23 November 1844).

scalded to death when there happened to be a washing...the jury would take it into their heads to ask troublesome questions, or the parishioners would rebelliously affix their signatures to a remonstrance. But these impertinencies were speedily checked by the evidence of the surgeon, and the testimony of the beadle; the former of whom had always opened the body and found nothing inside (which was very probable indeed), and the latter of whom invariably swore whatever the Parish wanted; which was very self-devotional.⁶⁴

Between the limitations of nineteenth century forensic science, and a reluctance of some coroners to make findings of murder, many inquests delivered verdicts that were as unedifying as they were inimical to prosecution.

Closer to home, one writer to the *Montreal Gazette* in 1850 was frustrated by what he perceived as the incompetency and opaqueness of an inquest on an infant suspected of being murdered. In his letter to the editor, he included the following doggerel verse:

Placed round the child, two certain Doctors stand,
Waved handsome wigs, and stretched the asking hand;
State the *grave* doubt, the cause they cannot see,
And both do claim--though none deserve the fee.⁶⁵

To aid coroners in their professional responsibilities, commentators compiled manuals that explained their legal duties as well as the nuances of accepted dissection techniques and tests used to ascertain causes of death. One such work, by William Boys, was published specifically for Ontario coroners.⁶⁶ In all such works, discussion of infanticide constituted a substantial part of the text, thereby underscoring the

⁶⁴ Charles Dickens, *Oliver Twist* (Oxford: Oxford University Press, 1999) 5.

⁶⁵ *The Montreal Gazette* (18 July 1850) (emphasis in original). The suspected murderess was a domestic servant to the family. Wright, *supra* note 47 at 24, mentions that Halifax inquests were criticized for the expense they incurred given that so little apparent effort was expended in discovering and punishing the offenders.

⁶⁶ Boys, *supra* note 47. The first edition appeared in 1864.

commonality of such investigations in the duties of coroners during that period. As Boys was to write to justify according infanticide a distinct chapter in his work, “the importance of the subject to Coroners requires that it should be dwelt upon at greater length and with more particularity than would be appropriate to the heading [of the previous general section]”.⁶⁷ An 1842 work on medical jurisprudence offered this editorial on the crime of infanticide:

That a young female of character and reputable connexions may be betrayed by the arts of a base seducer, and when reduced to a state of pregnancy, to avoid the disgrace which must otherwise be her lot, may stifle the birth of the womb, or after it is born, in a state of frenzy imbrue her hands in the infant’s blood, in the expectation of throwing the mantle of oblivion over her crime, is a case which too frequently occurs; but even such a case, with all its palliations, cannot be considered as less than wilful murder, and as such demands exemplary punishment.⁶⁸

Such statements were designed to remind physicians of the centrality of their rôle in the prosecution of crimes of that type. However much some physicians desired to ensure that “exemplary punishment” fell upon the head of a murderous mother, those cries for justice tended to remain a minority voice.

While inducing abortion itself was a criminal offence, a distinction can be drawn between the medical and legal definitions of infanticide. Medically speaking, infanticide involved either the destruction of a baby *in utero*, or after birth *ex utero*. Legally speaking, however, infanticide was more narrowly construed: it was only after birth that

⁶⁷ *Ibid.* at 48. Infanticide played a large part in many contemporary works of this type. See e.g. A. S. Taylor, *A Manual of Medical Jurisprudence* (London: John Churchill & Sons, 8th ed., 1866) 456-503 (discussion of infanticide and medical tests to be employed).

⁶⁸ Krueger, *supra* note 32 at 275 (citing T.R. Beck & J. B. Beck, *Elements of Medical Jurisprudence* (7th ed., 1842)).

the infant became a “life in being;” prior to that time its destruction could not lead to a murder charge.⁶⁹

Infant bodies that showed overt evidence of mistreatment were the most obvious examples of neonaticide, but were rare. The fragility of infant existence meant that little effort needed to be expended to extinguish life, and in most cases there was little external evidence to indicate whether an infant had been stillborn. As Boys was to explain, one test had traditionally been used to ascertain whether an infant had respired, respiration being considered the “best test of a child having been alive.”⁷⁰ That test, referred to in medical terminology as the “hydrostatic test”, was designed to ascertain whether a child had breathed on his or her own after birth. In its most basic form, it involved immersing the lungs (or portions thereof) in water, the logic being that if the lungs floated the child had breathed.⁷¹

The limitations of period forensic science clearly limited the ability of coroners to reach accurate determinations of the causes of death. Seen from the vantage point of

⁶⁹ For contemporary discussion of that nuance in the medical jurisprudence literature, see Boys, *supra* note 47 at 48. See also *infra* note 149.

⁷⁰ *Ibid.* at 49. Discussion of the full nuances of nineteenth century medical procedures in such cases falls beyond the scope of this thesis. That test, however, played an indispensable part in determining whether infanticide charges might be brought, and as such further discussion of those procedures is warranted.

⁷¹ See *ibid.* at 50. The test was described by Boys as follows:

The lungs are removed from the chest in connection with the trachea and bronchi, and placed on the surface of water, free from salt or other ingredient which would increase its specific gravity--pure distilled or river water is recommended. If they sink, notice whether rapidly or slowly. Then try if each lung will sink separately; cut them into several small pieces, and see if these pieces float or sink. If the lungs float, note if they float high above the surface, or at or below the level of the water, and see if the buoyancy is due to the lungs generally, or only to the state of particular parts. By considering the general result of these experiments, an inference may be drawn as to whether respiration has taken place at all, or partially, or perfectly. *Ibid.* at 91.

modern medical science, the hydrostatic test was of dubious utility. Even by the early-eighteenth century, English medical practitioners were frequently communicating doubts and caveats about the efficacy of the procedure.⁷² Boys, in his treatise, also took pains to emphasize that the hydrostatic test should lead to an inference *only*:

Although employing this test as conclusive evidence of the child having breathed or not, is now exploded, yet when used by an intelligent physician, thoroughly acquainted with its real value, and who considers its result with other circumstances, it is a proper and important test to employ in many cases of infanticide....A person using the hydrostatic test in cases of alleged infanticide, should remember that the lungs floating is not a proof that the child has been born alive, nor their sinking a proof that it was born dead. At most it can only prove if the child has breathed or not. The fact of living or dead birth has, strictly speaking, no relation to the employment of this test. The lungs may sink from disease; or they may sink, although the child has lived for hours and even for days; and they may float from putrefaction, either after the child is still-born, or after death *in utero* previous to its birth, or from artificial inflation; or from respiration before complete birth.⁷³

The pressures facing a coroner in such situations were obvious: application of the hydrostatic test, despite its limitations, could make the difference between conviction and acquittal. As another contemporary treatise writer was to state, the question of whether a child was born alive was “of great importance” in allegations of infanticide, and the issue “is unfortunately one which, in respect to the proofs upon which medical evidence is commonly founded, has given rise to considerable controversy.”⁷⁴ The importance of the medical evidence lay in the fact that “[w]hen it is stated that in most

⁷² See Malcolmson, *supra* note 38 at 199-200; Rose, *supra* note 58 at 72.

⁷³ Boys, *supra* note 47 at 50-51 & 91. As Cliche pointed out in the context of Quebec City, the immersion test was questioned but remained in use by coroners in the mid-nineteenth century. Cliche, *supra* note 47 at 50 note 75.

⁷⁴ Taylor, *supra* note 112 at 461.

cases of alleged infanticide which end in acquittals in spite of the strongest moral presumptions of guilt, the proof fails on this point only, it must be obvious that this question especially claims the attention of a medical jurist."⁷⁵ In the context of eighteenth century English infanticide trials, it has been shown that hesitation on the part of medical witnesses offered juries another source of reasonable doubt of a defendant's culpability,⁷⁶ and no doubt many coroners and doctors simply wished to avoid inculcating women as perpetrators of infanticide.⁷⁷ As Cliche has written, in cases of uncertainty the doctors gave the benefit of the doubt to the accused."⁷⁸

Despite the warnings proffered by medical writers, however, the difficulty may not have been with medical experts who professed doubts about the efficacy of such tests, but rather with those who did not do so. Fully a century after many English physicians were discounting the importance of the immersion test, a doctor of medicine by the name of Archibald Hall was holding an autopsy on the body of a six-month-old male infant found in a hole in the ice. Fortuitously, the doctor's affidavit on the autopsy

⁷⁵ *Ibid.*

⁷⁶ Malcolmson, *supra* note 38 at 199-200:

The inadequacies of forensic medicine during the eighteenth century sometimes aided in the acquittal of an accused woman, for though the facts against her might be very strong, and though evidence might be produced which indicated the high probability of a live birth, medical witnesses were normally unable to reject entirely the possibility of a still-birth, and this lack of certainty clearly favoured the cause of the defendant.

⁷⁷ Rose, *supra* note 58 at 43 (juries of inquest) and 59 (coroners).

⁷⁸ Cliche, *supra* note 47 at 50 (author's translation). Wright had stated that jurors were reluctant to credit the results of the immersion test, but rather "seem to have been ready to believe the most remarkable stories of ignorance and coincidence, and appear to have been anxious to reduce sentences to a minimum." Wright, *supra* note 47 at 28.

has survived within the records of the city coroner. After immersing the infant in water for several hours to thaw, he observed that:

no external marks of violence [were found]....In order to ascertain whether it had breathed or not, the hydrostatic test was had recourse to. For this purpose the thorax was opened; the lungs did not fill the whole cavity of the chest....They together with the heart were carefully removed, and immersed in the tepid water; the mass sank rapidly to the bottom. The heart was then separated from the lungs, and the lungs subjected to the test--they likewise sank. In order to obviate a fallacy likely to occur in the employment of this test from a partial establishment of the respiratory functions, the lungs were lastly divided into small portions, all of which sank in immersion in the water.⁷⁹

Dr. Hall therefore concluded that the appearance of the infant's various organs, "coupled with the evidence afforded by the hydrostatic test, indicated with certainty that it never respired."⁸⁰

Notwithstanding Hall's best efforts to "obviate a fallacy" that often occurred with the misapplication of that test, he was nonetheless conducting an experiment that established nothing, and which contemporary accounts emphasized should be used with caution. Examinations such as that one could result in inaccurate determinations regarding an infant's death, and could have important repercussions for the pursuit of justice. Perhaps, as Malcolmson has stated, the doubts expressed by medical witnesses about the efficacy of such tests "clearly favoured the cause of the defendant;" but it seems equally possible that the certainty espoused by practitioners such as Dr. Hall could have a non-salutary effect on a defendant's case if the defendant were identified

⁷⁹ A.N.Q.M., CR no.331 (17 March 1841) (verdict: "found dead without marks of violence.").

⁸⁰ *Ibid.*

and prosecuted.⁸¹ How the certainty espoused by Dr. Hall could have affected the outcome of a trial cannot be known, as the mother was never identified.

Ascertaining the cause of death, then, was daunting enough. Moreover, identification of the party responsible for abandoning an infant body was a virtual impossibility in the absence of witnesses. Thus, even when it appeared evident to a jury of inquest that an infant had been murdered, the culprits usually remained unknown.⁸² As was the case for homicide in general, if an initial investigation did not easily yield a suspect, further efforts to pursue justice were rarely made.⁸³ In the occasional case in which there were strong suspicions about the mother's identity, indictments could still be hard to obtain. In August 1841, for example, Ann Murphy was suspected of having murdered her newborn child. cursory notes from the coroner's inquest reveal the testimony of several individuals who believed Murphy to have been pregnant. Among others, a fellow servant with whom she had worked testified that he observed a "visible change in her size" during the two months she was employed as a domestic, and that she was of bad character.⁸⁴ While witnesses suspected the body of a newborn found

⁸¹ See *ibid.* For the view that coroners were known to be inaccurate, see Higginbotham, *supra* note 75 at 323.

⁸² See e.g. *The Pilot* (24 December 1847) (citing *The Montreal Courier*):

Infanticide--An infant male child was found dead on Monday last in a wood-shed off Bleury Street. After a careful examination of the body by Dr. Hall, the Coroner's Jury returned a verdict that death had been caused by violence inflicted by some person or persons as yet unknown.

⁸³ See generally Wiener, *supra* note 15 at 479 note 38.

⁸⁴ A.N.Q.M., Files of the Court of Quarter Sessions [hereinafter QS(F)], *Queen v. Ann Murphy* (14 August 1841) (notes of inquest).

near the old locks was Murphy's, a grand jury failed to indict.⁸⁵ Likewise, in 1849 and 1850, two inquests were held where the infant deaths were attributed to violence and the alleged mothers named, but neither mother was prosecuted.⁸⁶ Conversely, in 1840 a mother outside of the city limits was arrested on "suspicion of murdering her own child," but a coroner's inquest resulted in a finding of not guilty.⁸⁷

One unmarried mother in 1845, however, was not to escape the clutches of the law quite so easily. While the records of the coroner's inquest that led to her identification, indictment and eventual conviction have not survived, an account of the inquest quite uncommonly appeared in the local press. In late-November of 1845, the coroner held an inquest at the central Police Station on the body of a male infant, supposed to be the son of Bridget Cloone, a young unwed domestic servant.

The inquest revealed that Cloone had lived with her master for thirteen months in the capacity of a domestic servant, and by all accounts had given satisfaction. Three weeks earlier she began to feel unwell, and obtained medicine from one of the witnesses (not a physician) who treated her for chronic indigestion. Despite his suspicions, and in spite of the fact that he saw her a week prior to the time she delivered her child, he professed ignorance as to the true nature of her complaint. She became bedridden after

⁸⁵ *The Montreal Gazette* (7 September 1841).

⁸⁶ A.N.Q.M., CR no.1836 (22 May 1849) (male child of Henrietta Miles, verdict: "premature delivery by violence."); A.N.Q.M., CR no. 2427 (31 October 1850) (female child of Emelie Legault, verdict: "death from violence.").

