'Justice in the Premises':
Family Violence and the Law in Montreal, 1825-1850

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Submitted in Partial Fulfillment of the Requirements
for the Degree of Doctor of Civil Law

Abstract

The judicial response to family violence in Montreal during the period 1825 to 1850 was marked by paradox and flux. The criminal justice system, driven by private prosecutors, limited the ability of some victims to seek the law's protection, but it allowed others to exercise considerable discretion and influence over the pursuit of justice. The legal response to the crimes of infanticide, child abuse, domestic violence, and spousal murder was equally contradictory. Infanticide may have been depicted as a horrific crime, but the call for justice was never strong. Western societies became increasingly sensitive to the notion that parents should be held accountable for causing injury to children, but a belief in the sanctity of the family was still paramount. When child abuse cases did come before courts, children were often accorded the same legal remedies by courts as were adult victims. Similarly, while the issue of family violence was not then a widespread societal concern, and while the notion that a wife was subordinate to her husband remained a prominent part of early-Victorian life, hundreds of abused wives prosecuted their husbands for assault. Those cases reflect not only that abused wives were contesting their partner's use of violence, but also that courts were willing to intervene. Spousal murder cases were further evidence of contradiction: women were subject to heightened legal penalties for killing their partners, but their gender also insulated them from the full severity of the law.

In a period before the sweeping public movements that developed in the last several decades of the nineteenth century, courts were forced to grapple with family violence because private prosecutors brought those issues before them. In their willingness to hear cases involving infanticide, child abuse, domestic violence, and spousal murder, courts made public some of Victorian Montreal's darkest secrets. While the privately-driven system of justice was slowly to erode over the intervening decades, that erosion was to coincide with the rise of public crusades against child-cruelty, domestic violence, and other social issues. The visibility of family violence likely fuelled, and in turn was fuelled by, those social movements.

Précis

Acknowledgments

First and foremost, I am greatly indebted to my thesis supervisor, Blaine Baker. His abiding commitment to scholarship and teaching has been an inspiring example and I am grateful to him for his supervision, mentorship and friendship. Nicholas Kasirer was supportive of this and many other endeavours during my time at the Faculty of Law. They have both had an immense impact on my personal and academic evolution, and for that I offer my heartfelt thanks.

I wish to thank Daniel Boyer, Louise Robertson and John Hobbins for their assistance in navigating the Nahum Gelber Law Library's collections, and for their ongoing interest in my research. I also note with appreciation the support of Deans Stephen Toope and Peter Leuprecht during my doctoral studies, particularly the opportunities to teach they have given me over the past five years.

This thesis would not have been possible without the love of family. I am greateful to my parents, who have imparted to me a love of learning as well as an appreciation for the law; and to Andrzej, who has always taken interest and pride in the activities of his little brother.

I have never forgotten that the individuals whose stories reside in this work were once living people, struggling to cope with issues that continue to haunt contemporary society. I offer this thesis as a humble tribute to the trials and tribulations they endured.

List of Source Abbreviations

A.N.Q.M.	Archives nationales du Québec à Montréal
AP	Applications for Pardons
CR	Coroners' Inquests
JP (township)	Returns for Justices of the Peace
KB(F)	Files of the Court of King's Bench
KB(R)	Registers of the Court of King's Bench
MG	Records of the Montreal Gaol
MG(GC)	Gaol Calendars of the Montreal Gaol
MP	Registers of the Montreal Police Court
MP(GR)	Records of the Montreal Police, General Register of Prisoners
MP(RR)(township)	Records of the Montreal Police, Rural Returns
N.A.C.	National Archives of Canada
QS(F)	Files of the Court of Quarter Sessions
Reid	James Reid Papers, Criminal Cases

Introduction

He did not wear his scarlet coat,
For blood and wine are red,
And blood and wine were on his hands
When they found him with the dead,
The poor dead woman whom he loved,
And murdered in her bed.[1]

Oscar Wilde's 1897 poem, "The Ballad of Reading Gaol," is a work of poetic paradox that is an apt metaphor for the phenomenon of family violence in nineteenth century Montreal. A poem that depicts the last days of a wife murdered sentenced to death, the account of that "monstrous paricide" nonetheless is a deeply sympathetic account of a man who murdered the woman he loved. Rife with allegory about the dehumanizing effects of incarceration, the hands of inexorable justice appear no less bloody than those of the condemned murderers who were subjected to the law's ultimate sanction. It is also a deeply unsettling work premised on the notion that "each man kills the thing he loves." It is strange to think of the person one loves in terms that objectify; it is stranger still to contemplate a love that kills, in whatever manner, the object of its affections.

It is perhaps equally strange, but no less accurate, to observe that the family remains one of the most dangerous places in society. One simply cannot study the modern family or its antecedents without also studying domestic violence. This thesis is an attempt to contribute to our awareness of that issue in the nineteenth century

[1] Oscar Wilde, *The Ballad of Reading Gaol* (New York: Brentano's, 1904).

Canadian family, by examining the criminal justice system's response to family violence in Montreal during the period 1825 to 1850.

This work focuses on two family relationships: the parent-child relationship; and the spousal relationship.[2] An expansive definition of those relationships has been used, one that takes into account the richness and diversity of personal associations without including those that cannot cogently be included under the rubric of "family." It does not purport to be an encyclopaedic analysis of the social phenomenon of family violence, nor have I attempted to canvass every conceivable form of legal or quasi-legal response to such conflict.

The causes, commonalities, and conclusions of acts of family discord are central of the thesis, but those conclusions were reached through examination of the sources. Essentially, this thesis examines domestic violence as seen through the lens of the law. Nineteenth century domestic violence, in all its forms, has been immortalized in few sources other than judicial archives. As Kathryn Harvey has astutely stated, "[d]omestic violence has evaded the historian partly because it has left few written traces. It has left more marks on the body than the body politic."[3] This thesis seeks to reclaim the legal response to family violence by examining four related areas. Chapter I deals with

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[2] Only cases in which the marital or family relationship could be substantiated were included. A complicating factor is that married women in Quebec tended to retain their maiden names. Relationships between parties that fit those parameters were included (*e.g.* people in cognizable parent-guardian relationships, and cohabiting partners). In any event, those types of relationships made up only a minute percentage of the cases examined.

[3] Kathryn Harvey, "To love, Honour and Obey': Wife-Battering in Working-Class Montreal, 1869-1879" (Université de Montréal, Ph.D. Thesis, 1991) 26.

violence directed at the youngest of family members, examining the phenomenon of infanticide. Chapter II provides a continuation of that theme, discussing the role of courts in addressing child abuse. Chapter III examines the issue of spousal violence, while Chapter IV considers the most extreme incidents of spousal violence, those culminating in the death of an abused partner.[4]

To keep the scope of the thesis manageable, it does not address the role of violence in the extended family, nor does it dissect violence directed towards parents by their adult children.[5] It should also be emphasized that this is, first and foremost, a study of related forms of social pathology, not a study of nineteenth century relations writ large.[6]

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4 That structure mirrors, in large part, Linda Gordon's seminal study of nineteenth century family violence in Boston, examining child neglect, child abuse, incest, and wife battering. See generally Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* (New York: Viking Penguin Books, 1988). At a time prior to the formation of "the Cruelty," the issue of child neglect could not be examined in the same manner. The issue of spousal murder is a logical adjunct to the study of spousal battery, however, and was therefore included in this study.

5 Adult children are only discussed when incidental to cases of spousal violence.

6 As Doggett has noted, such complaints may not have much correlation with marriages in general. See Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London: Weidenfeld and Nicolson, 1992) 120. See also A. James Hammerton, *Cruelty and Companionship, Conflict in Nineteenth-Century Married Life* (London & New York: Routledge, 1992) 3:

> Some will no doubt regard all this an exercise in futility. An examination of marriage through its 'hard cases,' especially…when marital litigation involved such a tiny proportion of all marriages, runs obvious risks of judging the mainstream from the experience of the exceptional. To some extent all social history which draws on legal case histories encounters similar problems.

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

> 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.[7]

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.

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[7] *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.[8] 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

[8] 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."[9] 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.[10]

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[9] *The Montreal Gazette* (27 November 1826).

[10] 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.

Unwed mothers therefore faced a desperate situation and, hence, desperate choices.[11] It is not surprising, therefore, that three of the most common alternatives were abortion, abandonment, or infanticide.[12]

Abortion, although hardly unknown, was an illegal procedure and required that the mother disclose her situation to at least one other person.[13] 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.[14]

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.

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[11] 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.

[12] 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.

[13] 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 primative abortion"; defendant acquitted (30 September 1842).

[14] 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.[15] 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.[16] Abandonment was usually the preserve of a mother who had given birth out of wedlock, although not exclusively so.[17]

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[15] 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.

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

[17] 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.[18] 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.[19] 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.[20] 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:

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[18] 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).

[19] 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.

[20] *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.[21]

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.[22] Indeed, the staggering mortality rates of these institutions essentially reduced them to glorified mortuaries for the very young.[23] It was the very youth of these infants that played a determinant factor in whether they would survive.

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[21] *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).

[22] 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.

[23] 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.[24] 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.[25]

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

[24] 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.

[25] *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.[26]

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.[27] 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,

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[26] *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.").

[27] 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."[28] 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.[29] The stealthy nature of the offence worked to shelter the murderer, and infants were readily disposed of, metaphorically and otherwise.[30] Easily hidden, they also decomposed quickly,[31] and there were generally no third parties to report the child's disappearance.[32] 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.[33] 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

[28] Malcolmson, *supra* note 38 at 188.

[29] See generally Jarvis, *supra* note 39 at 133-134.

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

[31] See Donovan, *ibid.* at 160.

[32] See Wheeler, *supra* note 39 at 407.

[33] 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."[34]

The records of coroners' inquests are often of limited utility to historians. Many coroners had little or no formal medical training,[35] 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.[36]

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

[34] Rose, *supra* note 58 at 57.

[35] See generally *ibid.* at 57-58.

[36] 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	Visitation of God	No Finding Unknown		
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,[37] but the mothers were identified in only fourteen cases.[38] 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.[39] In seven other instances in which the inquest determined that the infant was murdered, the mother was also identified.[40] 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."[41]

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.[42]

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[37] 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).

[38] 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).

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

[40] Cases in which mothers were identified are denoted in Figure 1 by an asterisk.

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

[42] 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."[43] 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,[44] as well as by more chivalrous and charitable motives.[45] That contrasts with the depictions of infanticide as "so foul a deed" committed by "unfeeling mothers," [46] 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.[47]

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.[48] No doubt many infant bodies were never recovered, and the limitations of

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[43] 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.

[44] *Ibid.* at 62.

[45] *Ibid.* at 59.

[46] See *supra* at note 46.

[47] *L'Ami du Peuple* (25 May 1839).

[48] 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....[49]

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.[50]

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

[49] A.N.Q.M., CR no.498 (4 April 1825).

[50] *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.[51] Indeed, in some instances the circumstances surrounding the discovery of infant bodies were highly suggestive of murder.[52] 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.[53]

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[51] 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.").

[52] 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.

[53] *The Montreal Transcript* (12 July 1842) (citing *The Montreal Courier*).

It was only in rare cases that the parents were identified.[54] 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."[55] 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.[56]

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

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

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

[56] *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....[57]

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.[58] Still others may have denied responsibility for providing for the infant's burial, or acted out

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[57] *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).

[58] 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;"[59] the male child found "thrust in a wooden coffin with handles" in a meadow outside the city;[60] or the baby found buried in a "very decent coffin" in the government garden.[61] 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.[62] While no such examples were found in Montreal,

[59] A.N.Q.M., CR no.1039 (10 June 1834) (jury's verdict of "found dead").

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

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

[62] 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.[63]

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.[64] 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.[65]

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.

[63] Wright, *supra* note 47 at 18.

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

[65] *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."[66] Was there a more innocuous explanation for the pre-mortem bruising that had taken place, perhaps the result of an inexpert 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?[67] 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

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[66] *The Montreal Gazette* (15 March 1834).

[67] 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."[68] 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."[69]

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

[68] *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.

[69] *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.[70]

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.[71]

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.[72] In all such works, discussion of infanticide constituted a substantial part of the text, thereby underscoring the

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[70] Charles Dickens, *Oliver Twist* (Oxford: Oxford University Press, 1999) 5.

[71] *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.

[72] 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]".[73] 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.[74]

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

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[73] *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).

[74] 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.[75]

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."[76] 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.[77]

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

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

[76] *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.

[77] 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. [78] 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.[79]

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."[80] The importance of the medical evidence lay in the fact that "[w]hen it is stated that in most

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

[79] 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.

[80] 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."[81] 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,[82] and no doubt many coroners and doctors simply wished to avoid inculpating women as perpetrators of infanticide.[83] As Cliche has written, in cases of uncertainty the doctors gave the benefit of the doubt to the accused."[84]

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

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[81] *Ibid.*

[82] 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.

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

[84] 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.[85]

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."[86]

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

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

[86] *Ibid.*

and prosecuted.[87] 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.[88] 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.[89] 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.[90] While witnesses suspected the body of a newborn found

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

[88] 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.

[89] See generally Wiener, *supra* note 15 at 479 note 38.

[90] 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.[91] 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.[92] 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.[93]

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

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[91] *The Montreal Gazette* (7 September 1841).

[92] 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.").

[93] 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.[94]

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."[95] 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.[96] She was eventually convicted of concealment only, and sentenced to six month's imprisonment.[97]

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

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

[94] *The Pilot* (21 November 1845) (citing *The Montreal Herald*).

[95] *Ibid.*

[96] *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.*

[97] 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.[98] 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

[98] 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.[99]

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.[100] 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.[101]

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[99] See *infra* at 96.

[100] See generally Backhouse, *Infanticide*, *supra* note 13 at 448.

[101] 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.[102] 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

[102] 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.[103]

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…."[104]

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.[105] 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.[106]

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

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[103] 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.

[104] Cliche, *supra* note 47 at 45.

[105] "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).

[106] 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.[107] 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.[108] 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.[109]

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.[110]

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

[108] "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).

[109] *Parliamentary History of England 36* (London 1820) at 1245-1247 (cited in Hoffer & Hull, s*upra* 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.

[110] 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.[111] Lower Canada was to enact similar legislative provisions in 1812.[112] These statutes only encompassed illegitimate children, apparently as they were viewed as being the primary victims.[113]

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

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[111] 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.

[112] "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.

[113] 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.[114] 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 "vitiated by the courts' notorious aversion to convicting mothers."[115] 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.[116] The Act took effect in Lower Canada on January 1, 1842 following reform of the criminal law.[117] 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

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[114] "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.

[115] 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*].

[116] Rose, *ibid*. See also Krueger, *supra* note 32 at 274.

[117] "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."[118] Fortunately for historians, her story can be reclaimed from a number of sources.[119] 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

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[118] *L'Ami du Peuple* (18 April 1840) (author's translation).

[119] *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.[120]

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.[121] 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

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[120] 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.

[121] 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.[122]

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.[123]

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.[124] 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.[125] In the absence of any defense, it seems hardly surprising that the jury rendered a verdict

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

[123] *L'Ami du Peuple* (18 April 1840) (author's translation).

[124] 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.

[125] 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.[126] However, it should be noted that defendants in felony cases generally were shown significant solicitude despite the absence of counsel.[127] 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...."[128] 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.[129]

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

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[126] *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.

[127] Hay, *supra* note 17 at 32.

[128] *Ibid.* at 23.

[129] 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....[130]

That appeal proved successful, and the "awful sentence of the law" was respited by Governor's Pardon to three years in the provincial penitentiary.[131]

The phenomenon where defendants convicted of infanticide or other capital crimes routinely had their death sentences commuted was to be a common occurrence.[132] Prior to the establishment of the provincial penitentiary in Lower

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[130] 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).

[131] *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).

[132] 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.[133] 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.[134] 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.[135] 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.[136]

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

[134] 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.*

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

[136] 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.[137] 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.[138] However, it has commonly been suggested that women were much more likely to harm intimates, including husbands, lovers, and children.[139] 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.[140] Given that women paid the price for societal disapprobation

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[137] 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).

[138] 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.

[139] 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.

[140] 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.[141] In fact, some scholars have suggested that infanticide was one of the most common crimes for which nineteenth century women were prosecuted.[142]

The reluctance of juries to convict women of infanticide, however, abundantly documented in scholarship dealing with other jurisdictions, was also apparent in Montreal.[143] 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

[141] 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.

[142] 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).

[143] 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....").

	No Bill	Acquitted	Convicted	Convicted Less. Offense	Fled	Unknown	Juris.
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. [144] At least three defendants thwarted

[144] 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.[145] 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.[146]

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.[147] 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* Lestrase, 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, [Lestrase] replied, I hear well, she (the deponent) said it is a child in the cellar, the aforesaid [Lestrase] 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

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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).

[145] For discussion, see *infra* at 84-85.

[146] Compare Higginbotham, *supra* note 75 at 331.

[147] 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.....[148]

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.[149] 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 beaùfrère qui demeuroit 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.[150]

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

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

[150] 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.[151]

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.[152] 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* Lestrase, 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.[153] Another person, perhaps a relative of the defendant, swore out an affidavit that the defendant had been pregnant during the previous autumn.[154] A coroner's inquisition on the body

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[151] *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).

[152] 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).

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

[154] 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.[155] Although a true bill was found against her for murder, she never stood trial.[156]

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.[157] 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.[158] 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:

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

[156] 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).

[157] See generally Galley, *supra* note 76 at 51.

[158] *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."[159] 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.[160]

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

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[159] *The Canadian Courant* (21 April 1830) (emphasis in original).

[160] 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.[161]

While Carmel recuperated, the child was placed in the care of the Grey Nuns.[162] She was eventually committed on 29 June 1846,[163] and a true bill found against her for attempted murder on 6 August.[164] 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."[165]

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

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

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

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

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

[165] *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.'[166] Confessions that were induced, prompted, or coerced by police or other agents were thrown out by judges,[167] 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.[168] Guilty pleas to capital felonies were especially discouraged, on the grounds that they were inimical to the administration of justice.[169]

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

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

[167] 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.

[168] 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.")

[169] 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.[170] Carmel was accordingly discharged.[171]

The most common criminal offence in Montreal related to infanticide was that of concealment of birth.[172] 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.[173] 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

[170] *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 1946-August 1849) p.112-113, *Queen v. Marie Carmel* (11 February 1847) (trial and verdict).

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

[172] 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).

[173] 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.[174]

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.[175] Described by one paper as a "well looking genteelly dressed young woman," Hughes pleaded not guilty before the Court of King's Bench.[176] 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."[177] It is a further sign of the law's mercy that three months later she was granted a full pardon.[178] Another young woman was

[174] 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.

[175] *The Montreal Gazette* (6 September 1834).

[176] *The Montreal Herald for the Country* (8 September 1834).

[177] 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.*

[178] 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.[179] The third defendant received a sentence of six months after pleading guilty to "avoir caché la naissance de son enfant" in 1846.[180]

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

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> 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....

[179] 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.").

[180] 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.[181] 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."[182]

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.[183] 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.[184]

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

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

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

[183] Compare Cliche, *supra* note 47 at 50-51; Sauer, *supra* note 51 at 82.

[184] 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.[185]

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.[186] 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

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

[186] 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.[187] The mother spent several days in prison before charges against her were dismissed.[188]

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.[189] Second, male infants were no more likely to

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

	____ *BIRTH* _____			____ *GENDER* _____			_____ *AGE* _____			
	Illeg.	Leg.	N/I	Male	Female	N/I	New-born	Less Than 1 yr.	Over 1 yr.	N/I
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%	--	

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

[188] 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).

[189] 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).

survive than their unwanted female counterparts, as coroners' reports for Montreal have also indicated, as a majority of victims were male.[190] Third, nearly all the victims were newborns, suggesting that the greatest risk to unwanted children occurred shortly after birth.[191] Only two children had survived more than a few days in their mother's care, one living to five weeks of age,[192] and another surviving nearly a year before being murdered by her mother.[193] 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.[194] Furthermore, as far as can be determined, nearly all of the women involved came from unprivileged socio-economic backgrounds.[195]

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[190] 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.

[191] 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.

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

[193] See *infra* at 105-106 (case of Susan Pengelly).

[194] 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.

[195] 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.[196] 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.[197] No doubt social condemnation of illegitimacy played a large part,[198] 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.[199] That child was also another mouth to feed and could easily strain a mother's resources past the breaking point.[200] 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

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[196] 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.

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

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

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

[200] 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."[201] 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.[202]

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.[203] 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.[204] 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

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

[202] 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.

[203] 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.

[204] 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.[205] In addition, it must be noted that domestics constituted the largest occupational group among women of the period.[206] 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.[207]

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.[208] 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. Howeverm 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.[209] 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

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[205] See generally Wheeler, *supra* note 39 at 412.

[206] See Rose, *supra* note 58 at 19.

[207] See *ibid.* at 18.

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

[209] 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 wallnut wood....[S]he is now in bed and appeared unwell.[210]

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.[211] 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.[212]

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

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

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

[212] 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?[213] Was the non-concealment indicative of lack of premeditation?[214] Did Laurin's actions reflect a helplessness borne out of depression and despair?[215] 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.[216]

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

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[213] Compare Higginbotham, *supra* note 75 at 326.

[214] Compare Monholland, *supra* note 47 at 125.

[215] Compare *ibid.* at 126.

[216] 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.[217]

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.[218]

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:

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[217] *The Montreal Transcript* (7 August 1847).

[218] But see Wheeler, *supra* note 39 at 408 (arguing that townsfolk 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.[219] Other aspects of natal care that were widely practised also constituted a significant risk to infants, such as administering narcotic-based soporific agents.[220]

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-

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[219] 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.

[220] 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.[221]

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."[222] 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.[223]

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

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

[222] *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."

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

source of shame.[224] 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.[225]

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."[226] 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."[227] 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

[224] 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.

[225] See *supra* note 227.

[226] *The Montreal Gazette* (14 August 1847).

[227] *Ibid.*

child died simply "from want of care."[228] 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,[229] and sentenced to six months' hard labour.[230]

Three prosecutions implicated co-defendants who were the alleged parents of the victims.[231] 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.[232] 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

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[228] *The Montreal Transcript* (7 August 1847).

[229] 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).

[230] 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.

[231] 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.

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

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.[233]

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.[234] 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.[235]

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

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

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

[235] 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.[236]

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.[237]

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, Elmire 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.[238]

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

[237] *Ibid.*

[238] *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 Elmire 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.[239]

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."[240] 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

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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 parâit 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.

[239] 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).

[240] *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.[241]

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.[242]

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

[241] *Ibid.*

[242] *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.[243]

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.[244] 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

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[243] *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).

[244] *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.[245] 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.[246] 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

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

[246] 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. [247]

Sally Ann Armstrong, for her part, endured extreme cold and privation but was convicted of concealment and sentenced to six months' imprisonment.[248] 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.[249]

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

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

[248] See *supra* at 98, 103, & 106-107.

[249] 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.[250]

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

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

unavailing.[251] 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.[252] 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.[253]

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[251] 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.

[252] 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.

[253] *L'Aurore* (10 June 1846).

As such, the penalties provided for those crimes may have seemed too draconian, particularly for the capital crime.[254] For those reasons, the gender of the majority of defendants may have induced leniency on the part of the law.[255]

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.[256] 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

[254] Compare Osborne, *supra* note 141 at 53.

[255] 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.

[256] Compare Gillis, *supra* note 242 at 463; Osborne, *supra* note 141 at 52.

inheritance, and deprived no-one of sustenance.[257] 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.[258] Infant murder, therefore, could simply not be seen as nefarious a crime as other forms of murder.[259] 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.

[257] 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.

[258] Compare Donovan, *supra* note 69 at 163.

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

A Time Before 'the Cruelty':

Child Abuse and the Montreal Courts, 1825-1850

Ian C. Pilarczyk*

In November of 1840, a capacity crowd sat transfixed in a Montreal courtroom as nine-year-old Cordille Levesque entered the witness stand in the trial of Emelie Granger, her aunt and legal guardian. Granger, a woman of respectable social standing from St. Jerome, Lower Canada, had been arrested five months earlier on a charge of "cruelly beating and ill-treating" her niece. No doubt the spectacle of a young girl testifying against an abusive relative was of sufficient rarity to guarantee heightened public interest, and the proceedings surely did not disappoint the spectators.[260]

Cordille's parents had died not long before, and her aunt and uncle, as legal guardians, were responsible for providing their young ward with the necessities of life as well as for promoting her general welfare. Cordille quickly learned, however, that her aunt was more likely to raise a fist in anger than offer a warm embrace. Granger's brutal treatment of her young niece took a toll on Cordille's health, and she was soon bedridden. The seriousness of her condition eventually brought her plight to the attention of the neighbourhood physician as well as relatives, and Cordille was removed

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[260] For discussion of the theatre-like atmosphere of local courts in the nineteenth century, see generally Peter King, *Crime, Justice, and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000). See also Paul Craven, "Law and Ideology: The Toronto Police Court, 1850-1880" in David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 248.

from her aunt's house and boarded with another family member. On 27 June 1840, a Terrebonne physician named Simon Fraser filed a complaint against Granger on a charge of "assault et batterie très grave sur un enfant de dix ans," in which he alleged that two days earlier he had visited Cordille and had found her on the verge of death from her injuries:

> [J]e trouvai la susnommé tellement meurtrie dans le bras gauche à l'articulation du coude qu'il étoit impossible de s'aperçevoir s'il était cassé et l'épaule droite est encore si enflé que je ne puis pas décider actuellement dans quel état il est. J'ai aussi aperçu plusieurs coups sur la tête et sur le corps, ceux de la tête pouroit cause une abcès pour les raisons ci dessus je ne puis encore dire si l'enfant est hors de danger par l'apparence je suis fonde à penser et jurer que ces blessures ont été infligées par autruie et qu'elles, ne sont point accidentelles, ne dit rien de plus.[261]

After one such episode left her covered in bruises, Granger told her niece, "si tu ne dit pas á ton oncle que tu as tombé eu bas de l'escalier je te tuerai."[262]

Cordille herself swore out an affidavit before William King McCord, Esquire, who served as Justice of the Peace for Terrebonne. The fact that this affidavit has survived leaves posterity with an account of her sufferings as she recounted them, albeit filtered through and perhaps translated into legal jargon:

> Cordele Levesque dit Sansaucis...[dit]...[q]ue depuis longtemps, elle aurait été maltraité et battu sévèrement par Emelie Granger sa tante. Que plusieurs fois elle l'aurait frappé avec une canne, d'autre fois avec un manche à balai, de manière à la blessé et lui faire des plaies. Que la tante le dit Emelie Granger l'aurait une fois enfermée dans la cave pour la battre et une autre fois dans le grenier. Qu'elle l'a plusieurs [fois] frappé à coup de poing et l'aurait pris par le col en la soulevent de

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[261] Archives nationales du Québec à Montréal [hereinafter A.N.Q.M], Files of the Court of Quarter Sessions [hereinafter QS(F)], *La Reine v. Emelie Granger* (27 June 1840) (affidavit of Simon Fraser, M.D.)

[262] *Ibid.*

> terre et l'aurait jeté de suite par terre la terrassant ainsi cruellement et la faisant souffrir boucoup et en la frappant de plusieurs coup de pieds—qu'elle lui aurait avec une cuillère a cassé une dent.[263]

Those charges against Granger would normally have been heard by the Court of Quarter Sessions, the general court of criminal jurisdiction in Lower Canada during the period in issue. However, even when the regular sittings of civilian courts resumed following suppression of the Rebellions of 1837 and 1838, swollen dockets of untried prisoners continued to frustrate courts' ability to dispose of cases in a timely manner. As such, a Court of Oyer and Terminer and General Gaol Delivery was convened in late 1840, and it was before that Court on 6 November that the grand jury found a true bill against Granger for abusing her niece.[264]

At Granger's trial the following week, Cordille was the principal prosecution witness, and was said to have delivered her testimony "in a clear and remarkably intelligent manner considering her youth."[265] Her depiction of the punishments she had endured at her aunt's hands was clearly shocking to middle-class sensibilities. As one newspaper account summarized it, the aunt had been "in the habit of practicing every description of cruelties on her person, such as beating her with sticks and other offensive weapons; locking her up in the cellar and in cupboards for hours together."[266]

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[263] A.N.Q.M., QS(F), *La Reine v. Emelie Granger femme de Toussaint Trudelle* (27 June 1840) (affidavit of Cordele Levesque dit Sansaucis).

[264] *The Montreal Gazette* (14 November 1840).

[265] *The Montreal Herald* (16 November 1840).

[266] *Ibid.*

Another newspaper reporter summarized her testimony as being to the effect that her aunt had been "in the habit of often cruelly and inhumanely beating her, and on some occasions, of inflicting such wounds upon her as to cause the blood to flow profusely."[267] A third newspaper reporter chose to avoid specifics, but left no ambiguity about his feelings: "the acts of violence to which she swore...are such as would cause the most hardened character to shudder at the bare recital of those acts."[268] Cordille's treating physician, Dr. Fraser, corroborated her story by offering a detailed account of her injuries, repeating the claims made in his original complaint in which he had stressed that he had considered her life to have been "in the most imminent danger" as a result of her mistreatment.[269] So badly battered was she, in fact, that Dr. Fraser was initially unable to tell whether or not her bruised and swollen limbs had been fractured.[270] It is unclear what strategy Granger's defense counsel employed in the face of such damning evidence. Apparently her attorney had attempted to establish "certain palliative facts…but these facts having occurred at different periods from those laid in the indictment, could have no relation to the injury done to the orphan child."[271] Whatever the nature of the evidence presented by defense counsel, the jury found it unconvincing, as they deliberated for only a few minutes before returning a verdict of

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[267] *The Montreal Gazette* (14 November 1840).