⁸⁷ National Archives of Canada [hereinafter N.A.C.], Records of the Montreal Police, Rural Returns (Napierville) [hereinafter MP(RR)], *Domina Regina v. Maria Atkins* (23 August 1840); Registers of the Court of King's Bench p.4 [hereinafter KB(R)] (coroner's report no.276, "infant child of Maria Atkins...died for want of necessary care") (27 August 1840).

returning from church a week before the inquest, and a local physician was called for who quickly ascertained that she was in the advanced stages of pregnancy.⁸⁸

Cloone was conveyed to the University Lying-in Hospital, where she persisted in maintaining that she was not with child. Upon the physician's examination, it became apparent that she was in labour, and that "appearances had been observed which led to the belief, that a twin had been already born."⁸⁹ That supposition having been confirmed following her delivery, her room in her master's house was searched and the other twin found under some clothes in a wooden chest. The father, it was disclosed by Cloone, was a man in her master's employ. The medical evidence was that the child had been born alive, and that the marks on the child's neck supported the inference that it had been strangled. The jury accordingly returned a verdict of wilful and intentional suffocation by the child's mother.⁹⁰ She was eventually convicted of concealment only, and sentenced to six month's imprisonment.⁹¹

*Characteristics of Found Infants
from Coroners' Inquests, 1825-1850*

GENDER		AGE				
Male	Female	N/I	Fetal	New-born	Less Than 1 yr.	N/I

⁸⁸ *The Pilot* (21 November 1845) (citing *The Montreal Herald*).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* According to *The Pilot*, *The Times* asserted that the medical testimony was to the effect "that the child had breathed, not that it was born alive." *Ibid.*

⁹¹ See also *infra* at 92.

n=57	31	14	12	4	34	3	16
% Of Total	54.4%	24.6%	21.1%	7.0%	59.7%	5.3%	28.1%
Adjusted %	68.9%	31.1%		9.8%	82.9%	7.3%	

Figure 2.

The condition in which many such infants were found often made it impossible for coroners to ascertain such rudimentary details as the approximate age of the infants or even their gender. *Figure 2* displays statistics regarding those characteristics, including absolute percentage and adjusted percentage, the latter derived by omitting the unknown or “not identified” figures. While it is therefore not possible to ascertain the actual number of found infants that expired due to unnatural causes, certain observations may nonetheless be made. Despite the fact that the gender of many infants was not determined, a majority of them clearly were males. Given that males had more ‘economic value’ than females during this period, that disparity suggests that gender was an irrelevant consideration, at least compared to the socio-economic circumstances of the mother.⁹² Furthermore, it is evident that a significant percentage of those children, and a majority by adjusted percentage, were newborns. That fact is unsurprising, as not only were mortality rates for newborns notoriously high, but

⁹² That conclusion mirrors observations by other scholars. See *e.g.* Malcolmson, *supra* note 38 at 192 (nineteenth century England). Gender also appeared to have been irrelevant in the context of infanticide prosecutions. See *infra* Figure 4 at 95.

unwanted children tended to be prone to early (and often violent) deaths. In the context of infanticide prosecutions, the majority of victims were also newborns.⁹³

II.

In those cases in which a culpable party was identified, nineteenth century criminal law provided legal mechanisms that were designed to deal with infanticide and the related offence of concealment. However, the manner in which this law was administered in the nineteenth century and, to a lesser extent the circumstances surrounding the amendment of the criminal law regarding infanticide, were reflective of an ongoing friction between conflicting moral dictates and societal norms. Historically, the English common law did not differentiate between infanticide and other conventional forms of homicide.⁹⁴ Indeed, infanticide remained an “invisible evil” in England for centuries, and rarely fell under the purview of the criminal law at all. Some historians have suggested that the reign of Queen Elizabeth I (1558 to 1603) was a turning point, as it was during Elizabeth’s reign that heightened attention was drawn to that crime.⁹⁵

⁹³ See *infra* at 96.

⁹⁴ See generally Backhouse, *Infanticide*, *supra* note 13 at 448.

⁹⁵ See *e.g.* Hoffer & Hull, *supra* note 47 at 3:

That epoch saw a burst of prosecutions and the emergence of new attitudes and laws on the crime. The cause of this shift in practice and opinion lies in a combination of jurisprudential, religious, economic, and social forces. With their confluence begins the history of modern Anglo-American infanticide law.

See also Paul A. Gilje, “Infant Abandonment in Early Nineteenth-Century New York City: Three Cases” (1983) 8 *Signs: J. of Women in Culture and Society* 580 at 582.

The first legislative provision to address infanticide was enacted in 1624, and served to reorientate the law of infanticide in a fundamental manner. Entitled “An Act to Prevent the Destroying and Murdering of Bastard Children,” that statute attempted to address the evidentiary hurdles that hampered infanticide prosecutions by enlarging the scope of the offence.⁹⁶ Not only did the statute govern the murder of an illegitimate child, but also concealment of the birth. Should a woman have given birth to an illegitimate child that died, and attempted to conceal that fact, she was statutorily presumed to have committed the capital crime of murder. The presumption could only be rebutted by the testimony of a reputable witness who would attest that she was present at the birth and that the child had been stillborn. Given the secrecy that attended

⁹⁶ 21 James I, c. 27, s. 2 (1624) (U.K.) [hereinafter the “Act of 1624”], which read:

Whereas many lewd women that have been delivered of bastard children, to avoid their shame and to escape punishment, do secretly bury, or conceal the death of their children, and after if the child be found dead the said women do allege that the said children were born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said child or children were murdered by the said women their lewd mothers, or by their assent or procurement: For the preventing therefore of this great mischief, be it enacted...that if any woman...be delivered of any issue of her body, male or female, which being born alive, should by the laws of the realm of England be a bastard, and that she endeavour privately either by drowning or secret burying thereof, or in any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, in every such case the mother so offending shall suffer death as in the case of murder except such mother can make proof by one witness at the least, that the child (whose death was by her so intended to be concealed) was born dead.

See also Backhouse, *supra* note 13 at 449; Arthur Rackham Cleveland, *Women Under the English Law, from the Landing of the Saxons to the Present Time* (London: Hurst & Blackett, 1896) 177; Malcolmson, *supra* note 38 at 196; Judith Osborne, “The Crime of Infanticide: Throwing Out the Baby With the Bathwater” (1987) 6 *Can.J.Fam.L.* 47 at 49. As Cliche has pointed out, legal scholars alternately give the date of that legislation as 1623 or 1624. Cliche, *supra* note 47 at 46 note 62. A similar law was enacted in Scotland in 1690. See generally Sauer, *supra* note 51 at 82.

to most such births, that statutory presumption would have been facially difficult to overcome.⁹⁷

French legislation of the period governing the offence of concealment was similar to that of England. The Edict of Henri II was applied in the province of New France (later Lower Canada and Quebec) and provided that “each woman who hides her pregnancy and delivery and the infant dies, is held responsible for the death and punished by death....”⁹⁸

Following the Conquest, the Act of 1624 replaced the Edict of Henri II as the applicable legislation, as it was received in British North America through an Act of Parliament that introduced the general criminal law of England into the colonies nearly two centuries later.⁹⁹ Thus, as Cliche has observed, the law governing infanticide in the pre-and post-Conquest period did not change appreciably, due to the similarities between French and English legislation.¹⁰⁰

The draconian nature of the Act of 1624 ensured that it resulted in very few convictions in England, but it was to have a lengthy lifespan. Indeed, the intent of the

⁹⁷ Backhouse, for example, has stated that legislators must have been aware of that fact and hence “must have known that they were sentencing innocent women to death in the many cases where a woman attempted to conceal her childbirth but the foetus was stillborn or died of natural causes.” Backhouse, *Infanticide*, *supra* note 13 at 450. See also Gilje, *supra* note 140 at 582. However, as Backhouse also acknowledged, few women were convicted.

⁹⁸ Cliche, *supra* note 47 at 45.

⁹⁹ “An Act for making more effectual Provision for the Government of the Province of Quebec in North America,” 14 Geo. III c.83 (1774) (U.K.). See also “An Act for the Further Introduction of the Criminal Law of England into this Province, and for the More Effectual Punishment of Certain Offenders,” 40 Geo. III, c.1 (1800) (U.C.) (establishing that the criminal law of England as it stood on 17 September 1792 was deemed received into Upper Canada, following the division of Quebec into Upper and Lower Canada).

¹⁰⁰ See Cliche, *supra* note 47 at 45.

legislation was largely undermined by the practice of shifting the onus of proving live birth onto the Crown.¹⁰¹ It was not until nearly two centuries later, in 1803, that the Act's provisions respecting infanticide were repealed as part of a general tough-on-crime bill, very shortly after it was received into Lower Canada.¹⁰² While the law as modified was more equitable to the accused, repeal of the infanticide provisions was not reflective of any inherent sympathy for the defendant. Rather, in the words of its sponsor, Lord Ellenborough, the Act of 1803 was designed to:

relieve the judges from the difficulties they labor under in respect to the trial of women indicted for child murder, in the case of bastards. At present the judges were obliged to train the law for the sake of lenity, and to admit the slightest suggestion that the child was stillborn as evidence of the fact.¹⁰³

The statutory presumption of live birth was removed from the Act of 1803, thus bringing the law in line with the practice of requiring the Crown to prove that fact as an element of the crime. Proving that the infant had been born alive was a fine point of law, for if it could not be shown that the infant had been fully expelled from the birth canal, it was not a legal person and hence its death could not trigger a murder charge.¹⁰⁴

¹⁰¹ See generally Backhouse, *Infanticide*, *supra* note 13 at 448. See also Osborne, *supra* note 141 at 50.

¹⁰² “An Act for the Further Prevention of Malicious Shooting and Attempting to Discharge Loaded Fire-Arms...and for Repealing ‘An Act to Prevent the Destroying and Murdering of Bastard Children,’” 43 Geo. III, c. 58 (1803) (L.C.) [hereinafter the Act of 1803]. See generally Gilje, *supra* note 140 at 582; Krueger, *supra* note 32 at 274; Rose, *supra* note 58 at 70; Sauer, *supra* note 51 at 82. *Contra* Cleveland, *supra* note 141 at 178-179 (noting that the 1803 Act reflected the fact that Parliament “saw the injustice” of the earlier statute).

¹⁰³ *Parliamentary History of England* 36 (London 1820) at 1245-1247 (cited in Hoffer & Hull, *supra* note 47 at 87 and note 25). Thus, while it may have been a more “equitable” law, as Sauer described it, the bill’s sponsor was not driven by sympathy for the accused. Sauer, *supra* note 51 at 82.

¹⁰⁴ That requirement was interpreted literally, so that if any part of the infant remained inside the birth canal at the time of death, a murder charge could not be sustained. Compare Krueger, *supra* note 32 at 274; Rose, *supra* note 58 at 70-72.

However, sensitive to the omnipresent challenges associated with proving the Crown's case in infanticide cases, the Act of 1803 provided that should a defendant be acquitted of murder, the charge of concealment (similar in substance to that provided for in the Act of 1624) could be substituted. While conviction for murder still carried with it the imposition of capital punishment, the crime of concealment--a lesser and included offense--was henceforth punishable by a maximum of two years' imprisonment.¹⁰⁵ Lower Canada was to enact similar legislative provisions in 1812.¹⁰⁶ These statutes only encompassed illegitimate children, apparently as they were viewed as being the primary victims.¹⁰⁷

In England, however, the next significant amendments to the law were not made until 1828. After that date, married women were included within the compass of the

¹⁰⁵ The Act of 1803, *supra* note 147, stated in pertinent part:

The Jury by whose verdict any Prisoner charged with such murder as aforesaid shall be acquitted, to find, in case it shall so appear in Evidence that the Prisoner was delivered of Issue of her Body, Male or Female, which, if born alive, would have been Bastard, and that she did, by secret Burying, or otherwise, endeavor to conceal the Birth thereof, and thereupon it shall be lawful for the court before which such Prisoner shall have been tried, to adjudge that such Prisoner shall be committed to the Common Gaol or House of Correction for any Time not exceeding two Years.

See generally Mary Beth Wasserlein Emmerichs, "Trials of Women For Homicide in Nineteenth-Century England" (1993) 5 *Wom. & Crim.Just.* 99 at 104. The current Criminal Code provides for a five-year maximum sentence for infanticide. See R.S.C. 1985, C-46. s.237.

¹⁰⁶ "An Act to Repeal an Act made in England, in the twenty-first year of the reign of His late Majesty King James the First, chapter twenty-seventh, intituled, 'An Act to Prevent the Destroying and Murdering of Bastard Children', as to this Province of Lower Canada, and for making provisions for the trials of women charged with the murder of any issue of their bodies, male or female, which being born alive, would, by law, be Bastard," 52 Geo. III, c.3 (1812) (L.C.). The statute's preamble stated that "the [previous statute] hath been found, as well in England as in this Province, in sundry cases, difficult and inconvenient to be put in practice...." *Ibid.* at s.1.

A number of American jurisdictions had acted to reform infanticide laws even earlier than England. Shortly after the Revolution, many of the existing English statutes were replaced; Massachusetts, for example, changed the law in 1784, and Pennsylvania altered the law in 1787 to place the burden of proof on the prosecution. See Hoffer & Hull, *supra* note 47 at 90-93; Gilje, *supra* note 140 at 582.

¹⁰⁷ See generally Backhouse, *Infanticide*, *supra* note 13 at 450.

criminal law. Furthermore, defendants could thereafter be charged outright with the crime of concealment, rather than requiring that an accused first be charged and acquitted of murder.¹⁰⁸ The charge of concealment as it was interpreted under that statute apparently left considerable discretion to judges and jurors. As Rose has stated, anti-concealment laws were “vitiating by the courts’ notorious aversion to convicting mothers.”¹⁰⁹ For example, English juries often acquitted if the infant’s body had been disposed of in a public thoroughfare, or in such a haphazard way as to guarantee discovery.¹¹⁰ The Act took effect in Lower Canada on January 1, 1842 following reform of the criminal law.¹¹¹ Under that Act, the law encompassed the concealment of legitimate as well as illegitimate infants. Thus, in Montreal for the period under examination, until 1841, an accused could only be charged with concealment following an unsuccessful prosecution for murder; thereafter, concealment was a free-standing

¹⁰⁸ “Offenses Against the Persons Act,” 8 Geo. IV, c. 34 (1828) (U.K.). See also Hoffer & Hull, *supra* note 47 at 87; Rose, *supra* note 58 at 70.