[268] *The Montreal Transcript* (14 November 1840).

[269] *The Montreal Gazette* (14 November 1840).

[270] See *The Montreal Herald* (16 November 1840). See also *La Reine v. Emelie Granger*, *supra* note 2.

[271] *The Montreal Transcript* (14 November 1840).

guilty.[272] Revealingly, Granger's status as an otherwise respectable woman did not insulate her from a prison sentence any more than it had insulated her from prosecution. Indeed, cases such as this one might have been among the few where respectability was a potential liability. There is some evidence to indicate that middle-class women who abused their children were punished more severely, as such conduct was deemed eminently unladylike.[273] Granger was remanded to the local prison, and shortly thereafter was sentenced to three months' incarceration.[274]

What makes the prosecution of Emelie Granger particularly riveting from an historical perspective is the fact that it happened at all. For a Montreal court to have taken cognizance of non-lethal child abuse in the first half of the nineteenth century, at a time that predated child protection legislation and agencies such as the Society for the Prevention of Cruelty to Children (better known as "the Cruelty"), is worthy of note. The exceptional nature of the case, however, certainly does not lie in the fact that Cordille's experiences were an anomaly, as immoderate correction of children was no doubt a common feature of nineteenth century life. Rather, its significance lies in the fact that the prosecution of a parent or legal guardian for what amounted to abuse or neglect was unusual in the early-to-mid-Victorian period. Then, as now, the family sphere remained a most dangerous place. Newborns often fell victim to abuse or to the

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[272] A.N.Q.M., Register of the Court of King's Bench, p.35-36 [hereinafter KB(R)], *The Queen v. Emelie Granger* (12 November 1840). See also *ibid.* (14 November 1840).

[273] Compare Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991) 107.

[274] See *The Montreal Gazette* (4 December 1840). See also *The Montreal Transcript* (5 December 1840).

homicidal impulses of parents, and were subject to assault, sexual abuse, and murder at their hands thereafter. Cases such as Cordille's reflect that when a family member's treatment of a child posed a serious risk to that child's health or welfare, Montreal courts were prepared to intervene, at least in some instances, and hold the adults responsible under the ordinary provisions of the criminal law.

This article will discuss the phenomenon of child abuse at the hands of family members in Montreal, and analyze those cases in which family members were alleged to have mistreated children. In so doing, it will demonstrate that during the period 1825 to 1850, as in other Western jurisdictions, the law was deferential to parents and guardians in terms of how they chose to discipline their children, and took only occasional cognizance of such cases. Even so, courts did impose limits on parental treatment of the Crown's youngest subjects, meting out sanctions in cases of the physical and sexual mistreatment of children despite the lack of statutory protections and institutions devoted to promoting child welfare. Part I will offer a brief history of social mores regarding the rearing of children, and will trace the evolution of child protection agencies in the nineteenth century. Part II will examine prosecutions of parents and guardians for assault, murder and related offenses against children, and Part III will round out the discussion of violence against children in the family sphere by exploring the phenomenon of incest.

I.

It is not mere hyperbole to state that the history of children in the western world is a history of victimization. Children were viewed as chattel belonging to their parents

(more specifically, their fathers), and limits on paternal authority over children were few and far between. As has historically been the case, the most dangerous place for children is usually in the family.[275] In England, the courts of Henry I intervened when a child was killed by anyone other than a parent,[276] but under the common law parents traditionally exercised virtually unfettered authority over their children.

Protection of children in Western jurisdictions before the late-nineteenth century was not unknown, however. For example, in 1641 the Massachusetts Bay Colony enacted a legislative code entitled *The Body of Liberties*. A very progressive legal code for its time in many ways, it proscribed parents from exercising "unnatural severity" towards their children, and accorded children legal redress in the event their parents did so.[277] Still, parents were able to make ready use of corporal punishment in correcting their children, and the term "unnatural severity" was sufficiently ambiguous as to allow for a wide range of parental discipline.

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[275] Thomas Boyle has made that point in his work about accounts of crime culled from the archives of mid-Victorian English newspapers, in which he stated that most violent crime during that era occurred in families. See Thomas Boyle, *Black Swine in the Sewers of Hampstead* (New York: Viking Books, 1989) 27. For a discussion of family violence in early nineteenth-century Montreal, including child abuse, see Ian C. Pilarczyk, 'Justice in the Premises': Family Violence and the Law in Montreal, 1825-1850" (McGill University, D.C.L. thesis, 2003) [hereinafter *Justice*].

[276] See generally 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) at 17.

[277] *The Body of Liberties* (1641), article 83, which stated (transliterated into modern English) that "[i]f any parents shall wilfully and unreasonably deny any child timely or convenient marriage, or shall exercise any unnatural severity towards them, such children shall have free liberty to complain to authority for redress." See generally Gleason L. Archer, *History of the Law* (Boston: Suffolk Law School Press, 1928) at 427. See also Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987) 22. The Massachusetts Bay Colony, along with Plymouth, was the earliest Western jurisdiction to criminalize family violence, including spousal abuse. See Pilarczyk, *Justice*, *supra* note 16 at 219.

As Elizabeth Pleck has suggested, examination of childrearing literature can offer telling insights into the changing nature of societal attitudes towards corporal punishment. By examining that literature from the sixteenth to the nineteenth century, an evolution in philosophy is apparent. While the use of corporal punishment to correct children had historically been widely advocated and commonly practised, by the first half of the nineteenth century American and English childrearing manuals indicated that there was a growing disinclination to inflict physical chastisement.[278] As the century advanced, that disinclination was to become more pronounced, with the result that this "gradually shifting stance toward childrearing practices constituted a kind of private reform movement against family violence."[279]

One trend in middle-class America in the early-nineteenth century was a change in parental roles in terms of the childrearing function. Mothers gradually usurped fathers as the main agent of childrearing, with increased emphasis on psychological methods of child discipline. A review of American magazines from 1741 to 1825 indicates a strong preference for a cooperative approach toward childrearing, with duties shared by both parents. By the period under examination, an increasing number of those same magazines argued that mothers should play the central role in childrearing, and indeed maintained that they already did so.[280]

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[278] See generally Pleck, *ibid.* at 34 (stating that by this period six child-rearing manuals advocated corporal punishment while three opposed it).

[279] *Ibid.*

[280] *Ibid.* at 39.

By the period under examination, there had therefore been a discernible shift in childrearing philosophy away from corporal punishment and towards a more psychologically-driven form of child discipline that relied much more heavily on selective reinforcement.[281] That approach was thought to be better adapted to developing a sense of conscience, enabling a child to see the errors of his or her ways. As such, the child was seen as playing a central role in his or her discipline.[282]

While those trends are illuminating, the extent to which the philosophies espoused in childreading manuals were emulated by parents is another issue. As Pleck has noted, "[s]ince parents often ignore childrearing advice, writers of such literature may have influenced each other more than they managed to modify parental behavior."[283] It is much more likely, as Pleck concluded following an examination of other sources, that corporal punishment remained a stalwart feature of child discipline. However, it also appears that by the first half of the nineteenth century corporal punishment of children had become milder, with whipping giving way to spanking.[284]

Changes in the nature of punishment in private eventually led to changes in modes of public punishment, as well. By the middle of the century in the United States, corporal punishment was eliminated from many public schools. Laws against flogging

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[281] See generally *ibid.* at 40.

[282] See generally *ibid*.

[283] *Ibid.* at 43.

[284] See generally *ibid.* at 46.

in the Navy soon followed.[285] Reform movements advocated the abolition of slavery, capital and corporal punishment, and animal cruelty during the mid-Victorian era, all of which reflected a growing revulsion towards physical abuse directed against sentient beings in positions of subordination or helplessness.[286] The movement against animal cruelty was firmly entrenched in England by the middle part of the century, in which it was argued that cruelty towards animals encouraged cruelty towards people.[287]

The 1830s and onwards, in particular, marked a period of institution-formation in England and the United States, designed to assist blind, deaf, mentally impaired, orphaned, or disadvantaged children. [288] As the century advanced, philanthropists and social crusaders became increasingly involved in issues related to children, setting up schools, facilitating emigration of neglected children to British North America and elsewhere, and forming societies designed to combat cruelty to children.[289]

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[285] See generally *ibid. at 48.*

[286] See generally *ibid.*

[287] See generally George K. Behlmer, *Child Abuse and Moral Reform in England, 1870-1908* (Stanford University Press, Stanford, 1982) at 3. As *The Montreal Weekly Pilot* of 15 October 1846 asserted:

> Cruelty to animals is one of the distinguishing vices of the lowest and basest of the people. Wherever it is found, it is a certain mark of ignorance and meanness--an intrinsic mark, which all the external advantages of wealth, splendour, and nobility, cannot obliterate.

Analogous statements about child abuse and spousal violence did not appear in the period press. In England, several statutes governing animal cruelty were passed between 1822 and 1835, and the Society for the Protection of Animals was founded in 1824. See generally Lionel Rose, *The Erosion of Childhood, Child Oppression in Britain 1860-1918* (London and New York: Routledge, 1991) 235 [hereinafter *Childhood*].

[288] See generally Radbill, *supra* note 17 at 13. See also Hugh Cunningham, *Children and Childhood in Western Society Since 1500* (London & New York: Longman, 1995) 147.

[289] See generally Cunningham, *ibid.* at 134.

Against that backdrop was a change in the conception of childhood itself. Some historians have pointed to the post-1830 period as marking a turning point, with growing awareness of the importance of a child's right to a proper childhood.[290] As the century progressed, a "romantic sensibility towards childhood" became predominant.[291] As one social historian has written:

> At its heart [romanticism] was a reverence for, and a sanctification of childhood which was at total odds with the Puritan emphasis on the child as sinful being. Romanticism embedded in the European and American mind a sense of the importance of childhood, a belief that childhood should be happy, and a hope that the qualities of childhood, if they could be preserved in adulthood, might help redeem the adult world.[292]

Romanticism, therefore, marked a shift away from the perception of children as miniature adults, to minors who required a proper childhood to mature into adulthood. Along with that greater concern for the sanctity of childhood was a growing concern about the family itself, viewed as a "crisis in the family" resulting from a rise in divorce and marital desertions, movements for women's rights, and the like.[293]

Despite a growing preoccupation with children's developmental needs, they remained a prominent part of the work force throughout the nineteenth century (and beyond) in Western jurisdictions. For much of the nineteenth century, children were routinely abused, exploited, maimed, and even killed by the cogs of industry. The New

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[290] See *e.g. ibid.*

[291] *Ibid.* at 74.

[292] *Ibid.* at 78.

[293] See generally Michael Grossberg, *Governing the Hearth*, *Law and the Family in Nineteenth-Century America* (Chapel Hill & London: University of North Carolina Press, 1985) 10.

England states began to pass child labour laws in the 1840s.[294] France passed the Child Labour Law in 1841, which marked the first concerted effort on the part of government in that country to protect children from the carnage wrought by the industrial revolution.[295] In all industrialized countries of that period, the perceived need to regulate child labour was palpable. In 1835, forty-three percent of the workers employed in the English cotton industry were minors.[296] It was not until the latter part of the Victorian period that child labour laws were passed that regulated working conditions for minors. Those statutes served to ameliorate, in a limited way, the worst abuses of the industrial age.[297]

The rise of the anti-child labour movement contributed to the growing societal awareness of children's issues. However, as George Behlmer has suggested in the English context, it may also have contributed to anti-child cruelty crusades in another way: "[c]orrespondingly, the need to shield the young from parental misuse became palpable because late Victorian children spent more time at home, in closer contact with their mothers and fathers, than did working children two generations earlier."[298]

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[294] See generally *ibid.* at 144.

[295] See generally *ibid.*

[296] See *ibid.* at 141.

[297] See generally Radbill, *supra* note 17 at 7; Behlmer, *supra* note 28 at 7-9; see generally Lionel Rose, *The Erosion of Childhood, Child Oppression in Britain 1860-1918* (London and New York: Routledge, 1991) 9-11 [hereinafter *Childhood*]. For discussion of Montreal labour law as it related to servants during the period under examination, including minors, see Ian C. Pilarczyk, "'Too Well Used by His Master': Judicial Enforcement of Servants' Rights in Montreal, 1830-1845" (2001) 46 *McGill L.J.* 491-529; "The Law of Servants and the Servants of Law: Enforcing Masters' Rights in Montreal, 1830-1845" (2001) 46 *McGill L.J.* 779-836 [hereinafter *Masters*].

[298] Behlmer, *ibid.* at 46-47.

While a general softening of attitudes towards the discipline of children is therefore discernable in the nineteenth century, the issue of corporal punishment of children remained separate from that of child abuse. As Pleck has observed in the context of antebellum America, "[c]ausing permanent injury to a child was always considered wrong, but before the Civil War there was no palpable interest in defining what cruelty to children was."[299] That observation holds true throughout Anglo-American jurisdictions of the mid-Victorian period, with parents continuing to exercise power over their children free from virtually all legal constraints save in respect of the most serious injuries.[300] English common law allowed that parents could "lawfully" or "reasonably" chastise a child, and were required to provide for children's basic physical needs, but no serious effort was expended to define those terms further.[301]

During the period under examination, societal acceptance of traditional modes of child discipline became increasingly uneasy. As sentimentalist notions of childhood took hold, there was increasing scrutiny of methods of correction. The 1830 New Hampshire case of Reverend Samuel Arnold is instructive in that regard. Indicted for having disciplined his five-year-old adopted son with a horsewhip for obduracy in his reading lessons, the case caused a firestorm of controversy over the minister's conduct. Arnold and his supporters felt driven to release an anonymous pamphlet to vindicate him in the eyes of popular opinion. Arnold's depiction of the innate stubbornness of

[299] Pleck, *supra* note 18 at 48.

[300] Compare *ibid.* at 2; Rose, *Childhood*, *supra* note 38 at 233.

[301] See generally Behlmer, *supra* note 28 at 6.

children, and the concomitant need to discipline them, no doubt rang true to many contemporary parents, although that sentiment was no longer universal:

> One of the most striking and prominent characteristics of human nature, is a disposition to be independent--an unwillingness to submit to salutary control. This disposition is abundantly manifested by persons of every age. The child, especially, has a strong disposition to have his own will….Children, or some of them at least, are emphatically self-willed. This foolishness is bound up in the heart of a child; and God, who knows the heart, and how to operate upon it in the best manner, has, with no less benevolence than wisdom, prescribed the rod of correction to drive it far from him.[302]

The view of children as stubborn creatures who were engaged in a battle-of-wills for dominance against their parents was a philosophy in dispute by the 1830s, and in the decades that followed the momentum shifted to more progressive child-rearing philosophies.

There were some attempts to curtail the worst instances of violence against children by the middle of the nineteenth century, but those legislative enactments were sporadic and of limited utility. Public discussion of children's issues became more noticeable in England in the 1830s, prompted by the anti-slavery crusade of the time.[303] As one social critic wrote in 1833:

> It is notorious that the health of the negro slave, of the adult felon, of the horse, of the ass, of the hare, of the rabbit, of the partridge, of the pheasant, of the cabbage, and of the strawberry, is protected by law; but at the same time, the Children of the Poor are unprotected by the law....[304]

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[302] Philandros, *An Astonishing Affair! The Rev. Samuel Arnold Cast and Tried for His Cruelty* (Concord: Luther Roby, 1830) 120.

[303] See generally Cunningham, *supra* note 29 at 140.

[304] *Ibid.* (citing Richard Oastler).

Indeed, abusing an animal in Montreal during that period routinely led to incarceration, while the same was not true for assaulting a child.[305] As has been famously stated about England in the nineteenth century, they "diminished cruelty to animals, criminals, lunatics and children (in that order)."[306]

Prior to the 1830s, policies towards children were marked by concern about the child's eternal soul, or reflected the state's concerns about population growth, drains on the public purse, and manpower needs. Thereafter, another concern was to surface prominently, namely an awareness of the need to protect children in their enjoyment of a proper childhood.[307] It became increasingly clear that children were victimized by parents for financial reasons, among them the payment of burial insurance following a child's death. In 1850, the English Parliament passed the first of several pieces of legislation designed to stamp-out the role of burial insurance in child murders.[308]

In terms of statutes that could be more properly characterized as "child protection" legislation, apprentices were the first group to be accorded legislative protection in the nineteenth century. In 1851, the English Parliament provided for three

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[305] See *e.g.* A.N.Q.M., Registers of the Montreal Police Court [hereinafter MP] p.276, *Domina Regina v. Edouard Nadeau* (11 August 1840) (fifteen days in House of Corrections for "illtreating a horse"); MP p.26, *Domina Regina v. Augustin Perrault* (19 July 1842) (one week imprisonment for "cruelty to a horse and overloading"); MP p.4, *Domina Regina v. Alexander Portelange* (11 April 1842) (three days imprisonment for "cruelty to a Horse"). See also 2 Vict. c. 2 (1839) (L.C.) (statute prohibiting cruelty to animals).

[306] Conley, *supra* note 14 at 105 (quoting Harold Perkins).

[307] See generally Cunningham, *supra* note 29 at 134.

[308] 13 & 14 Vict. c.115 (1850) (U.K.). The Act prohibited insurance over £3 on any child under the age of ten, and stipulated that all benefits be paid directly to undertakers rather than parents. For discussion of burial insurance and child murder, see generally Behlmer, *supra* note 28 at 119-137.

years' incarceration on conviction for willful neglect or malicious assault on an indentured child, prompted by the case of Jane Wilbred, a fourteen-year-old ex-workhouse girl, who was beaten and nearly starved by the couple she served as a domestic.[309] Two years later the same Parliament enacted "The Act for the Better Prevention of Aggravated Assaults upon Women and Children," which was an attempt to accord greater legal protection to women and children against assaults.[310] However, not only was that legislation not intended to address abuse within the family, but it also did little to alleviate the ill-usage of children. Prosecutions brought under the Act dealt almost exclusively with violence against women.[311] A law providing for legal proceedings to be brought against parents for child neglect that resulted in serious risk of harm to a child was not enacted in England until 1868.[312] At any rate, legislation could only be part of the solution. Conservative judges still proved exceedingly reluctant to punish parents for conduct that did not result in a child's death.[313]

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[309] 14 & 15 Vict. c.11 (1851) (U.K.). See Rose, *Childhood, supra* note 38 at 42 and 234. See also Behlmer, *ibid.* at 305.

[310] 16 Vict. c.30 (1853) (U.K.). It provided for a prison term of six months or a fine of up to , 20 for attacks on females and on males under fourteen that resulted in bodily harm.

[311] See generally Behlmer, *supra* note 326 at 12. Rose, *Childhood, supra* note 326 at 233, likewise noted the lack of utility of the legislation in addressing child abuse by parents. In the context of spousal violence, some commentators have pointed out that greater levels of violence were tolerated when directed at children rather than wives. See *e.g.* David Peterson del Mar, *What Trouble I Have Seen: A History of Violence Against Wives* (Cambridge: Harvard University Press, 1996) 57 (nineteenth century Oregon).

[312] That Act, known as "The Poor Law Amendment Act," allowed for Boards of Guardians to initiate legal proceedings against parents for neglect. See generally Behlmer, *ibid.* at 80. It superseded the Poor Law Act of 1834 that required parents to support children as a way of preventing them from being public burdens, but by all accounts it was a failure. See generally Rose, *Childhood, supra* note 28 at 234.

[313] Rose, *ibid.* at 233 (footnotes omitted):

It was not until the 1870s that the child protection movement became a potent social force. In North America, it was again the case of an abused child that focused public attention on the issue, this time the saga of Mary Ellen in 1874. Her mistreatment led the Director of the American Society for the Prevention of Cruelty to Animals (ASPCA) to initiate legal proceedings against Mary Ellen's stepmother, although he acted as a private citizen and did not--contrary to a popular myth that persists--argue that she deserved protection of the law as a member of the animal kingdom.[314] The stepmother was found guilty of felonious assault and sentenced to one year at hard labour, and Mary Ellen was sent to an orphanage.[315]

As a direct result of the Mary Ellen case, the New York Society for the Prevention of Cruelty to Children (NYSPCC) was founded shortly thereafter, a linear descendant of the six-year-old ASPCA.[316] It concerned itself first with physical abuse, but the Cruelty (and its offspring) eventually expanded its efforts to encompass child beggary, child

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> In a rare success [in England] against a parent in 1869 a man named Griffin was convicted for so severely thrashing his 2 2 year-old-daughter with an 18-inch strap when her crying annoyed him, that she died of shock. His defence that he had every right to 'correct' his child was rejected by the judge on the grounds that the chastisement must be appropriate to the age of the child. And by the later 1880s it was established in principle that chastisement by teachers and parents must be 'reasonable' but it was still difficult to secure convictions before conservative-minded judges where no death resulted. Thus, when at that time a father was tried for stripping and beating his frail son when drunk till the boy was found a mass of bruises, the magistrate held that this was insufficient to amount to an 'aggravated assault'!

[314] Apparently Mary Ellen was brought to Court under the medieval English writ of *de homine replegando*, which allowed a magistrate to remove a person from another's custody. See Pleck, *supra* note 18 at 71. For the story of Mary Ellen, see J. Riis, "Little Mary Ellen's Legacy" in *The Children of the Poor* (London: Sampson, Low & Marston, 1892); Pleck, *ibid.* at 69-73.

[315] See generally Pleck, *ibid.* at 71.

[316] *Ibid*; Joyce & Stephen Antler, "From Child Rescue to Family Protection, The Evolution of the Child Protective Movement in the United States" (1979) 1 *Child & Youth Services Rev*. 177 at 179.

labour, neglect, abandonment, parental alcoholism, and the like.[317] Such social activism was less controversial than campaigning for women's rights, and women played a prominent and socially accepted role in the rise of the anti-child cruelty movement.[318]

By the early 1880s, the child protection movement had taken root in England, with social reformers and philanthropists crusading against child abuse.[319] Using the NYSPCC and similar organizations as a model, the Liverpool Society for the Prevention of Cruelty to Children was founded in 1883,[320] followed the next year by the London Society for the Prevention of Cruelty to Children.[321] Those organizations not only provided quasi-governmental intervention and oversight in suspected cases of child abuse and neglect, but also were powerful lobbying groups. While progress did not always come easily, by the 1880s Western legislative bodies showed a heightened inclination to promulgate child protection laws. For example, New York passed the State Penal Amendment Act in 1884 that contained provisions against child neglect and prohibited certain types of child employment on health and moral grounds.[322] The Act for the Prevention of Cruelty to Children was enacted in England in 1889, and was the first such act in that country to provide that children could be put under the

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[317] See generally Antler, *ibid.* at 180; Pleck, *Tyranny*, *supra* note 18 at 84-85.

[318] See generally Pleck, *ibid.* at 88; Cunningham, *supra* note 29 at 136.

[319] See generally Behlmer, *supra* note 28 at 44.

[320] See generally *ibid.* at 53.

[321] See generally *ibid.* at 63. See also Linda Gordon, "The Politics of Child Sexual Abuse: Notes from American History" (1988) 28 *Fem.Rev.* 56 at 57 [hereinafter *Politics*].

[322] See generally Behlmer, *ibid.* at 81.

guardianship of relatives or institutions should their parents be convicted of cruelty.[323] The same year France enacted legislation designed to protect children's welfare by allowing for guardianship of children when "fathers and mothers...through their habitual drunkenness, their notorious and scandalous misconduct, or through ill treatment, compromise the safety, health or morality of their children."[324]

In many ways, the work of those early child protection agencies was inefficacious. Among their other limitations, they tended to be class-driven. However, one point is unassailable: by the mid-1880s the discourse in the United States and England regarding children had been significantly altered, and a child's right to reasonable treatment by relatives became increasingly embedded in the collective Victorian consciousness. While legions of children still suffered brutality at the hands of adults, the family sphere was no longer deemed to be impervious to outside scrutiny, the authority of the *pater familias* never again considered to be sacrosanct.

The period 1825 to 1850, then, was an era that saw the genesis of movements that were antecedents to the anti-child cruelty crusades. While methods of child rearing were evolving and softening from those of earlier periods, the years 1825 to 1850 evidenced no widespread legislative, social, or juridical action to protect children from the excesses of their parents and guardians. Nevertheless, those years may be seen as providing the 'soil' from which those movements sprouted, thereby presenting a fruitful and under-

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[323] See generally *ibid.* at 109.

[324] Cunningham, *supra* note 29 at 151 (quoting J. Donzelot, *The Policing of Families* (London, 1980) at 30 & 83-88). See also Behlmer, *ibid.* at 110.

appreciated period for scholarly examination. Analysis of the legal response to child abuse in the family in Montreal during that period assists in illuminating the evolution of the Western anti-family violence movements that became so prevalent in later decades.

II.

The existence of child abuse and neglect in Montreal during the period 1825 to 1850 is a paradox, as it was both invisible and ubiquitous. As has been stated, that period was many years removed from the formation of child protection organizations in any Western jurisdiction, Quebec included, and there were no statutory provisions specifically designed to deal with child abuse or neglect. In view of a strong deference to family authority, a pervasive ethos of paternalism, and the importance placed on the private sphere by Victorian society, the relative invisibility of child abuse should not be surprising. The paucity of child abuse prosecutions is also due in no small part to the fact that children did not have ready recourse to the legal system, an enormous obstacle in a system that depended largely on private prosecutions to bring offenses to the attention of courts.325 While there were many factors that militated against the legal system taking cognizance of such cases, one need not dig far below the surface of contemporary periodicals or that of the judicial annals to see that instances of child

325 The system during this period was a highly-localized, court-driven system, in which private prosecutors initiated a great deal, if not the majority, of the business heard before the courts. For discussion of privately-driven criminal justice, see *e.g.* Allen Steinberg, *The Transformation of Criminal Justice, Philadelphia, 1800-1880* (Chapel Hill & London: University of North Carolina Press, 1989); David Philips, *Crime and Authority in Victorian England* (London: Croom Helm Limited, 1977); Peter King, *Crime, Justice, and Discretion in England 1740-1820* (Oxford: University Press, 2000).

abuse and neglect nevertheless did come to the attention of the legal system, and that many possible cases were never prosecuted.

The discovery of infant bodies in Montreal was, as has been seen, a constant hint of infanticide. Likewise, foundling hospitals struggled to deal with a stream of abandoned infants.[326] Older children were also left to fend for themselves. In the fall of 1829, for example, a ten-year-old child stricken with smallpox was found in the suburb of St. Lawrence. His relatives had left him to provide for himself, as his mother had died and his father's whereabouts were unknown. The editor of the *Montreal Gazette* incredulously asked how it was possible that a person could be "so lost to every feeling of humanity as to abandon a child in such a situation to death, by disease or hunger, in a city where a Hospital is open for the reception of such unfortunates."[327]

Children were also found neglected or abused in public areas. More often than not, their parents were found to be habitual inebriates.[328] With the establishment of the Montreal Police force in 1838 and sporadic coverage of their exploits in the press, references to neglectful and drunken parents surfaced. *L'Ami du Peuple* in November

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[326] For discussion of infant abandonment, see Pilarczyk, *Justice*, *supra* note 16 at 30-36.

[327] *The Montreal Gazette* (15 October 1829). No evidence was found of any related legal proceedings.

[328] See *e.g. L'Ami du Peuple* (27 November 1839):

> Mardi 26, Station B: un jeune enfant fut trouvé a une heure du matin, nus pied, dans les rues, et l'on sut bientôt qu'il était celui de M. et Mad. Davidson, qui s'était sauvé au milieu des disputes ordinaires et désordonnées de ses parens. Le pauvre petit eut péri sans doute sans les promots secours qui lui furent donnés par la police. Le père et la mère furent logés à la Station jusqu'au lendemain matin. Puisse cette légère correction leur inspirer plus de quiétude à l'avenir.

When brought before the Police Magistrate on charge of "ill-treating their child," the parents were "admonished and discharged." A.N.Q.M., MP, *Domina Regina v. James Davidson* (26 November 1839); MP, *Domina Regina v. Mary Davidson* (26 November 1839).

1839 contained news from Stations A and B of the Montreal Police, including the following item:

> Deux femmes mariées, habituées de la Station, furent arrêtées comme troublant la paix dans leur ivresse....Elles furent mises en liberté le matin, l'une à sollicitation de son pauvre mari, et l'autre parce qu'elle avait un enfant à allaiter. Il est à regretter qu'il n'existe pas un asyle où l'on puisse donner refuge aux enfants, qui ont le malheur d'être nes de semblables mères.[329]

Horrific cases of child abuse occasionally surfaced in the popular press, such as the saga of a young girl in Quebec City routinely abused by her mother. The child had been beaten and whipped all over her body, even on the soles of her feet.[330] Tried before the Court of King's Bench, her mother was sentenced to one year in prison and ordered to supply a surety in the amount of £100 to keep the peace for one year.[331] Accounts of children being starved to death by their parents were also fodder for the Montreal press, as in other jurisdictions of the day. As one such account read:

> Shocking Barbarity--One of the most shocking instances of inhumanity, we have ever heard of was communicated to us by a respectable female. In a lane leading from Church St., one of the neighbours has been annoyed for two or three days by the crying and afterwards moaning, of two children in an adjoining house.--Upon entering the house to investigate the cause, a hearty, lusty woman was discovered sitting on the lap of a man, and every thing around indicating the abode of wretchedness and cruelty.--After a search of some time, the children were discovered in an upper apartment, coiled up in a parcel of straw, one, a nursing child of about eight months old, and the other apparently about two years, deserted by the inhumane mother, and both starving to death. A few hours more and relief would have been too late. The oldest child had not strength left to raise its head.--It was the intention of the mother to rid herself of her troublesome burthens, and starving was the means designed, as the better way to elude

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[329] *L'Ami du Peuple* (30 November 1839).