¹⁰⁹ Rose, *ibid.* at 71. See also J.M Beattie, “The Criminality of Women in Eighteenth-Century England” in D. Kelly Weisberg, ed., *Women and the Law, A Social Historical Perspective*, vol. 1 (Cambridge: Schenkman Publishing Company, 1982) 197 at 203 [hereinafter *Criminality*].

¹¹⁰ Rose, *ibid.* See also Krueger, *supra* note 32 at 274.

¹¹¹ “An Act for consolidating and amending the Statutes in this Province relative to offences against the Person,” 4,5 Vict. c. 27 s.14 (1841) (L.C.), which read:

And be it enacted, That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at or after its birth: Provided always, that if any woman, tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth.

legal offence. The following section shall analyze the manner in which that law was applied in infanticide and related cases in Montreal.

III.

In April 1840 Elizabeth “Betsey” Williams was arrested for a crime that was characterized, however inaccurately, by one local newspaper as “until the present unknown in the criminal annals of Canada.”¹¹² Fortunately for historians, her story can be reclaimed from a number of sources.¹¹³ Williams, a twenty year-old mulatto woman, was accused of having left her illegitimate infant son, François Xavier, to die in the forest of the parish of St. Benoit. She was brought before one of the Justices of the Peace for the District of Montreal, P.E. Leclerc, who recorded her testimony:

I have two living children with my father the eldest of which will be three next Spring. I gave birth roughly five weeks ago at the said René’s, a native living in the native village of the Lake of Two Mountains, where the male child in question was baptised by the resident priest. I left the lake Saturday morning, April 11 of this year, with my child to return to my father’s where I arrived around one in the afternoon. Along the way, fearing that my father would mistreat me if I arrived at his house with my child, I came up with the idea...to leave it in the woods and indeed I executed this idea because I left it under a pine in the area called “le petit brulé”. I was taken prisoner at my father’s, in St. André, by the

¹¹² *L’Ami du Peuple* (18 April 1840) (author’s translation).

¹¹³ *Contra* Frank W. Anderson, *A Dance With Death, Canadian Women on the Gallows 1754-1954* (Fifth House Publishers: Saskatoon & Calgary, 1996) at 186:

In colonial times and up to 1914, the killing of a new child by its mother was not a newsworthy event, and it would take a prodigious amount of research to come up with even fragmentary statistics on the subject. A prime example was Betsy Williams. Reverend J. Douglas Borthwick’s *A History of Montreal Prisons* (sic) mentions her briefly, indicating that...she was found guilty of the murder of her child and condemned to be hanged. She was later respited and her sentence commuted. Though appalling to contemporary readers, the matter was apparently so incidental that there was not even any mention of it in the newspapers of the day. Our history abounds in such passing references to the subject.

In reality, Williams’ case did receive newspaper coverage, and many other examples of infanticide trials that appeared in the local media may be found herein. For every instance of trial coverage found, undoubtedly others were not found due to the lacunae of the sources.

police last Monday the 13th of this year, and returning from Montreal I saw my child, dead, at the justice of the peace's, Mr. Globenski, in St. Eustache. It was purely fear of my father caused my child's death. My child was in good health when I abandoned it.¹¹⁴

Williams' voluntary examination is one of the few sources that allow for the voice of the defendant to be heard, albeit through a transcription by the presiding Justice of the Peace. The dry, matter-of-fact manner in which the account was recorded makes the words even more chilling.

In corroborating affidavits filed before the same Justice, the daughter of a farmer in St. Benoit attested that between eleven and twelve a.m. on Saturday a mulatto woman unknown to her arrived at her father's house, cradling a young infant in her arms swaddled in a piece of blanket and waistcoat fabric. She stopped for about two hours to warm up the infant and suckle it. The deponent's mother then washed the baby and wrapped it in cast-off clothing. The young woman in question stated she was headed for the Lake of Two Mountains to meet a native named René and left shortly afterwards. The deponent heard that the young woman had stopped at the premises of a blacksmith, some two miles away, but without the child.¹¹⁵ Likewise, a farmer attested that on Saturday a mulatto woman had stopped at the farmer's home with a young infant; when he saw her later in the distance she was no longer carrying her child. His suspicions raised, the farmer retraced the woman's path on the road. Two days later he

¹¹⁴ A.N.Q.M., Files of the Court of King's Bench [hereinafter KB(F)], *Queen v. Betsey Williams* (16 April 1840) (voluntary examination of Betsey Williams) (author's translation). Monholland, *supra* note 47 at 72, stated that fifty percent of murdered infants were killed on journeys away from the mother's workplace or, as in Williams' case, en route to visiting family.

¹¹⁵ A.N.Q.M., KB(F), *Queen v. Betsey Williams* (15 April 1840) (affidavit of Dometheld Charlebois).

found the body of the child lying near a fallen tree, and delivered the body to town so an inquest could be held.¹¹⁶

Based on that evidence, as well as her voluntary examination before the Justice of the Peace, Williams was committed for trial. Foreshadowing sentiments that were to last after her trial, the editor of *L'Ami du Peuple* wrote:

We have only provided below the facts that are public and would be angered if they were to warn the public against this poor creature, the trial of whom may lead to certain circumstances which attenuate a crime we believe to be completely out of keeping with the Canadian nature or sentiment.¹¹⁷

It would be five months, in September 1840, before the Court of Queen's Bench could take cognizance of her case. She did not have benefit of counsel, and she offered no defense at trial.¹¹⁸ Williams also did not testify on her behalf, as defendants were incapable of testifying under oath in their own defense under English law until 1898.¹¹⁹ In the absence of any defense, it seems hardly surprising that the jury rendered a verdict

¹¹⁶ A.N.Q.M., KB(F), *Queen v. Betsey Williams* (15 April 1840) (affidavit of François Augustin Menard).

¹¹⁷ *L'Ami du Peuple* (18 April 1840) (author's translation).

¹¹⁸ There was no right to counsel for felons in English jurisdictions during the first several decades of the nineteenth century. There was, however, a convention that courts in England and British North America would commonly secure the services of defense counsel for defendants charged with capital crimes. Counsel could cross-examine witnesses and argue points of law, but were disqualified from addressing the jury. As the case of Williams and others in this study indicate, many defendants in Montreal did not have counsel. The statutory right to counsel in felony cases was only established in 1836, along with the right of defense counsel to address juries. See "The Prisoner's Counsel Act," 6 & 7 Will. IV c.114 (1836) (U.K.); "An Act to authorize Counsel to address Jurors in Capital Cases," 5 Will. IV c.1 (1836) (L.C.). See generally David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Oxford & New York: Hambledon Press & Oxford University Press, 1998); Philips, *supra* note 16 at 104; Taylor, *supra* note 36 at 114; F. Murray Greenwood & Beverley Boissery, *Uncertain Justice: Canadian Women and Capital Punishment 1754-1953* (Toronto: Osgoode Society, 2001) 84; Wiener, *supra* note 15 at 474-474. For discussion of lack of counsel in such cases, see generally Monholland, *supra* note 47 at 154-159.

¹¹⁹ See generally Patrick Devlin, *The Criminal Prosecution in England* (New Haven: Yale University Press, 1958) 108; Taylor, *supra* note 36 at 115; Philips, *supra* note 16 at 106. This did not preclude defendants from giving unsworn testimony on their own behalf, but such statements were often seen as self-serving and given little weight. In none of the cases in this study was there any evidence that defendants addressed the court.

of guilty without deliberation.¹²⁰ However, it should be noted that defendants in felony cases generally were shown significant solicitude despite the absence of counsel.¹²¹ Moreover, the magnitude of capital crimes often worked against the Crown. As Douglas Hay has stated, “rather than terrifying criminals, the death penalty terrified prosecutors and juries, who feared committing judicial murder...”¹²² In that regard, Williams was to be exceptional, as the jury showed no hesitation in finding her guilty, and the Court accordingly sentencing her to death. Following an age-old custom, the Chief Justice donned a black cap before delivering what was no doubt a suitably solemn invocation of the law’s retribution for her transgression.¹²³

Despite the jury’s alacrity in convicting Williams, members of the community, and ultimately the Crown itself, felt considerable sympathy towards her. Two weeks later, while Williams sat in prison labouring under her sentence, more than a dozen of her neighbours implored the Governor General to grant her clemency. The “humble

¹²⁰ *The Montreal Gazette* (10 September 1840). The newspaper account read as follows:

Elizabeth Williams, for the murder of her infant (male) child, aged five weeks, was tried, and found guilty, the Jury not even withdrawing to deliberate. It appeared in evidence, that the unfortunate prisoner had deposited her child in the bush at *Grand Brulé*, under a tree, in very inclement weather in the month of April last. She acknowledged she had been induced to this act from the fear she entertained of her father, to whose residence she was repairing, having been away at the Indian village of the Lake of the Two Mountains, for about a year. The child was illegitimate. The prisoner offered no defence.

For accounts of the short time spent in deliberation by juries in such cases in nineteenth century England, see Monholland, *supra* note 47 at 193-195.

¹²¹ Hay, *supra* note 17 at 32.

¹²² *Ibid.* at 23.

¹²³ A.N.Q.M., KB(R) p.77-78, *Queen v. Elizabeth Williams* (8 September 1840) (verdict); KB(R) p.94-95, *ibid.* (10 September 1840) (sentence). The sentencing remarks have not survived. Those ritualized aspects of the administration of the criminal law were important components of the ‘majesty, justice and mercy’ of the law. For discussion, see Hay, *ibid.* at 26; King, *supra* note 16 at 334-340.

petition of the notables and other inhabitants of the County of Two Mountains” read, in pertinent part:

That among the unfortunate individuals in the Gaol of Montreal, condemned to suffer death, at the last Court of Criminal Pleas, is Elizabeth Williams....convicted of the murder of her child, aged five weeks, under circumstances demonstrating her imbecility of mind, more clearly, than a wilful intention of depriving her infant of life. That Your Petitioners, under the circumstances of the weakness of mind of the said Elizabeth Williams esteem it their duty to recommend her as an object of commiseration. Wherefore, Your Petitioners respectfully implore the extension of the Royal Clemency to the said Elizabeth Williams and commutation of the punishment of death into such other as Your Excellence may deem fit to decree....¹²⁴

That appeal proved successful, and the “awful sentence of the law” was respited by Governor’s Pardon to three years in the provincial penitentiary.¹²⁵

The phenomenon where defendants convicted of infanticide or other capital crimes routinely had their death sentences commuted was to be a common occurrence.¹²⁶ Prior to the establishment of the provincial penitentiary in Lower

¹²⁴ N.A.C., Applications for Pardons [hereinafter AP], vol. 24, p.10776-7, “Pray mercy for Elizabeth Williams sentenced to death for murder” (28 September 1840).

¹²⁵ *The Montreal Gazette* (10 October 1840). See also N.A.C., AP, vol. 24, p.10776-7 (28 September 1840) (Williams given conditional pardon and three years in the House of Corrections); pp. 10778-9 (14 November 1840) (Sheriff’s confirmation of receipt of Williams’ pardon). See also J.Douglas Borthwick, *History of the Montreal Prison from A.D. 1784 to A.D. 1886* (Montreal: A. Feriard, 1886) 265 and J. Douglas Borthwick, *From Darkness to Light, History of the Eight Prisons Which Have Been, Or Are Now, in Montreal, from A.D. 1760 to A.D. 1907--Civil and Military* (The Gazette Printing Company: Montreal, 1907) 79-80 [hereinafter Borthwick, *Darkness*]. Compare Cliche, *supra* note 47 at 49, Table III (noting that the sole conviction for murder in Quebec City was punished by six months’ incarceration).

¹²⁶ See generally Beattie, *Criminality*, *supra* note 154 at 8; Higginbotham, *supra* note 75 at 323; Jim Phillips, “The Operation of the Royal Pardon in Nova Scotia, 1749-1815” (1992) 42 *U.Tor.L.J.* 401 [hereinafter *Pardon*]. For discussion of pardons, see Hay, *supra* note 17 at 43-49; R. Chadwick, *Bureaucratic Mercy: The Home Office and the Treatment of Capital Cases in Victorian Britain* (New York: Garland, Modern European History Series, 1992); King, *supra* note 16 at 297-333 (pardons for property offenses); Jonathan Swainger, “A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880” in Hamar Foster & John McLaren, eds., *Essays in the History of Canadian Law*, vol. 6 (Toronto: Osgoode Society, 1995) 204. For Canadian infanticide prosecutions where sentences of death were not commuted, see Anderson, *supra* note 158 at 185-210.

Canada, banishment was the customary alternative.¹²⁷ Commutation of capital punishment was an important, indeed central, adjunct to the administration of the criminal law. With a large number of capital crimes in the “Bloody Code” until the first quarter of the nineteenth century, the law alternated between a showing of its terrible majesty and its boundless mercy.¹²⁸ Gender was probably a significant factor, as it has been frequently suggested that women were more likely to be pardoned for capital crimes in general.¹²⁹ Mercy was an important component, tempering the law’s severity in individual cases, but ultimately doing little to redress more systemic inequalities in the administration of justice.¹³⁰

¹²⁷ See generally Greenwood & Boissery, *supra* note 163 at 16; Phillips, *ibid.* at 406.

¹²⁸ See generally Hay, *supra* note 17. As stated in Beattie, *Criminality*, *supra* note 154 at 8-9:

At the centre of the ‘bloody code’ was capital punishment: its dominating image was the gallows. By the end of the eighteenth century, indeed, some two hundred crimes--most of them varieties of property offences--were subject to hanging and the great umbrella of terror that this criminal code created allowed those who administered it and the gentlemen of England in whose interests and on whose behalf it was mainly run to select victims for periodic demonstrations of the power and majesty of the law. Not everyone convicted of a capital offence could have been hanged, for the bloodbath would have undermined public acceptance of the law. Selection of victims was essential and around the discretion of judges and juries and the royal prerogative of pardon there developed in the course of the eighteenth century an elaborate system which saved large numbers from the gallows....It was a system that did a great deal to sustain the authority of the social elite, especially in rural society, for they had it in their hands to rid their local community of a troublemaker or to extract deference and obedience from those they saved.