[330] *The Montreal Gazette* (31 March 1835) (case of *Pierre Gauvin v. Sophie Mailloux*).

[331] *The Montreal Gazette* (4 April 1835).

> justice. We have endeavoured yesterday morning to ascertain what disposition had been made of them, and learn the mother had consented to give the infant away, to a person who will take care of it. We can say nothing to the fate of the other; but it is hoped that our authorities will provide for it, and punish this hard hearted wretch to the utmost rigor of the law. Humanity calls for it.[332]

Perhaps those parents wished to avoid the risk of attempting to abandon their children. Indeed, accounts of abandonment of children of all ages graced the pages of Victorian periodicals with a frequency that is shocking to modern-day sensibilities. The account is also typical, in that while "humanity" might have called for punishment "to the utmost rigor of the law," no prosecution apparently followed.

The limitations of the sources often make it difficult, if not impossible, to determine what final disposition resulted in many cases. Many references to inhumane acts in the press were to parents and incidents that never appeared before the court system. Even when complaints were filed, the inability to trace those cases to any sort of formal disposition is an omnipresent frustration. In many instances, a final judgment was never recorded. As discussed in the context of infanticide cases, the reasons for that problem are multifarious, yet the explanations for the premature termination of a specific case can only rarely be adduced. For example, on 29 April 1844 a true bill was found before the Court of Quarter Session against a parent "pour avoir cruellement battu son enfant âgé de 8 ans," but thereafter no mention of that case was found in any

[332] *The Vindicator* (13 January 1829) (citing *The Christian Register*). For similar accounts of murder of children through violence and starvation in mid-nineteenth century England, compare Boyle, *supra* note 16 at 27-34.

of the judicial sources. Whether the defendant fled from the province, or the prosecutor declined to pursue the matter further, remains unknown.[333]

Despite those constraints, it is possible to recreate the framework of child abuse cases and the legal response to them. Similarly to the crime of infanticide, scholars have commonly argued that nineteenth century child assaults and homicides were crimes usually perpetrated by women, and children constituted the main type of victim at the hands of women.[334] In Montreal, women figured prominently in judicial annals, making up a slim majority of defendants in child abuse prosecutions.[335] However, those figures should not be taken as dispositive. As discussed in the following chapter, many affidavits by abused wives evidence violence inflicted on children by their fathers that was never brought to the attention of authorities.[336]

During this period, cases of child abuse generally came to the attention of the state in one of two ways: through the activities of the local police, who happened upon

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[333] *La Minerve* (2 May 1844). See also *The Montreal Gazette* (2 May 1844) (case of Clot/Clet Goulette).

[334] See *e.g.* Judith Knelman, *Twisting in the Wind, The Murderess and the English Press (Toronto: University of Toronto Press, 1998)* 123 (noting that in Victorian England infants and children were the most common murder victims at women's hands); Conley, *supra* note 14 at 107-108 (noting that women committed the majority of child assaults and homicides). Adler noted that in his study sixty-nine percent of child homicides were committed by women prior to 1890, but after the 1890s men accounted for eighty-four percent of child homicides. Jeffrey S. Adler, "'My Mother-In-Law Is To Blame, But I'll Walk On Her Neck Yet': Homicide In Late Nineteenth-Century Chicago" (1997) 31 *J. Soc. Hist.* 253 at 262.

[335] Excluding cases involving incestuous acts or abduction, seventeen out of twenty-nine cases, or 58.6%, were brought against female relatives. In Canada in 2001, 60% of alleged perpetrators of child abuse were mothers. *Family Violence in Canada, A Statistical Profile 2001* (Ottawa: Statistics Canada, 2001) 1.

[336] See Chapter III, Pilarczyk, *Justice*, *supra* note 16 at 285-288. In the context of marital violence, Hammerton claimed that "even the most drunken man chose his victims with care and calculation, rarely attacking his children, which would have brought more serious consequences...." A. James Hammerton, *Cruelty and Companionship, Conflict in Nineteenth-Century Married Life* (London & New York: Routledge, 1992) 46. I find such a claim dubious for myriad reasons, but will limit my comment to the observation that I believe violence against children was less likely to be prosecuted than was wife battery.

or responded to an incident of child abuse; or through the filing of a complaint before a local magistrate that led to the issuance of an arrest warrant. Not surprisingly, usually complaints were filed by third parties. Indeed, it must be emphasized that several obstacles would have hampered prosecutions for child abuse. Foremost among them was the notion of the inviolability of the family.[337] Besides the disabilities of lack of statutory or common law protection, children faced a multitude of economic, social, psychological, legal and other obstacles that militated against their seeking protection of the laws. As George Behlmer has observed in his work on the public response to child abuse in later nineteenth century England, "[t]hat few children appear to have been assaulted is natural; the young either could not or dared not prefer charges against adult males."[338] Many, if not most, jurists would have recognized the right of fathers to discipline their children physically, so assault and battery prosecutions would generally have required severe injury.[339]

In a period that predated child protection agencies by decades, there were also no social workers or child advocates dedicated to protecting children from neglect and abuse. In the event that a complaint was filed, evidentiary encumbrances further hampered prosecutions. If a child was found not to understand fully the nature of the oath, he or she was disqualified from testifying, effectively precluding the testimony of

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[337] Compare Conley, *supra* note 14 at 100 (also noting that non-intervention reflected "the more practical concern that rate-payers not have to support the children of idle reprobates.").

[338] Behlmer, *supra* note 28 at 13.

[339] Compare Conley, *supra* note 14 at 104.

the youngest victims of assault.[340] Furthermore, under the law a wife was legally incapacitated from testifying against her husband, hindering private prosecutions even further if a child's mother was a witness to the abuse.[341] In the absence of well-organized police forces and the investigative apparatus of the modern state, allegations of child abuse were only likely to come to the cognizance of the courts if third parties intervened on the child's behalf.[342] Coupled with the fact that most instances of violence against children happened in the home, set against a backdrop of a strongly-entrenched ethos of the sanctity of the *patria potestas*, it was undoubtedly only the rare instance of child abuse that surfaced.

With respect to third party intervention, police occasionally witnessed acts of child abuse while patrolling city streets. Some of those were acts of violence perpetrated by strangers against children. Occasional newspaper reports also indicate that, in some instances, abusive conduct by parents was publicly observed and precipitated intervention by bystanders. In the summer of 1829, for example, a mother was seen immersing her child several times in the river. Suspecting she wished to drown the child, a small number of bystanders watched her to ensure no tragedy occurred while the police were summoned. She was committed to prison for breach of the peace.[343] Similarly, in the summer of 1848 a father was brought before the Police Magistrate after

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[340] See Rose, *Childhood*, *supra* note 28 at 237.

[341] *Ibid.* This rule did not apply if the wife had been victimized at her husband's hands. See Pilarczyk, *Justice*, *supra* note 16 at 239.

[342] Conley, *supra* note 14 at 105.

[343] See *The Vindicator* (12 June 1829) (case of McCluskey).

he took his seven-year-old son to the waterfront, tied a rope to the boy's waist and attached the other end to a nearby post, and then pushed the child into the water from a scaffold used to unload scows. A bystander confronted him and was told by the father to "[m]ind your own business." Believing that the child was in danger, he dragged the child out of the water. In the meantime, another citizen alerted a policeman who apprehended the father; for his part, the father said in his defense that he had not intended to harm his boy but only wished to punish him for some misdeed.[344] In both cases, there was an element of ambiguity as to whether the parent had really intended to drown the child, but nonetheless both had put their child's wellbeing at risk.[345]

When a parent was brought before the Police Court for abusive conduct, the usual response of the magistrate was to "admonish and discharge" the offender.[346] For example, in April of 1839 a mother was arrested, admonished, and discharged for assault and battery against her child.[347] Later that same year, a husband and wife were charged with "illtreating their child" and the same disposition ensued.[348] One such case appeared to have implicated breach of the peace as well as neglect, and the defendant was admonished and discharged for being "drunk and turning his child out of doors" in

[344] See *The Montreal Register* (8 June 1848) (citing *The Montreal Herald*) (case of McLean).

[345] It is not known what legal disposition resulted in either of those cases.

[346] That was similar to the experience involving domestic violence cases heard before the Police Court. See Pilarczyk, *Justice*, *supra* note 16 at 310-311.

[347] A.N.Q.M., MP, *Domina Regina v. Mary McShewen* (22 April 1839).

[348] A.N.Q.M., MP, *Domina Regina v. James Davidson*, and *Domina Regina v. Mary Ann Davidson*, *supra* note 365. See also MP, *Queen v. François Lanschagrin* (29 August 1838 (defendant charged with "beating his daughter," admonished and discharged).

January.[349] The nature and ramifications of such a proceeding remains a matter of conjecture, although it is likely that the Police Magistrate heard the testimony of a police constable or reviewed the affidavits filed in the case, and then warned the defendant not to repeat his or her conduct for fear of being fined or incarcerated.

While admonishing a malefactor was obviously of limited utility in terms of child protection, it is interesting to note that this response foreshadowed that of later decades, following the advent of child protection agencies. In the 1870s and 1880s, as inspectors from "the Cruelty" investigated cases of child abuse and neglect, the usual response of inspectors was to issue an admonition to offenders.[350] While the existence of such agencies afforded children greater protection than in earlier periods, relatively few cases of abuse were brought before a court.

In other situations, the presiding Justice of the Peace required that the defendants provide a surety to keep the peace. One such situation involved Elizabeth "Betsey" Kennedy, a spinster who had frequent altercations with the law. Kennedy had borne two illegitimate sons in the late-1830s. If the judicial sources are accurate indicators, Kennedy's case was atypical in that she bore those children out of wedlock with Henry Driscoll, Esquire, a man of otherwise respectable social standing. Even more interestingly, Driscoll was a member of the minor judiciary, serving as a Justice of the Peace for the judicial district of Montreal.

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[349] N.A.C., Records of the Montreal Police, General Register of Prisoners, vol. 33 [hereinafter MP(GR)] (John Paylor arrested 19 January 1841).

[350] See *e.g.* Behlmer, *supra* note 28 at 52, noting that the NYSPCC acted circumspectly so as to avoid engendering public hostility: "Discretion was exercised in the prosecution of offenders. Unless aggravated assault was involved, the society's action consisted of a warning…followed by occasional visits from an inspector."

While judicial archives have obvious limitations as sources of information for reconstructing personal relationships, it is clear that the association between Kennedy and Driscoll was violently antagonistic, and their appearance in the annals of the criminal courts of the period began soon after the birth of the eldest of the two sons. Driscoll and Kennedy maintained separate places of habitation, the children lodging with Kennedy. The first court appearance by one of the parties followed the arrest of Driscoll on 29 April 1840 on a charge of having assaulted Kennedy.[351] Just over two weeks later the role of defendant was reversed, with Driscoll charging Kennedy for a misdemeanor, alleging that she continually harassed him with "persevering persecutions." As he stated in his complaint:

> Betsey Kennedy...does, and for a long time past, has been in the habit of so doing, come frequently to this deponent's door and rings violently and knocks there at, and continues to do so until this deponent descends thereto, and then by violent language and abuse endeavours to extort money from him although he duly supplies her with lodging, clothes, and money for the comfortable support of the said two children, and molests and disturbs him so as that he cannot live peaceably, and quietly and follow properly his business and avocation. And this deponent further saith that…for the purpose of extorting money from him...[Kennedy] frequently brings the said children to his door, and pushes one of them in, and makes them cry, and after having pushed one of those children in as aforesaid, afterwards returns and abusingly demands from him the same child, and sometimes brings them to his door in bad weather and thinly clad (although he has supplied them with comfortable clothing), and endeavours by making an outcry in the street and by pretending to cry, and by falsely stating that this Deponent lets the said children starve, occasions this deponent public scandal....

[351] A.N.Q.M., QS(F), *Domina Regina v. Henry Driscoll*, *Esquire* (April 29, 1840) (arrest warrant).

Driscoll maintained that Kennedy's actions made him "inexpressibly miserable" and "inspires him with an apprehension that, at length, goaded to desperation by her persevering persecutions, he may endeavour to repulse her by some bodily force...." He continued by stating that he also feared her actions might have deleterious effects on the children, and that she would never cease her behaviour towards him unless he secured legal intervention:

> And this deponent further saith that he entertains a just apprehension that, unless the said Betsey Kennedy be bound to refrain from so molesting him by bringing the said children to his house as aforesaid in bad weather and in slight cloathing, the said children may receive injury to their health and possibly die. And this deponent further saith that...he is certain that she will not refrain from persecuting him unless she be bound over to keep the peace….[352]

She was accordingly arrested and lodged in the local prison.[353]

Thereafter Kennedy's appearances before local courts were prompted by her alleged mistreatment of their children. In July of 1841, she was prosecuted for illtreating her eldest son. A neighbour whose apartment overlooked a courtyard shared by the house occupied by Kennedy alleged that one afternoon he saw her grab her son, pin him between her knees and strike him in the face with her fist "with such violence as to stun the child to such a degree...that thereby and by her covering its mouth with one of her hands as it to stifle its cries, it was unable to cry out but struggled in vain to escape."[354]

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[352] A.N.Q.M., QS(F), *Henry Driscoll, Esquire v. Betsey Kennedy* (15 May 1840) (affidavit of Henry Driscoll).

[353] A.N.Q.M., QS(F), *Domina Regina v. Betsey Kennedy* (15 May 1840) (arrest warrant). According to the language of the warrant, she was arrested for "molesting Henry Driscoll...by knocking violently at his door, and by abuse and violent language, endeavouring to extort money from him...."

[354] A.N.Q.M., QS(F), *Domina Regina v. Elizabeth Kennedy* (8 July 1841) (affidavit of Joseph Guilbault).

As a result of the blows, he alleged that she bloodied the child's apron as well as her own hand.

Alarmed by her conduct, the neighbour wanted to intervene but his wife, he attested, convinced him instead to seek out the landlord. After being informed of what had transpired, the landlord sent his daughter-in-law to retrieve the child, thus concluding a chain of intervention-by-proxy initiated by the neighbour. In his complaint, the neighbour further alleged that Kennedy was frequently drunk and "when in that state is of such a violent temper as to be unfit to have the charge of children," and as a consequence he feared the children's lives were endangered. By virtue of that complaint, in September of 1841 Kennedy appeared before a local Justice of the Peace. There is more than a hint of irony in that proceeding, as the Justice in question was Henry Driscoll, the child's father. That type of presentistic conflict of interest appears to have been of no real note during the period under examination. Indeed, Justices of the Peace and other jurists often presided over matters in which they had a direct or indirect interest, and exhibited no discernable concern about the appearance of impropriety.[355] Driscoll required Kennedy to provide a surety for her future good conduct in the amount of twenty pounds.[356]

During the period under examination, sureties took two related forms: sureties requiring court attendance (often referred to as "recognizances"); and sureties for good

[355] For discussion of conflict of interest in proceedings before Justices of the Peace, see generally Donald Fyson, "Criminal Justice, Civil Society and the Local State: The Justice of the Peace in the District of Montreal, 1764-1830" (Université de Montréal, Ph.D. thesis, 1995).

[356] For the text of Kennedy's surety, see Appendix A in Pilarczyk, *Justice*, *supra* note 16 at 453.

conduct (also referred to as "being bound to the peace"). The former was a document that bound the individual to attend court, either as a defendant or as an essential witness, on penalty of forfeiture of a specified sum of money. Most frequently two other co-signers or co-sureties were required, each of whom pledged one-half of the specified amount in case of default. Failure to pay the specified amount of money could result in incarceration until the payment was made. As the majority of criminal cases were launched by private prosecution, an individual who commenced proceedings was often required to provide surety to ensure his or her attendance at the upcoming session of court in which the case would be tried. That requirement had the double advantage, at least in theory, of preventing unfounded prosecutions as well as of facilitating the efficient administration of justice.

The type of surety that Kennedy was required to enter into, a surety for good conduct, operated in similar fashion except that the defendant was required to keep the peace for a specified length of time. Sureties were an ancient element of English criminal justice, and repeat offenders involved in family violence in early-colonial America were often required to post such bonds.[357] During the first half of the nineteenth century in Montreal, the length of time specified in those documents typically ranged from three months to two years, but most commonly was of six months' or a years' duration. Kennedy's surety was exceptional insofar as no length of

[357] See generally Pleck, *supra* note 18 at 27. Similarly to nineteenth century Montreal, Pleck further observed that if offenders failed to post such a bond they were imprisoned. If they did post the bond and were found to have violated its terms, the bond was forfeited. *Ibid.*

time was specified. While that may have been merely an oversight--albeit a fairly egregious one--one suspects that Driscoll might have been exercising his discretionary power to produce a document that would effectively require Kennedy to keep the peace in perpetuity. Regardless, the terms of a surety required that the defendant keep the peace towards the aggrieved party, and/or the public at large, for the specified length of time. The sums of money forfeited in case of default also varied considerably, from a low of five pounds to a high of five hundred, but most commonly consisted of twenty, fifty, or a hundred pounds.

Those two types of sureties were closely related to each other, and indeed overlapped in several crucial ways. A recognizance to appear in court also bound the defendant to keep the peace until his or her scheduled court appearance, for example, and the forms used for both were often the same, with deletions or additions being entered in ink by the issuing Justice of the Peace.[358] Sureties to keep the peace are of most relevance to discussions of family violence, as they were an essential element in the administration of criminal justice. Such sureties interposed the coercive arm of the law between two conflicting parties and thus share similarities with contemporary restraining orders, offering as they did some form of protection to the victim. Sureties to appear in court, for their part, were similar in principle to bail today, as non-attendance in court resulted in forfeiture of the specified sum; however, they were commonly applied to private prosecutors and witnesses as well as to defendants. Undoubtedly

[358] For discussion of recognizances, see generally David Philips, *Crime and Authority in Victorian England* (London: Croom Helm Limited, 1977) 99-100.

sureties were of limited efficacy, but they were nonetheless commonly sought by private prosecutors, and in some cases were specifically requested in complaints.[359]

Those types of cases, whether they were heard before Police Magistrates or Justices of the Peace, simultaneously illustrate the law's willingness, as well as its reluctance, to intervene in cases of parental violence towards children. Jurists no doubt felt that they were warranted in expressing disapprobation of a parent's methods of

Prosecutions for Child Abuse Against Relatives and Guardians, 1825-1850

Charge	No N/I	Acquit Bill	Admon. & Disc.	Surety	Convicted	
Murder	n=2	--	--	1	1*	--
Carnally knowing and abusing female child under 10 years	n=1	--	1	--	--	--
Incest	n=1	--	--	1	--	--
Ravishment	n=1	--	--	--	--	1
Abduction	n=1	--	--	--	(1) 3 yrs.	--
Attempted murder/ Assault with intent to murder	n=3	1	--	2	--	--
Assault with intent to maim	n=1	--	--	--	(1) 9 mon.	--
Aggravated assault	n=4	--	--	--	(1) 3 mon.	3

[359] For an example, see Pilarczyk, *Justice*, *supra* note 16 at 245.

Threats and menaces	n=2	--	--	--	--	(1) 9 days (1) 5 days	--
Assault and battery	n=7	--	--	2	2	1**	2
Ill-usage/ill-treatment	n=6	--	--	5	--	(1) 7 wks.	--
Misdemeanor	n=1	--	--	--	--	--	1
Dangerous lunatic	n=1	--	--	--	--	1***	
Breach of the peace	n=1	--	--	--	--	--	1
Misc.	n=1	--	--	1	--	--	--
TOTAL	n=33	1	1	8	6	9	8
% of Total		3.0%	3.0%	24.2%	18.2%	27.3%	24.2%
Adjusted Total		4.0%	4.0%	32.0%	24.0%	36.0%	

Figure I.

* reprieved from sentence of death
** incarcerated for lack of bail
*** institutionalized

disciplining a child, but that expression had its limitations. Moreover, any rulings must be viewed contextually--in many ways, such judgments flouted traditional deference to family privacy and the tenets of paternalism, and flew in the face of precepts enshrined in the common law.

Figure I outlines all the instances of legal proceedings initiated in Montreal during the period that involved child abuse at the hands of family members, including sexual offenses, and their final dispositions. Only complaints where children were alleged to be the primary victims were counted. Many acts of family violence were directed towards

multiple family members, as well as third parties, and violence against a spouse and children were usually prosecuted as if only against a parent.[360] Many complaints that included violence against children therefore were not examined in this study, such as the case of Mary Whitely, prosecuted for assault and resisting the police in 1841. In the complaint it was alleged that she had assaulted her young son, breached the peace, attacked her aunt and a neighbour (who filed suit against her), and resisted arrest.[361] Analysis of child abuse allegations is inhibited by the large number of complaints for which no clear information on the disposition can be found, amounting to nearly a quarter of all cases. While all period juridical sources suffer from lacunae, that figure is in itself suggestive. Penetrating the privacy of the family was not an easy undertaking in the early-to-mid Victorian period.

Likewise, the near-absence of any full-fledged trials of relatives or guardians for the murder of children is striking. Infanticide prosecutions were not infrequent at that time, and numerous cases of children being killed by non-relations were found in the archives.[362] The dearth of prosecutions for child murder is somewhat inexplicable. While one might wish that no child fell victim to lethal mistreatment at the hands of family members, such an inference seems naive.

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[360] See Pilarczyk, *Justice*, *supra* note 16 at 285-288.

[361] A.N.Q.M., QS(F), *Domina Regina v. Mary Whitely* (3 April 1841).

[362] Most Montreal cases involved children being accidentally run over by carriages in the streets of Montreal or other instances of misadventure. For examples of child murder in nineteenth century England, see Patrick Wilson, *Murderess: A Story of the Women Executed in Britain Since 1843* (London: Michael Joseph Limited, 1971) 150-154 & 186-189.

One of the most interesting cases found in the judicial annals is that of Elizabeth Birch, heard in 1830. Not only is it an intriguing case, it was also singularly difficult to reconstruct. The surviving judicial records concerning that case, for example, have one unusual feature: while no copies of complaints, arrest warrants, or related documents were found, several affidavits of support from neighbours were located. The events leading up to her arrest therefore must be synthesized largely from newspapers.

The earliest public reference to that case appeared in *The Vindicator* of 15 June 1830, which stated that an unnamed woman was committed to jail "for an attempt on the lives of two of her own children. One of them she was in the act of hanging when prevented; the other received some severe wounds on the head."[363] That reference, it transpired, was to a washerwoman named Elizabeth Birch, the wife of a Montreal turner. Not only had she allegedly tried to hang one of her children, but it was also claimed that she had attacked the other with an axe. The horrific nature of those accusations naturally led to considerable public interest, and there was a flurry of newspaper coverage.

Following her arrest, several neighbours swore affidavits of support on her behalf. One of those was the Birch's landlord, who attested that:

> [T]his deponent hath had daily opportunities of observing the conduct of the said Elizabeth, and has never seen her behave with rigour or harshness towards any one of her children, to whom she hath always appeared to this deponent to be a careful mother. That this deponent hath, indeed, only in one instance, seen her administer correction to any of then, and that correction was trifling and moderate. That this deponent hath never perceived in the said Elizabeth any

[363] *The Vindicator* (15 June 1830).

> disposition to cruelty or violence in the smallest degree. That this deponent never hath seen in her any tendency to insanity nor any species of disposition that would render it dangerous to any one of her own family or others of His Majesty's subjects, that she should be at liberty and go at large.--That this deponent was astonished when he heard, about a fortnight ago, that the said Elizabeth had been arrested on a charge of having attempted to hang one of the said children and kill another of them with an axe; offences of which this deponent firmly believes her incapable.[364]

Not only did Birch's landlord offer a rousing defense of her character, he went on to offer an alternate explanation of the daughter's head injury, who, he maintained, had fallen down the stairs and hit her head on a rock. He described the son, aged approximately eight years, as a "turbulent boy...inclined to give trouble," but that he had never seen her correct him. Furthermore, he claimed that she and her neighbours were on bad terms, which he suspected was the underlying reason for Birch having been accused.[365]

Another fellow tenant, a boot and shoe-maker named Martin, likewise presented a deposition in Birch's defense. Martin attested that a fortnight earlier he had seen her son William running around the yard with a cock under his arm that had been alleged to have been stolen. After his mother heard of this, he attested that she tried to remove a cord from a water-bucket. Martin assisted her, thinking she intended to use it to whip her son:

> [S]he then went out into the street, and presently returned, leading the said boy with the said cord round his neck and bleeding at the chin as if he had been pursued and fallen in his flight. That this deponent, seeing her lead the said boy

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[364] A.N.Q.M., QS(F), *Dominus Rex v. Elizabeth Birch* (30 June 1830) (affidavit of James Ross).

[365] *Ibid.*

> through the said kitchen and yard into the stable of the said premises, went to the door of the said kitchen to observe what she was about [to do]. That she then placed the boy with his side against an upright post and wound the said cord around the said post, and left the said boy there standing upright and in no say suspended....That this deponent, during that time, stood at the door of the said kitchen, looking at the boy whom he could distinctly see, as the stable was not more than about thirty feet distance and the door was open all the time. That, while this deponent was so observing the said boy, the said boy neither shrieked, nor struggled, nor, in any manner, seemed to suffer pain, nor to be suspended, nor to be bound too tight by the said cord, but was able to, and did actually, turn his head and look around. That the said Elizabeth, in a few minutes, returned into the said stable and unbound the boy....[366]

Tying a child by the neck and leaving him in the stable for a few minutes does appear, on its face, to be a bizarre form of discipline. Notably, however, Martin's affidavit did not question the propriety, or even logic, of such a mode of punishment.

Returning to the kitchen after retrieving her son, Birch purportedly exclaimed that "sooner than he should take anything from any person to the value of a copper I would nail him by the ear to the floor." Later that night, Birch was arrested on a charge of having attempted to hang her son. Martin alleged that he examined the boy but did not see any signs of violence or injury, and believed her sole purpose had been to frighten her son from committing theft in the future.[367]

Those affidavits apparently held sway with the authorities as, according to several newspapers, Birch was admitted to bail based on them.[368] One paper asserted

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[366] A.N.Q.M., QS(F), *Dominus Rex v. Elizabeth Birch* (30 June 1830) (affidavit of David Martin).

[367] *Ibid.*

[368] See *e.g. The Montreal Gazette* (15 July 1830). See also *The Montreal Gazette* (19 July 1830). *The Canadian Courant* of 21 July 1831 stated that:

that Birch had never been charged with attempted murder of her children, but that her neighbour's depositions "tended only to represent her as keeping a disorderly house, which was by them deemed a nuisance."[369] While the original complaints have not survived, that assertion is belied by all other newspaper accounts as well as by the references in the surviving affidavits. Regardless, Birch apparently had no further dealings with the criminal justice system based on her treatment of her children. In the Birch case, the parent in question was bailed. That leads to the inference that while the evidence presented to the presiding magistrate did not ultimately support the original allegations, the magistrate nonetheless resorted to a common mechanism of the law as a preventive measure to ensure that the peace was kept in the future.

The case of Judith Couture, accused of having slashed the throats of several of her children, appeared in local newspapers in January of 1829:

> Évènement Horrible--Une femme nommé Judith Couture, épouse de Pierre Guilot (ou Guillet) de la Presentation, a été hier confinée dans la prison de cette ville, pour avoir coupé le gosier de cinq de ses enfans, dont un seulement est mort, d'après l'information que nous avons reçue. Cette infortuneé éprouvait des attaques de folie, en conséquence de la mort de son mari, pendant lesquelles elle devint accablée de tristesse, et affectée de l'idée terrible qu'il était nécessaire qu'elle commit quelques meurtres horribles pour assurer son salut.[370]

We some time ago mentioned the committal to the Gaol of this city, of a woman named Elizabeth Birch, charged with attempting to strangle and wound her children, we have been since informed that the charge is unfounded, and originated in the fears of some of her neighbours who saw her correcting one of her children for some delinquency, and we have now the pleasure to state that such affidavits have been laid before the judges as have led to her being admitted to bail. *The Herald* in announcing this unfortunate occurrence, was pleased to aver that she was an Irishwoman, we are now enabled to contradict this assertion, and have been left at liberty to state the country of her nativity; but as we cannot possible perceive what connexion a person's crimes or misfortunes can have with their birth place, we decline to do so.

[369] *The Montreal Gazette* (19 July 1830).

[370] *La Minerve* (22 January 1829) (citing *The Vindicator*). See also *The Vindicator* (20 January 1829).

Of all the newspaper accounts related to child abuse during the period, the reference to the Couture case is without a doubt the most horrific.

Couture was arrested and charged on 19 January 1829. Unfortunately, little additional information on her case was found, although she was apparently convicted, sentenced to death, and reprieved.[371] Couture appears to be an unlikely candidate for clemency, but evidently there were circumstances that were viewed as extenuating, most notably her supposed motive, which if accurate would have suggested that she was of unsound mind.[372] There is also an element of truth in Judith Knelman's observation that society could well-afford to exercise mercy towards a child killer under such circumstances. In noting that the "two most notorious child murderesses of nineteenth-century England were not hanged," Knelman further observed that: "[c]hild murder was not a crime that incited public vengeance. These crimes were bizarre but were peculiar to their own unhappy situations. They were not perceived as threats to

[371] See J. Douglas Borthwick, *History of the Montreal Prison From A.D. 1784 to A.D. 1886* (Montreal: A. Feriard, 1886) at 261; 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) 49; Frank W. Anderson, *A Dance With Death, Canadian Women on the Gallows 1754-1954* (Fifth House Publishers: Saskatoon & Calgary, 1996) 109-110; F. Murray Greenwood & Beverley Boissery, Uncertain Justice: Canadian Women and Capital Punishment 1754-1953 (Toronto: Osgoode Society, 2001) 231 & note 31; A.N.Q.M., MG no.466 (Judith Couture committed 19 January 1829, bailed 27 January 1829 by Judge Pyke). That latter notation likely suggests that she was released on a recognizance pending trial.

[372] Compare Greenwood & Boissery, *ibid.* at 231 and note 31. For discussion of the role of insanity in child murder trials, see generally Knelman, *supra* note 47 at 137-144. Knelman further observed that courts and jurors balked at extending leniency towards mothers accused of child murder based on insanity. *Ibid*. at 137.

the general public."[373] The further point has been made that domestic homicides were rarely treated as murders.[374]

It must be noted that the near-absence of trials of parents charged with the murder of their children does not, by itself, indicate a negligible rate of child homicide. As was discussed in the context of infanticide prosecutions, one cannot extrapolate crime rates from records of that sort.[375] As has been pointed out in other jurisdictions, "the disappearance of children does not seem to have been of particular interest among the poor, whose rate of reproduction was perhaps greater than was felt necessary by the rest of society."[376] Deaths of children simply did not merit significant attention in early Victorian society, and no doubt the deaths of many young victims of abuse, neglect, or murder were never scrutinized. Child murder was not condoned, but neither was it aggressively condemned, investigated, or prosecuted. A child who did not receive protection in the family premises was unlikely to find it elsewhere. As parents were assumed to be the arbiters of a child's well-being, the public was loath to intercede vigorously if the antithesis proved true.[377] On the other hand, it has also been suggested

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[373] *Ibid*. at 142.

[374] Compare Conley, *supra* note 14 at 59-60. She also observed that "[t]hough not formally recognized in law, the relationship between the victim and the accused was crucial both in deciding whether to call a homicide a manslaughter or a murder, and in determining sentences." *Ibid.* at 59.

[375] See Pilarczyk, *Justice*, *supra* note 16 at 43.

[376] Knelman, *supra* note 74 at 124.

[377] See *ibid.* at 144 (noting that murder of children was an extension of a culture that permitted infanticide).

that child homicide rates increased dramatically by the end of the century.[378] Either explanation might go a long way towards explaining why the number of non-neonatal child homicides during this period appears to have been so low.

Those instances in which parents were prosecuted, convicted, and punished for child abuse usually involved aggravated assault or a similar offense, or uttering threats and menaces to harm a child. The distinction of being sentenced to the longest period of incarceration, three years, belongs to a defendant convicted of attempting to abduct his stepdaughter.[379] The next longest periods of incarceration, nine months and three months, both involved assaults of an aggravated nature. The former sentence was given to Betsey Kennedy, the mother who had borne two illegitimate sons with a local Justice of the Peace. On 12 January 1844 a grand jury found a true bill against her for assaulting her five year-old son on a charge of "stabbing with intent to maim."[380] She was tried by the Court of Quarter Sessions three days later, where it was shown that she had stabbed her child in the forehead with a knife, leaving a wound described as "about an inch in length and as deep as the bone."[381] Witnesses also testified that Kennedy was a habitual inebriate who often brutalized her children, and that she had been intoxicated at the

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[378] Adler, *supra* note 74 at 261 observed that in nineteenth century Chicago:

> [C]hild homicides increased significantly as the nineteenth century drew to a close. During the late 1870s, police files included no cases in which parents killed their children. By the early 1880s, however, such homicides constituted nearly six percent of all homicides in the city....

[379] See the case of Michael Coleman, *infra* at 70-74.

[380] *The Times and Daily Commercial Advertiser* (15 January 1844) (case of Betsey Kennedy).

[381] *Ibid.* (19 January 1844).

time of the assault. The un-genteel nature of such barbarity was further underscored by the observation made in *The Times* that "when she inflicted the wound, she made use of most unbecoming language."[382] Kennedy's attack, complete with indecorous language, resulted in her son losing consciousness. She was convicted, although somewhat perversely the jury also recommended mercy.

The jury's recommendation was taken into account by the presiding judge, who emphasized her alcoholism. The only surviving account of her trial concerns her sentencing, and it records that:

> The Court in passing sentence on the prisoner, condemning her to an imprisonment of 9 months in the House of Corrections, animadverted, at length, on the evil effects of intemperance, and reminded the prisoner of the consequences of the conviction had against her, which, according to the late criminal Statute laws granted in the Province, amounted to felony, subjecting her to imprisonment in the Provincial Penitentiary for life; a place to which she, in all probability, would have been consigned but for the humane recommendation of the respectable Jury who had tried her case.[383]

Betsey Kennedy was clearly not of respectable background, unlike the jury that tried her, and also unlike Emelie Granger. Nevertheless, Granger's social status did not immunize her from the law following her conviction for having ill-treated her young niece Cordille, as evidenced by the three-month term of imprisonment to which she was sentenced. Ultimately, Cordille was fortunate in that third parties intervened on her behalf. While Granger may have been of respectable social standing, her disciplinary

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[382] *Ibid.*

[383] *Ibid.* The term of incarceration was computed from the time of Kennedy's sentencing on 15 January 1844; she was accordingly released on 15 October 1844. A.N.Q.M., MG (Elizabeth Kennedy committed for "maliciously stabbing a child" on 21 November 1843).

methods did not comport with the Court's notion of acceptable childrearing. The fact that Granger's methods of corporal punishment were seen as barbaric, even life threatening, tipped the judicial scales in favour of intervention. Besides having had the benefit of third parties to champion her cause, Cordille was even more fortunate in that other relatives provided for her after she was removed from her aunt's custody. In the absence of any child protection laws, there were no legal provisions governing the appointment of a guardian for an abused child and, as Cordille's closest kin, her aunt would probably have had primacy in retaining guardianship. The removal of Cordille from her aunt's home was a clear example of proactive legal intervention.

Uttering threats of murder could also provide the impetus for prosecution and, interestingly, short periods of incarceration tended to follow. Two such cases were found, both of which resulted in conviction. In 1841 a neighbour filed an affidavit attesting that the defendant, who boarded in the same house, "auroit violamment et cruellement battu et maltraité sa fille, âgé d'environ dix-sept ans," and then "se seroit de plus place dans la porte du déposant, qui fait face à la dite rue, et auroit la et alors, crier jure et invectiver le dit déposant tout haut, par la causant du bruit dans la rue...."[384] The defendant's propensity for violence led the neighbour to fear that he would put his threats into execution, and he requested that a warrant for his arrest be issued. The defendant was tried summarily on 5 November for "threats and menaces," with the deponent and another neighbour testifying against him. He was convicted and

[384] A.N.Q.M., QS(F), *Queen v. Baptiste Poirier* (5 November 1841) (affidavit of Nicholas Metillier).

sentenced to five days in the House of Correction.[385] It is unclear in that instance whether the defendant was convicted for having threatened the deponent, for the violent conduct towards his daughter that precipitated the episode, or for both.

A less ambiguous instance occurred in 1846, in which a mother was arrested on a charge of threatening to murder her child. She spent nine days in prison as a result.[386] The ambiguity in the former case is a natural by-product of the reality that children could only rarely have the wherewithal to file a complaint. Since third parties were largely responsible for child abuse prosecutions being initiated, it is hardly surprising that the primary victims of those acts of violence tended, all too often, to recede into the background. Regardless, as *Figure I* indicates, fully one-sixth of all cases of child abuse in Montreal during the first half of the nineteenth century led to at least short prison sentences. One aberrant case charged a mother with being a dangerous lunatic and putting her child, as well as herself, at risk. The defendant's sister alleged that she was insane, and included the assertion that she had "exposed her person in a state of nakedness, and placed her male child aged of about twelve months on her private parts, saying that she had been told to do so by a Black woman, for the good of her other children." She was committed to the Montreal Lunatic Asylum.[387]

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[385] A.N.Q.M., QS(F), *Queen v. Baptiste Poirier* (5 November 1841) (trial notes).

[386] A.N.Q.M., MG, *Domina Regina v. Isabel Belile* (committed 1 August 1846; discharged on 10 August 1846).

[387] A.N.Q.M., QS(F), *Queen v. Elizabeth Eveley* (4 March 1842) (affidavit of Margaret Eveley); *Queen v. Elizabeth Eveley* (4 March 1842) (affidavit of William Eveley).

The lack of detail in most of those cases is an obvious hindrance to analysis of their common features. Notwithstanding those limitations, a few observations can be made. The surviving judicial records indicate that family members tried to insulate and protect each other from the brutal conduct of an abusive parent. Indeed, some of the most serious instances of violence directed at children were prompted by a child's intervention in cases of domestic disputes. One such instance occurred in 1832, when a defendant was prosecuted on a charge of assault with intent to murder by his sixteen year-old son, William. In a poignant affidavit sworn from his bed at the Montreal General Hospital, William alleged that a week and half earlier he had been sick in bed at his parents' house, when he was alarmed by the cries of his mother calling out murder." William rose from bed and confronted his father, who was in the act of beating his mother. Asking his father whether he intended to kill her, the father replied that "he would and me likewise," prompting William to seize him by the arm.

William's father responded by throwing him down the stairs and then ejecting him from the house. In the process his father kicked William several times between the shoulder blades, causing wounds that later festered, requiring his hospitalization.[388] William's father was obliged to provide a recognizance in the amount of £150 to appear before the Court of Quarter Sessions and keep the peace towards his son.[389] Insofar as

[388] A.N.Q.M., QS(F), *Dominus Rex v. Abraham Bagnell* (23 October 1832) (affidavit of William Bagnell).

[389] A.N.Q.M., QS(F), *Dominus Rex v. Abraham Bagnell* (14 November 1832) (surety).

children seldom were in a position to prosecute a parent for abusive conduct, William's case was definitely unusual.

Such cases also illustrate the dangers faced by a family member physically interposing him or herself between an abusive parent and the victim of that parent's rage. Physical resistance could not only be futile, it could further enrage a wrathful family member and escalate an already volatile situation. It is no surprise, therefore, that family members often attempted to secure the protection of the law after an attack rather than offer physical resistance. In some instances, family members other than the main victim of the affray filed complaints to seek justice and obtain mutual protection of the law.

By way of example, the wife and daughter of a Montreal weaver filed complaints against him in 1843 for having assaulted his son. The defendant's daughter alleged that he was "addicted to liquor" and that when drunk he was extremely violent. She also alleged that the previous evening while inebriated he "did without any cause or provocation violently assault beat and strike this deponent's brother, and cause a great noise in the house...."[390] The defendant's wife likewise alleged that her husband had been drunk the previous evening and while in that state "did disturb the public peace and tranquility and moreover violently assault, beat and strike the deponent's son" and that because of the "intemperate habits of her said husband she has reason to fear for

[390] A.N.Q.M., QS(F), *Queen v. John Miller* (16 March 1843) (affidavit of Agnes Miller).

her life."[391] He was unable to provide surety for good conduct, and was therefore committed to jail.[392]

Both affidavits made reference to the defendant having caused a great deal of noise, most explicitly through the wife's assertion that he had disturbed the "public peace and tranquility." That emphasis appears incongruous, especially when one considers that it is much more likely that the defendant's wife and daughter would have been preoccupied with thoughts of personal safety than with concerns about preserving quiet in the neighbourhood. That is a potent reminder that affidavits were prepared by Justices of the Peace, who translated the facts presented to them so as to coincide best with an existing legal offense. In Miller's case, references to causing a public disturbance ensured that the defendant's actions rendered him liable to prosecution for breach of the peace, if nothing else, suggesting an intentional desire to maintain flexibility in finding a cause of action. Whether that was prompted by the Justice's inquiries, or was a legal stratagem employed by a knowledgeable prosecutor, or simply reflected a preoccupation with prosecuting public offenses, is unknown. However, it is interesting to note that a sizeable number of complaints involving spousal assault were categorized as breaches of the peace.[393]

Furthermore, other incidents involving violence towards children and characterized as breaches of the peace were located in the judicial archives. For example,

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[391] A.N.Q.M., QS(F), *Queen v. John Miller* (16 March 1843) (affidavit of Mary Smith).

[392] *Ibid.* (notation that Miller was "committed for want of bail.").

[393] See Pilarczyk, *Justice*, *supra* note 16 at 261 (Figure 6).

a constable in the City Police swore out a complaint in 1841 in which he alleged that the defendant "is a person of brutal and violent habits towards his children, in the habit of disturbing the peace and tranquility…and a drunkard and continually annoying and incommoding persons residing under [the] same roof as himself."[394] Combined in that account were allegations of breach of the peace, child abuse, public drunkenness and nuisance, reflecting the fact that many such acts were not clearly distinguishable from one another.

Stepparents tended to feature prominently in cases of child abuse. One such example is that of sixteen-year-old Jane Berry, who alleged that while her father was absent from the home, her stepmother (who did not cohabitate with them) visited the house and assaulted her:

> [The defendant] without cause of provocation, violently seized this Deponent, threw her down on the floor and then and there with both hands and feet, assaulted battered bruised and struck the deponent in such a manner as to make her fear for her life and the Deponent verily believes that had it not been for the assistance rendered her by Ann Morrison, who lives as servant with Deponent's father, she would have been killed and murdered on the spot by the said Margaret Cooper, who she believes harboured that intention, that on divers occasions before and...since, she has been put in danger of her life on the part of the said Margaret Cooper.[395]

Berry was indeed fortunate, not only insofar as she had not been alone in the house, but also as her father's domestic servant was present to intervene on her behalf.

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[394] A.N.Q.M., QS(F), *Queen v. Donald McCarthy* (5 April 1841) (affidavit of James O=Neil). He was committed later the same year for being "drunk and beating his wife." N.A.C., Gaol Calendars of the Montreal Gaol vol. 34 [hereinafter MG(GC)] (3 October 1841) (committal of Donald McCarthy).

[395] A.N.Q.M., QS(F), *Dominus Rex v. Margaret Cooper* (9 January 1834) (affidavit of Jane Berry).

While that case is unusual insofar as the stepmother did not reside in the same house, violence directed towards stepchildren was not. Berry herself alleged that she had caused her stepmother to be arrested six months earlier for a similar offense.[396] The aforementioned domestic servant provided corroboration, alleging she found the stepmother "beating and illusing [her] to such a degree that she verily believes that if she had not rendered her assistance that she would have been murdered on the spot" by her stepmother.[397] Her stepmother was charged with assault with intent to murder, and was bound to appear at the next session of the Quarter Sessions.[398] The grand jury, however, declined to indict, returning a finding of *ignoramus*.[399] In another instance, Ann Farmer (who had been prosecuted on three other occasions by her husband for violence against him) was charged with attempted murder for having tried to strike her stepdaughter with a sharpened piece of iron. Farmer's husband alleged she would have killed the stepdaughter had he not intervened and requested --in the common legal parlance of the time--"justice in the premises."[400]

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[396] No record of that earlier arrest has been located.

[397] A.N.Q.M., QS(F), *Dominus Rex v. Margaret Cooper* (9 January 1834) (affidavit of Ann Cowan *a.k.a.* Morrison included with affidavit of Jane Berry).

[398] A.N.Q.M., QS(F), *Dominus Rex v. Margaret Cooper* (23 January 1834) (recognizance).

[399] A.N.Q.M., QS(F), *Dominus Rex v. Margaret Cooper* (30 June 1834). Endorsing "ignoramus" on a bill of indictment was similar to endorsing a "no bill." Grand juries made that endorsement when "after having heard the evidence, they thought the accusation against the prisoner was groundless, intimating that, though the facts might possibly be true, the truth did not appear to them...."). Henry Campbell Black, *Black's Law Dictionary* (St. Paul: West Publishing Company, 1991, 6th edition) 511-512.

[400] A.N.Q.M., QS(F), *Dominus Rex v. Ann Farmer* (26 November 1836) (affidavit of William Lilly).

Parents and stepparents appeared as the most common victimizers of children in the complaints found for the period, with mothers appearing most frequently. As the primary caretakers of children, it is not surprising that mothers would often have been responsible for child abuse, as children regularly bore the brunt of a parent's rage. It was much rarer for extended family to be involved, but Emelie Granger's conviction for cruelty towards her niece illustrates that parents and stepparents were not the only offenders. By way of another example, a grandmother was charged with assault and battery on her adult daughter, who alleged that the grandmother routinely abused her and her children. Three years earlier, she and her family had paid for the grandmother to come to Canada from Ireland. For most of the time since her arrival, O'Brian had lived with her daughter, but "from the day of her arrival to the present Deponent and her children have...been continually taunted, abused and even beaten and maltreated by her." Over the intervening three years her daughter "endured her said mother until her conduct to Deponent has become so outrageous as to be intolerable."

Of most concern to the daughter, however, was that she became increasingly abusive towards her four young grandchildren, grabbing them by the throat and even slapping them on the face as they slept. The night before she filed the complaint, the deponent alleged that O'Brian attacked her and "threatened to have the deponent's blood." That, coupled with her history of violence towards her family, made O'Brian's

daughter fear for her family's lives, and "[w]herefore the Deponent prays that her said mother may be arrested and held to give bail to keep the peace."[401]

Not surprisingly, most allegations of child abuse at the hands of relatives were brought to the attention of authorities by third parties, typically neighbours.[402] In 1836 a man in Chambly was accused by several neighbours of being abusive towards his children. He was described by one neighbour as a "very severe father," who further alleged that he had "often seen him beat his children with a large stick and strike them in a brutal manner with his fists and feet." As a consequence of habitual mistreatment, the three children were known to have run away from home several times, and the neighbour alleged that on at least one occasion he saw them cowering in a nearby stable, afraid to return home.[403] Another neighbour, his occupation described as "gentleman," attested that it was "generally reported" that the children were illtreated by the parents, and that in his opinion one of the boys was undernourished. Furthermore, he claimed that it was "the opinion of some of the family and friends that if [the daughter] had continued to remain in her father[']s house she might suffer materially in her health and condition."[404]

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[402] Compare Conley, *supra* note 14 at 106.

[403] A.N.Q.M., KB(F), *Dominus Rex v. Jean Baptiste Roy* (27 September 1836) (affidavit of Antoine Fleury).

[404] A.N.Q.M., KB(F), *Dominus Rex v. Jean Baptiste Roy* (27 September 1836) (affidavit of Mathew Sterns).

Similarly, a Montreal blacksmith prosecuted a joiner by the name of Joseph Latour and his wife on a charge of aggravated assault and battery, alleging that they habitually beat and mistreated their ten year-old imbecile daughter in a manner "la plus cruelle." Concerned that she was in grave danger, he requested that both defendants be arrested.[405] In another instance, a bystander intervened by summoning the police when he observed a mother beating her child in an alley off of Notre Dame Street.[406]

In a few instances, the complainant was a non-custodial relative, typically a biological parent who did not reside with the child. Occasionally the child him or herself also filed a complaint, probably accompanied on the trip to the local Justice of the Peace by the non-custodial parent after he or she provided refuge. Those affidavits are particularly resonant, as they offer one of the few sources of those young victims' testimony, albeit filtered through the Justice of the Peace who recorded it. One such case was triggered by complaints filed against a mother, both by her father as well as by the child:

> [The deponent] is credibly informed and knows as a matter of fact that one Rosa Clifford is in the habit of frequently beating and illtreating one Catherine Hameron his child, living with the said Rosa Clifford. That moreover the said Rosa Clifford continually keeps this deponents child in confinement and will not allow her to go to the deponents house. That the said deponent from these circumstances hath reasons to fear, and doth verily fear that the said Rosa Clifford will cause her some bodily injury wherefore he prays for Justice....[407]

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[405] A.N.Q.M., QS(F), *Dominus Rex v. Joseph Latour et Elmire Roy* (8 August 1833) (affidavit of Etienne Legrenade).

[406] A.N.Q.M., QS(F), *Dominus Rex v. Mary Burk wife of William Freeman* (29 May 1830) (affidavit of William Bingham).

[407] A.N.Q.M., QS(F), *Queen v. Rosa Clifford* (9 Sept 1840) (affidavit of James Hameron).

On the same day his daughter, Catherine, also swore out a complaint against her mother, filed by the Justice of the Peace under the generic legal offence of misdemeanor. In it, Catherine alleged that her mother was in the habit of "beating striking illusing and illtreating" her, and that "from her manner of abusing [her] heretofore she has reason to fear and doth verily believe that her said mother would again violently assault beat and illuse her as aforesaid."[408] Her mother was committed to prison for lack of bail,[409] but the following day provided co-sureties in the amount of five pounds each and was bound to keep the peace towards her daughter for six months.[410]

Another characteristic shared by those cases is the conjunction of alcoholism and family violence. The relationship between the two was well known by the late-nineteenth century, and during the period under examination it had also become apparent to social commentators.[411] In a case involving two drunken mothers in 1839, the newspaper observed that "[i]l est á regretter qu'il n'existe pas un asyle ou l'on puisse donner refuge aux enfans, qui ont le malheur d'etre nés de semblables mères.[412] Unfortunately, no institutions for neglected children existed during this period.

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[408] A.N.Q.M., QS(F), *Queen v. Rosa Clifford* (9 September 1840) (affidavit of Catherine Hameron).

[409] *Ibid.*

[410] *Queen v. Rosa Clifford*, *supra* note 148.

[411] In London in the 1880s, for example, the British National Society for the Prevention of Cruelty to Children found that nearly ninety percent of child neglect cases implicated habitual inebriation on the part of one or both parents, with the worst cases of child neglect involving mothers who were drunkards. See Radbill, *supra* note 17 at 8. In Liverpool SPCC cases in 1884 to 1885, over thirty-five percent were tied to alcohol abuse. See Behlmer, *supra* note 28 at 72.

[412] *L'Ami du Peuple*, *supra* note 69.

Unfortunately, too, drunken parents often were found carousing in the streets, while their children huddled in doorways in a futile bid for shelter.[413] Mary Burk, arrested in 1830 for beating her daughter in Notre Dame Street, was alleged to be a person of thoroughly disreputable proclivities. As the private prosecutor alleged in his affidavit, "I believe the child's life would be endangered by its being restored to the care of its mother who is a prostitute a drunkard and a woman of great violence of character."[414] Imprisoned on 29 May 1830, Burk spent just over seven weeks in prison until her release.[415] No information on the fate of Burk's child is available.

More information is known about the mistreatment of ten-year-old Janet Sutherland. In May 1838 her father, a bookbinder named Alexander Sutherland, prosecuted his wife for assault and battery of their daughter. He alleged that his wife had repeatedly been abusive towards Janet, and a few days previous had "committed a most violent assault and battery...thereby splitting her head open so as to cause the blood to flow from the wound inflicted in profusion." He added that his wife was a

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[413] See *The Pilot* (18 March 1851), containing the following account, not counted in the statistics as it falls beyond the period covered in this article:

> Drunkenness--March 7--Bridget Fury, the second offence, was charged with being drunk and abusive towards her little girl--a child of two-and-a-half years old. Sentenced to pay a fine and costs of 1/2/6, which not being paid, Mrs. F. was committed to gaol, and her interesting child sent to the House of Industry.
>
> This same lady had been previously taken up on the night of the 5th January, when she was discovered by the Police, near the Catholic Church, in a state of drunken insensibility, and her unfortunate child sitting by her side, nearly frozen to death.

[414] A.N.Q.M., *Dominus Rex v. Mary Burk wife of William Freeman*, *supra* note 147.

[415] A.N.Q.M., MG no.988 (29 May 1930) (Mary Freeman discharged on 19 July 1830).

habitual drunkard and "commits such outrages when in a state of inebriety."[416] Sutherland eventually removed his daughter and other children to the country to sequester them from their mother's violent impulses.[417]

During the period, many cases of spousal battery chronicled alcohol abuse on the part of one or both of the parties involved.[418] Another common feature was the existence of mental aberration or insanity.[419] In the case of Betsey Kennedy, the mother who had two illegitimate children with a local Justice of the Peace, it was claimed that she suffered from a mental disorder. In March of 1842, approximately six months after her previous involvment with the law, a Montreal physician filed an affidavit alleging that he had treated Kennedy for some time for "aberration of intellect" but that she was now insane. He further alleged that she showed a desire to commit suicide, and "in all probability, if not put under sufficient constraint, will obey some suggestion of her own diseased imagination, in the injury of some description or other, to those about her."[420]

Whether Kennedy was in fact deranged cannot be known. What is clear from the records, however, is that she was not sufficiently constrained, despite her physician's request, to prevent her from escalating her violent conduct towards her children, as

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[416] A.N.Q.M., QS(F), *Alex Sutherland v. Janet Shawn* (1 May 1838) (affidavit of Alexander Sutherland); *ibid.* (9 May 1838) (surety).

[417] A.N.Q.M., QS(F), *ibid.* (20 July 1838) (affidavit of Alexander Sutherland).

[418] See Pilarczyk, *Justice*, *supra* note 16 at 316-323.

[419] See *ibid*. at 333-337.

[420] A.N.Q.M., QS(F), *Domina Regina v. Elisabeth Kennedy* (10 March 1842) (affidavit of Stephen C. Sewell).

evidenced by her conviction two years later for having stabbed her five-year-old son. Interestingly, the Court during her sentencing made no reference to any allegations of derangement and, indeed, there is no evidence that her mental competency was put in issue during her trial. It is also unknown whether she had benefit of counsel (although it is unlikely), let alone what strategy her counsel may have employed. Whatever the reality, a finding of insanity would have seemed unsurprising to most Victorians, given the commonly held view that women were prone to hysteria and derangement.

III.

Any comprehensive discussion of child abuse within the family must include the topic of incest. Like other forms of child victimization, incest has been a known phenomenon from antiquity to the present. By the latter decades of the nineteenth century, as Western societies had become increasingly sensitized to the plight of abused and neglected children, it was also recognized that incest was a form of family violence.[421] One can, of course, draw a distinction between incest and rape insofar as the latter inherently implies a non-consensual act of violence.[422] However, the issue of consent is irrelevant. Even when incest falls short of rape, it is a crime perpetrated

[421] The definition of incest used in this article is the standard legal definition of "sexual intercourse or cohabitation between a man and a woman who are related to each other within the degrees wherein marriage is prohibited by law." *Black's Law Dictionary*, *supra* note 138 at 522. Incest therefore involves both blood relatives and relatives through marriage or cohabitation. See Linda Gordon & Paul O'Keefe, "Incest as a Form of Family Violence: Evidence from Historical Case Records" (1984) *J.Marriage & the Fam.* 27 at 28 ("we considered sexual relations incestuous not only if the two people were kin but also if they occupied kinship roles--for example, stepfather and daughter.").

[422] See generally Radbill, *supra* note 17 at 11.

against children by adults in a position of familial authority and therefore consent cannot exist. As such, the fact that incest is a form of family violence is unassailable.[423]

Analyzing the nineteenth century crime of incest poses numerous challenges. Such acts occurred covertly within the endogamous family, then as now, and preserving the family secret was seen as being of paramount importance. Furthermore, sexual offences were not widely discussed during the Victorian era, and the existence of incest was barely hinted at in the contemporary press.[424] Historians grappling with issues related to family structure in the Victorian period therefore have tended to avoid delving into such issues.[425] While the extent to which incest occurred in the Victorian period (especially in the earlier part of the century) might therefore be a matter of conjecture, it is a reasonable inference that incest was one form of social pathology that, while occurring surreptitiously, was nonetheless present.[426] Reanimating the history of

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[423] See Gordon & O'Keefe, *supra* note 162 at 28 ("[H]istorical cases...suggest that such incest is usually coercive, thus appropriately considered a form of family violence.").

[424] See generally Anthony S. Wohl, "Sex and the Single Room: Incest Among the Victorian Working Classes" in Anthony S. Wohl, ed., *The Victorian Family, Structure and Stresses* (London: Croom Helm, 1978) 200.

[425] Wohl made a similar observation:

> However unclear the psychological and sociological impact upon the family, incest still merits study by the historian of the Victorian family, if for no other reason than that the incest taboo was as strongly held in the nineteenth century as in most other centuries...and its violation suggested disease at the heart of what Victorians regarded as essential to the moral, religious and social harmony of their society: the virtuous Christian family.

Ibid. at 199. For discussion of the legal response to incest in other jurisdictions, see generally Patrizia Guarnieri, "'Dangerous Girls', Family Secrets, and Incest Law in Italy, 1861-1930" (1998) 21 *Inter.J.Law & Psych.* 369-383.

[426] Compare Wohl, *ibid.* at 212-213. Wohl included among them the offences of infanticide, drunkenness, theft, murder, and, "however tentatively,"incest.

behaviour that was, by its very nature, cloistered within the darkest recesses of the Victorian family is therefore a daunting task.[427]

Scholars of incest therefore face the double calamity of trying to recreate an act that was a stealthy (albeit typically recurring) offense, in addition to being unspeakably taboo. Any cases that surfaced during this era must be considered exceptional, not because of any doubts about the existence of incest, but because of the multiple factors that would have militated against its discovery. Incest tended to become public only when another intervening event occurred, such as an act of overt violence, pregnancy, or diagnosis of venereal disease, or when it was disclosed by an adult child after leaving home.[428]

Incest has been a human phenomenon since time immemorial. As Samuel Radbill has stated, "[a]nthropologically and historically sexual unions between father and daughter, mother and son, or brother and sister were not infrequent, but it was usually abhorred."[429] The taboo was far from universal, given the emphasis historically placed on blood lineages and succession. In England, prohibitions against incestuous acts were originally enforced by Ecclesiastical courts. The canonical rules established and enforced by those courts set out extensive prohibitions on marriage between partners who were

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[427] That observation also holds true for a variety of other sexual activities, most notably homosexual acts. As one scholar aptly put it, "[h]istorians who study sexual behaviour and gender roles are all too familiar with the obstacles inherent in recovering from the past that which occurred in private." See Lorna Hutchinson, "Buggery Trials in Saint John, 1806: The Case of John M. Smith" (1991) 40 *U.N.B.L.J.* 130 at 130.

[428] Compare Radbill, *supra* note 230 at 12.