An Act of 1827 reduced the scope of capital punishment significantly, the first major English legal reform that would eventually leave only a few capital crimes remaining. *Ibid.* at 10. In Canada, this reform was to occur under 3 Will. IV c.3 (1833). *Ibid.* In 1841, the scope of capital punishment was further limited, essentially limiting its application to murder and treason. *Ibid.*

¹²⁹ Compare Beattie, *supra* note 19 at 436-438 (reporting that seventy-five percent of women were pardoned); Phillips, *supra* note 16 at 257.

¹³⁰ See generally Carolyn Strange, “Wounded Womanhood and Dead Men: Chivalry and the Trials of Clara Ford and Carrie Davis” in France Iacovetta & Mariana Valverde, *Gender Conflicts: New Essays in Women’s History* (Toronto: University of Toronto, 1992) 149 at 176 [hereinafter Strange, *Chivalry*].

Williams was to be one of a small number of defendants in Montreal charged with infanticide and related offences during the years 1825 to 1850. Thirty-one such cases were found, involving twenty-eight defendants.¹³¹ Those cases offer varying levels of detail; several of them merited no more than passing references in local newspapers. Analysis is further hampered by newspapers' reluctance to divulge details that conflicted with Victorian standards of decorum. However, in canvassing those cases through the use of a variety of primary and secondary sources, a clear picture of nineteenth century infanticide emerges.

Women historically have comprised a much smaller criminal class than men, especially in respect to violent crimes.¹³² However, it has commonly been suggested that women were much more likely to harm intimates, including husbands, lovers, and children.¹³³ Infanticide was one among a handful of crimes in which women constituted a clear majority of offenders; in Montreal, only three of the twenty-six alleged perpetrators were male.¹³⁴ Given that women paid the price for societal disapprobation

¹³¹ By way of comparison, see *e.g.* Jarvis, *supra* note 39 at 134 (seven cases in 1860s Toronto); Malcolmson, *supra* note 38 at 191-192 (sixty-one cases tried before Old Bailey in 1730 to 1774 London).

¹³² See Greenwood & Boissery, *supra* note 163 at 17 and note 15 (citing figure in Montreal that during the half-century after 1812, female convictions in the Court of King's/Queen's Bench constituted approximately 5.4% of all convictions). See also King, *supra* note 16 at 283.

¹³³ See *e.g.* Greenwood, *ibid.* at 18; King, *ibid.*; Ann Jones, *Women Who Kill* (New York: Fawcett Columbine, 1980) xv-xvi. There is evidence that most homicide trials involving women defendants concerned the killing of children rather than husbands or lovers. See *e.g.* Emmerichs, *supra* note 149 at 99. In 2001 in Canada, while most child homicides were committed by fathers and step-fathers, biological mothers were more likely to murder children aged 3 years or less. *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: Statistics Canada, 2001) 16.

¹³⁴ Compare Donovan, *supra* note 69 at 169 & note 11 (citing figure that 5.5% of defendants were men in France during the period 1826 to 1913); Hoffer & Hull, *supra* note 47 at 98 (citing figure that ninety percent of infanticide defendants were women); Malcolmson, *supra* note 38 at 192.

of unmarried motherhood, and that they bore the brunt of caregiver responsibilities, it is unsurprising that they were more likely than men to commit infanticide.¹³⁵ In fact, some scholars have suggested that infanticide was one of the most common crimes for which nineteenth century women were prosecuted.¹³⁶

The reluctance of juries to convict women of infanticide, however, abundantly documented in scholarship dealing with other jurisdictions, was also apparent in Montreal.¹³⁷ Women were acquitted in all but four prosecutions for infanticide, with Betsey Williams retaining the dubious distinction of being the only defendant during the period 1825 to 1850 to have been convicted of the capital offence rather than the lesser crime of concealment. As set out in *Figure 3*, the overall conviction rate for all infanticide-related offenses was approximately thirteen percent, as only four out of

Dispositions of Proceedings for Infanticide and Related Offenses, 1825-1850

¹³⁵ See generally Osborne, *supra* note 141 at 56. See also Hoffer & Hull, *ibid.* at 98 (arguing that as women performed virtually all of the child care, “[w]hen they felt anger, the nearest object was not another adult but a child....It was in this sense inevitable that infanticide would be a woman’s crime.”). That latter view suggests that infanticide was primarily a crime of passion rather than an act of desperation or a survival strategy, with which I disagree.

¹³⁶ See *e.g.* Emmerichs, *supra* note 150 at 99 (stating that there is a mistaken assumption that women in nineteenth century England were most often charged with killing husbands or lovers, but in reality they were most often arrested for murdering their children); Jones, *supra* note 178 at xv-xvi (stating that women usually killed intimates, including husbands, lovers, and children); Knelman, *supra* note 47 at 145 (citing infanticide as the most common type of murder by women).

¹³⁷ Compare Backhouse, *Infanticide*, *supra* note 13 (nineteenth century Canada); Higginbotham, *supra* note 75 (nineteenth century England); Osborne, *supra* note 141 (nineteenth century Canada); Beattie, *Criminality*, *supra* note 154 at 203 (nineteenth century England); Philips, *supra* note 16 at 261 (ditto). For a contemporary reference, see *The Pilot* (15 May 1847) (“Of the many women tried at the recent assize circuits in England and Wales for the murder of their infant children, not one was convicted, although the evidence against several of them was indisputably clear.”). For a modern-day analogy, see Osborne, *ibid.* at 47 (arguing that the provisions of the Canadian Criminal Code reflect “reluctance to find the mother guilty of murder....”).

Juris.	Fled	Unknown	No Bill	Acquitted	Convicted	Convicted Less. Offense
Murder n=24	12	4	1	3	3	1
Attempted Murder n=1	--	1	--	--	--	--
Concealment n=2	1	--	--	--	--	1
Abandonment n=1	--	--	--	--	--	1
Assisting to Conceal & Assisting to Murder n=1	1	--	--	--	--	--
Manslaughter n=2	--	2	--	--	--	--
TOTAL n=31	14	7	1	3	3	3
% of Total	45.2%	22.5%	3.2%	9.7%	9.7%	9.7%
Adjusted %	50.0%	25.0%	3.6%	10.7%	10.7%	10.7%

Figure 3.

thirty-one complaints resulted in trial and conviction. For murder, only one case resulted in conviction for the full offense, while the rate of conviction for the lesser crime of concealment was closer to ten percent.¹³⁸ At least three defendants thwarted

¹³⁸ Compare Backhouse, *Infanticide*, *supra* note 13 at 456 note 26, 461-462, 465 & 468 (noting that in 1840 to 1900 Ontario, of twenty-seven murder cases, eighteen or 66.6% resulted in acquittals, six or 22.2% in convictions on lesser charge, two or 7.4% in convictions on initial charge; two out of six or thirty-three percent of manslaughter cases resulted in conviction; and forty-three percent of concealment cases resulted in conviction, 46.7% in acquittals); Cliche, *supra* note 47 at 49 (noting that out of nineteen murder cases, one or 5.2% resulted in conviction; eleven out of eighteen concealment cases or 61.1% resulted in conviction; zero out of four infanticide cases resulted

the judicial process by making themselves unavailable for trial, although the figure for unknown dispositions likely includes other fugitives from the law.¹³⁹ It is also possible that prosecutors simply chose to discontinue those prosecutions at some stage of the proceedings, or alternately chose to ignore the indictments outright.¹⁴⁰

Indeed, it is apparent that significant filtering of cases took place, as grand juries rejected indictments (known as a finding of “no bill”) in forty-five percent of the cases.¹⁴¹ An example of a case in which the grand jury refused to indict occurred in 1840 in the Parish of Laprairie. A farmer’s wife swore out an affidavit before a local Justice of the Peace attesting that on the evening of 9 November between the hours of 11:30 and midnight, she had entered the home of Françoise Coullard *dit* Lestrage, a widow, and found her in bed. As the deponent stated in her affidavit:

[I] heard something crying in the cellar, [and] said do you hear, [Lestrage] replied, I hear well, she (the deponent) said it is a child in the cellar, the aforesaid [Lestrage] replied, she put it there to keep it from the knowledge of her brother in law, and told her she might take it out, she (the deponent) found it under a little

in conviction; and zero out of one manslaughter cases resulted in conviction); Higginbotham, *supra* note 75 at 331 (sixty-eight percent conviction rate if charged with murder first; seventy-three percent conviction rate for concealment only); Wright, *supra* note 47 at 27 (noting that out of eleven murder cases, two or 5.5% resulted in acquittals, two resulted in conviction for infanticide, seven or 15.7% resulted in conviction for concealment); Conley, *supra* note 35 at 110-111 & 117 (sixty-two percent of women charged with infanticide convicted of concealment); Philips, *supra* note 16 at 261 (fifteen out of thirty-nine infanticide and concealment cases or 38.5% resulted in guilty verdict).

¹³⁹ For discussion, see *infra* at 84-85.

¹⁴⁰ Compare Higginbotham, *supra* note 75 at 331.

¹⁴¹ See *La Minerve* (8 February 1847) (no bill found before the Court of Queen’s Bench on 3 February 1847 against Elizabeth Scott on charge of concealing the birth of her child). Compare Taylor, *supra* note 36 at 118 (noting that in the context of seventeenth and eighteenth century England, twenty-seven percent of infanticide indictments were ignored).

hole in the floor in front of her bed, it was a male child, said, why did you bring forth your child by yourself and call no person to be with you, she replied, she did not want [assistance as] she was well.....¹⁴²

The deponent further claimed that she prepared to wash the child, but was “so much afraid that she ran away and brought another neighbour woman, and afterwards washed and dressed the child, and put it into the bed in its mother’s arms.” Lestrase declined further assistance and the offer to find someone to stay with her through the night. The next morning when the deponent visited, the child was dead. She concluded by stating that Lestrase “had concealed her condition from the neighbours and refused to say who was the father of the child and that although her neighbours might suspect they could not be sure, as there were many men [who] went about her house....”

A warrant was issued for her three days later for “infanticide and concealment of pregnancy,” and she was committed to the local jail.¹⁴³ In her voluntary examination before a local Justice of the Peace the day of her arrest, she stated that:

Qu’il est vrai qu’elle a eu un enfant illégitime, et que craignant d’être découvert par son beaufrère qui demuroit avec elle dans la même maison...elle mit l’enfant dans un coffre enveloppé dans des linges: et s’apercevant que les cris de l’enfant étoit entendus elle le mit dans le cave pour etouffer sa voix; Qu’alors elle envoya chercher une voisine pour l’aider à avoir soin du dit enfant. Que cette voisine au nom de Marguerite Doré vient à sa demande et en soir et que cependant l’enfant est mort durant la nuit.¹⁴⁴

¹⁴² A.N.Q.M., KB(F), *Domina Regina v. Françoise Coullard dit Lestrase* (15 November 1840) (affidavit of Margaret Doré).

¹⁴³ A.N.Q.M., KB(F), *Domina Regina v. Françoise Coullard dit Lestrase* (18 November 1840) (arrest warrant); MG (Françoise Coullan committed 20 November 1840 for infanticide).

¹⁴⁴ A.N.Q.M., KB(F), *Domina Regina v. Françoise Coullard* (20 November 1840) (voluntary examination).

A grand jury declined to indict and she was discharged from prison.¹⁴⁵

Those women who found themselves defendants in infanticide prosecutions were clearly only a small minority of those who actually committed such offences. As has been seen, in most instances where the body of a murdered infant was found, the culprit was never identified.¹⁴⁶ Furthermore, a criminal justice system that revolved around private prosecution was singularly ill-suited to grapple with such crimes. No doubt many illegitimate infants were delivered and disposed of without any suspicion.

As was mentioned earlier, at least three defendants charged with infanticide eluded prosecution entirely by fleeing the jurisdiction. For example, one month after the events that had transpired involving Françoise Coullard *dit* Lestrage, a forty-two year old widow came to the attention of authorities after a dead infant was found in her home. Two neighbours attested that on 15 December 1840 around six a.m. they found “un enfant...enveloppé dans un torchon de toile...et ensuite dans une vieille chemise de coton de femme, sans bière” in the house in which the defendant lived.¹⁴⁷ Another person, perhaps a relative of the defendant, swore out an affidavit that the defendant had been pregnant during the previous autumn.¹⁴⁸ A coroner’s inquisition on the body

¹⁴⁵ *The Montreal Gazette* (1 December 1840) (no bill); A.N.Q.M., MG, *supra* note 188 (including notation of her discharge on 6 December 1840).

¹⁴⁶ Compare Emmerichs, *supra* note 149 at 105 (in England in 1860, eighty-one women charged with infanticide but 126 dead infants found); Jarvis, *supra* note 39 at 134 (in Toronto in the 1860s, seven women charged but fifty to sixty infants found).

¹⁴⁷ A.N.Q.M., KB(F), *Domina Regina v. Geneviève Clouthier* (29 December 1840) (affidavit of Joseph Desjardins and Rosalie Leraux).

¹⁴⁸ A.N.Q.M., KB(F), *Domina Regina v. Geneviève Clouthier* (29 December 1840) (affidavit of Noel Clouthier).

resulted in a finding of murder, but Clouthier had already absconded from the province. In a letter found in the Court's files, a neighbour provided identifying information to authorities to facilitate her apprehension, describing her as "petite mais grosse, teint blanc, yeux noirs, cheveux noirs" and stated that she had fled with her male cousin during the night, either taking the road to Burlington, Vermont or Plattsburgh, New York.¹⁴⁹ Although a true bill was found against her for murder, she never stood trial.¹⁵⁰

Some women suspected of the crime of infanticide successfully evaded prosecution with the tacit collusion of third parties, perhaps as a suspect's flight might have been the optimal outcome for all concerned.¹⁵¹ In 1830, a young unmarried domestic servant secretly gave birth to, and disposed of, the child's body in the privy of the boarding house where she lived and worked. Suspicious circumstances having come to her mistress' attention, she was confronted and admitted to having given birth, but claimed the child was stillborn. A coroner's inquest, however, returned a verdict of wilful murder after an autopsy ostensibly revealed that the child had respired.¹⁵² Left to recuperate before her transportation to prison, she escaped from house arrest, due to her guardian's (perhaps intentional) laxity. As one newspaper editor wrote:

¹⁴⁹ A.N.Q.M., KB(F), *Domina Regina v. Geneviève Clouthier* (25 December 1840) (name of author illegible).