[429] *Ibid*.

related to each other through specified relationships of consanguinity (based on blood) or affinity (based on marriage). Ecclesiastical courts were empowered to afford dispensations in individual cases, annul prohibited marriages and declare any resultant offspring to be illegitimate, and excommunicate offenders.

The prohibition against incest in English legal history had its origins in the lengthy Old Testament admonitions found in *Leviticus,* which began with the order that "[n]one of you shall approach any one near of kin to him to uncover nakedness.…"[430] Statutory prohibitions against incest were first promulgated during the reign of Henry VIII.[431] Those laws passed during Henry VIII's reign were, in fact, less restrictive in scope than the prohibitions enforced by the Ecclesiastical courts. The number of forbidden consanguineous relationships was decreased, limiting them to the marriage of first cousins or closer relatives.[432]

In 1563, the Church of England formulated a table that set out prohibited relationships and provided the foundation for much of the legislation passed in common law jurisdictions in the seventeenth century and afterwards.[433] Those common law jurisdictions, however, were not to include England. The Statute of Henry VIII was dispensed with during the reign of Mary I in her sweeping abolition of all felonies

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[430] *Leviticus* 18: 6-18 (King James Version).

[431] 28 Henry VIII c.27 (1536) (U.K.).

[432] See generally Peter W. Bardaglio, *Reconstructing the Household: Families, Sex and the Law in the Nineteenth-Century South* (Chapel Hill & London: University of North Carolina Press, 1995) 41.

[433] See generally *ibid.*

promulgated since the first day of Henry VIII's ascension to the throne, and was never reinstated. As such, from the time of Mary I onwards, the criminal law of England did not take cognizance of that offence. Rather, it was again the Ecclesiastical courts that were responsible for punishing incest, but the sanctions were not severe.[434]

In 1857, the Church of England was deprived of its jurisdiction over matrimonial cases by operation of the *Matrimonial Causes Act*, which allowed for divorce on grounds of incestuous adultery.[435] The *Offenses Against the Person Act 1861* made it an offence to procure the defilement of a girl under twenty-one years of age, which was intended to address the practice of parents' selling their daughters to procurers, although it did not govern incest itself.[436] Thereafter it was not until the first decade of the twentieth-century, with the passage of the Incest Act of 1908, that incest *per se* was once again punishable in England as a criminal offence.[437] That was in stark contrast to Scotland,

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[434] William Blackstone stated that enforcement of the incest taboo was left to the "feeble coercion of the spiritual courts, according to the rules of canon law." Wohl, *supra* note 165 at 208 & note 47 (citing B. Gavit, ed., *Blackstone's Commentaries on the Law* (1892) 778). Those convicted were made to do solemn penance at church or in market squares, bare-legged, bare-headed, and cloaked in a white sheet. The period of penance was to continue for two to three years, although that was widely interpreted to be limited to the period of Lent. *Ibid.* at 208-209 & note 48 (citing Robert Burn, *The Ecclesiastical Law*, vol. 3 (London, 1842) 101).

[435] 20 & 21 Vict. c. 85 (1857) (U.K.).

[436] 24 & 25 Vict. c. 100 s. 42 (1861) (U.K.). See Rose, *Childhood*, *supra* note 38 at 234.

[437] 8 Edw. VII c. 45 (1908) (U.K.). That Act encompassed the following familial relationships: parents and children; siblings; and grandfather and granddaughter. See generally Sybil Wolfram, "Eugenics and the Punishment of Incest Act 1908" (1983) *Crim. Law. Rev.* 308 at 308. Indeed, the 1908 Act was largely the result of lobbying by two pressure groups, the National Vigilance Association (founded in 1885) and especially the National Society for the Prevention of Cruelty to Children (founded in 1889). See generally *ibid.* See also Wohl, *supra* note 165 at 209. Wohl emphasized the obvious discomfort and timidity exhibited by members of Parliament when discussing that Act. See *ibid.* at 201.

where incest had been a capital offence for centuries and remained so until 1887.[438] In the American colonies, for instance, New Haven followed Levitical prohibitions and made incest a capital crime, while Massachusetts Bay mirrored English law and did not deem it a punishable offense.[439]

For the period under examination in this thesis, it was the southern states of the United States where legal prohibitions against incest were most pronounced. In the absence of common law proscriptions against such acts, courts in the antebellum South generally refused to penalize defendants for incest until legislatures promulgated laws rendering it a punishable offense.[440] The most common definition of the offence under those statutes involved marriage or intercourse between two individuals related to each other within a prohibited degree of kinship.[441] It was father-daughter incest that was considered most shocking to jurists in the antebellum South, as it flew in the face of the self-control thought to be necessary for a patriarch to fulfill his responsibilities as head of a household.[442] In most of those jurisdictions, only the man was subject to

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[438] See generally Wohl, *ibid.* at 208.

[439] See generally Pleck, *supra* note 18 at 25. She went on to note that "[i]n all the New England colonies, the definition of incest was more extensive than current views; besides a father's sexual relations with his daughter, it included consensual sex or even marriage between near relatives." *Ibid.*

[440] See generally Bardaglio, *supra* note 173 at 40.

[441] See generally *ibid.* at 45.

[442] See generally *ibid.* at 39-40.

punishment for incest.[443] If force was used to commit the act, the defendant could alternatively be charged with rape.[444]

The appellate decisions rendered by courts in the South during that time evince a degree of contradiction, characterized by one scholar as a mixture of "rhetorical condemnation and reluctance to prosecute patriarchs."[445] The rulings, and language, of those courts left no doubt that incestuous behaviour was seen as destructive to the integrity of the family.[446] As Peter Bardaglio has pointed out, however, in the same breath as those courts condemned incest, they stressed that it was an infrequently-occuring aberration. By minimizing its frequency, jurists were able to avoid drawing connections between the act itself and the power structure of contemporary families that was a large causal factor in the existence of that social pathology. Thus, those courts "helped to preserve the patriarchal ideal and minimize state intrusion in the private sphere."[447] At any rate, such legislation had as its primary *telos* the desire to prevent inbreeding and other social calamities, not the protection of women and children from

[443] See generally *ibid.* at 45.

[444] See generally *ibid.*

[445] *Ibid.* at 48.

[446] See generally *ibid.* at 39.

[447] *Ibid.* at 40.

sexual abuse. As such, they were narrowly construed to encompass only acts of intercourse between parties within the prohibited degrees of kinship.[448]

Unlike the situation in a variety of other Anglo-American jurisdictions during this period, England and British North America had no statutory prohibitions against incest.[449] As Parliament had not seen fit to provide for its punishment, courts remained reluctant to criminalize that type of behaviour. That reluctance was compounded by the sacrosanct status of the family during the Victorian period, such that the law was generally loath to intervene. In a statement that also rings true for British North America of the period, Anthony Wohl has written about Victorian England that:

> [I]ncest, far more hidden than prostitution, gambling, drunkenness or even the white slave trade, was unlikely to become the subject of a Victorian hue and cry. Its setting--the home--precluded it; those exploited by it, mainly young girls, had no one to champion their cause until the last decades of the century. That the state should be called in to protect girls from the lust of brothers and fathers was too unpalatable a notion for the mid-Victorian generation.[450]

The unsavoury character of the offense, respect for the sanctity of the family, Victorian prudery, and the gender of its victims all contributed to make incest a crime patently unsuitable for public discussion.

Indeed, legislatures and jurists alike evidenced a pronounced reluctance to deal with the issue. Some scholars have concluded that the topic of incest was not only unseemly or "unpalatable" as Wohl has suggested, but that it was simply too explosive

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[448] Compare *ibid.* at 45. The penalties also ranged widely, from one year incarceration and a $1000 fine in Florida, to life imprisonment in Louisiana.

[449] Conley, *supra* note 14 at 23, described it as "legally permissible but socially abhorrent behaviour." Bardaglio, *ibid.* at 44, stated that the "criminalization of incest took place in America long before England, perhaps due to separation of church and state." Strictly speaking, however, that observation is inaccurate as it overlooks the existence of incest as a statutory criminal offense in the time of Henry VIII.

[450] Wohl, *supra* note 165 at 211.

an issue on both sides of the Atlantic, due in large part to the prevalence of latent incestuous sentiments in Victorian families. According to that view, the "emphasis placed on the cultivation of affection and sentiment," coupled with the importance placed on sexual purity, resulted in an "intense and intricate emotional climate within the household that led, in many cases, to latent incestuous feelings."[451] It is most likely that incest was too ambiguous and troubling an issue: ambiguous insofar as it involved issues not present in other cases of sexual assault or abuse;[452] and, troubling insofar as it implicated Victorian reluctance to discuss sexual matters as well as to delve into matters related to the private sphere of the family.[453]

Regardless of the reasons, in analyzing the legal response to incest in Montreal during the first half of the nineteenth century, the legal historian is effectively dissecting a crime that did not exist. This is not to say that incestuous acts were not committed in Montreal during that era, an assertion that would be patently untrue.[454] Rather, it is to say that given the absence of legal prohibitions against incest, the act was not an indictable criminal offence. However, like child rape, it was often viewed as more

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[451] Bardaglio, *supra* note 173 at 39. For discussion of erotic portrayals of children in the nineteenth century, see generally J. R. Kincaid, *Child-Loving, The Erotic Child and Victorian Culture* (New York: Routledge, 1992).

[452] Linda Gordon has noted that "[o]ne of the most complicated and painful aspects of incestuous sex is that it cannot be said to be motivated only by hostility or to be experienced simply as abuse." Gordon, *supra* note 62 at 209.

[453] Compare Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* (Chicago: University of Chicago Press, 1993) 62.

[454] In the context of late-nineteenth century and early-twentieth century Ontario, it has been observed that "incest and infanticide cases brought to light massive evidence of sexual exploitation in families." Dubinsky, *ibid.* at 61.

infamous than the crime of sexual assault. Incest was therefore both a greater and lesser offense than rape: lesser, because technically the law did not provide for its punishment; and greater, because it was seen as a particularly heinous act.

While nineteenth century English law did not provide for sanctions for incest, incestuous conduct sometimes fell within the purview of the law. Such acts could be, and indeed were, subsumed under the rubric of rape or the normal provisions of the criminal law governing sexual offences against children.[455] However, legal requirements for a showing of rape would not have been satisfied in most instances. The obvious result was that all but a few prosecutions for incest were destined to be unsuccessful. Ruth Olson has given an example reported in Kingston in 1845 in which a grand jury returned a "no bill" for rape in a case of incest because of the "absence of that violent resistance which the law requires as a constituent of that crime."[456] Thus, during this period, a father could be charged with having ravished his daughter rather than with having committed the crime of incest *per se*. Otherwise, courts did not have jurisdiction over such acts.

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[455] See generally Rose, *Childhood*, *supra* note 28 at 234. See also Wohl, *supra* note 165 at 210. For an example of such a provision, see 4 & 5 Vict. c. 27 s.17 (1841) (L.C.):

> And be it enacted, That if any person shall unlawfully and carnally know and abuse any Girl under the age of ten years, every such offender shall be guilty of Felony; and being convicted thereof, shall suffer death as a Felon; and if any person shall unlawfully and carnally know and abuse any Girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to be imprisoned for such term as the Court shall award.

[456] Ruth Olson, "Rape—An 'Un-Victorian' Aspect of Life in Upper Canada" (1976) 68 *Ont. Hist. Soc.* 75 at 78 (citing *The Kingston Chronicle* (12 November 1845)).

The phenomenon of incest has floated in and out of Western public consciousness during the past century, with the 1970s evidencing a reawakening of interest among children's rights advocates and social workers in that form of social pathology.[457] However, as Linda Gordon as demonstrated in her work on the Society for the Prevention of Cruelty to Children in Boston, child protection agencies were grappling with that problem on a regular basis a century earlier, with ten percent of the case records she sampled from the 1880s containing references to incestuous conduct.[458] Child protectors of the period knew that child sexual abuse was most prevalent within the family and that the father was the most common assailant, observations that continue to ring true today.[459]

While child protection agencies might have grappled with that phenomenon later in the century, incest remained nearly invisible in Lower Canada of the first half of the nineteenth century. With no specific criminal provisions governing it, and in the absence of public discussion about the issue, it could not have been otherwise. On those rare occasions when it was alluded to, however, the infamy with which it was viewed was unequivocal. For example, the following newspaper account from 1846 recounted a conviction in the judicial district of Trois Rivières:

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[457] See generally Linda Gordon, *Heroes of Their Own Lives: The Politics of Family Violence* (New York: Viking Penguin Books, 1988) 56 [hereinafter Heroes].

[458] Compare *ibid.*

[459] See *ibid.* at 61. According to 1995 statistics from the F.B.I., children under the age of twelve were nearly three times more likely to be victims of family rape than were all victims of rape. See "The Structure of Family Violence: An Analysis of Selected Incidents" (found at http://www. fbi.gov/ucr/ nibrs/famviol21.pdf).

> PUNISHMENT OF DEATH--Joseph Roberts a labourer of this town was sentenced to be hung on the 19th ult., by the Court of Queen's Bench of this District, for violating the person of his own daughter, aged ten years and a half. The sentence was pronounced by the President of the Court, the Hon. Judge Panet, who intimated to the culprit that the circumstances of his crime would render the Executive deaf to any application for a mitigation of his punishment. The crime of Joseph Robert has a character of unexampled demoralization. It is one of those, almost unheard of in the annals of humanity. The execution will take place on the 21st November.[460]

Under the facts as reported, Roberts could have been successfully prosecuted as his actions fit the *mens rea* required for a rape conviction, or more simply as a case of statutory rape. However, given that the facts suggest that his daughter was just over the age of ten—which would have rendered the crime a misdemeanor not punishable by death—it is more likely that he was convicted of rape.

The newspaper's assertion that this was a crime "almost unheard of in the annals of humanity" was true insofar as few cases involving child rape by a relative came before the courts during the nineteenth century. However, references to incestuous conduct were sporadically found in the archives. As stated earlier, incestuous acts tended to surface when intervening acts occurred, such as family violence. One such example involved Elmire Legault *dit* Deslauriers and her uncle Louis, against whom a complaint had been filed for having killed the two illegitimate children they had produced together.[461] In the latter case, while the family relationship was mentioned,

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[460] *The Pilot* (6 November 1846) (citing *The Three Rivers Gazette*). That case was not included in discussion in this thesis as it fell outside the judicial District of Montreal.

[461] See Pilarczyk, *Justice*, *supra* note 16 at 111-112.

the discussion centered on the accusation of infanticide.[462] Another instance involved a spouse who filed suit against her husband in 1832 for assault and battery and uttering threats. In her affidavit, she mentioned that her husband had abandoned their marital bed and slept with his seventeen-year-old stepdaughter in the "presence of her and four infants." The daughter, she alleged, had become pregnant, an assertion that was apparently confirmed by the husband.[463] While in neither instance was the incestuous conduct subject to criminal sanction in its own right, accounts such as those provide 'shadow evidence' of the existence of incest.

For historians, however, the question of greater interest is the extent to which the institutions of criminal justice of the period grappled with that issue. Given the non-existence of statutory prohibitions, incestuous conduct could only be expected to result in a legal response if an act had occurred that was otherwise punishable as an instance of rape or unlawful carnal knowledge of a female child. As such, the family relationship would have been incidental to the legal charge itself, although it might well have been seen as adding to the enormity of the offense.

Only four prosecutions that implicated incest were found in the judicial archives for the District of Montreal. In August of 1826, a brutal assault was alleged to have been perpetrated on a seven-year-old girl by one Joseph Massé. It was a "most atrocious crime," hissed the *Montreal Gazette*, going on to explain that the "wretch" in question

[462] For an example of an Upper Canadian case in 1840 in which a father and daughter were convicted of killing the newborn conceived as a result of their incestuous relationship, see Anderson, *supra* note 113 at 186.

[463] A.N.Q.M., KB(F), *Dominus Rex v. René Lavoie* (5 March 1832) (affidavit of François Hinse); KB(F), *Dominus Rex v. René Lavoie* (5 March 1832) (affidavit of Marie Hinse).

had given the young girl rum until she was intoxicated, after which he "violated her person with circumstances of aggravation too shocking to be detailed."[464] Massé was indicted on a charge of carnally knowing and abusing a female child under the age of ten years, and tried before the fall term of the Court of Queen's Bench.[465]

The victim in that case was, in fact, Massé's niece, an observation made wholly in passing in the newspaper's discussion. The niece had been spending the day at his house and, according to the testimony, her mother had repeatedly sent for her but on several occasions had been told that her daughter was playing in the woods. The child's mother as well as Massé's wife went in search of the child and found her lying on the floor of the cellar, allegedly intoxicated and bloodied. As the Court reporter delicately put it, "[i]t appeared in the course of the evidence, that certain parts of the child had been injured by the prisoner." Even more potentially damning to the defendant was that he had apparently confessed several times to the crime after his apprehension, perhaps as he had hoped for lenient treatment. Under standard criminal procedure of the period, however, confessions that might have been coerced were inadmissible, including those that might have been induced by the hope of escaping prosecution. The presiding judge therefore refused to allow Massé's confession to be heard by the jury, and he was

[464] *The Montreal Gazette* (21 August 1826) (citing *The Montreal Herald*).

[465] A.N.Q.M., KB(R), *King v. Joseph Massé* (7 September 1826). See also *The Montreal Gazette* (7 Sept 1826); *The Canadian Courant* (9 September 1826). Note that Massé was charged with a sexual offense against a child.

quickly acquitted.[466] Massé's niece did not testify, but even had she been inclined to do so, it is not certain the Court would have found her competent to testify under oath by virtue of her tender age.

Standards of propriety throughout the Victorian era being what they were, there was considerable societal concern about commingling of the sexes. The exception was the family sphere, in which, as Karen Dubinsky has written, the "presumed moral safety of families afforded cousins, uncles and in-laws unsupervised access to female relatives."[467] The alleged facts of the Massé case coincide with that observation, as he was given unchaperoned access to his niece while she stayed at his home for the day. Untold numbers of females fell victim to the sexual advances of men during the nineteenth century, and the family premises were a fertile hunting ground for predatory men.[468]

Despite the lack of a common law or statutory offense of incest, in two other instances incest itself was specifically alleged. In April of 1838, one defendant was committed to the Montreal jail for that crime, and was admitted to bail five months later.[469] Unfortunately, no other records of that case have survived. In the other

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[466] *King v. Joseph Massè*, *ibid. The Montreal Gazette* (7 Sept 1826). See also *The Canadian Courant* (9 September 1826).

[467] Dubinsky, *supra* note 194 at 58.

[468] See *ibid.* at 61. For the conjunction between incest and infanticide cases, see *ibid.* at 60-62.

[469] A.N.Q.M., MG (John Young committed 12 April 1838 for incest; bailed 10 September 1838 by Court of Queen's Bench). The fact that the notes on his incarceration explicitly refer to "incest" should not be seen as a refutation of the claim that incest was not a discrete legal offense, as notations often were couched in terms more descriptive than legally accurate. For further discussion of the fluidity inherent in criminal charges, see Pilarczyk, *Justice*, *supra* note 16 at 258-260.

instance, however, the judicial record is marginally more complete. In 1842 Jean Baptiste Schnider was accused of having had sexual relations with his eighteen-year-old daughter, Mérante, against her will. In her complaint in which he was charged with "ravishing his own daughter," she claimed that since the age of eleven he:

> auroit durant la nuit prit la deposante lorsqu'elle étoit endormie et l'auroit [mise] dans son lit....Qui cette fois, le dit Jean Baptiste Schnider malgré qu'il auroit essayé à connoître la dite deposante charnellement n'auroit pu reussir à cause de son jeune âge. Que depuis ce tems [il] a très souvent essayé à violer la dite deposante mais n'a jamais pu réussi avant l'année mil huit cent trente sept ou trente huit, lorsqu'il parvient enfin à la violer. Que lorsque [il] connoissoit la dite deposante charnellement (apres qu'il l'eut seduite) ce qu'il faisoit très souvent.... Que dans le mois de Juiller dernier [il]...auroit encore et connu la dite deposante comme susdit. Que la dite deposante se seroit ensuite confessée à son curé.…Qu'en effet la dite deposante se seroit mis en service, d'ou son dit pere voulet la fai[re] sortir, et alors la dite deposante refusoit de retourner chez lui, occasiona sa bourgoise une nommé Marie Muir...à lui demandu la raison pour laquelle elle refusoit de retourner chez son père.....[470]

Mérante's claims were supported by her mistress, Marie Muir, who filed an affidavit on her behalf. In fact, her affidavit appeared to have been dated two days before that of Mérante, so Muir might have initiated the legal proceedings herself, perhaps as Mérante was reluctant to do so. Muir stated that Mérante had been employed as a domestic for approximately fifteen days, but that after the eighth or ninth day of her service her father had come for her, wishing to take her home.[471] Mérante adamantly refused, prompting Muir to inquire why she reacted so strongly against visiting her father. When pressed, she confessed to Muir that her father had first raped

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[470] A.N.Q.M., KB(F), *Domina Regina v. Jean Baptiste Schnider* (15 October 1842) (affidavit of Mérante Schnider).

[471] As Dubinsky has noted, "[n]either marriage nor adulthood necessarily freed women from sexual obligations to their fathers." Dubinsky, *supra* note 194 at 59.

her at the age of eleven, and was in the habit of doing so whenever he found her alone in the house. As she got older, she confided, she came to realize the consequences of the abuse she suffered at her father's hands.[472]

Appearing before a local Justice of the Peace, Mérant's father underwent a voluntary examination. His response to the charge of having "illégalement, félonieusement et contre le gré de Mérante Schnider, sa fille, violé la personne de la dite Mérante Schnider et joui d'elle charnellement," was to assert his innocence and deny any knowledge of the acts in question.[473] For unknown reasons that case did not proceed to trial. A notation on one of the documents reads simply "no proceedings had," and no further reference to Mérant's complaint was found, suggesting that perhaps she decided not to pursue the matter further, or was prevailed upon not to do so. This case was likely able to proceed as far as it did only because, under the facts alleged, Mérante had filed a complaint for ravishment. Using a rape prosecution as a vehicle by which to prosecute cases of incest was probably a well-known legal stratagem, albeit one of only limited utility since it required a showing of force. It has been noted that in late-nineteenth century Ontario, while there were statutes that proscribed incest, defendants were often charged with rape because that offence

[472] A.N.Q.M., KB(F), *Domina Regina v. Jean Baptiste Schnider* (13 October 1842) (affidavit of Marie Muir).

[473] A.N.Q.M., KB(F), *La Reine v. Jean Baptiste Schnider* (15 October 1842) (voluntary examination of Jean Baptiste Schnider).

provided for much more severe penalties.[474] As such, it is no surprise that rape charges would have been brought (however unsuccessfully) where statutory provisions governing incest were lacking.

Prosecutions for incestuous conduct were also subsumed under other criminal charges during this period. One of the most interesting examples is an abduction case brought against Michael Coleman in 1850. Abduction, defined as the "unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution," was a centuries-old common law offense.[475] A charge of abduction often masked consensual sexual relations, but that was not always the case.[476] In the case at hand, Coleman was charged with, and ultimately convicted of, the abduction of a woman under the age of sixteen years. What makes that case of relevance to the discussion of incest is that Coleman was the victim's stepfather. That fact was also to have weighty ramifications for the jurists involved, who had to grapple with the question of whether Coleman, as the girl's father by marriage, therefore qualified as her guardian and hence was legally incapable of committing the *actus reus* in question.

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[474] Compare Carolyn Strange, "Patriarchy Modified: The Criminal Prosecution of Rape in York County, Ontario, 1880-1930" in Jim Phillips *et al*, eds., *Essays in the History of Canadian Law*, vol. 5 (Toronto: University of Toronto Press, 1994) 207 at 230 [hereinafter *Patriarchy*]. That is not to say that rape prosecutions were often successful, as more often than not they failed. See generally Olson, *supra* note 197; Dubinsky, *supra* note 194; Strange, *ibid*; Constance Backhouse, "Nineteenth-Century Canadian Rape Law 1800-1892" in David Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 200.

[475] See generally *Black's Law Dictionary*, *supra* note 140 at 3.

[476] See generally Dubinsky, *supra* note 194 at 81-84.

While none of the corresponding judicial documents were located, it is known that Coleman was arrested and committed to the Montreal Gaol on 18 July 1849.[477] He was tried eight months later before the Court of Queen's Bench, in a trial that was immortalized through the reporting of *The Montreal Gazette*. In his opening remarks, the Solicitor General argued that "[a]ll those who had daughters and sisters were interested in the punishment and prevention of crimes like this," adding that the offense was "fortunately for us, almost unknown in Canada."[478]

The first witness called by the Crown was the eldest of Coleman's stepdaughters, Ann, the alleged victim of the attempted abduction. She and her younger sister had proceeded into the woods on a Sunday evening to find and milk the cows, when the stepfather accosted them. By the use of various stratagems--including telling Ann that she "had been long enough lamenting" a dress and shawl she had missed from her room and that she would find them further in the woods--he lured them further and further away from home, until they reached a house where her stepfather gave a half-dollar to the male resident to take her younger sister home. The stepfather then grabbed Ann by the hand and pulled her along with him. When about five miles from home, and some three miles from where her stepfather first accosted them, he was arrested by two men and Ann was returned home to her mother. Ann's missing clothes were found in a

[477] A.N.Q.M., MG (commitment of Michael Coleman on 18 July 1849, discharged 1 May 1850 "by being sent to Provincial Penitentiary.").

[478] *The Montreal Gazette* (20 March 1850).

bag in her stepfather's possession. On cross-examination, she asserted her ignorance of her stepfather's true intentions.

The Crown next attempted to call Ann's mother, but she was rejected as a witness after the defense objected on the grounds of marital privilege. Ann's younger sister was then called, and her testimony apparently corroborated that proffered by Ann. Other witnesses, including the two men who had arrested Coleman, established facts that were highly suggestive of Coleman's plans to abduct Ann, including the evidence of a neighbour who had been paid to ferry Coleman across the river along with one other passenger, who proved to be his stepdaughter. One of the witnesses who had arrested Coleman testified that he asked him "how it would do in the eyes of the public to live with this girl?", to which Coleman answered that it "would suit him very well." After the witness told Coleman that he thought he would go to hell if he died after having committed such debauchery, to which Coleman purportedly replied that "he would sooner go there then go home again to live."

Coleman's two attorneys pursued a vigorous, two-pronged procedural defense, arguing that the girl's age had not been proven, and that by virtue of the civil law the stepfather was vested with the guardianship of the child. With respect to the first argument, the Crown countered by arguing that the girl had been born in the United States and a birth certificate was not available. Since her biological father was dead and her mother was disqualified as a witness, the Crown offered the testimony of Ann, her sister, and neighbours to establish her age. With respect to the second argument, the Crown mentioned that the mother's right to guardianship remained unhindered unless

the stepfather formally became the legal guardian, a claim that he had forsaken by his criminal act. The Court reserved judgment on those points until after a verdict was reached, allowing that they might be raised in seeking to arrest judgment should Coleman be convicted.[479] The jury withdrew for only a few minutes before rendering a verdict of guilty.[480]

Nearly two weeks later, the Court rendered its decision on a motion for a new trial. The crux of the issue raised by the defense was, as reported in *The Montreal Gazette*, whether "the allegation of the indictment, that the girl abducted was taken from the possession and custody of her mother, while that mother was under the marital *puissance* of her husband, the abductor, was sufficient." In its ruling, the Court averred that "the law of nature" granted guardianship over children to the mother, a right that was not completely lost following marriage, but held cojointly with the father:

> Previously to the marriage the law of nature gave the guardianship to the mother. The subsequent marriage did not take it altogether from her. There had been no regular appointment of the stepfather to that guardianship. If then, the father had a right to guardianship, the mother also held it cojointly with him. The right of protutor with which he was invested by his acquisition of the *puissance maritale* did not entirely destroy the right of the mother; it rather invested the stepfather with the duties and responsibilities, than with the rights and powers of the *tutelle*....In England, where the rights of the husband over the wife are much greater than under our law in Canada, and the legal existence of the wife merged in that of the husband, she was still held to possess this power and guardianship....The *puissance* of the husband, then, being greater than in Canada, who shall say that the mother,

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[479] *Ibid.*

[480] A.N.Q.M., KB(R) (March 1850-October 1857) p.46, *Queen v. Michael Coleman* (18 March 1850). See also *The Pilot* (19 March 1850); *La Minerve* (21 March 1850).

> who is under that stricter system, even, left this power, has not with us this power of protection over the morals and safety of her child, in the absence of the father.[481]

The crux of that prolix legal discussion was that the mother was deemed to share guardianship over her minor children even under English law, which was more restrictively interpreted than was the law in Lower Canada.

As the Court went on to emphasize, those rights of authority and guardianship of the mother would be heightened by the facts of the instant case, when the father (Coleman) was not only "absent," but was also "the person endeavouring to debauch her daughter." The Court made no reference to the other issue raised earlier, namely that of proof of the girl's age, apparently satisfied with the evidence offered, and went on to dismiss the application for a new trial. The surviving newspaper reports of that trial are, like many such accounts, sterile transcriptions of what transpired in Court, and contain little trace of the emotive content that permeated trials for offenses deemed especially reprehensible (and, by extension, most interesting) during the early-to-mid Victorian period. The Court's disapprobation was vividly displayed at the sentencing, however. While no accounts of the presiding judge's speech during sentencing have been found, Coleman's attempted abduction of his stepdaughter netted him three years in the provincial penitentiary.[482]

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[481] *The Montreal Gazette* (1 April 1850). Counsel had argued that the verdict was contrary to law, and that Coleman's stepdaughter was under his guardianship. A.N.Q.M., KB(R) (March 1850-October 1856) p.46, *Queen v. Michael Coleman* (26 March 1850).

[482] *The Montreal Gazette* (1 April 1850). See also *La Minerve* (1 April 1850) ("Michael Coleman, enlèvement d'une fille au-dessous de 16 ans, 3 ans au pénitentiaire."); *The Pilot* (3 April 1850); A.N.Q.M., KB(R) (March 1850-October 1856) p.59, *Queen v. Michael Coleman* (31 March 1850) (motion denied); p.66-67, *ibid.* (31 March 1850) (sentence).

In other nineteenth century jurisdictions, incest was seen more as a sin than a criminal offence. As Carolyn Strange has pointed out in the context of Toronto during a later period, "the language [juries, judges, and the press] used to describe incest was filled with the same terms of pollution and disgust reserved for portrayals of interracial rape, homosexual offences, bestiality, and child molestation."[483] It is probably safe to assume the same was true for Montreal, but there is little evidence either way. And while the conviction rate elsewhere has been shown to be higher than for sexual assault in general, and higher than for non-familial child rape, given the near absence of convictions, the Montreal experience cannot be said to be similar.[484]

Those cases, as limited as they are, allow for circumspect extrapolation as to their common features. In all instances, the malefactors were male.[485] Conversely, all alleged victims were female.[486] The perpetrators were usually fathers or men in fatherly roles: one was a father; one was a stepfather; one was an uncle; and one was an unknown relation.[487] Among non-incest prosecutions that involved incestuous conduct, one malefactor was a stepfather and the other was an uncle.

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[483] Strange, *Patriarchy*, *supra* note 215 at 229-230.

[484] *Ibid.* at 230 (citing the figure that six out of eight men in Ontario charged with that offense during the period 1880 to 1929 were found guilty, although she also noted that the number of incest prosecutions was "miniscule."). Strange went on to state that offenses "against fundamental taboos seemed to call for extraordinary responses from the criminal justice system." *Ibid.*

[485] Gordon & O'Keefe likewise noted in their study that the preponderance of perpetrators were male. See Gordon & O'Keefe, *supra* note 161 at 28.

[486] Almost all of the children involved in Gordon & O'Keefe's study were female. See *ibid.*

[487] The case of John Young contains no information on the family relationship involved. See *supra* at 67. Compare Dubinsky, *supra* note 194 at 58 (noting that one-third of sexual assaults against children committed by

As has been noted in other jurisdictions, incestuous assaults were rarely spontaneous acts, but rather tended to be ongoing, sustained affairs. Whether the case of Joseph Massé would be an exception is unknowable. More typically, in the case of Mérante Schnider the incestuous relationship was alleged to have continued for several years.[488] Schnider's allegations surfaced after she moved away from home, perhaps a more common scenario than that of Massé, in which a relative exposed the incident.[489] It must be emphasized, however, that those cases represent only those that fell within the purview of the judicial system, and the sample size is small. As such, no statement about the frequency with which incest occurred can be proffered, nor can any conclusions be drawn about the correlation between incest and larger rates of family violence.[490] Disturbingly, it may well have been the case that families in which incest occurred were not otherwise unusual.[491] As mentioned previously, many factors would have militated against children seeking redress before courts of law, and it was only the

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household members were perpetrated by uncles, stepbrothers and cousins, while the remainder were committed by fathers, stepfathers, and adoptive fathers).

[488] By way of comparison, Gordon & O'Keefe's survey indicates that thirty-eight percent of the incestuous relationships continued for three or more years; twenty-nine percent for one to three years; five percent for less than twelve months; seventeen percent took place on several occasions; and ten percent were found to have occurred once. See Gordon & O'Keefe, *supra* note 162 at 29. See also Dubinsky, *ibid.* at 59 (stating that father-daughter incest was typically sustained over a period of months or even years).

[489] Compare Gordon & O'Keefe, *ibid.* (stating that "[i]n our cases the incestuous relations were terminated either by the girl's moving away from the household, by discovery by some outside authority or, least frequently, as a result of discovery by another family member.").

[490] Compare *ibid.* at 28 ("[Those cases] represent only those family violence cases that have come to the attention of social-control forces. These cases bear an indeterminate relation to the actual incidence of family violence, and we can make no judgements about that problem in the population at large.").

[491] Dubinsky, *supra* note 194 at 62 ("[o]ne is struck by the sheer ordinariness of most families in which incest was reported. Sexual abuse does not, of course, characterize all Canadian families, but privacy and the ideology of the moral sanctity of the family do.").

rare case of abusive conduct towards children that would have prompted a complaint, let alone a full-fledged prosecution.

In a period before widespread awareness of children's issues, few statutory provisions regarding children existed, and they offered no specific protections for children *vis-à-vis* their families. Contemporary Western societies recognize the need to accord children heightened legal protection to take account of the fragile nature of children's physical, social, and psychological well-being, even though our collective record with respect to protecting children is spotty at best. In those infrequent instances when allegations of abusive conduct came before the courts, they were heard by jurists who tended to accord deference to the traditional role of the *pater familias*. There were limits, however, to parental correction of children. The censure of treatment that was life-threatening or ran the risk of permanent injury was fairly non-controversial.

Cases during the first half of the nineteenth century in Montreal were suggestive of flux. A degree of ambivalence must be recognized, along with the observation that parental crimes against children were not viewed as being as abhorrent as others. Parents were given wide latitude in disciplining their children, and children were not viewed as full rights-holders. In general, causing the death of a child did not trigger the same societal response as a wife killing or husband killing.[492] As children became more valued by society, there was more vociferous condemnation of such acts.[493]

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[492] As Knelman has noted, "[t]he truth was, however, that the reprieve of a child murderer sent a less threatening message than the reprieve of a husband murderer. Excuses could be accepted for the murder of a child, but the murder of a husband under any circumstances was not to be condoned." Knelman, *supra* note 75 at 142.

[493] See also *ibid.* at 144 (noting increasing press coverage of child murders as the century progressed).

However, the existence of depositions, indictments, and full-fledged trials for child abuse is evidence of a growing recognition of limits to parental authority, however tentative. While legislatures had yet to promulgate laws designed to protect children from familial brutality, courts showed at least some inclination to apply the ordinary provisions of the criminal law to shield children. It is unlikely that Judith Couture, Betsey Kennedy, or Emelie Granger felt that they were constrained in their actions towards the children in their care until the law intervened. It is equally unlikely that Isabel Belile ever contemplated the possibility of facing incarceration for threatening to kill her child. Yet, they were not the only adults to face legal sanction for harming children. Were children not faced with so many disabilities, it is likely that a private prosecutor-driven system would have resulted in many more cases coming before the courts. How the courts would have reacted is a matter of speculation, but perhaps a flurry of such prosecutions would have caused Montreal society to begin grappling decades earlier with the issue of child abuse in a more public and proactive fashion.

Allegations of incest are most illustrative. Despite the fact that Parliament had yet to enact legislation governing that offense, allegations of incest still surfaced in the judicial archives. Myriad obstacles prevented prosecution of those acts--lack of statutory authority or of a common law offense, evidentiary obstacles, and the like--yet some cases were still squeezed into existing legal offenses to punish transgressors. Michael Coleman could not have been charged with incest, rape or even unlawful carnal knowledge, but his intentions towards his stepdaughter left him vulnerable to prosecution for abduction. Joseph Massé could not have been charged with incest, but

he was prosecuted (however unsuccessfully) for unlawful carnal knowledge in a trial at which his young niece did not testify.

That those cases happened at all is perhaps the best evidence that by the period 1825 to 1850, Montreal jurists were beginning to grapple with the issue of imposing limits on the sanctity of family authority over children. By so doing, they tacitly began to recognize that the family premises could be havens for child victimization as well as child protection. It is true that such cases forced society to acknowledge issues its members would much rather have ignored:

> Whereas reports of sexual misconduct may be occasions for a wide range of reactions--from humor to outrage--the details of the violence of one person to another evoke more immediate and visceral responses. There is no room for laughter in a courtroom when we hear verbatim the circumstances of a child being beaten to death, and the smile of the cynic is swallowed as grave after grave of murdered babies is, literally, or figuratively, opened. The fact that, as today, most violent crime occurred within families served to intensify this effect in an age which so vocally prided itself on its domestic solidarity.[494]

There was no societal movement to expose and address the plight of abused children during the early-to-mid Victorian period, and indeed attention directed at such issues was often viewed by society as unwelcome. Courts, however, were the fora where such issues came to light, forcing some measure of societal acknowledgment of their existence as well as their seriousness. Had children had readier access to the courts, or had the notions of family privacy and the *pater familias* not been so firmly entrenched, early-nineteenth century Montreal courts could well have been forced to grapple with those issues in a much more sustained manner.

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[494] Boyle, *supra* note 16 at 27.

Early Victorian attempts at child protection might have been hesitant, uneasy, disjointed, and ultimately unsatisfactory. Those attempts nonetheless reflect the fact that courts were, on at least some occasions, willing to grapple with actions that flew in the face of countervailing social and legal precepts. It would not be until the 1870s and 1880s that a battery of legislative enactments instituted formal limits on parental power, and representatives of "the Cruelty" investigated child abuse by combing the alleys and tenements of urban centers. The notion that the law should protect children from the excesses of their guardians, however, had already stirred in the minds of Montreal jurists decades earlier.

Chapter Three
'Her Bruised Heart Bleeds in Secret':
Spousal Violence in Montreal

> THE DRUNKEN HUSBAND--The common calamities of life may be endured--poverty, sickness, and even death may be met--but there is even that which, while it brings all these with it, is worse than all three together. When the husband and father...by slow degrees becomes the creature of intemperance, there enters into his home the sorrow that rends the spirit--that cannot be alleviated; that will not be comforted....What shall delight [the wife] when she shrinks from the sight of his face, and trembles at the sound of his voice? The heart is indeed dark, that he has made desolate. There, in the dull hour of midnight, her griefs are known only to herself--her bruised heart bleeds in secret.[495]

That newspaper article, appearing in 1834, was a condemnation of the evils of intemperance. Couched in the heavily sentimental language common at the time, it alluded to the "sot's disgusting brutality" in depicting the specter of violence that often lurked in the alcoholic's household. Depictions of overt violence against wives rarely appeared in the period press, and that violence was not yet the subject of public crusades or pronounced criticism in the first half of the nineteenth century.[496] As court records make clear, however, it was a common element of family life.[497] Indeed, wife battery was the form of family violence most likely to surface in judicial archives.

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[495] *The Montreal Gazette* (1 May 1834).

[496] For a rare example, see *e.g. The Montreal Gazette* (2 August 1844):

> On Saturday last, a man of the name of Larochetiere, living in the Quebec suburb, while in a state of drunkenness, beat his wife so severely that her life was despaired of; but we learn that she has since rallied, and that hopes are entertained that she will recover.

[497] A fact that remains true today. Statistics Canada reported that in the 1993 "Violence Against Women Study," twenty-nine percent of women who were married or in common law relationships had been assaulted. Statistics Canada, *Women in Canada: A Statistical Report* (Ottawa: Statistics Canada, 1995) 104.

As that newspaper account noted, in many instances battered wives suffered in silence, then as now, and their stories therefore cannot be reconstituted from judicial proceedings of the period. This chapter analyses the judicial response to spousal battery in Montreal during the years 1825 to 1850. By examining the hundreds of instances in which the judicial process was implicated in violence between spouses, one can arrive at a fuller, more representative, and more contextual understanding of domestic violence during this period.[498] Part I offers an overview of spousal abuse up to the nineteenth century. Part II examines the options available to an abused spouse, including legal remedies. Part III analyzes instances of domestic violence that led to such charges as assault and battery, aggravated assault and attempted murder, while Part IV dissects the causes and dynamics of domestic violence as set out in those complaints.

Scholars have tended to divide the study of domestic violence into spousal (wife) battery and spousal (wife) murder. While such studies remain valuable, that pattern of inquiry had had two unfortunate consequences: first, wives have typically been depicted as victims and stripped of all agency. Violence against wives is not only a story of male brutality, but also involved wives' resistance to male domination.[499] Furthermore, while domestic violence was typically the preserve of men rather than women, the role of wives as aggressors or mutual combatants also deserves

[498] All spouse-like relationships are examined in this study, including relationships in which the two parties had children together or purported to be husband and wife. Some couples who claimed to be married were probably not viewed as such in the eyes of the law.

[499] Compare Peterson del Mar, *supra* note 8 at 45-46. See also Gordon, *supra* note 4.

examination.[500] Many such studies also fail to view those issues along a 'violence continuum,' which allows one to establish the extent to which chronic abusers were likely to accelerate violence.[501] Combining study of all forms of violence in the family does not mitigate the banefulness of less lethal forms of domestic battery, but it does serve to probe the similarities and differences between their lethal and non-lethal forms.

I.

Violence has been a factor in family life since time immemorial. There has been considerable scholarship dealing with that issue in the English and American contexts, and the experiences in those countries provide a wealth of information. As scholars have pointed out, domestic violence was common in Victorian England.[502] Francis Power Cobbe, an early crusader against that issue, argued that society sanctioned wife abuse.[503] It has been argued that the law in England, and indeed in Western jurisdictions at large, "mirrored the public acceptance of wife-beating and, in turn, reinforced it."[504] The

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[500] Compare Statistics Canada, *supra* note 534 at 103 (reporting that seventy-two percent of violence against women was committed by relatives and acquaintances). See also Conley, *supra* note 35 at 74. Some modern-day social scientists have controversially argued that wives commit a much higher percentage of spousal batteries than has been traditionally acknowledged, but that is clearly a minority view. Further discussion is beyond the scope of this thesis.

[501] Cobbe argued that wife beating amounted to "wife torture," which she argued usually ended in "wife-maiming," "wife-blinding," or "wife-murder." See Francis Power Cobbe, "Wife-Torture in England" (1878) 32 *Cont. Rev*. 55 at 72.

[502] See *e.g.* Carol Bauer & Lawrence Ritt, "'A Husband is a Beating Animal': Frances Power Cobbe Confronts the Wife Abuse Problem in Victorian England" (1983) 6 *Inter. J. Women's Stud*. 99 at 100 note 6.

[503] See Cobbe, *supra* note 539 at 62-64. See also *ibid.* at 110.

[504] Bauer & Ritt, *supra* note 540 at 102.

extent to which wife beating was publicly sanctioned in Victorian England is open to debate. However, it is unassailable that in earlier centuries a husband exercised dominion over his wife, and that included the right of physical chastisement.

At the common law, wives did not generally have recourse to prosecutions against their husbands for assault and battery. As set out in Sir Seymore's case of 1613, wives were considered *sub virga viri*, or under their husband's rod.[505] Moreover, women's legal status was subsumed into that of their husbands, with women facing a range of legal and social disabilities due to the rule of "marital unity" in which their legal identity was merged into that of their husbands.[506] Victims of domestic violence were confronted by a well-entrenched belief in family immunity.[507] A husband's right to chastise his wife was not absolute, however, and not all commentators agreed on its legality. Cobbe argued that the long-standing common law rule respecting a husband's right to chastise his wife, immortalized in an act of Charles II, was only revoked in 1829.[508] As Doggett has observed, however, while some observers may have questioned

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[505] See generally Doggett, *supra* note 6 at 5-6.

[506] Those legal disabilities included contractual and testamentary incapacity. For discussion of the law related to marital unity, see generally *ibid.* at 34-99; Reva D. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 *Yale L.J.* 2117 at 2122-2123.

[507] See generally Elizabeth Pleck, "Criminal Approaches to Family Violence, 1640-1980" in Lloyd Ohlin & Michael Tonry, eds., *Family Violence, Crime and Justice: A Review of Justice*, vol. 2 (Chicago: University of Chicago, 1989) 19 at 20 [hereinafter *Criminal Approaches*].

[508] See Cobbe, *supra* note 539 at 64.

the legality of wife beating, few denied its legality altogether.[509] Wives in eighteenth century England, for example, could have their husbands bound to the peace, but the ancient premise of a husband's dominion over his wife was still well-entrenched.[510]

That right to correction survived as an accepted social and legal practice well into the nineteenth century, although as the century advanced there was increasingly vocal opposition. Still, husbands were given wide latitude. As Charles Dickens was to observe in 1851, "[t]he fact of a woman being the lawful wife of a man, appears to impress certain preposterous juries with some notion of a kind of right in the man to maltreat her brutally, even when this causes her death."[511] By the last decades of the century, legal commentators had forged a consensus that the husbands' prerogative was an archaic remnant from a less civilized past.[512] Even by the early-Victorian period, English spouses pursued criminal prosecutions of abusive spouses in significant numbers, particularly after Justices of the Peace were accorded the right to try assault cases summarily by virtue of the "Offences Against the Person Act" of 1828.[513] The law provided minor penalties on conviction, however, with a maximum fine of five pounds

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[509] See Doggett, *supra* note 6 at 10; Conley, *supra* note 35 at 74 (noting that there was no legal right to beat one's wife, but that judges generally sympathized with husbands.).

[510] See generally Beattie, *Criminality*, *supra* note 154 at 205.

[511] [Richard J. Horne & Charles Dickens], "Cain in the Fields," *Household Words* (10 May 1851) (cited in Wiener, *supra* note 15 at 478 note 34).

[512] See generally Doggett, *supra* note 6 at 15.

[513] "Offenses Against the Person Act " 9 Geo. IV c.31 s.7 (1828) (U.K.). See generally *ibid.* at 30.

and two months' imprisonment in default of payment.[514] There was little other legislative change until the middle of the century, when the English Parliament passed legislation in 1853 designed to address the frequency of serious assaults on women and children.[515] Four years later legislation designed to liberalize the law of divorce was enacted, although the law remained ineffective and far from egalitarian.[516]

While by the first half of the century English courts generally no longer accepted the permissibility of spousal correction, the law did not yet recognize its outright illegality. As Doggett has stated, "[t]he courts may no longer have recognised a husband's right to beat his wife, but they had not advanced so far as to recognise *the wife's right not to be beaten*."[517] Spousal cruelty was an increasingly prominent social issue by the mid-part of the century, and by 1857 the first branch of the Society for the Protection of Women and Children from Aggravated Assaults had been founded.[518]

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[514] See generally Doggett, *ibid.* at 106.

[515] "An Act for the Better Prevention and Punishment of Aggravated Assaults Upon Women and Children, and for Preventing Delay and Expense in the Administration of the Criminal Law," 16 Vict. c. 30 (1853) (U.K.). See generally Bauer & Ritt, *supra* note 540 at 111; Behlmer, *supra* note 326 at 12; Doggett, *ibid.* at 106-107; Hammerton, *supra* note 6 at 59; Conley, *supra* note 35 at 74. That Act provided for six months' incarceration and a £20 fine, and allowed for third-party prosecutions.

[516] "Matrimonial Causes Act," 20 & 21 Vict. c. 85 (1857) (U.K.). That Act provided for judicial divorce and transferred responsibility for matrimonial matters from Ecclesiastical courts to a formalized Divorce Court. The inequalities remained, however, as husbands could obtain a divorce on the grounds of adultery, while wives were required to make a showing of adultery coupled with incest, bigamy, rape, sodomy, bestiality, cruelty, or desertion. See generally Doggett, *ibid.* at 100. For discussion of legislation passed in late-nineteenth century and early-twentieth century Canada, see generally Lepp, *supra* note 31 at 455-461.

[517] Doggett, *ibid.* at 31 (emphasis in original).

[518] See generally *ibid.* at 111.

The frequency with which households were marred by violence cannot be known, although it must have been a common feature of early-Victorian life. Nancy Tomes has provided a rough estimate of the frequency of domestic violence in London of the 1850s and 1860s, stating that in a working-class neighbourhood of 200 to 400 houses, ten to twenty men would be convicted of assault against women every year.[519] Summary jurisdiction over assault cases, and the development of a police force, as well as liberalizing legal attitudes, all played a part in the increase in prosecutions for that offense.[520] Still, many husbands beat their wives, at least in part, because they felt it was their right to do so and could do so with impunity. Those who were called to task for it remained a minority of abusive husbands.[521]

While there is substantial scholarship on, and evidence of, wife battery in Victorian England, it was not a phenomenon unique to that jurisdiction. As Bauer and Ritt have pointed out, "it could be argued that the traditional patriarchal notions of family life were nowhere better illustrated than in the timeworn idea of the power of the husbands to compel wifely obedience to his authority by kicks, blows, and stomps."[522] Those patriarchal notions of family were common throughout the Western world.

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[519] See Tomes, *supra* note 7 at 330.

[520] See generally Doggett, *supra* note 6 at 114.

[521] Compare Harvey, *supra* note 3 at 137.

[522] Bauer & Ritt, *supra* note 540 at 102.

Indeed, notions of family privacy and male dominion worked against judicial intervention in matters related to domestic violence.[523]

Domestic disharmony and violence were issues from the earliest days of the American colonies. Under the Puritan model of the household, the family hierarchy was well-defined and operated as a "stable system of domestic government," with the husband as leader, the wife in a subordinate support role, and the children as obedient servants of the parents.[524] The major form of protection afforded to victims of domestic violence was the public scrutiny inherent in Puritan communities.[525] Evidence of domestic disharmony was usually quick to come to the attention of the main arbiter of such matters: the minister. More serious cases came before church courts, which dealt with such disparate offenses as uttering falsehoods, spousal and child abuse, drunkenness, adultery and fornication, and murder.[526]

Complementing the church courts was the ordinary criminal apparatus of the colonies. As Pleck has pointed out, Massachusetts Bay and Plymouth enacted what she characterised as the first laws against spousal violence in the Western world.[527] Pleck has argued, for example, that Puritan communities in Massachusetts Bay "acted against

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[523] See generally Buckley, *supra* note 34 at 179.

[524] Pleck, *supra* note 316 at 19.

[525] See generally *ibid.* at 18.

[526] See generally *ibid.* at 20.

[527] See generally *ibid.* at 21.

family violence in ways without parallel in Western history."[528] As was discussed in the previous chapter on child abuse, the Massachusetts *Body of Liberties* of 1641 was a remarkably progressive legal code. Besides proscribing child abuse, it outlawed wife battery, stating that "[e]verie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault."[529] An amendment to the code a few years later outlawed husband battery, as well.[530] Likewise, the Plymouth Bay Colony enacted a law in 1672 that punished wife battery with a fine of five pounds or a public whipping, while husband battery was punished at the court's discretion.[531]

Despite those statutory prohibitions, the law's application leaves little doubt that judicial emphasis was placed on preserving the family unit rather than protecting the victims of domestic assault.[532] Separations were not encouraged, and divorces--while more readily available than in England--were few. Matrimonial cruelty was not sufficient to justify divorce, and aggravating circumstances such as adultery or

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[528] Pleck, *ibid.* at 18. However, the intention primarily was to preserve the family unit, not to protect the individual rights of the victim. See generally *ibid.*

[529] *The Body of Liberties* (1641) (cited in Pleck, *Criminal Approaches*, *supra* note 545 at 80). See also Pleck, *supra* note 316 at 21-22; Archer, *supra* note 316 at 426.

[530] Pleck, *supra* note 316 at 22.

[531] *Ibid.*

[532] Compare *ibid.* at 23. ("Although there were humanitarian and religious dimensions to the Puritan legal code, the major purpose of their laws against family violence was to reinforce hierarchy within the family or in society.")

abandonment were necessary.[533] In seventeenth century Plymouth courts, family violence cases usually involved wife battery. The frequency of such cases decreased from the 1660s until the 1750s. In fact, by 1690 other types of family violence--most notably husband battery, parental assault by children, and incest--were no longer appearing before Plymouth courts. Various societal changes in those communities were no doubt responsible, but so too was the fact that colonial courts came under increasing pressure to conform to English common law.[534]

From the time of the 1672 statute until the middle part of the nineteenth century, no colonial or American legislation was passed that outlawed family violence. Occasional cases reflect the lack of an overall consensus on the issue, as evidenced by an 1824 Mississippi case that held that a husband had the right of "moderate chastisement" over his wife.[535] Such cases, however, were the exception rather than the rule, and the view that a husband had a legal right to discipline his wife was not common currency in American courts of the period.[536] As one legal scholar has posited:

> underlying most conversations about the prerogative [of wife correction] was a common assumption, articulated more frequently with the passage of time: that marital chastisement was a vestige of another world, an ancient legal precedent

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[533] See generally *ibid.* at 23.

[534] See generally *ibid.* at 29.

[535] See *ibid.* at 21. For early and mid-nineteenth century American cases recognizing the right, see Siegel, *supra* note 544 at 2125 and note 25.

[536] Compare Myra C. Glenn, *Campaigns Against Corporal Punishment, Prisoners, Sailors, Women, and Children in Antebellum America* (Albany: State University of New York Press, 1984) 67 note 15.

> of increasingly uncertain legitimacy. Yet, precisely by reason of its lineage as an ancient prerogative of marriage, chastisement did not die an easy death.[537]

Before a Tennessee statute addressing that issue was promulgated in 1850, little legislative action was discernable.[538] From the early years of the Victorian era to the 1870's, family violence was not viewed as a pressing social issue. However, the criminalization of those acts did happen at the local level, driven by the creation of a variety of general courts in American, English, British North American, and other jurisdictions. Those courts, which included police, alderman and hustings courts, depending on the jurisdiction, allowed for the summary disposition of family violence cases alongside the usual litany of public drunkenness, petty larceny, and other such cases.[539] Those courts presented a geographically and legally accessible venue for the working classes who lived in the teeming tenements and crowded streets of urban centers.[540] Courts such as the Police Court in Montreal presented a venue in which abused spouses could seek legal protection, and forced the law's servants to take cognizance of family violence, even if their response remained anemic.[541]

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[537] Siegel, *supra* note 544 at 2122.

[538] See generally Pleck, *Criminal Approaches*, *supra* note 545 at 29-35.

[539] See generally *ibid.* at 30.

[540] See generally *ibid.* Clark, *supra* note 31 at 198 observed that people "resorted to magistrate's courts with enthusiasm" and expected those courts to dispense justice on their own terms.

[541] Clark went so far as to say that judges "faced continual pressure from wives who wished to prosecute their husbands for assault whether or not they had a right to do so." *Ibid.* at 192.

It was the emergence of various social movements that was to provide the genesis for later legislative action. The nineteenth century American social movement against domestic violence was closely tied to the growth of the temperance movement. The first temperance society in the United States was founded in 1808, and within thirty years family violence became one of the focal points of that movement.[542] Eventually temperance crusaders came to view the issue of domestic abuse as inseparable from, and as a logical adjunct to, alcohol abuse. Remove the latter, they reasoned, and the former would disappear in its wake.[543] Activists who later took on the cause of spousal violence typically had been involved in other social movements, among them women's' suffrage, anti-child cruelty and social purity movements, the latter dedicated to abolishing the sex trade and related social ills.[544]

For the first half of the nineteenth century, however, public debate over wife beating took a back seat to the issue of corporal punishment of convicts, slaves, sailors and children.[545] Indeed, Societies for the Prevention of Cruelty to Children predated equivalent societies designed to aid women, and the SPCC was even known to act on behalf of battered wives.[546] As discussed in Chapter II, the SPCC was itself predated by

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[542] See Pleck, *supra* note 316 at 51.

[543] See generally ibid. at 49. As Pleck has stated, the temperance activists "subsumed the issue of domestic violence under the rubric of the ills caused by intemperance." *Ibid.*

[544] See generally *ibid.* at 89.

[545] See generally Glenn, *supra* note 573 at 80.

[546] Compare Pleck, *supra* note 316 at 88. For the conjunction between the SPCC and aid to battered women, see generally Gordon, *supra* note 4 at 252-264 & 280-285.

the Society for the Prevention of Cruelty to Animals, which reveals something about the evolution of social thought about those issues.[547] The temperance movement helped spawn the women's rights movement of the mid-and-late nineteenth century, whose supporters called increasingly vociferously for amendments to the laws regulating divorce, child custody and women's property, although lobbying against alcohol consumption was their primary medium. As Linda Gordon has stated:

> The attack on male sexual and familial violence was often disguised in temperance rhetoric. American women's historians have recently conducted a reinterpretation of temperance, acknowledging its anti-Catholic, anti-working class content, but also identifying its meanings for women contesting the evils that alcohol created for them and their families: violence, disease, impoverishment, male irresponsibility. Moreover, the feminist anti-violence campaign had significant successes. In the course of the century wife-beating was transformed from an acceptable practice into one which, despite its continued widespread incidence, was illegal and reprehensible, a seamy behaviour which men increasingly denied and tried to hide.[548]

While temperance advocates may never have constituted more than a small percentage of the upper social strata, let alone of the population as a whole, assumptions about the ills brought on by alcoholism among the lower classes became much more pervasive.[549]

Prompted by a convergence of related social movements, the issue of spousal violence itself was to reach its international zenith as a social cause in the period 1870 to

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[547] See Chapter II, *supra* at 130 & 139.

[548] Gordon, *Politics*, *supra* note 360 at 57.

[549] See generally Beattie, *supra* note 154 at 4-5.

1890.[550] That was also the case in Montreal. As Harvey has written in the context of late-Victorian Montreal:

> Wife-battering became an issue of public concern in Montreal in the 1870s....The existence of newspaper accounts and court cases treating wife-abuse, attests to a public awareness of it as a social problem. During this period, the voices of the temperance movement and middle-class law and order reformers joined in chorus to alert the public to the evils of alcohol abuse. The link made by the temperance movement between drunkenness and wife-battering focussed the public's attention on a crime that remained unnamed in other periods because it had no public face.[551]

It was not until the early-1880s that a Society for the Protection of Women and Children was founded in Montreal.[552]

As the century advanced and spousal violence was increasingly viewed as a crime that tore at the fabric of society, and not merely a crime against the victim, there was mounting support for the criminalization of that behaviour.[553] As society became

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[550] Pleck, *supra* note 316 at 88-89; Pleck, *Criminal Approaches*, *supra* note 545 at 20.