¹⁵⁰ A.N.Q.M., KB(R) p.29, *Queen v. Geneviève Clouthier* (3 March 1841) (true bill found); KB(R) p.32, *ibid.* (5 March 1841) (defendant defaulted and process issued). See also *The Montreal Gazette* (4 March 1841); *The Montreal Herald* (8 March 1841).

¹⁵¹ See generally Galley, *supra* note 76 at 51.

¹⁵² *The Canadian Courant* (17 April 1830) (case of Elizabeth McQuillon). See also *The Montreal Gazette* (19 April 1830).

We understand that in consequence of the constable who had the woman in charge [for infanticide]...leaving the apartment in which she was confined for a short time, she availed herself of the indulgence of her *watchful* attendant and made her escape. We understand that both the physicians examined on the inquest gave their opinion that her removal to the Gaol was practicable and not dangerous to her life, so why was she not removed accordingly?

As the editor sniffed, “[t]his is the second instance of escape from an accusation of infanticide which has fallen under our observation.”¹⁵³ Successful prosecutions for infanticide or concealment were the exception rather than the rule.

The crime of attempted murder was a non-capital offence, but carried a significantly more severe penalty than did concealment. Only one prosecution for attempted murder of an infant was found for the period, no doubt reflecting the fragility of infant life and the ease with which an infant could be dispatched. That sole prosecution, however, also typifies the reality that even in those cases where indictments had been secured, juries remained loath to convict. That is not surprising, as criminal trials were the culmination of an investigative process that was also highly discretionary; coroners’ inquest juries, grand juries, and prosecutors were all links in a chain where discretionary power could be exercised to save a suspect from trial.¹⁵⁴

At one o’clock on a June morning in that year, a lodger at a respectable boarding house on Great St. James Street heard the wail of a newborn infant from the courtyard. Summoning the landlord and Sergeant McCormack from the Montreal Police, by candlelight the three discovered a male infant “feebly struggling” amid the refuse at the

¹⁵³ *The Canadian Courant* (21 April 1830) (emphasis in original).

¹⁵⁴ Galley, *supra* note 76 at 13.

bottom of a ten-foot-deep privy. A search of the house quickly pointed the finger of blame at Marie Carmel, an unmarried domestic servant who was found lying unconscious in a pool of blood on the floor of her room. At first denying all knowledge, she allegedly broke down and confessed her crime after the child was brought to her presence by the attending physician. Too ill to be moved, Carmel was not lodged in the Montreal Gaol for some weeks.¹⁵⁵

While Carmel recuperated, the child was placed in the care of the Grey Nuns.¹⁵⁶ She was eventually committed on 29 June 1846,¹⁵⁷ and a true bill found against her for attempted murder on 6 August.¹⁵⁸ It was to be a further six months before her case would go to trial in the February term of the Court of Queen's Bench. As had become increasingly common in trials of that sort--despite the experience of Betsey Williams--counsel had been secured for her. The prosecution's case was straight forward, calling as witness the lodger at her boarding house who had first heard the cry of the infant. Two physicians were called to testify, but the nature of their testimony is not known, except that it was deemed to have "supported the medical part of this case."¹⁵⁹

Carmel's purported confession was to play no role in her trial. As mentioned previously, defendants could not then testify under oath. Interestingly, in effect they

¹⁵⁵ *The Pilot* (9 June 1846) (citing *The Times*). See also *L'Aurore* (10 June 1846).

¹⁵⁶ *The Pilot* (2 July 1846) (citing *The Montreal Herald*). For discussion of the Grey Nuns (or "Soeurs Grises"), see generally Gossage, *supra* note 14.

¹⁵⁷ A.N.Q.M., MG (Marie Carmel committed 29 June 1846 for "throwing her child into the privy.").

¹⁵⁸ *The Montreal Gazette* (7 August 1846) ("true bill Marie Carmel for attempting to murder her child.").

¹⁵⁹ *The Montreal Transcript* (23 February 1847).

were often disqualified from testifying against *themselves*, as well. As will also be seen in the context of child abuse and domestic violence prosecutions, judges evidenced an institutionalized distrust of confessions, based largely on an aversion to self-incrimination that was enshrined in the quasi-constitutional common law principle that ‘no man shall convict himself.’¹⁶⁰ Confessions that were induced, prompted, or coerced by police or other agents were thrown out by judges,¹⁶¹ and it would appear that judges erred on the side of exclusion rather than risk admitting a confession that was induced by promises of leniency or the like.¹⁶² Guilty pleas to capital felonies were especially discouraged, on the grounds that they were inimical to the administration of justice.¹⁶³

In the absence of a confession or guilty plea, Carmel’s attorney presented a two-pronged defense, described as “eloquent,” in which he argued that she was feeble minded, and also that there was insufficient evidence to tie her to the crime in question. Two gentlemen were called as witnesses who testified that they “considered the prisoner to have been always of weak intellect, in fact a kind of idiot;” to this the Crown offered no rebuttal. After the defense rested, the Chief Justice summed up the evidence

¹⁶⁰ See generally Taylor, *supra* note 112 at 115; King, *supra* note 16 at 225-226.

¹⁶¹ See Monholland, *supra* note 47 at 138-143. *Contra* Galley, *supra* note 76 at 54-55 (claiming that confessions to the crime of infanticide guaranteed conviction). In the context of my research, several defendants that appear in this thesis were said to have confessed to the offense, but later pleaded not guilty and were tried and acquitted. If that group of Montreal defendants is representative, then confessions did little to increase the chance of conviction.

¹⁶² That fact was not without its contemporary critics. See *e.g.* *The Times and Daily Commercial Advertiser* (2 February 1844) (criticizing the suppression of confessions, even if made by defendants “in the confusion of guilt or in the despair of concealment.”)

¹⁶³ Wiener, *supra* note 15 at 473 note 15 (murder trials).

to the jury, which quickly returned a verdict of acquittal despite what appeared to be inculpatory circumstances.¹⁶⁴ Carmel was accordingly discharged.¹⁶⁵

The most common criminal offence in Montreal related to infanticide was that of concealment of birth.¹⁶⁶ The statutory provision for the crime of concealment, as mentioned previously, was a legislative attempt at circumventing the evidentiary obstacles facing most prosecutions for infanticide. Concealment, at least prior to 1842 when it became a free-standing misdemeanour, was a lesser-and-included offense to that of infanticide, meaning that a charge of concealment could be substituted if a defendant was acquitted of the felony charge itself. Defendants tried for infanticide were much more likely to be convicted of concealment.¹⁶⁷ Even so, and despite the less draconian penalties on conviction as well as the greatly-lessened evidentiary burden placed upon the Crown, only three defendants were convicted of that offense and then only after having been unsuccessfully prosecuted for murder. Indeed, the charge of

¹⁶⁴ *The Montreal Transcript* (23 February 1847). That account, typical in its summary nature, nevertheless provides the most exhaustive source of information on the trial. The only other account found, in *La Minerve* (11 February 1847), merely noted that “Marie Carmel accusée d=infanticide, a subi son procès ce matin. Le jury a rapporté un verdict de non coupable. La défense a été habilement conduite par J.C. Coursol, avocat.” See also A.N.Q.M., KB(R) (August 1846-August 1849) p.112-113, *Queen v. Marie Carmel* (11 February 1847) (trial and verdict).

¹⁶⁵ A.N.Q.M., MG, *supra* note 202 (Marie Carmel discharged 11 February 1847 by order of Court of Queen’s Bench).

¹⁶⁶ Compare Backhouse, *Infanticide*, *supra* note 13 at 468; Higginbotham, *supra* note 75 at 327. But see Cliche, *supra* note 47 at 49, Table III (indicating that there were nineteen murder, eighteen concealment, four infanticide and one manslaughter charges brought in Quebec City during the period 1812 to 1892).

¹⁶⁷ Compare Higginbotham, *ibid.* at 331.

concealment allowed judges and juries to prevent guilty women from evading legal penalties completely, while ensuring that they did not face a capital charge.¹⁶⁸

Among those unlucky few was Jane Hughes, against whom a grand jury on September 6, 1834 found a true bill for the suffocation death of her illegitimate male child.¹⁶⁹ Described by one paper as a “well looking genteelly dressed young woman,” Hughes pleaded not guilty before the Court of King’s Bench.¹⁷⁰ The evidence presented against her was largely medical in nature, and revolved around the issue of whether the child had been born alive. She was ultimately acquitted of murder but convicted of concealment. The Court accordingly sentenced her “to be taken from hence to the Common Goal of this District and that she be therein confined and kept at hard labor during the space of twelve calendar months.”¹⁷¹ It is a further sign of the law’s mercy that three months later she was granted a full pardon.¹⁷² Another young woman was

¹⁶⁸ For example, Emmerichs, *supra* note 150 at 108, has suggested that the charge of concealment “by the middle of the nineteenth century represents, in my opinion, the kind of ‘pious perjury’ so common in English law, used to prevent the capital punishment of offenders for whom the courts had some sympathy.” Emmerichs went on to note that most of the women in England charged with concealment after 1862 were young, unmarried domestic servants; faced with loss of their livelihood, “it is likely...that many of the young women did actually kill their infants.” *Ibid.* See also Backhouse, *Infanticide*, *supra* note 13 at 467-468; Higginbotham, *ibid.* at 328.

¹⁶⁹ *The Montreal Gazette* (6 September 1834).

¹⁷⁰ *The Montreal Herald for the Country* (8 September 1834).

¹⁷¹ A.N.Q.M. KB(R) p.15-17, *Dominus Rex v. Jane Hughes* (9 September 1834) (trial and verdict); KB(R) p.92, *ibid.* (10 September 1834) (sentence). See also *The Vindicator* (12 September 1834); *The Montreal Gazette* (11 September 1834). The latter newspaper described concealment as a “minor offence.” *Ibid.*

¹⁷² N.A.C., AP, vol. 19 p.7884-6, “The Attorney General’s Draught of pardon in favour of Jane Hughes” (18 December 1834):

Whereas lately at our Court of King’s Bench...one Jane Hughes was convicted of a certain felony; and whereas upon the said conviction judgment was pronounced in our said Court of King’s Bench against the said Jane Hughes; Now know Ye that for divers good causes and considerations being willing to extend our

tried in 1840 for murdering her illegitimate infant son, *The Montreal Gazette* observing that the “particulars of this affair are of a nature which cannot with propriety be placed before our readers.” Convicted of concealment, she was sentenced to four months’ at hard labour.¹⁷³ The third defendant received a sentence of six months after pleading guilty to “avoir caché la naissance de son enfant” in 1846.¹⁷⁴

It was rarer still for a defendant to be charged outright with concealment rather than infanticide, which the law explicitly allowed in Lower Canada after 1841. During this period, only two such cases were found. The charge of concealment implied a belief that the child in question had died of natural causes or been stillborn. In the absence of corroborative witnesses--and with many women in that position having every incentive to lie--one might assume that concealment charges would not have been levied without convincing evidence that the infant had died a natural death. And yet, in the case of one Sarah Thomas, her claims that her child had been stillborn apparently went unquestioned. When interrogated by a Justice of the Peace, she claimed that she had

Grace and mercy to the said Jane Hughes we of our especial Grace, certain knowledge and mere motion have pardoned, remitted and released and by these presents do pardon, remit and release the said Jane Hughes of and from the said Felony whereof she hath been convicted as aforesaid....

¹⁷³ A.N.Q.M., KB(R) p.8, *Queen v. Anastasie Lepine dit Chevaudier* (5 November 1840) (true bill); KB(R) p.24-35, *ibid.* (10 November 1840) (trial and verdict); KB(R) p.14, *ibid.* (5 December 1840) (sentence). See also *The Montreal Gazette* (10 November 1840); *The Montreal Herald* (12 November 1840) (noting her conviction and stating that the “facts which we cannot lay before our readers were such as to excite a great interest in the fate of the prisoner.”).

¹⁷⁴ A.N.Q.M., KB(R) p.67, *Queen v. Bridget Cloone* (14 February 1846). See also *La Minerve* (16 February 1846). The eleven convictions for that offence in Quebec City resulted in the following sentences: (1) two years hard labour; (1) one year hard labour; (2) one year in prison; (1) six months hard labour; (3) six months in prison; (1) four months in prison; (1) two months in prison; and (1) six weeks in prison. See Cliche, *supra* note 47 at 49.

secretly delivered a stillborn infant and hid the body under a tree stump.¹⁷⁵ A resident physician attested that he went to her home in the company of several other persons, and upon examining her, ascertained that she had been recently delivered of a child. He had conducted the examination, he stated, "it being expected that Sarah Thomas had been secretly delivered of a child and that she had disposed of the said child with a view to conceal the birth."¹⁷⁶

Thomas was bound to the Court of King's Bench, but no evidence of further proceedings was found. It is possible that she, like other defendants, felt that leaving the jurisdiction was preferable to a court appearance. However, at no time did there appear to be any doubt entertained that her child's death had been anything other than natural. Indeed, the experience in other jurisdictions was that concealment charges were brought in many cases in which the facts pointed to infanticide.¹⁷⁷ It is further interesting to contemplate that the conviction rate, as low as it was, could have been considerably lower if many cases--ostensibly the weakest of them--had not failed to pass the indictment stage.¹⁷⁸

Infanticide, concealment, and attempted murder were not the only charges related to the crime of neonaticide. Two cases involving other charges related to that crime were found for the period under examination. The first was a complaint filed in

¹⁷⁵ A.N.Q.M., KB(F), *Queen v. Sarah Thomas* (7 July 1843).

¹⁷⁶ *Ibid.* Thomas Thomas, presumably Sarah Thomas' father, was discharged as there was no evidence against him to charge him as an accessory.

¹⁷⁷ Compare Cliche, *supra* note 47 at 50-51; Sauer, *supra* note 51 at 82.

¹⁷⁸ Compare Donovan, *supra* note 69 at 162.

1834 for abandonment, although the outcome is unknown. In an affidavit filed by the Reverend John Bethune, he alleged that:

[O]n Wednesday the 24 December instant a woman of the name of Pollard whom the Deponent can point out did wickedly and maliciously leave her two infant children within the portico of the Deponent's front door saying that she left them there so that the Deponent should take care of them then departed and made her escape--That through humanity the Deponent has taken the said infant children under his charge and placed them at the Ladies Benevolent institution until further provision is made for them--and the Deponent further saith that if he had not taken the said children under his charge they would have perished with cold and hunger--Wherefore the Deponent prayeth for relief and further that the said Pollard may be arrested and dealt with according to law.¹⁷⁹

It is far from clear how such a charge could have been sustained unless the abandonment had led to death or serious injury. There was no statutory authority for the charge of abandonment during the period under examination, and that may account for why no evidence was found that the complaint was pursued further.¹⁸⁰ In any event, the majority of abandonment cases could not have been prosecuted, if for no other reason than the fact that identification of the culprit would have been impossible. The other, more directly-related variety of infanticide prosecution involved a charge of "assisting to conceal and murder a child," brought against the mother of a defendant

¹⁷⁹ A.N.Q.M., QS(F), *Dominus Rex v. Mary Pollard* (26 December 1834) (charge of misdemeanor).

¹⁸⁰ Abandonment *per se* was not a statutory offense in British North America until 1864, when the New Brunswick legislature was the first to promulgate such legislation; it became a federal offense in 1869. See generally Backhouse, *Infanticide*, *supra* note 13 at 472. For discussion of abandonment prosecutions, see *ibid.* at 471-474.

who was charged with infanticide and ultimately convicted of concealment.¹⁸¹ The mother spent several days in prison before charges against her were dismissed.¹⁸²

Analysis of the infanticide prosecutions brought during the period 1825 to 1850 indicates that the circumstances leading up to most of those cases were similar, and that the Montreal experience mirrored that of other Western jurisdictions. As shown in *Figure 4*, nearly all of the twenty-eight victims had been illegitimate births, with only one having been born in a legal marriage.¹⁸³ Second, male infants were no more likely to

***Characteristics of Infant Victims in
Infanticide and Related Prosecutions, 1825-1850***

	BIRTH			GENDER			AGE			
Over	Illeg. N/I	Leg.	N/I	Male	Female	N/I	New- born	Than 1 yr.	Less 1 yr.	
n=28	24	1	3	15	4	9	25	2	--	1
% of Total	85.7%	3.6%	10.7%	53.6%	14.3%	32.1%	89.3%	7.1%	--	3.6%
Adjusted %	96.0%	4.0%		79.0%	21.1%		92.6%	7.4%	--	

¹⁸¹ A.N.Q.M., KB(F), *Domina Regina v. Ann Armstrong* (2 February 1847).

¹⁸² A.N.Q.M., MG (Ann Armstrong committed on 27 January 1847; discharged 3 February 1847); KB(R) p.83, *Queen v. Sally Anne Armstrong & Anne Armstrong* (3 February 1847).

¹⁸³ See *infra* at 106 (case of Susan Pengelly). Five pairs of twins were alleged within those court documents, but only two pairs of twins appeared in the evidence at trial. Perhaps in the other cases one of the siblings was deemed to have died a natural death. For comparable observations about other jurisdictions, see *e.g.* Backhouse, *Infanticide*, *supra* note 13 at 448 & 457 (nineteenth century Canada); Higginbotham, *supra* note 75 at 321 (nineteenth century London); Malcolmson, *supra* note 24 at 192 (eighteenth century England); Monholland, *supra* note 47 at 68 (nineteenth century England); Philips, *supra* note 16 at 261 (ditto).

Figure 4.

survive than their unwanted female counterparts, as coroners' reports for Montreal have also indicated, as a majority of victims were male.¹⁸⁴ Third, nearly all the victims were newborns, suggesting that the greatest risk to unwanted children occurred shortly after birth.¹⁸⁵ Only two children had survived more than a few days in their mother's care, one living to five weeks of age,¹⁸⁶ and another surviving nearly a year before being murdered by her mother.¹⁸⁷ No children were aged over a year, reflecting the fact that their deaths would have been covered under the ordinary provisions of the criminal law governing murder.¹⁸⁸ Furthermore, as far as can be determined, nearly all of the women involved came from unprivileged socio-economic backgrounds.¹⁸⁹

¹⁸⁴ See *supra* at 63. See also Backhouse, *ibid.* at 450 note 12 (noting no significant difference between murder rates of male versus female infants); Malcolmson, *ibid.* at 124 (noting that in English infanticide cases "the circumstances of the mother provided the rationale for infanticide, not the sex of her infant."). Contemporary experience follows the same pattern. See *Crime in the United States, 2001* (Washington: Federal Bureau of Investigation, U.S. Department of Justice, 2002) (stating that of 220 infanticide cases in 2001, 126 were male infants, ninety-two were female, and one was unidentified). But see generally Langer, *supra* note 47, for the view that female infants were historically the most likely to be murdered. See also Samuel X. Radbill, "Children in a World of Violence: A History of Child Abuse" in Ray E. Helfer & Ruth S. Kempe, *The Battered Child* (Chicago: University of Chicago Press, 1987) 6.

¹⁸⁵ See *infra* at 63. See also Higginbotham, *supra* note 75 at 324; Malcolmson, *supra* note 38 at 192; Rose, *supra* note 58 at 7. That fact remains true in the modern era, as pointed out by Rose, *ibid.* at 1. See also *Family Violence in Canada*, *supra* note 178 at 18.

¹⁸⁶ See *supra* at 71-76 and *infra* at 114-115 (case of Betsey Williams).

¹⁸⁷ See *infra* at 105-106 (case of Susan Pengelly).

¹⁸⁸ Likewise, no fetal deaths were identified. As discussed previously, an infant would have to be fully born of the mother to constitute a life-in-being.

¹⁸⁹ Compare Higginbotham, *supra* note 75 at 321; Malcolmson, *supra* note 38 at 192; Monholland, *supra* note 47 at 64-67. That remains true today. See Maria W. Piers, *Infanticide* (New York: W.W. Norton & Company, 1978) 514-515.

In cases of illegitimate births, the mothers in question had all attempted to conceal their pregnancies, and generally gave birth unaided and unaccompanied.¹⁹⁰ The case of Betsey Williams might have been exemplary insofar as she was convicted of murder, but otherwise her case typified that of a young, unmarried, working-class woman who took drastic action when faced with ostracism and poverty. Betsey Williams, for one, was worried about her father's disapproval of her pregnancy.¹⁹¹ No doubt social condemnation of illegitimacy played a large part,¹⁹² but equally important (if not more so) was the prospect of destitution. A bastard child not only foreclosed certain future employment opportunities, but his or her birth would also likely result in the mother's dismissal from employment.¹⁹³ That child was also another mouth to feed and could easily strain a mother's resources past the breaking point.¹⁹⁴ The physician who testified at the trial of Sally Ann Armstrong painted a bleak picture of the circumstances under which he had found the defendant, pointing to the sort of privation that was doubtlessly shared by many unwed mothers: he found her "dying with cold, in bed, in a house, and on a table the body of a male child [lay] frozen....[T]he prisoner was very ill-covered in bed....It is certain that if care had not been taken of the prisoner she

¹⁹⁰ Compare Cliche, *supra* note 47 at 40; Higginbotham, *ibid.* at 326. For accounts of women who died during childbirth rather than disclose their condition to family, see Galley, *supra* note 76 at 32-33.

¹⁹¹ See also Cliche, *ibid.* at 40-41 (citing reproach by parents as being a factor leading up to infanticide).

¹⁹² See generally Cliche, *ibid.* at 39; Higginbotham, *supra* note 75 at 321-322; Sauer, *supra* note 51 at 84.

¹⁹³ Compare Cliche, *ibid.* at 41-42; Higginbotham, *ibid.* at 327; Malcolmson, *supra* note 24 at 193.

¹⁹⁴ See Gilje, *supra* note 140 at 583 (noting that the traditional view was that those mothers were trying to save their reputations, but arguing that poverty was probably a more likely impetus). See also Sauer, *supra* note 51 at 85.

must have died with cold.”¹⁹⁵ The indigent circumstances in which she and her baby found themselves were not unique. When poverty, panic and ignorance converged, an infant’s death could not be anything less than inevitable.¹⁹⁶

One subcategory of women who fit the paradigm for murderous mothers was that of domestic servants. Young and unmarried, socially and economically vulnerable, their exploitation at the hands of lecherous masters and members of their master’s household during the nineteenth century is well documented.¹⁹⁷ The corollary is that domestic servants have been identified by scholars in many jurisdictions as figuring prominently, perhaps even predominantly, in the annals of Victorian infanticide.¹⁹⁸ The frequency with which they appear in infanticide cases has led some scholars to conclude that domestics were more likely than other women to resort to that course of action, although it may be that they were simply less able to conceal the fruits of their crime

¹⁹⁵ *The Montreal Transcript* (7 August 1847). For discussion of Sally Ann Armstrong’s case, see *infra* at 102-103 & 106-107.

¹⁹⁶ Sauer, for example, has noted that “[i]llegitimacy occurred predominantly in lower social groups where sanitary standards were low and mothers were least aware of proper techniques of child care.” Sauer, *supra* note 51 at 87. I am skeptical that one can accurately describe these women as “revolutionaries” and “rebels” who were driven by a desire to protest a lack of birth control or assert control over their sexuality. See Backhouse, *Infanticide*, *supra* note 13 at 477; Jones, *supra* note 178 at 49.

¹⁹⁷ See generally John R. Gillis, “Servants, Sexual Relations and the Risks of Illegitimacy in London, 1801-1900” in Judith L. Newton *et al.*, eds., *Sex and Class in Women’s History* (London: Routledge and Kegan Paul, 1983) 115; Claudette Lacelle, *Urban Domestic Servants in Nineteenth Century Canada* (Ottawa: Environment Canada, 1987) at 59. For discussion of the legal response to seduction of domestics in Upper Canada, see generally Martha J. Bailey, “Servant Girls and Upper Canada’s *Seduction Act*: 1837-1946” in Russell Smandych *et al.*, eds., *Dimensions of Childhood: Essays on the History of Children and Youth in Canada* (Winnipeg: Legal Research Institute of the University of Manitoba, 1991) 159.

¹⁹⁸ See *e.g.* Backhouse, *Infanticide*, *supra* note 13 at 457; Cliche, *supra* note 47 at 38; Donovan, *supra* note 69 at 169; Krueger, *supra* note 32 at 285; Langer, *supra* note 47 at 357; Malcolmson, *supra* note 38 at 192; Monholland, *supra* note 47 at 85; Rose, *supra* note 58 at 18.

due to a lack of privacy.¹⁹⁹ In addition, it must be noted that domestics constituted the largest occupational group among women of the period.²⁰⁰ One scholar has made the intriguing suggestion that women of more respectable backgrounds also may have identified themselves as domestics as a means of camouflaging their identities.²⁰¹

While domestics were not invisible in infanticide proceedings in Montreal, they did not figure as conspicuously as they have in other jurisdictions, for unknown reason.²⁰² While the occupations of many of the women are unknown, thus complicating analysis of this issue, only a handful of them were classified as domestics. However, nearly all appeared to hail from the labouring classes. The case of Zoe Laurin (or Lorrain), for example, is particularly resonant. As graphic and disturbing as is the dispassionate affidavit of Zoe Laurin's master, even more startling is the apparent recklessness with which she acted, as she made no attempt to conceal her infant's body.²⁰³ As her master, a yeoman named Louis Pontus *dit* Claremont, attested:

[O]n Saturday morning last about half past four a.m. his attention was directed by his wife to the body of a new born female infant with the afterbirth attached in a bucket about half full of water in which there was blood...the bucket was used to put the slops in and for the children in the night[;] there was sufficient water to cover completely the body [of] the said infant and the said deponent sayeth that the said child was the offspring of Zoe Lorrain his servant maid and furthermore during the night previous about midnight he heard the said Zoe Lorrain sitting

¹⁹⁹ See generally Wheeler, *supra* note 39 at 412.

²⁰⁰ See Rose, *supra* note 58 at 19.

²⁰¹ See *ibid.* at 18.

²⁰² For a rare example of press coverage implicating a domestic servant, see *supra* at 62-63 (case of Bridget Cloone).

²⁰³ Similar observations were made by Higginbotham, *supra* note 75 at 326.

upon the said bucket upon which she sat for about ten minutes, moaning and he heard discharged into the bucket a quantity of liquid which he at the moment thought might be from the bowels. The said Zoe Lorrain had appeared unwell in the evening previous to going to bed and the said deponent accused the said Zoe Lorrain of pregnancy but she denied it and said it was only retarded menstruation and that she had seen nothing for the space of two years[;] and after she had used the bucket she went again to bed and said she was much relieved for her menses had been evacuated. During the time the deponent heard no child cry[;] she was rather in a hurried manner in the morning and went out for about ten minutes....[T]he deponent and his wife reproached her for having concealed and brought to such a termination the infant[;] [Lorrain]...looked in the bucket but did not speak....[I]n the afternoon of the Monday the deponent carried the body of the infant to Thomson Clements the Beadle in a coffin of walnut wood....[S]he is now in bed and appeared unwell.²⁰⁴

From that account the evidence of whether the child had been stillborn was inconclusive, although her master indicated he had not heard the child cry. The grand jury, for its part, were “unanimously of opinion that the death of the said child was from negligence or want of knowledge (simplicité)” and declined to indict her.²⁰⁵ Had she been prosecuted the following year, the grand jury could instead have opted to find an indictment for concealment, but that was technically not an option in 1840. As such, historians are prevented from knowing how a jury would have reacted to the plight of that young servant, although a sympathetic jury might well have acquitted her on the grounds that she had made no attempt to conceal the body.²⁰⁶

That, however, begs the question of why a young woman who had managed to keep her pregnancy a secret under such difficult circumstances would not have acted

²⁰⁴ A.N.Q.M., KB(F), *Queen v. Zoe Laurin/Lorrain* (31 May 1840).

²⁰⁵ A.N.Q.M., KB(F), *Queen v. Zoe Laurin* (29 August 1840); KB(R) p.29, *Queen v. Zoe Lorrain* (29 August 1840).