[551] Kathryn Harvey, "'To Love, Honour and Obey': Wife-Battering in Working-Class Montreal, 1869-1879" (1990) 19 *Urban. Hist. Rev*. 128 at 129-130 [hereinafter *Wife Battering*].

[552] See generally Harvey, *supra* note 3 at 20; Lepp, *supra* note 31 at 455 note 35.

[553] As Beattie, *supra* note 154 at 3 has stated:

> If crime proceeded from immorality then it posed a much greater threat to society than the mere taking of property or even the threat to life. It was evidence of a malaise of a much more fundamental character, for it argued that some members of society did not accept or had not been taught to accept the essential principles on which the social order rested, and that the foundations of the society were to that extent threatened.

See also Hammerton, *supra* note 6 at 16 (noting growing intolerance towards violence in the nineteenth century); Peterson del Mar, *supra* note 8 at 13 (violence by husbands deemed less acceptable than in past).

less inclined to defend vigorously the historical entitlements, protections and sanctity afforded to the family, it became more inclined to criminalize family violence.[554]

But social movements and legislative action (or the lack thereof) do not tell the whole story. Assaulting a spouse could still be an offense under the common law, regardless of larger legal and social trends. As Pleck has insightfully noted:

> the absence of a specific statutory prohibition [does not] prove that wifebeating was legal. Prior to the passage of the Maryland law of 1882, wifebeaters in that state were arrested for assault and battery. Similarly, although no judicial decisions were issued about the right of chastisement in Pennsylvania and South Carolina and neither state had a statute prohibiting wifebeating, it was nonetheless the case that violent husbands in both states were arrested on charges of assault and battery.[555]

The privately-driven nature of criminal justice during the period allowed individuals to assert their rights and seek redress despite more hegemonic social mores. As Allen Steinberg has noted, that accounts in large part for the frequency with which abusive husbands were prosecuted by their wives, relatives, and other parties.[556] On the other hand, the flexibility of the law to censure family violence, through treating it as it would any other form of violence, must be balanced against a prevalent societal ethos that showed great deference towards patriarchal relationships. As such, it is best to

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[554] Compare Pleck, *Criminal Approaches*, *supra* note 545 at 21.

[555] Elizabeth Pleck, "Wife Beating in Nineteenth-Century America" (1979) 4 *Victimology* 60 at 63 [hereinafter *Wife Beating*]. For discussion of the relationship between wife battery and divorce petitions, see generally Thomas E. Buckley, *The Great Catastrophe of My Life: Divorce in the Old Dominion* (Chapel Hill & London: University of North Carolina Press, 2002) 153-176 (nineteenth century Virginia).

[556] See Steinberg, *supra* note 16 at 46. As Clark has stated, "[w]e must admire the courage of the women who could defy patriarchy, while recognizing the power of the law to frustrate their efforts." Clark, *supra* note 21 at 205.

characterise early-Victorian legal attitudes towards wife battery as follows: prosecutions for spousal battery should not be equated with the widespread societal repudiation of this crime; conversely, the absence of statutory protections should not be deemed to be proof of its legality.[557] Nineteenth century legal and social mores in the first half of the century were less about governing family conflict than they were governed *by* conflict.

As shall be discussed, that was precisely the situation in Montreal during the years 1825 to 1850. The hundreds of assault and related cases brought against abusive spouses indicates that, even in the absence of specific statutory prohibitions, assault of one spouse by another fell under the purview of the criminal law. At the same time, however, the legal response towards spousal violence was defined neither by consistency nor by severe sentences designed to act as deterrents. Furthermore, the administration of criminal justice remained sporadic, particularly in the early period when fledgling police forces were too small to be effective agents of social control.[558]

II.

A spouse faced with violence had limited options. She could, of course, stay and endure her husband's conduct as best she could, and no doubt many abused spouses did precisely that.[559] Some wives were fortunate to find sanctuary or intervention due to the kindness of family and friends, which in some cases may have acted as a form of

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[557] Compare Pleck, *Wife Beating*, *supra* note 593 at 63 ("A more general claim is that wifebeating, even if a criminal offense, was nonetheless considered appropriate behavior for nineteenth-century American husbands.")

[558] Compare *ibid.* at 64.

[559] Compare Doggett, *supra* note 6 at 30; Buckley, *supra* note 593 at 157.

informal regulation of marital relations and served to put a stop to the abuse.[560] Divorce in Quebec remained a political procedure, not then having made the transition to a common judicial procedure, let alone the final step to an administrative procedure as it now is in most Western jurisdictions. Securing a divorce necessitated the expensive, lengthy and nearly always fruitless process of obtaining a private bill in Parliament for that purpose.[561] Securing an annulment was a possibility, but was not always easy. More accessible options included obtaining a "separation from bed and board" or a *séparation de corps*, a form of partial dissolution of the marriage,[562] or a request for separate maintenance.[563]

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[560] See generally Doggett, *ibid.* at 30; Pleck, *Wife Beating*, *supra* note 593 at 67-68; Buckley, *supra* note 593 at 180-181.

[561] A unique example of a newspaper advertisement signifying intention on the part of the advertiser to petition for divorce appeared in *The Montreal Gazette* (14 April 1844). Running for more than six months, it read:

> NOTICE. FLORA THOMSON, of North Georgetown, in the Seignory of Beauharnois, intends to apply to the Parliament of this Province, at its next Session (or at the Session following the next, if the rule of the Parliament will not sooner admit of the application), for a Bill or Act of Divorce from JOSEPH TOLL, her husband, for cause of adultery. FLORA THOMPSON. North Georgetown, 30th March, 1844.

For discussions of the law regulating divorce, see Constance Backhouse, "Pure Patriarchy: Nineteenth-Century Canadian Marriage" (1986) 31 *McGill L.J.* 265; Robert L. Griswold, *Family and Divorce in California, 1850-1890: Victorian Illusions and Everyday Realities* (Albany: State University of New York Press, 1982); Kimberley Smith Maynard, "Divorce in Nova Scotia 1750-1890" in Philip Girard & Jim Phillips, eds., *Essays in the History of Canadian Law*, vol. 3 (Toronto: Osgoode Society, 1990) 232; Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford: Oxford University Press, 1990) 301-367.

[562] Separations are defined as "[a] species of separation not amounting to a dissolution of the marriage." Black's Law Dictionary, *supra* note 437 at 951. Legal separations, known as "séparations de corps" or "separations as to person and property," were common in Quebec. While divorces were extremely difficult to obtain in the early-nineteenth century, legal separations in Quebec were much more freely granted. That is one of many examples suggesting

Informal "self divorces" or separations were always an option, in which one or both parties decided to live separately from each other, but these arrangements could pose financial and social disadvantages to women.[564] Self-divorce entailed a voluntary renunciation by both parties of their marital ties, but was without legal effect.[565] In the case of abandonment, moreover, the other spouse could renounce financial responsibility towards the other, at least in respect to debts incurred following the abandonment. For that reason, spouses placed advertisements in local newspapers announcing separation or desertion and refusing to be held responsible for debts incurred in their name. Such advertisements were similar to those used to advertise apprentices and other servants who deserted from service, and likewise served as negative character references, sought information on the deserting party, and were

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that even when the law was rigid (*e.g.* holding that marriage was dissolvable only by the natural death of one of the parties) there was frequently some flexibility within the legal system itself. I was unable to locate documents related to petitions for legal separations in the judicial archives. For discussion of legal separations in England, see generally Stone, *ibid.* at 183-230.

[563] See generally Buckley, *supra* note 34 at 154.

[564] Peterson del Mar, *supra* note 8 at 36-37 (noting that they "courted poverty as well as notoriety."). For discussion of desertion and elopement, see generally Stone, *supra* note 599 at 139-143. For discussion of private separation agreements, see generally *ibid.* at 149-182.

[565] A historical variant was the practice of "wife-selling," often practised in rural eighteenth century England. Typically it functioned as an informal type of divorce, usually consensual, and often involved the wife's lover as a prearranged buyer. See E. P. Thompson, *Folklore, Anthropology and Social History, A Studies in Labour Pamphlet* (Brighton: John Noyce, 1979) 9; S. P. Menefee, *Wives for Sale: An Ethnographic Study of British Popular Divorce* (Oxford: Basil Blackwell, 1981); K. O'Donovan, "Wife Sale and Desertion as Alternatives to Judicial Marriage Dissolution" in John M. Eekelaar and Sanford N. Katz, eds., *The Resolution of Family Conflict: Comparative Legal Perspectives*, (Toronto: Butterworths, 1984) 41; Stone, *ibid.* at 143-148.

intended to insulate the advertiser from financial liability.[566] As such, they illuminate the dynamics of marital relations during that period.

Once a separation had occurred, it was often advertised (most often by the husband) to prevent debts from being contracted in the advertising spouse's name.[567] Occasionally such announcements acted as negative character references:

> I hereby caution all persons from crediting my Wife SOPHIA TAYLOR any thing on my account, as I have been compelled by her bad conduct, to banish her from my House, and will not pay any debts of her contracting after this date. Oliver Mitchell.[568]

Regardless of who was the culpable party in the breakdown of a marriage, the sources disclose that husbands had the power to banish their wives from the marital home if they chose to do so. A wife banished by her husband was not immune from his violence, however. Mary Ann Turner lived apart from her husband for several months after he exiled her from their house, but he continued to attack and harass her at her

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[566] One advertisement placed by a husband closely mirrored the language commonly found in desertion advertisements, going so far as to say that not only would he not be responsible for his absconding wife's debts, but also that "any one harbouring her will be prosecuted according to law." *The Montreal Transcript* (31 August 1843). For discussion of similar advertisements as a tool to combat desertion by servants, see generally Pilarczyk, Masters, *supra* note 336.

[567] See *e.g. The Montreal Transcript* (11 September 1838) ("Notice--Whereas a separation having taken place between Caroline Valentine, formerly my wife, I hereby give notice to the Public of this city, that the Subscriber will not be accountable for any debts or obligations contracted by her in my name.").

[568] *The Canadian Courant* (2 March 1830). For an anonymous notice advertising a man as a bigamist who had abandoned his wife and children, see *The Canadian Courant* (5 May 1832). For further discussion of such advertisements, see Stone, *supra* note 599 at 330-334.

home and vandalize her possessions in her absence, as well as threatening to "blacken her eyes" when given the opportunity.[569]

In addition, spouses--again usually husbands--often placed advertisements to announce the desertion of their spouse without "just cause." Occasionally, the impetus appears to have been a desire to obtain information on the whereabouts of an absconding spouse, presumably to secure their return or take legal action against them.[570] Most often, it was merely to foreclose financial liability. In rare instances, the advertisement claimed that the absconding spouse had eloped,[571] or was cohabiting with another.[572] François Corbeille took out an advertisement in local newspapers in 1835 absolving himself from legal responsibility for his wife, who had absented herself from the marital home "with the intention, as it would appear, of abandoning her

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[569] A.N.Q.M., *Queen v. Thomas Day* (12 March 1841) (affidavit of Mary Ann Turner). Day was bound to keep the peace towards his wife for six months in the amount of forty pounds. QS(F), *Domina Regina v. Thomas Day* (13 March 1841) (surety).

[570] See *e.g. The Canadian Courant* (5 March 1831):

> A LARGE REWARD!! Thomas Lee being married about two months since, has now absconded from his Wife, leaving her nothing but the bare walls of a house, without either food or fuel to sustain her. She now offers 7 2 d. reward to any person who will give information where he may be found. Elizabeth Mullins.

[571] See *The Canadian Courant* (7 January 1832).

[572] See *The Montreal Gazette* (24 January 1831) ("Notice is hereby given, that as my wife, Matilda Knox, had left my bed and board, without any provocation, and is now living with another person, I will pay no debt or debts of her contracting….").

husband, she having taken with her all the household furniture and other articles in the house."[573]

Not surprisingly, estranged spouses did not always agree on what constituted reasonable provocation for desertion, and it was not unheard of for wives to contest their husbands' denials of just cause.[574] Two such instances were found in period newspapers, the first from September 1839, in which Thomas Doyle stated that his wife "having left my Bed and Board, without any just cause, I hereby give Notice that I will not pay any debts she may contract in my name, after this date."[575] This advertisement prompted a poignant response from Doyle's estranged wife, wherein she pointed to his "barbarity" as the impetus for her desertion:

> Whereas my husband, Thomas Doyle, of St. Johns, has thought proper to notify, that the undersigned has left his Bed and Board without any just cause, and notifying that he will not pay any debts contracted in his name after the date of his advertisement--this is therefore to notify the public, that I should never have left his Bed and Board if I had been treated as a woman should be; but, on the contrary, he treated me with the greatest barbarity. As to my contracting debts in his name, he might have spared himself that trouble, as he well knows my relations are above being beholden to him for any thing; and that but for their kindness in taking me from him, I might soon be beyond their assistance, on account of his barbarity, as all the neighbours are ready to testify. Mary Amelia Webb. Montreal, September 19, 1839.[576]

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[573] *The Vindicator* (9 October 1835).

[574] As Lepp has noted, there were few details offered to explain most desertions. Lepp, *supra* note 31 at 331.

[575] *The Montreal Transcript* (17 September 1839).

[576] *The Montreal Transcript* (29 September 1839).

A similar rebuttal advertisement was found in *The Montreal Gazette* of 1850, involving a woman named Mary Sixby who had left her husband a short time earlier:

> Whereas my husband JABEZ SAFFORD has advertised me as leaving his bed and board without any just provocation, I take this method of informing the public that his "provocations" are of such a nature, and carried on for so long a time, without any hope of amendment, that I can no longer endure them. As to any body trusting me on his account, he need not be under any alarm; Long ago he would not have been trusted but for my credit and industry. I hereby warn all persons against harbouring or trusting JABEZ SAFFORD on my account, as I am unwilling any longer to pay his debts or endure his behaviour. MARY SIXBY St. Armand, July 1850.[577]

Advertisements such as those suggest that some wives did not hesitate to flee from abusive husbands, nor were they bashful about publicly alluding to their reasons for doing so. However, wives described in advertisements as having abandoned their marital homes were not found in the judicial archives, strongly suggesting they did not seek legal recourse. Seeking a legal separation or abandoning the marital home were drastic steps, and it has been suggested that violence by itself would not have driven wives to the threshold of tolerance of their abusive husbands, given that violence was a typical part of marriages that were founded on "sexual antagonism."[578]

However, the sources do disclose that many wives sought temporary asylum at the homes of third parties following an outbreak of violence. Neighbours and nearby family could offer some refuge for a battered spouse, but many wives lived in

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[577] *The Montreal Gazette* (18 July 1850). The original advertisement placed by her husband was not found.

[578] According to that view, threats of murder, child abuse, sexual insults and refusal to provide the necessities of life provided the impetus for wives' fleeing the marital home. Compare Ellen Ross, "'Fierce Questions and Taunts': Married Life in Working-Class London, 1870-1914" (1982) 8 *Fem. Stud*. 575 at 593.

geographically remote areas and did not have that option. Catherine Martin, married to a pork butcher named Ludwig Bauer, deposed that her husband had beaten her on several occasions and that he "hath since then threatened to beat her again, insomuch as to cause her to take refuge in the neighbouring houses, and that...she fears to return to her house, and is forced to seek protection from the laws of the country."[579] Louise Goyette alleged that she "aurait été maintes et maintes fois assailli, frappé et maltraitée" by her husband, forcing her to take refuge at her father's house.[580]

Other spouses secreted themselves in unspecified locations, perhaps as a way of ensuring that their places of refuge would remain unknown to their assailants. One wife, who had frequently been brutalized at the hands of her husband for many years charged him in 1837 with misdemeanor for having thrown her and their six-month-old infant out of the house and threatening her life. For the week following the incident she and her child remained "concealed from the fear she entertains of him, wherefore [she] prays for justice in the premises."[581] Mary Gallagher, whose tavern-keeper husband struck her, seized her by her throat, and threatened to kill her, deposed that she "hath been under the necessity of quitting and abandoning her own dwelling house,

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[579] A.N.Q.M., QS(F), *Dominus Rex v. Ludwig Bauer* (25 February 1831) (affidavit of Catherine Martin. Her husband was bound to the peace towards his wife in the amount of twenty pounds for twelve months. QS(F), *Catherine Martin v. Ludwig Bauer* (26 February 1831) (surety).

[580] A.N.Q.M., QS(F), *Dominus Rex v. John Henry Wallingsford* (27 March 1829); *ibid.* (27 March 1829) (surety).

[581] A.N.Q.M., QS(F), *Dominus Rex v. James Cowan* (20 July 1837) (affidavit of Mary Ann Foster). Cowan was bound to the peace for six months. *Dominus Rex v. James Cowan* (26 July 1837) (surety).

considering her life to be in danger and being apprehensive of some further ill-treatements" at her husband's hands.[582]

Similar occurrences were experienced by husbands, although more sporadically. A Montreal bread driver alleged in 1843 that his wife, an alcoholic, frequently threatened to murder him, and that "aware of the extreme violence of his wife [he] has been compelled to sleep away from his home...for the last six nights." He did not, however, take his four children with him, leaving them "to the mercy of their inebriate mother when [he] is compelled to be away from home."[583] A labourer who prosecuted his wife for assault in 1835 alleged that after being attacked with an empty blacking bottle by his wife, he absented himself from home for six weeks. He prosecuted his wife only after she once again attacked him with various weapons, including a knife.[584]

Finding alternate accommodations or hiding did not usually offer more than a temporary reprieve from a malevolent spouse. Julie Palosse, a long-suffering wife, left her house to stay with her mother. A month later, her inebriated husband located her at her mother's house. Striking and kicking her, he threw her to the ground and dumped her clothes outside while threatening to take her life. That overt, public display of marital discord caused "un grand scandale," in her words, and prompted a large group

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[582] A.N.Q.M., QS(F), *Mary Gallagher v. John Norton* (18 June 1831) affidavit of Mary Gallagher).

[583] A.N.Q.M., QS(F), *William Gregg v. Catherine Blair* (3 October 1843) (affidavit of William Gregg).

[584] A.N.Q.M., QS(F), *Domina Regina v. Jane Porter* (31 August 1835) (affidavit of Richard Fougherty). Porter was bound to appear before the Court of Quarter Sessions. QS(F), *Domina Regina v. Jane Porter* (31 August 1835) (recognizance).

of people to gather outside the house to gawk.[585] Similarly, a labourer absented himself from the marital home in July 1835 after his wife attacked him with an empty blacking bottle. Six weeks later his wife encountered him in the city and threw a stone at his head, and then brandished a knife with which she threatened to stab him.[586] As those examples illustrate, leaving the marital home was no guarantee of peace, and in some cases did little more than embroil other parties in the conflict.[587]

As emphasized earlier, the putative victim was the primary actor in the legal system of the period. The common law provided that a marital privilege prevented spouses from testifying against each other, but that privilege was generally held inapplicable in cases wherein a spouse had sustained personal injuries at the other's hands.[588] While third parties could, and occasionally did, prosecute abusive spouses, if the victim chose not to pursue legal sanctions then the matter usually ended there. Prosecutions for wife battery must have been only a fraction of the actual incidences of domestic violence. Prosecution was, after all, only one stage in a complex and highly-discretionary filtering process.[589] Nowhere was that fact more evident than in prosecutions for spousal battery. Then, as now, many (and perhaps most) instances of

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[585] A.N.Q.M., QS(F), *Dominus Rex v. François Leduc* (1 June 1829) (affidavit of Julie Palosse). Palosse's husband was bound to the peace for twelve months in the amount of twenty pounds. A.N.Q.M., QS(F), *ibid.* (9 June 1829) (surety).

[586] *Dominus Rex v. Jane Porter*, *supra* note 622.

[587] Compare Harvey, *supra* note 3 at 134.

[588] Compare Lepp, *supra* note 31 at 346-347 & 450.

[589] See generally Taylor, *supra* note 36 at 14.

spousal violence went unreported and unprosecuted.[590] Nineteenth century commentators frequently decried the phenomenon of non-prosecution in this context, as well as low conviction rates once proceedings were commenced.[591] A host of legal, social, economic, religious, psychological, and political factors militated against abused wives charging husbands with a criminal offense, and continue to do so today.[592] Wives had to contend with power inequities, both within the institution of marriage and the larger society, as well as social mores that accorded husbands considerable discretion over the manner in which they chose to rule their households.[593]

Spouses also had to weigh other considerations, including the dangers of retaliation or other recriminations, the inconvenience and expense of the process itself, and the likely outcome of the proceedings.[594] Fear was perhaps the largest inhibiting factor, as pursuing legal options could be met with a ferocious response from an abusive spouse.[595] The economic costs of a husband's incarceration could also be devastating to a family. That left many abused wives with a Hobson's choice: endure the abuse, or risk

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[590] See generally Philips, *supra* note 16 at 262.

[591] See generally Taylor, *supra* note 36 at 14; Clark, *supra* note 21 at 199; Harvey, *supra* note 3 at 134.

[592] Lepp, *supra* note 31 at 442.

[593] Harvey, *supra* note 3 at 129; Taylor, *supra* note 36 at 30. For discussion of wives' legal disabilities, see generally *Lori Chambers, Married Women and Property Law in Victorian Ontario* (Toronto: Osgoode Society, 1997).

[594] Compare Taylor, *ibid.* at 109; Philips, *supra* note 16 at 49.

[595] See generally Tomes, *supra* note 7 at 333; Harvey, *supra* note 3 at 137.

penury.[596] Many abused spouses no doubt chose not to pursue legal action. Somewhat perversely, however, wife battery is perhaps the most accessible form of Victorian family discord to study.[597] Despite all the obstacles that hampered prosecution, including societal indifference, many such suits were brought.[598] Bringing a complaint before a judicial official turned those private acts into communal issues, bringing them out of the shadows of the private sphere into the harsh light of the public sphere.[599]

The usual outcome of a spousal battery prosecution was that the defendant was required to provide surety for his good conduct towards his spouse. Such an outcome was typical not only of spousal battery cases, but also of assault and battery cases at large. It has been suggested that Justices of the Peace sitting singly were not, strictly

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[596] As Harvey, *ibid.*, has pointed out, a wife's survival was "both threatened and guaranteed by her place within the family" as she was simultaneously subject to violence at her husband's hands while "being part of a family economy kept her from starvation. To protect herself against one helped undermine the other." Clark, *supra* note 21 at 194 observed that labouring-class women were reluctant to prosecute their husbands, and cited economic pressures as a possible explanation. As she stated, "[e]vidence for this lies in the fact that the number of cases in which women prosecuted unrelated men for minor assaults far outnumbered cases of wifebeating, though it is likely that the amount of wifebeating was actually much greater."

In the records examined in this study, occasionally the notation "gratis" or the like was written in the Justices' handwriting on a complaint, suggesting that some complaints were filed for free. That anomaly is worthy of further research, as it would amount to additional evidence of the accessibility of the legal system to members of the working class. See *e.g.* A.N.Q.M., QS(F), *Appoline Sanschagrin wife of J.B. Johannet v. J.B. Johannet* (30 September 1831); QS(F), *Lilly Neill v. William Rainey* (20 September 1831).

[597] Pleck, *Wife Beating*, *supra* note 593 at 21 ("[i]n general, wife abuse has been the type of family violence most likely to appear in court...because battered wives have been the victims of domestic violence most willing to press charges.").

[598] Compare Lepp, *supra* note 31 at 442-443 (noting that societal views did not translate into lack of lawsuits against abusive husbands).

[599] Compare Buckley, *supra* note 34 at 3.

speaking, empowered to render summary justice in such cases, but that such was the overlap between their administrative and magisterial functions that the distinction was largely meaningless.[600] For centuries, minor judicial officials in England and elsewhere had authority to bind abusive spouses to keep the peace, and it should be unsurprising that such was also the case in Montreal.[601] Indeed, binding a defendant to the peace became the most common 'final disposition' in most cases of family violence.[602] Violation of the terms of such a surety resulted in the forfeiture of a specified sum of money to the Crown, and imprisonment in default thereof. Both the amounts of the surety and the length of time during which the defendant was bound to the peace was the prerogative of the Justice of the Peace.

The amounts of sureties in this study ranged from a low of five pounds to a high of £200, with the usual amount being twenty or forty pounds.[603] Amounts over fifty pounds were uncommon, and appeared to have been reserved for defendants perceived

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[600] See generally Fyson, *supra* note 17 at 35.

[601] Compare Beattie, *Criminality*, *supra* note 154 at 205 (sureties issued against abusive husbands in eighteenth century England); Buckley, *supra* note 593 at 154 (the same in nineteenth century Virginia).

[602] This situation was similar in other jurisdictions. Compare Steinberg, *supra* note 16 at 47; Philips, *supra* note 16 at 262 (defendants required to provide bonds or fined); Judith A. Norton, "The Dark Side of Planter Life: Reported Cases of Domestic Violence" in Margaret Conrad, ed., *Intimate Relations: Family and Community in Planter Nova Scotia, 1759-1800* (Fredericton: Acadiensis Press, 1990) 182-189 (peace bonds in late-eighteenth and early-nineteenth century Nova Scotia).

[603] While little is known about what criteria were applied by Justices in determining those amounts, they likely took into consideration the husband's resources and the severity and duration of the abuse. Compare Doggett, *supra* note 6 at 12-13.

as unusually ferocious and persistent. Jean Baptiste Beauchamp was forced to provide sureties in the amount of seventy-five pounds, even though he was charged with making threats rather than assault. It is likely that his threat to poison his wife if she would not abandon the marital home was seen by the presiding Justice of the Peace as particularly odious.[604] The largest surety, in the amount of £200, was imposed on an affluent Montreal grocer who systematically beat his wife. Whether it was his affluence or brutality that was the primary impetus behind that large surety remains unknown, although the former appears likely.[605] A carter, accused of misdemeanor against his wife, was bound to the peace in the amount of one hundred pounds, although various other relations (also alleged to have been violent towards his wife) were bound for less. Perhaps the carter, as head of the household, was seen as instigating the family's violence towards his wife.[606] Sureties were usually for six months or a year, although there were sporadic exceptions to that norm.

While being bound to the peace was not the same as a prison term, nor did it accord the right to a legal separation, it was nonetheless a remedy that was easily

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[604] A.N.Q.M., QS(F), *Queen v. Jean Baptiste Beauchamp* (11 July 1843) (affidavit of Euladie Caron); *Queen v. Jean Baptiste Beauchamp* (14 July 1843) (surety).

[605] A.N.Q.M., QS(F), *Domina Regina v. Charles Smith* (20 June 1843) (surety). For discussion of this case, see *infra* at 338-339.

[606] A.N.Q.M., QS(F), *Dominus Rex v. François Laurin* (18 March 1837) (affidavit of Clarissa Allo); *Dominus Rex v. François Laurin et al* (18 March 1837) (affidavit of Jasper & John Allo); *Dominus Rex v. François Lawrence* (25 March 1837) (surety); *Dominus Rex v. Louis Laurence* (25 March 1837) (surety); *Dominus Rex v. Thérèse Lavoy* (25 March 1837) (surety); *Dominus Rex v. Amable Laurence* (25 March 1837) (surety).

accessible.[607] Surety documents essentially were primitive forms of restraining orders. While they contained no prohibition on physical proximity like modern restraining orders, they nonetheless afforded a measure of protection to plaintiffs by interposing the coercive arm of the state. The state therefore had a tangible pecuniary interest in enforcing sureties, if nothing else, and violation of them resulted in forfeiture of the money in question or imprisonment in lieu of payment.[608] A surety had obvious limitations, insofar as it did not afford the wife any right to live separately from her husband; and if the husband was jailed, or held liable for the amount, she might suffer financially and in other ways.[609] Sureties were one of the two legal dispositions most readily available to battered spouses, the other being outright imprisonment of the offender, although the two were not mutually exclusive. Spouses often specifically requested a surety be granted, or imprisonment in lieu thereof. Typical of such affidavits was Josephte Morin's request that "elle demande qu'il soit confine ou qu'il donne bonne et suffisant caution pour sa bonne conduite future envers tous les sujets de sa majesté et particulierement envers la deposante."[610] Even when spouses did not make such explicit requests, sureties were a common outcome.

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[607] Compare Doggett, *supra* note 6 at 11-12 (noting that many wives in eighteenth century England sought sureties against husbands, and that they were routinely granted by Justices of the Peace).

[608] For an example of a typical surety, see Appendix A, *infra* at 453.

[609] Compare Doggett, *supra* note 6 at 14-15.

[610] A.N.Q.M., QS(F), *Josephte Morin v. Joseph Lapointe* (3 June 1834) (affidavit of Josephte Morin). For an example of a case in which a wife requested her husband be required to

While sureties were designed to afford protection from violent assailants, their utility in many cases could easily be predicted, as they provided little insulation from many an abusive spouse, and did little to dissuade the most persistently bellicose spouses. Antoine Legault dit Desloriers, for example, was prosecuted at least thirteen times, and was bound to the peace towards his wife on numerous occasions.[611] Marie Leduc, for example, had lived in constant apprehension of her spouse, a Montreal innkeeper named Vincent Brazeau. On 19 August 1837 she alleged that he had beaten her again the night before and earlier that morning. Given his long history of violence, she reluctantly requested that he be arrested and held to give surety for his good conduct.[612] Being bound to the peace had little inhibiting effect on her husband, as no sooner had he returned home following his release then he again attacked his wife. Leduc sought protection from the legal system, requesting that her husband be arrested and made to provide surety for his good conduct, a request that was granted.[613] Leduc's first surety was for a period of six months, and in the amount of ten pounds. His two co-sureties, both respectable gentlemen, were therefore responsible for ten pounds each in

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provide surety of , 25, see QS(F), *Isabella Hawkins v. Michael Rice* (31 August 1832) (affidavit of Isabella Hawkins).