²⁰⁶ Compare the case of Catherine Whelan, *infra* at 111-114.

more circumspectly when it came to disposing of the evidence. After all, while she had managed to perform her household duties during the duration of her pregnancy, Zoe Lorrain's master had accused of her being pregnant only the night before. Even if that had not been the case, leaving the infant's body in a waste bucket was hardly a successful strategy for avoiding detection. Was she subconsciously seeking discovery and punishment?²⁰⁷ Was the non-concealment indicative of lack of premeditation?²⁰⁸ Did Laurin's actions reflect a helplessness borne out of depression and despair?²⁰⁹ Is it possible that she believed that she had not really given birth? The latter scenario seems improbable from a presentistic point of view, yet contemporary sources indicate clearly that this was either a common occurrence, or was viewed as such.²¹⁰

Zoe Laurin's story came to light partially because of her master's suspicions, but mainly due to her own imprudence. While the difficulties attendant in keeping an illicit pregnancy secret as a domestic must have been daunting, she might well have feared discovery even if her circumstances had been different. Prying neighbours were not unknown, and anecdotal evidence suggests that some had little hesitation in acting on their suppositions if they felt an unmarried woman was with child. The newspaper

²⁰⁷ Compare Higginbotham, *supra* note 75 at 326.

²⁰⁸ Compare Monholland, *supra* note 47 at 125.

²⁰⁹ Compare *ibid.* at 126.

²¹⁰ The theme of a woman mistaking labour pains for those of a bowel movement or cramps frequently arose in Victorian jurisdictions and was a commonly-accepted defense. See generally Krueger, *supra* note 32 at 285-286 (also noting that accidental death by drowning was a common defense); Rose, *supra* note 58 at 73; Wright, *supra* note 47 at 13 (citing the example of a domestic who claimed she thought her labour pains were merely cramps). For a reference in Victorian medical jurisprudence, see Boys, *supra* note 47 at 54 (stating that the "pains of labour may be mistaken for other sensations, and the child in consequence be born under circumstances which would inevitably cause its loss without any blame attaching to the mother.").

account of Sally Ann Armstrong's trial, for example, reported that it was the neighbor of Armstrong's mother who was responsible for disclosing Sally Ann's predicament:

[T]he neighbor of the prisoner's mother...suspecting the prisoner to be on the eve of confinement...went to her on the morning of the day mentioned in the indictment. She saw the prisoner's mother, who told her that nothing was wrong except a little head-ache which her daughter had. Witness then returned to her house; but as she was quite convinced that her suspicions were correct, her husband advised her to return again, and render all the assistance in her power. She did so return, and was then told that a child had been born; and upon searching, the body of a dead infant was found at the foot of the bed; a stain was also found...which seemed to show that the child had lain there. It was folded up in a cloth which was stained with blood.²¹¹

As that account illustrates, officious neighbours could be the downfall of a single mother who had given birth to an illegitimate child. Some neighbours felt they were driven by a moral imperative to probe suspicious activities, behaving like investigative officers. It is equally true, however, that other neighbours simply sought to deliver assistance to a frightened and distressed young mother and were probably not likely to ask awkward questions if the child disappeared. Others, of course, had no knowledge (or chose not to have knowledge) of the births and deaths of illegitimate infants in their midst.²¹²

While the preponderance of cases during the period followed those archetypes, there were notable exceptions that deviated from the patterns common to nineteenth century infanticide cases. As stated previously, married women were virtually invisible in the annals of infanticide prosecutions. Many reasons can be adduced for that fact:

²¹¹ *The Montreal Transcript* (7 August 1847).

²¹² But see Wheeler, *supra* note 39 at 408 (arguing that townfolk played a prominent part in attempting to ferret out the murderers of illegitimate newborns). Even if that was common, the public's ambivalence is evidenced by the fact that jurors refused to return indictments or convict women of those crimes with great frequency.

most fundamentally, married women usually did not face the despondency and penury associated with unmarried motherhood. Furthermore, an infant who died in the household of a married couple tended to elicit sympathy rather than suspicion. Thus, while “overlaying”--the smothering of an infant while sleeping in bed with its mother--may well have masked many cases of infanticide, it was commonly viewed as an accidental occurrence rather than something potentially more sinister.²¹³ Other aspects of natal care that were widely practised also constituted a significant risk to infants, such as administering narcotic-based soporific agents.²¹⁴

A singular example involving a married woman tried for the murder of her infant during the period was Susan Pengelly, who in 1839 ventured into a forest and slashed the throat of her eleven-month-old daughter before attempting to commit suicide. Married to a prosperous farmer in the Township of Grenville, Pengelly was faced neither with the social stigma of giving birth out of wedlock, nor with the prospect of a life of destitution. She had raised several children, the eldest of which was a thirteen-

²¹³ See generally Sauer, *supra* note 51 at 81. For an example of a reference to overlaying, see *The Pilot* (1 September 1846) and *The Montreal Weekly Pilot* (1 September 1846):

DEATH OF AN INFANT FROM SUFFOCATION--On Thursday, an inquest was held upon the body of an infant, ten months old. It belonged to a Mrs. Vergaigle, who resided in Dereene street. It appears that the infant, while sleeping with its mother slipped between the bed and wall, which produced suffocation. A verdict was accordingly returned.

For discussion of overlaying as a form of infanticide, see generally Elizabeth de G.R. Hansen, “Overlaying in Nineteenth-Century England: Infant Mortality or Infanticide?” (1979) 7 *Human Ecology* 333.

²¹⁴ See *The Pilot* (11 March 1845), cautioning parents against that practice.

year-old boy, and the testimony of the witnesses at her trial left no doubt that she was generally regarded as a kind and doting mother.²¹⁵

As part of her defense, her son (as well as two neighbours) testified that she had begun to act deranged the previous winter. Her son asserted that from that period onwards his mother “used occasionally to get up during the night, dress herself and dance about the house...say[ing] that the fairies were coming to carry her off.”²¹⁶ Any evidence of Pengelly being *non compos mentis* would have gone a long way to offering an explanation for what would otherwise have appeared inexplicable, and the jury quickly acquitted her by reason of insanity. Her counsel then moved for her immediate discharge, asserting that she was “now in a perfect state of sanity.” Not surprisingly the Attorney General balked at this request, but the Court granted the motion.²¹⁷

Unlike the situation facing most single mothers, Pengelly did not have any reason to conceal the birth of her child. Single mothers, however, had every incentive to give birth clandestinely so as to avoid the shame of public exposure. On those rare occasions when a defendant had assistance, she was most likely to turn to other family members, usually the defendant’s own mother. Family members may have been bound by a sense of familial duty, while others might also have been inclined to remove such an obvious

²¹⁵ *The Montreal Gazette* (21 March 1840). For a similar case in Ontario, see Backhouse, *Infanticide*, *supra* note 13 at 464-465 note 51.

²¹⁶ *Ibid.* As Monholland, *supra* note 47 at 179-181, noted, children were commonly accepted as witnesses in mid-nineteenth century England and elsewhere. For the period under examination, evidence of that practice found in Montreal sources is mixed. In the instant case, Pengelly’s family clearly helped her case. Compare Monholland, *ibid.* at 169, noting that “in virtually every case wherein a defendant’s family member testified, those comments about a defendant were derogatory, negative, and hurtful to that case.”

²¹⁷ A.N.Q.M., KB(R) p.79-80, *Queen v. Susannah Pengelly* (7 March 1840).

source of shame.²¹⁸ Only two Montreal cases involved defendants who had secured assistance during their *accouchement*. One such case concerned Sally Anne Armstrong, who bore an illegitimate male child on January 24, 1847. Sally Anne was more fortunate than most, insofar as she was aided in the delivery by her mother. Her mother's involvement had not been without its attendant risks, however. Arrested three days later for having assisted the concealment and murder of her grandchild, she was fortunate to not be indicted.²¹⁹

Her daughter, however, did not fare so well. Committed to the local jail on 9 February--the delay presumably motivated by a desire to allow her to recover--Sally Ann was tried six months later on a charge of "wilful murder of her male infant child...by suffocating and stifling the child between two beds."²²⁰ Among the witnesses called was a neighbour who had suspected Sally Ann was pregnant; on entering her house she "eventually discovered the child rolled up in a quilt, with every appearance of having been smothered as soon as born."²²¹ The child had evidently been born alive, as upon her first visit the neighbour heard the child crying, and "afterwards the voice of the prisoner saying 'pussy pussy' as if to disguise the cause of the cry." The testimony of a physician was that the infant showed no marks of violence, and that he believed the

²¹⁸ See generally Wheeler, *supra* note 39 at 413. Hoffer likewise made the observation that the most frequent abettor in those rare cases involving accessories was the defendant's mother. Hoffer & Hull, *supra* note 47 at 103.

²¹⁹ See *supra* note 227.

²²⁰ *The Montreal Gazette* (14 August 1847).

²²¹ *Ibid.*

child died simply “from want of care.”²²² That latter claim, if true, corroborates the view that infanticide was not infrequently a passive act. Sally Ann was acquitted of murder but convicted of concealment,²²³ and sentenced to six months’ hard labour.²²⁴

Three prosecutions implicated co-defendants who were the alleged parents of the victims.²²⁵ In two instances, the victims were twins. The first of those cases, which was tried in fall 1843, involved a respectable young woman and her lover charged with the murder and concealment of their illegitimate infant the previous December. One witness, a shopkeeper who lodged with his wife in the same house, alleged that Chance had been delivered of a child in December but that “la seule connoissance qu’il a eu de cette affaire est d’avoir trouvé un paquet de lainage plein de sang, dans sa cour près de la maison,” although he also attested to seeing a mysterious trench that had been recently dug in the building’s cellar.²²⁶ His wife claimed that on 2 December she heard the cries of a newborn emanating from Chance’s room. Chance refused all assistance, but the following day was confronted by the deponent and was told the infant had died

²²² *The Montreal Transcript* (7 August 1847).

²²³ A.N.Q.M., KB(R) (August 1846-August 1847) p.151-152, *Queen v. Sally Anne Armstrong* (3 August 1847). See also *ibid.*; *La Minerve* (5 August 1847).

²²⁴ A.N.Q.M., MG (Armstrong committed 9 February 1847, convicted 14 August and sentenced to six months’ imprisonment; discharged on 14 February 1848). A.N.Q.M., KB(R) (August 1846-August 1847) p.195, *Queen v. Sally Anne Armstrong* (14 August 1847). See also *The Montreal Transcript* (17 August 1847); *La Minerve* (16 August 1847). Note that just over a year had elapsed from the time of her initial incarceration to her discharge.

²²⁵ Hoffer & Hull, for example, have pointed out that fathers were not infrequently charged in concealment prosecutions, although they were rarely convicted. Indeed, co-defendants tended to be related. See Hoffer & Hull, *supra* note 47 at 103.

²²⁶ A.N.Q.M., KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (1 March 1843) (affidavit of Dominique Joannette).

shortly after birth and that it was in a box under the bed, awaiting burial in the cellar by Forgette. Later that evening, she saw Forgette enter the cellar with a shovel. Upon examination of the site with her husband, she saw that the earth had been disturbed, and she had no doubt that the child had been interred in the cellar.²²⁷

Chance and Forgette were examined before a local Magistrate. Chance acknowledged that she had delivered a male infant, but steadfastly denied having been responsible for its death. The child had died shortly after birth, and as she had lost consciousness she was not aware of the cause. She denied having said that Forgette was to bury the child in the cellar, and further denied any knowledge of the infant found in a thicket in Ste. Thérèse--perhaps as the authorities believed the couple had later removed the body from the cellar for fear of examination by the authorities, as there was no mention of a successful exhumation by the police in the court records.²²⁸ Forgette's assertions were largely identical, except that he added that the child had been buried in consecrated ground a few days after the delivery.²²⁹

The testimony elicited at trial has not survived, and the only information on her case appeared in a pithy reference found in the *Times and Commercial Advertiser*:

The prisoner had borne an unimpeachable character previous to her seduction, and the case excited much interest. It is to be regretted that the circumstances are not better fitted for publication, as they might convey a useful lesson to the

²²⁷ A.N.Q.M., KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (1 March 1843) (affidavit of Félicité Monette).

²²⁸ A.N.Q.M., KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (5 March 1843) (voluntary examination of Eleanor Chance).

²²⁹ A.N.Q.M., KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (3 March 1843) (voluntary examination of Stanislas Forgette).

public, and possibly prevent much of the immorality which prevails. The prisoner was ably defended by Messrs. Johnson and Hartley.²³⁰

That “able defense” was successful, as Chance was acquitted. Her alleged co-conspirator had been saved the ignominy of a trial as the grand jury refused to indict.²³¹

In the other two instances both co-defendants were bound to their trial, although the second of those cases was atypical in one important respect, namely that the putative parents were also implicated in an incestuous relationship:

POLICE--Yesterday, Elmiere Legault dit Deslauriere, and Louis Legault dit Deslauriere, her uncle, a habitant in respectable circumstances...were brought up on a charge of child murder. It appeared from the evidence of...the brother of the female prisoner, and Mr. Coursol, the Coroner, that the former having reason to believe that his sister had concealed the birth of a child, and had buried the body in the cellar, gave information of the fact to the latter, who thereupon went to the house of the prisoners, and instituted a search for the body, without success. He again returned in the afternoon, and the prisoners, who before had been away from home, now returned. Upon presenting themselves at the house, they were immediately given into custody, and brought to the Court House for farther investigation. Here they confessed that they had had two illegitimate children...and that they had buried both of them in the cellar; but that the latter had become so offensive as to induce them to remove it to the garden. Louis Legault also offered to show the spot where it was interred. He therefore accompanied the Coroner to his residence, and the ground was turned up in the place indicated by him; but without discovering the object of the search. Prisoner was therefore brought back; and now stands remanded, together with his sister, for farther examination. The male prisoner is a widower, of about thirty-five years old, and has three legitimate children. He has been cohabiting with his niece for the last three years.²³²

²³⁰ *The Times and Commercial Advertiser* (9 September 1843). See also *The Montreal Transcript* (8 September 1843).

²³¹ *Ibid.*

²³² *The Pilot* (7 September 1848) (citing *The Montreal Herald*). For other accounts of this case, see *L'Aurore* (8 September 1848) and *La Minerve* (7 September 1848):

INFANTICIDE--Un nommé Louis Legault et Elmiere Legault sa nièce, tous deux de St. Laurent ont été arrêtés mardi, et amenés au bureau de police sur accusation d'avoir entretenu ensemble un commerce illicite et d'avoir caché la naissance de deux enfants qui auraient été enterrés dans une cave. Avis en ayant été donné à

Neither of the two was prosecuted, as the grand jury failed to indict them for murder, manslaughter, or even concealment.²³³

The third case involving parents as co-defendants, the Whelan and Brennan trial, was among the more high-profile criminal trials of the period, eliciting extensive coverage in a number of Montreal newspapers. At their trial before the Court of Queen's Bench, the first witness called by the Attorney General was a neighbour of the defendants, who testified that the couple had cohabited for approximately four years, and that it had become apparent by May of the previous year that Whelan was in "the family way."²³⁴ After Whelan had delivered, the neighbour visited her at home, and saw Whelan sitting on the bed, looking very dejected. When asked what was the matter, Whelan allegedly replied, "whisht: with the help of God I will soon be well." The neighbour then observed a newly-delivered infant on the bed, and asked whether it was dead, to which Whelan ominously replied, "not yet." A short time later, having heard that there was another dead infant, the inquisitive neighbour returned and asked if it were true. Whelan admitted so, and the neighbour pulled back the bed sheets to uncover the other infant, who alleged sported a visibly crushed head and was covered

M. Coursol le coroner par le frère de la fille, il se transporta sur les lieux mardi et fit faire des fouilles dans la cave, mais sans résultat. Il parait que le prisonnier a avoué depuis, que les corps ont été exhumés de la cave et enterrés dans un champ, mais après de nouvelles recherches par le coroner, il a été impossible de les découvrir. D'après les témoignages et quelques aveux faits par les prisonniers ils ont tous deux été envoyés en prison.

²³³ A.N.Q.M., KB(R) p.321, *Queen v. Louis Legault otherwise called Desloriers & Elmire Legault otherwise called Desloriers* (6 February 1849) (no bill for murder); KB(R) p.322, *ibid.* (6 February 1849) (no bill for manslaughter); KB(R) p.323, *ibid.* (9 February 1849) (no bill for concealment).

²³⁴ *The Montreal Gazette* (7 February 1848) (case of Catherine Whelan and Peter Brennan).

in bruises. Whelan volunteered by way of explanation that Brennan's twelve-year-old son had beaten the infant the night before.²³⁵

A surgeon by the name of Frederick Steele Verity was next to testify. Upon examining the dead child at the behest of the acting coroner, Dr. Verity noted that "he was struck by the extraordinary appearance of the head, which had lost its rotundity, and was flattened." The autopsy revealed graphic evidence of head trauma, as the brain had been reduced to a "pulpy mass, shewing fearful violence to have been used," and the marks of fingers were still visible on the scalp. The lungs were found to have been uninflated, and the child fully developed, leading him to conclude that the child had not breathed and would have otherwise survived were it not for the traumatic injuries it had sustained. On cross-examination, Dr. Verity emphasized that he could not find any other cause of death, and that the injuries could not be have been caused in any other fashion. At the conclusion of his testimony the Court commended the doctor for the clear and scientific (and presumably truthful) way in which he had testified.²³⁶

Following Verity's cross-examination, defense counsel cited legal authorities for the proposition that in order for the defendants to be charged with murder, the evidence had to support the inference that the child had been "entirely born" and had breathed. As the evidence did not indicate that either of those elements was present, the defense argued, the charge of murder could not stand. The Court conceded the point, and the murder charges were dismissed. However, while noting the defendants had shown

²³⁵ *Ibid.*

²³⁶ *Ibid.*

“great moral criminality,” the Court nonetheless added that, while Whelan could conceivably be charged with concealment, the evidence would not sustain such a charge, and she was summarily acquitted of concealment as well.²³⁷

There remained one more legal hurdle for the defendants to clear: the fact that the other twin had been born alive and had died in the defendants’ care. The defendants were then summarily indicted for manslaughter, but the Jury, in the words of the *Montreal Gazette*, “did not consider the evidence conclusive” and acquitted them yet again.²³⁸ Thus, the prosecution, faced with two dead infants--one of which had sustained a crushed skull and severe bruising--was unable to secure a conviction for murder, manslaughter, or even concealment against either parent. Such cases, in which acquittals resulted in the face of strong inculpatory evidence, illustrate how the law could exhibit extraordinary leniency, either intentionally or through the Byzantine-like complexity of the criminal law, even in instances where the moral culpability of the defendants seemed incontrovertible. There would be little justice found on the family premises for illegitimate newborns during that era.

Those cases provide a wealth of information on the dynamics and circumstances surrounding neonaticide in Montreal during the first half of the nineteenth century. It is evident that juries were reluctant to convict defendants of any offense related to that crime. Circumstantial evidence, even facially compelling circumstantial evidence, was

²³⁷ *Ibid.* See also A.N.Q.M., KB(R) (August 1846-August 1849) p.219-220, *Queen v. Catherine Whelan & Peter Brennan* (trial for murder); KB(R) p.220-221, *ibid.* (trial for manslaughter).

²³⁸ *Ibid.*

often found to be insufficient to sustain a conviction. Indeed, juries often grasped at any evidence that would allow them to acquit.

The few cases in which convictions resulted, involving one count of murder and three of concealment, also indicate that mercy was extended insofar as the penalties imposed were far from the allowable maximum.²³⁹ It is not possible to offer dispositive reasons why those women were convicted when so many others were not, but the trials nonetheless offer tantalizing clues. Betsey Williams' distinction for being the only defendant convicted of infanticide during the years 1825 to 1850 raises intriguing questions. Hers appeared to be a clear case of infanticide, but she was hardly unique in that regard. Procedurally, the fact that she incriminated herself by making a full confession to the Justice of the Peace, and moreover offered no defence, certainly may have contributed to the outcome. Faced with unambiguous circumstances, the jury had to know that on conviction the Court would be required to impose a sentence of death, but that she would most likely have her sentence commuted, as indeed was the case. The likelihood of clemency being granted may well have assuaged whatever discomfort the jury felt at convicting her.²⁴⁰ However, the main distinguishing element of Williams' case (besides its outcome) was her identity. One is left to contemplate whether her status as an outsider--a mulatto woman who had lived far outside the city limits and who had

²³⁹ See *supra* at 71-76 (case of Betsey Williams); *supra* at 91-94 (concealment convictions).

²⁴⁰ That was a common occurrence in successful prosecutions for infanticide. Compare Osborne, *supra* note 141 at 51; Phillips, *Pardon*, *supra* note 171 at 438.

borne a child with a member of the First Nations – may not have made her a candidate for exemplary punishment.²⁴¹

Sally Ann Armstrong, for her part, endured extreme cold and privation but was convicted of concealment and sentenced to six months' imprisonment.²⁴² In her case, the evidence of negligence in providing for the child may have raised the possibility that she had intentionally let the child die. A jury, reluctant to convict for infanticide under any circumstances, may have felt that her actions warranted a clear sign of disapprobation and accordingly found her guilty of concealment. Not enough is known about the circumstances of the other two women who were convicted to allow for meaningful extrapolation.²⁴³

Examination of those cases leads one to conclude that the juridical response to infanticide was rife with contradiction. Despite public calls for the apprehension and punishment of the perpetrators of infanticide, there was strong sympathy for the unfortunate mothers who found themselves in untenable situations. Mothers were rarely identified, even more seldom brought to trial, and in a preponderance of cases were acquitted despite evidence that often strongly pointed to their guilt. In those exceptional instances where a defendant was convicted, she was much more likely to be convicted of the lesser offence of concealment. The handful of convictions found for the

²⁴¹ Compare Backhouse, *Infanticide*, *supra* note 13 at 112-124 (discussion of a First Nations defendant convicted of infanticide in Upper Canada in 1817).

²⁴² See *supra* at 98, 103, & 106-107.

²⁴³ See *supra* at 91-92 (cases of Anastasie Lepine *dit* Chevaudier and Jane Hughes).

period 1825 to 1850 further reflect that sentences tended to be below the maximum penalties allowed by law, and that the exercise of clemency further tempered the penalties imposed by courts.

The law and its servants--whether judges, jurors, or private or public prosecutors--could well afford to extend their chivalric notions of mercy to defendants charged with infanticide. The accused often had few options: an illegitimate child tended to bring with him or her ignominy, poverty, and a life of wretchedness. The young women in question had often given birth under less than auspicious circumstances, and given those women's ignorance of midwifery and the fragility of infant life, it required no leap of imagination in the absence of clear evidence of violence to assume the death was due to a "visitation of God." High infant mortality rates also served to inure people to the phenomenon of infant death.²⁴⁴

Even when the facts inculpated a defendant in an unassailable and unambiguous manner, the desire to exercise forbearance and leniency remained. Period medical literature depicted women as uterine-driven, with mental states that were fragile and easily addled. Indeed, it was a commonly espoused belief that a form of temporary insanity often overtook a woman due to the pain of labour. That form of dementia--a *fureur maniaque*, *folie passagère*, or puerpural mania--provided a ready justification for some mothers' murderous impulses when other explanations might have been

²⁴⁴ See generally Backhouse, *Infanticide*, *supra* note 13 at 447; Osborne, *supra* note 141 at 52; Rose, *supra* note 58 at 5.

unavailing.²⁴⁵ Jurors and jurists alike were also cognizant of the fact that a party who shared moral (if not legal) culpability--the father of the infant--rarely received censure.²⁴⁶ In the case of Marie Carmel, charged with and eventually acquitted of attempted murder of her infant by dropping him in a boarding house privy, a local newspaper unusually concluded its account of the facts leading up to her arrest by commenting as follows:

De quel poids le monstre qui la séduite n'a-t-il pas la conscience chargée? Chose épouvantable, la société déshonore, repousse de son sein une pauvre malheureuse créature qui a eu la faiblesse de céder aux séductions, peut-être aux promesses de mariage d'un amant, ou plutôt d'un ennemi atroce, et lui qui est la cause première de tout le mal, demeure impuni, ne perd rien de la considération qu'on a pour lui. Dans le cas actuel, quelle est la cause première du crime horrible qui s'est commis, et qu'on ne peut expliquer que par un délire, une démence, un étourdissement qui empêche la voix de la nature de se faire entendre? La mère assez barbare pour donner au fruit de ses entrailles une mort si épouvantable, est certainement un monstre; mais qui l'a réduite à cet état? Si l'impunité n'était par assurée aux séducteurs, il se commettrait moins de crimes de ce genre.²⁴⁷

²⁴⁵ Compare Donovan, *supra* note 69 at 169; Galley, *supra* note 76 at 81-85; Knelman, *supra* note 47 at 151; Sauer *supra* note 51 at 83. That view was to survive well past the nineteenth century. For example, the 1922 infanticide law in England declared all women potentially insane for the first few months after childbirth. See generally Higginbotham, *supra* note 76 at 337. Similarly, the present Criminal Code provisions concerning infanticide (R.S.C. 1985, C-46, s.233) read as follows:

A female person commits infanticide when by a willful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent upon the birth of the child her mind is then disturbed.

²⁴⁶ See generally Backhouse, *Infanticide*, *supra* note 13 at 462; Donovan, *ibid.* at 169 & 173; Langer, *supra* note 47 at 360; Rose, *supra* note 58 at 74.

²⁴⁷ *L'Aurore* (10 June 1846).

As such, the penalties provided for those crimes may have seemed too draconian, particularly for the capital crime.²⁴⁸ For those reasons, the gender of the majority of defendants may have induced leniency on the part of the law.²⁴⁹

While deeply-entrenched societal values were therefore implicated in the commission of infanticide, those values tended to be antithetical. The notion of an innocent babe being deprived of life by its mother certainly was, on its face, deeply shocking to Victorian sensibilities and inimical to sentimentalist notions of the purity of motherhood as well as general Christian precepts. That, however, was counterbalanced by the fact that those were middle-class constructs: the women most apt to commit infanticide may not have been seen as fitting that paradigm. Children were also viewed more as chattel than as individual rights-holders.²⁵⁰ If parents themselves did not champion their child's well-being, the extent to which society could comfortably justify incursions into the family sphere remained unclear. An infant who did not receive protection in the arms of his or her mother was unlikely to receive it elsewhere.

One is also rather cynically forced to conclude that from the viewpoint common in that era, infant deaths within the lower classes posed no tangible threat to the social fabric: their deaths caused no bereavement, threatened no laws of primogeniture or

²⁴⁸ Compare Osborne, *supra* note 141 at 53.

²⁴⁹ Compare Donovan, *supra* note 69 at 169. It has also been suggested that violent crimes in which women figured predominantly were generally not deemed as compelling as those crimes committed by men. *Ibid.* at 170.

²⁵⁰ Compare Gillis, *supra* note 242 at 463; Osborne, *supra* note 141 at 52.

inheritance, and deprived no-one of sustenance.²⁵¹ There were few adoptive families willing to provide for unwanted children, and no concerted public campaigns on their behalf. One can even go further and suggest, as has been argued in the context of nineteenth century France, that the infants in issue were not mourned as it was thought that the disreputable circumstances under which they had been born rendered them likely to become miscreants, prostitutes, or criminals.²⁵² Infant murder, therefore, could simply not be seen as nefarious a crime as other forms of murder.²⁵³ Ultimately, the law and its servants could well afford to exhibit mercy towards murdering mothers, for while the act might be characterized as “so foul a deed,” the stakes were nonetheless perceived as largely insignificant.²⁵⁴

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²⁵¹ Hoffer & Hull, *supra* note 47 at 79, have pointed out that the mercy shown defendants in infanticide trials by eighteenth century English judges and juries “perhaps reflected a sense of the diminished threat of crimes like infanticide to the social order.” For the view that infant deaths did not threaten bloodlines or inheritances, see generally Backhouse, *Infanticide*, *supra* note 13 at 477-478.

²⁵² Compare Donovan, *supra* note 69 at 163.

²⁵³ See generally Backhouse, *Infanticide*, *supra* note 13 at 463; Sauer, *supra* note 51 at 82-83.

²⁵⁴ That statement mirrors sentiments expressed by Harriet Taylor Mill and John Stuart Mill in *The Morning Chronicle* (28 August 1851) (cited in Clark, *supra* note 128 at 202.).