[611] See *infra* at 278-284.

[612] A.N.Q.M., QS(F), *Marie Leduc v. Vincent Brazeau* (10 August 1837) (affidavit of Marie Leduc).

[613] A.N.Q.M., QS(F), *Marie Leduc v. Vincent Brazeau* (14 August 1837) (affidavit of Marie Leduc).

the event that Leduc violated the terms of his surety.[614] His second surety, entered into two days later, was for twice the duration as well as twice the amount, namely twenty pounds and twelve months. Not surprisingly, Leduc's co-sureties were different than on the previous occasion.[615]

While abusive husbands like Leduc were required to provide greater sureties for subsequent offenses, no general pattern is apparent. Examples of courts rendering identical judgments on multiple occasions were common. The case of John McGuire exemplifies that scenario: arrested in 1837, 1839, and 1840 for acts of domestic violence (twice for assault and battery, and once on a charge of breach of the peace brought by a third party), he was bound to the peace for six months on each occasion.[616]

Of greater utility to an abused spouse was the securing of a legal separation, which offered advantages to abused spouses but likewise was no panacea. In addition to limitations (namely that remarriage was not an option), the record reveals that in the nineteenth century, as now, legal separations from an abusive spouse often provided

[614] A.N.Q.M., QS(F), *Queen v. Vincent Brazeau* (12 August 1837) (co-sureties were Edouard Etienne Rodier, Esquire and Denis A. Laberge, Esquire).

[615] A.N.Q.M., QS(F), *Marie Leduc v. Vincent Brazeau* (14 August 1837) (co-sureties were Joseph Nadeau, Yeoman, and a barber named Jean Ethier).

[616] A.N.Q.M., QS(F), *Jane Dervin v. John McGuire* (8 November 1837) (affidavit of Jane Dervin); *ibid.* (9 November 1837) (surety); *Queen v. John McGuire* (23 August 1839) (affidavit of Jane Dervin); *Domina Regina v. John McGuire* (12 December 1839) (affidavit of Mary McLoed); *ibid.* (12 December 1839) (surety); *ibid.* (7 July 1840) (affidavit of Jane Dervin); *ibid.*(8 July 1840) (surety).

little or no protection from further violence.[617] While references to legal separations were not frequent within surviving affidavits, some abused spouses were repeatedly threatened and assaulted by spouses from whom they were separated.

Elila Menard, who prosecuted her husband, a Montreal saddler, for threats and menaces in 1843, had been separated from her spouse for thirteen years. Since that time he threatened her life whenever she encountered him. On the last occasion he appeared at her house while drunk and disturbed the public peace, also threatening to kill her. Given what she knew about her husband's bad character, she deposed, she had reason to fear for her life and requested he be dealt with under the law. He was arrested and bound to keep the peace towards his wife for six months on penalty of thirty pounds.[618]

Marie Louise Dubois alleged that she had received "un jugement en séparation de corps et de biens d'avec son mari William Thompson" but that he assaulted, maltreated, and threatened to kill her since that time.[619] A Montreal cabinetmaker was charged with assault and battery and threats to murder his wife in 1834; the wife alleged in her affidavit that she was "séparée de Biens d'avec son dit mari par l'contrat de

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[617] In 1995, nineteen percent of women reported that domestic violence continued after their separation. Moreover, violence sometimes began, or escalated, following a legal separation. See Statistics Canada, *supra* note 534 at 105. See also Irene Hanson Frieze & Angela Browne, "Violence in Marriage" in Lloyd Ohlin & Michael Tonry, eds., *Family Violence*, vol. 11 (Chicago: University of Chicago Press, 1989) 163 at 207.

[618] A.N.Q.M., QS(F), *Queen v. Jean Baptiste Leduc* (9 January 1843); *Domina Regina v. Jean Baptiste Leduc* (19 January 1843) (surety).

[619] A.N.Q.M., QS(F), *Dominus Rex v. William Thompson* (28 June 1831) (affidavit of Marie Louise Dubois).

mariage" but that he continuously assaulted her and threatened her life.[620] Another wife alleged that despite a legal separation, her inebriated spouse continued to sleep in an upper story of her house, and had broken the back stairs of her house "with intent to do her bodily injury in case she had occasion to go out that way."[621]

A surety was a welcome outcome for many wives, but the reality is that the apparatus of the criminal justice system was ill-suited to provide meaningful protection to spouses. Incarceration could provide a temporary respite from a spouse's violence, but offered little by way of long-term solutions. Given that the penalties for spousal assault were so diverse, it is difficult to provide conclusions about sentencing patterns.[622] Most defendants were bound to the peace, but in the other cases a wide heterogeneity of sentences is apparent. One husband arrested for disturbing the peace and abusing his wife at two in the morning was fined five shillings.[623] Another was fined ten shillings and costs of six shillings threepence, or two months' imprisonment.[624]

Defendants were routinely imprisoned pending, or in lieu of, providing security for keeping the peace, and some defendants spent long periods of time in jail awaiting

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[620] A.N.Q.M., QS(F), *Dominus Rex v. Ralph Mellanby* (14 August 1834).

[621] A.N.Q.M., QS(F), *Elizabeth Castleman v. Andrew Summers* (13 August 1828) (affidavit of Elizabeth Castleman).

[622] This mirrors an observation by Pleck, *Wife Beating*, *supra* note 593 at 65 (stating that the "best evidence about penalties comes from a unique study of 211 wifebeaters in Pennsylvania during the 1880s. Those men served an average sentence of three months for assault and battery on their wives.")

[623] A.N.Q.M., MP(GR), *Domina Regina v. Narcisse Labelle* (11 June 1841).

[624] A.N.Q.M., MG, *Domina Regina v. Daniel Gilchrist* (16 December 1850).

further disposition of their case. James Farrell, a tavernkeeper, spent two and a half months in prison for assaulting his wife before providing bail.[625] Other defendants were imprisoned outright for their acts of violence against their spouses, and such sentences ranged widely in their duration. One husband was sentenced to forty-eight hours in prison for assaulting his wife,[626] while another received five days. A defendant arrested in Ste. Scholastique for ill-treating his wife and stepmother was sentenced to one month in jail in October of 1840.[627] Records of the Police Court indicate that Guillaume Falere was sentenced to two months' imprisonment in the House of Correction for assault and threats against his wife.[628]

Repeat offender Antoine Legault dit Desloriers was imprisoned on numerous occasions for battering his wife. His experiences suggest that offenses deemed more serious (or serial) were punished by longer prison terms. For example, on 14 July 1828 Desloriers was indicted for assault and battery following his plea of guilty.[629] Five days later he was sentenced to "stand committed to the Common Gaol of this District for three months" and was also required to provide sureties to keep the peace for twelve

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[625] A.N.Q.M., QS(F), [*Dominus Rex v. James Farrell*] (20 April 1826) (affidavit of Isabella Grant); [*Dominus Rex v. James Farrell*] (6 July 1826) (surety); N.A.C., MP(GC) (James Farrell committed 21 April 1826).

[626] A.N.Q.M., MP(GR), *Domina Regina v. Robert McCload* (29 November 1841).

[627] N.A.C., MP(RR) (Ste. Scholastique) (Louis Briyer sentenced to one month in jail for "illtreating wife and stepmother" on 1 October 1840).

[628] A.N.Q.M., MP p.424, *Domina Regina v. Guillaume Falere* (30 December 1841).

[629] A.N.Q.M., QS(R) p.506, *King v. Antoine Legault dit Deslorier* (14 July 1828).

months "towards Marie Louise St. Aubin his wife and all other [of] His Majesty's subjects himself in the sum of fifty pounds and two sureties in twenty-five pounds each."[630] Charles Heney, charged with attempted murder, was committed on 3 February 1847, and remained in prison until his trial, conviction and sentencing on 23 April; he was sentenced to three months in prison and released on 23 July.[631]

Incarceration could work hardship for families who were dependent on a husband's wages. Economic necessity, socialization, fear, and feelings of guilt often contributed to a wife's desire to have her husband released shortly after his arrest, as well as a hope that the husband had been adequately chastened.[632] Indeed, many wives exhibited ambivalence about having their husbands prosecuted at all.[633] Often wives simply sought an end to the violence, not their husband's incarceration. Wives were known to have used their savings or to have borrowed money to purchase a spouse's release from prison, as the loss of his salary could be devastating to the family.[634]

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[630] A.N.Q.M., QS(R) p.515, *King v. Antoine Legault dit Deslorier* (19 July 1828); QS(F), *The King v. Antoine Legault dit Deslorier* (20 October 1828) (surety).

[631] A.N.Q.M., MG (Charles Heney committed 23 April 1847 for attempting to kill his wife, sentenced to three months imprisonment, discharged 23 July 1847).

[632] See generally Hammerton, *supra* note 6 at 40 (citing wives' fear of vengeance, economic concerns, and their frequent wish to stop the violence rather than punish their spouse); Harvey, *supra* note 3 at 137 (stating that "for some women, having their husbands arrested was punishment enough."); Steinberg, *supra* note 16 at 47 (noting that abused wives often avoided having their husbands imprisoned); King, *supra* note 16 at 45 (noting that committal before trial was often seen as sufficient punishment by prosecutors in cases alleging property offenses).

[633] Compare Harvey, *ibid.* at 129 & 134-135.

[634] Compare Pleck, *Criminal Approaches*, *supra* note 545 at 31.

It is also likely that some spouses wished to appear before a court to air their grievances in an impartial public forum, rather than seeking the law's mediation.[635] A private prosecutor's failure to appear on a court date was an effective, albeit unorthodox, method of halting the process.[636] Anne Byrnes, arrested for being "drunk and beating her husband," was discharged by the Police Magistrate after her husband failed to appear in court to sustain the charges.[637] And many spouses likely would have suffered severe recriminations at their partner's hands for having had them arrested. Ann Green, married to a tailor who refused to help support his family, suffered abuse at his hands even though she was five months' pregnant. During his arrest, her husband made clear his intention to murder her when he regained his liberty.[638]

The judicial archives are also replete with examples of instances in which spouses, usually wives, requested that their spouse be released from prison or the case settled.[639] That has been shown to have been a common occurrence in other nineteenth century jurisdictions, and occurred with some frequency in Montreal as well. Indeed, as one scholar has posited about spousal violence in the United States, "[t]he problems of

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[635] Social anthropologists have commonly noted the importance of courts to wives as a venue to air grievances. Clark, *supra* note 21 at 195.

[636] Tomes cited a figure of ten percent of cases being dropped due to wives' failure to appear. See Tomes, *supra* note 7 at 333.

[637] *The Pilot* (22 January 1850). For discussion of parties' failure to appear in court, see Steinberg, *supra* note 16 at 65-66.

[638] A.N.Q.M., QS(F), *Queen v. James Head* (31 July 1843) (affidavit of Ann Green).

[639] Compare Tomes, *supra* note 7 at 333-334 (twenty-two percent of cases settled out of court).

criminal justice appear, nonetheless, to have rested less with the police than with the victims themselves and the prosecuting attorneys....[for] many abused wives, once they reached the courtroom, pleaded for their husbands' release."[640] That phenomenon was hardly unique to the Victorian era, for it remains a common feature of domestic violence cases today.[641] Private prosecution could be particularly ill-suited to such cases, as in the interim physical evidence often dissipated and thus there was a greater chance that wives could be cajoled, coerced, or shamed into silence.[642]

It is no less true to observe that such actions were also evidence of the pliability of the criminal justice system. The discretionary nature of the system surely worked to many wives' disadvantage, but no less certain is that it reflected, and augmented, the agency of other abused spouses.[643] John McGinnis, charged before a Justice of the Peace outside the city limits with assault and battery on his wife Margaret, was released from jail at his wife's request, although he was required to pay costs of seven shillings and

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[640] Pleck, *Wife Beating*, *supra* note 593 at 67. See also Steinberg, *supra* note 16 at 47.

[641] As Clark, *supra* note 21 at 204, has written:

> Accounts of eighteenth- and nineteenth- century battered wives evoke many of the dilemmas we face today: how to empower women by asking what they want from the courts, while facing the fact that many women drop charges and blame themselves.

[642] Compare Doggett, *supra* note 6 at 106.

[643] See Steinberg, *supra* note 16 at 69 ("This was probably the clearest example of the usefulness of the criminal law to the relatively powerless group, and of the extensive ability prosecutors had to determine how much of the law they would use.").

sixpence.[644] Joseph Lapointe's wife charged him with assault and battery in 1833 and again in 1834.[645] On the latter occasion, he was released on 24 June 1834, three weeks after the filing of the initial complaint, "on the application of Josephte Morin his wife, the prosecutrix, without bail or mainprize."[646] While it is unknown when he was actually arrested--although it was often the case that arrest followed shortly after the complaint was filed--in some cases a violent spouse was held in prison for a lengthy period of time before his release was requested.

It is only in rare instances that written requests for a spouse's release have survived in the archives, and they tend to offer little evidence of the underlying reasons. One wife filed a complaint against her husband in the Peace Office situated in the Old Market on 14 July 1832, and he was accordingly arrested and lodged in prison. After more than a month elapsed, she petitioned for his release, citing no reasons for her request.[647] In contrast, however, Margaret Buchanan sought and obtained her husband's arrest after he assaulted her while drunk one Sunday afternoon in 1834. She noted that she had been informed that he went about armed with pistols and that she

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[644] A.N.Q.M., Returns for Justices of the Peace (Grenville) [*hereinafter* JP], *Margaret McInnis v. John McInnis* (8 January 1841) (defendant committed for assault and battery; "afterwards released by request of plaintiff but to pay costs of seven shillings sixpence).

[645] A.N.Q.M., QS(F), *Josephte Morand v. Joseph Lapointe* (20 April 1833); *Josephte Morin v. Joseph Lapointe* (3 June 1834). According to the 1833 affidavit, Lapointe's wife had him arrested on at least one previous occasion, although no other records were found.

[646] *Ibid.*

[647] A.N.Q.M., QS(F), *Mary Kallagan wife of John Kallagan v. John Kallagan* (16 August 1832).

"stands in constant fear for her life."[648] Contrast that affidavit with another dated three days later, in which Buchanan deposed before the Justice of the Peace that she "no longer entertains any apprehensions for her life from her said husband," and that accordingly "she is willing and satisfied that he should be liberated from imprisonment to which he has been confined upon her complaint...on the promises to her made by her husband."[649] He was bound to the peace for twelve months in the amount of fifty pounds.[650] While it is almost too much to hope that her husband's brief sojourn in prison discouraged him from tormenting her ever again, the admittedly-incomplete records of the period contain no further references to him.

A similar scenario was encountered in the case of Benjamin Baillard. On 23 March 1831 Baillard's wife summoned a member of the Watch to apprehend him for his abusive behaviour. Having endured his violence during a three-week-long drinking spree, Baillard's wife began to fear that his violence was escalating to life-threatening levels.[651] A week after his arrest and incarceration, Baillard's wife requested his release, and set out her reasons in an affidavit that has survived in the records of the Court of Quarter Sessions:

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[648] A.N.Q.M., QS(F), *Margaret Buchanan v. Gilbert McCulloch* (25 August 1834) (affidavit of Margaret Buchanan).

[649] A.N.Q.M., QS(F), *ibid.* (28 August 1834) (affidavit of Margaret Buchanan).

[650] A.N.Q.M., QS(F), *ibid.* (28 August 1834) (surety).

[651] A.N.Q.M., QS(F), *Rosalie Denis v. Benjamin Baillarde* (23 March 1831) (affidavit of Rosalie Denis).

> La dite...femme du dit Benjamin Baillard a comparu ce jourd'hui par devant moi et a demandé que...[son] mari maintenant en prison, soit liberé du lieu de son Emprisonnement et mis en liberté, le dit Benjamin Baillard ayant promis à la dite Rosalie Denis de se comporter mieux envers elle à l'avenir, et de ni la battre ni maltraiter en aucune manière: la dite Rosalie Denis sur les promesses que lui aurait faites le dit Benjamin Baillard, déclarant n'avoir Plus aucune raison d'appréhender quelques mauvais traitements de sa part, et ne craignant plus pour sa sureté Personnelle.[652]

It is likely that some spouses sought to humble their partners or hoped they would be 'scared straight' following the intervention of the law. One case, while a prosecution for being "loose, idle and disorderly" and therefore not otherwise relevant to this study, illustrates that summoning legal intervention was sometimes intended to chasten an uncooperative partner. Ellen Lewis, the wife of a Montreal blacksmith named William Lewis, was arrested for that offense in 1840. The arresting constable alleged that she was "of idle and disorderly habits, being a drunkard, and in the habit of shouting, screaming, swearing, disturbing, incommoding and impeding peaceable passengers in the streets," and she was summarily convicted before the Police Court and sentenced to two months' imprisonment and hard labour.[653] Shortly before Christmas 1840, Lewis petitioned the Governor that he might commute her sentence and release Ellen from prison. As he stated in his petition:

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[652] A.N.Q.M., QS(F), [*Dominus Rex v. Benjamin Ballard*] (30 March 1831) (affidavit of Rosalie Denis).

[653] N.A.C., AP vol. 24, p.10901, *Queen v. Ellen Lewis* (3 November 1840). A fellow boarder in the Lewis' house, a private in Her Majesty's Eighty-Fifth Regiment, filed a complaint alleging that she "repeatedly disturbs the public peace and tranquility by shouting, screaming, and swearing and moreover is an habitual drunkard." He also alleged that earlier in the day she had assaulted him while drunk, and that consequently he was afraid for his life. AP vol. 24, p. 10903-10904, *ibid.* (2 November 1840).

> That on Sat. evening the thirty-first day of October last a misunderstanding took place between Your petitioner and his wife Ellen Lewis, that with a view of intimidating her and causing obedience he thought by recourse to a police officer, he would attain his object, Your petitioner accordingly went for & Explained his intention to the police officer in that quarter, requesting him merely to come to his House, but not to arrest or remove his wife, a few words ensued between him and Your petitioner's wife, when the police man withdrew and against the will and wish of Your Petitioner returned shortly after made prisoner of his wife and forcibly dragged her to the Station House, from whence she was brought before the police Magistrate by whom she was without any complaint on the part of Your petitioner, Condamned to two months imprisonment and to hard labor since which time she had remained in Gaol, to the great distress of Your petitioner. That Your petitioner and his wife have a family of three Small Children, the youngest of whom a Suckling Baby, now attacked with the Mea[s]les is with her in Gaol, the other two left with Your petitioner whose business as a Blacksmith Compells him to absent himself from his House and Expose his Children by his absence to danger.[654]

The Chief Constable responded to that affidavit by alleging that Ellen had frequently been brought to the authorities' attention, was a habitual drunkard, and had threatened him with an axe.[655] While there is no evidence that Lewis' petition was successful, that case is resonant insofar as he had voluntarily sought out the involvement of the police to humble his wife, with attendant consequences he had not foreseen.

III.

The majority of available cases during the period involved a spouse appearing before a local Justice of the Peace or Magistrate and swearing out a complaint. To fully understand the legal response to that issue, it is important to catalogue the multiplicity

[654] N.A.C., AP, vol. 24, p.10897-10900 ("Wm. Lewis Prays release of his Wife from Gaol") (23 Dec 1840).

[655] N.A.C., AP vol. 24, p.10905-10907, *Queen v. Ellen Lewis* (26 December 1840) (affidavit of Chief Constable Hypolite Jeremie).

of charges that could result from a non-lethal domestic altercation.[656] For the period under examination, 571 complaints alleging violence at the hands of a spouse were identified.[657] The fact that so many complaints were found implies that informal types of social control capable of acting as inhibitors of spousal violence were lacking.[658] The majority of such offences were labeled as straightforward assault and battery charges, but there were numerous other legal offenses that involved spousal abuse. Often spouses coupled violence with threats of murder and other forms of mayhem. The multiplicity of charges found in the archives were identified by the following descriptions, among others: aggravated assault; assault with intent to murder; cruel ill-treatment; uttering threats; misdemeanor; and breach of the peace.[659] That fluidity is also illustrated by the filing of complaints under categories more descriptive than constitutive of a legal offense.[660] It is unlikely that this would have made any practical difference in many cases. The act in question could always be more precisely pigeon-

[656] Homicides, which could be translated into the offenses of murder, manslaughter, and petite treason, were capital felonies and made up a small percentage of domestic violence cases. For discussion, see generally Chapter IV.

[657] Compare Lepp, *supra* note 31 at 623 (623 cases in Ontario between 1830 and 1920).

[658] As Pleck, *Wife Beating, supra* note 593 at 67 has stated, "[t]here is much truth in the notion that law is necessary only when other forms of social control are weak.@

[659] Pleck has similarly pointed out that family violence was often prosecuted as assault and battery, disorderly conduct, or breach of the peace. See Pleck, *Criminal Approaches, supra* note 545 at 21.

[660] As D'Cruze has observed, "courts' own categorization of sexual and physical assault (for example into rape, indecent assault, criminal assault, aggravated assault, common assault, etc) did not necessarily accord with the event as described in the the (sic) records." Shani D'Cruze, *Crimes of Outrage: Sex, Violence, and Victorian Working* Women (De Kalb: Northern Illinois University, 1998) 19.

holed at a later stage if necessary, and many of those acts involved the same degree of criminality. However, in other instances, the discretionary power of prosecutors to categorize the offense--for example, in prosecuting for aggravated assault rather than assault and battery--could have had ramifications for defendants, either by lessening or aggravating the potential penalties the defendant faced.[661]

Because of the inconsistency and fluidity in the descriptions of charges brought against violent spouses, observations about the nature of those charges should be made with caution. In many instances, that labeling of criminality reflected little more than the opinion of an individual justice of the peace, magistrate, or other jurist at an early stage of legal proceedings.[662] As shown in *Figure 6*, the preponderance of complaints were made against husbands. Out of 571 such complaints identified for the period 1825 to 1850, just under fifteen percent concerned violence by wives against husbands. That coincides with the well-established conclusion that women constituted a much smaller class of criminal culprit in general,[663] and that men were much more likely to commit acts of violence than were women.[664] Female criminals tended to commit property

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[661] Compare King, *supra* note 16 at 43.

[662] As Taylor, *supra* note 36 at 30 has stated, the "distinction between various forms of assault is less clear-cut than the legal definitions would suggest. Much depended upon the discretion of the individual prosecutor and/or the police and magistrates involved in the case."

[663] Compare Emmerichs, *supra* note 149 at 99; Philips, *supra* note 16 at 147. For contemporary comparison, seventeen percent of all adult offenders in Canada were women, according to a 1995 report. Statistics Canada, *supra* note 535 at 101.

[664] See Cobbe, *supra* note 539 at 71 (noting that in 1876 more than five-sixths of violent crime was committed by men); Tomes, *supra* note 7 at 330 (citing ratio of 100 to eighteen in

offenses rather than acts of physical aggression.[665] Related to that observation is the truism that spousal violence was overwhelmingly a crime by husbands against wives, although power was contested by husbands and wives alike.[666]

The most commonly charged offenses for both husbands and wives were assault

Classification of Primary Charges in Domestic Violence Complaints in Montreal, 1825-1850

Charge	Wives	%	Husbands	%
Assault and battery	247	50.7%	27	32.1%
Misdemeanor	79	16.2%	14	16.7%
Assault and battery & threats	45	9.2%	8	9.5%
Breach of the peace	23	4.7%	9	10.7%
Assault with intent to murder/ attempted murder	24	4.9%	2	2.4%
Uttering threats/ threats and menaces	19	3.9%	12	14.3%
Aggravated assault/ assault with intent to do grievous bodily harm/ cruel assault	18	3.7%	2	2.4%

favor of men). According to 1993 figures, women constituted eleven percent of all violent offenders in Canada. Statistics Canada, *ibid.*

[665] See generally Tomes, *ibid.* at 329-330; Philips, *supra* note 16 at 147. Greenwood & Boissery, *supra* note 163 at 18 stated that the "relative lack of violence by women in England, from 1650 to 1850, has been attributed to female socialization, less use of potentially lethal tools, and less alcohol consumption, among other factors." For discussion of female petty criminals in Canada, see generally Jim Phillips, "Women, Crime and Criminal Justice in Early Halifax, 1750-1800" in Jim Phillips *et al*, eds., *Essays in the History of Canadian Law*, vol. 5 (Toronto: Osgoode Society, 1994) 174; B. Jane Price, "'Raised in Rockhead, Died in the Poor House': Female Petty Criminals in Halifax, 1864-1890" in Philip Girard & Jim Phillips, eds., *Essays in the History of Canadian Law*, vol. 3 (Toronto: University of Toronto, 1990) 200.

[666] Compare Beattie, *Criminality*, *supra* note 154 at 204-205 (husband beating in eighteenth century England).

Assault and battery & miscellaneous	7	1.4%	1	1.2%
Breach of the peace & violent	7	1.4%	-	-
Miscellaneous	6	1.2%	2	2.4%
Drunk & violent/ drunk & assault/ drunk & threats	4	.82%	1	1.2%
Attempted murder & assault and battery	4	.82%	-	-
Quarreling	2	.41%	1	1.2%
Insane/insane & threats/ insane & assault	2	.41%	6	7.1%
Maiming	-	-	1	1.2%
TOTAL n=571	487	85.3%	84	14.7%

Figure 6.

and battery (or some variation), and misdemeanour. In respect to the former, assault and battery was often coupled with another offense, most notably uttering threats.[667]

The category of 'assault and battery and miscellaneous' contains a small but interesting collection of offenses, including vagrancy,[668] drunkenness,[669] bastardy,[670] and

[667] In at least one case the threat was not murder but arson. A.N.Q.M., QS(F), *Dominus Rex v. William Johnston* (27 July 1829) (affidavit of Catherine Clarke and Patrick Hannaven).

[668] A.N.Q.M., QS(F), *Domina Regina v. John Taylor* (30 July 1840).

[669] A.N.Q.M., MP(GR) vol. 33 (Hypolite Deauseneau committed 30 December 1840 for being "drunk and beating his wife").

[670] A.N.Q.M., QS(F), *Dominus Rex v. John Crooks* (2 November 1835) (affidavit of Margaret Farrell).

attempted suicide.[671] Misdemeanor was a catchall that referred to the category of offenses distinct from felonies, generally punishable by fines and short terms of imprisonment.[672] The diversity of charges can be illustrated by a few examples. Pierre Tessier was arrested in St. Cesaire for being "drunk and illtreating his wife" in 1841,[673] while Narcisse Labelle's arrest during that same year was precipitated by his "disturbing the peace and illtreating his wife [at] 2 a.m."[674] The charge of "beating his wife" or a related variant appears often in these records,[675] but the sources also contain the more descriptive phrase, "cruel assault and battery."[676] An attempt to strike a spouse with an implement or weapon could also be incorporated into a charge, as evidenced by the prosecution of frequent-offender Charles Osteront, namely "assault

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[671] A.N.Q.M., QS(F), *James Little v. William Goften* (2 November 1831) (neighbour prosecuted defendant for "attempting to destroy himself,"also alleging that he had illtreated his wife before slitting his throat.) He was bound to the peace towards his wife for six months, presumably as he could not be bound towards himself. QS(F), *Dominus Rex v. William Goften* (4 November 1831) (surety).

[672] The distinction between felonies and misdemeanors is an ancient one in the common law. Historically, felonies were capital crimes, although the distinction between the two categories has become increasingly muddled over the intervening centuries. By the period examined herein, the distinction had become largely arbitrary. As Taylor, *supra* note 36 at 10-11 pointed out in his discussion of the distinction, petty thefts could be categorized as felonies while serious assaults were misdemeanors.

[673] N.A.C., MP(RR) (St. Cesaire) (Pierre Tessier arrested in February 1841, and provided surety for one year). See also MP (Thomas Langhorn arrested 25 November 1840 for being "drunk and fighting with his wife.").

[674] N.A.C., MP(GR) vol. 34 (Narcisse Labelle fined five shillings on 11 June 1841).

[675] N.A.C., MP(RR) (Grenville) (John McInnis arrested for beating his wife; discharged November 1840).

[676] See *e.g.* A.N.Q.M., QS(F), *The King v. David Robertson* (1 March 1830) (affidavit of Andrew Watt).

with an axe."[677] Miscellaneous charges included such disparate acts as resisting arrest and assaulting constables when they intervened in cases of domestic violence,[678] breaking windows,[679] and breach of the peace, the latter of which was sometimes coupled with vagrancy or a similar charge.[680] Breach of the peace was a common charge for activity that involved domestic battery, and common recourse was made to that charge when a third party intervened in a domestic dispute. When a police constable was alerted to a violent altercation in Saint Dominique Street in which the defendant was alleged to have been in the act of murdering his wife, the police arrested the defendant after finding his wife was covered in blood, but charged him with disturbing

[677] A.N.Q.M., KBF), *Domina Regina v. Charles Osteront* (1 August 1840) (affidavit of Marguerite Blais). See *infra* at 278.

[678] See *infra* at 307-309.

[679] See *e.g.* A.N.Q.M., QS(F), *Domina Regina v. Ellen Maloney* (16 October 1839) (affidavit of Matthew Doyle).

[680] A good example of the conjunction between breach of the peace and spousal violence is reflected in the prosecution of Mathew Doyle. A letter found in his file from a Justice of the Peace read:

> To the Officer of the Police.
> Mr. Wand (?), You will please receive a man named Mathew Doyle whom I myself saw disturbing the Peace, besides the testimony of all the neighbours and his own wife also who declares that he has often beaten her I therefore commit him for one month as a vagabond and common Brawler unless he can procure good and sufficient security for his good behaviour. D. Arnoldi J.P. Montreal, July 26, 1838.

He was bound to the peace towards his wife for one year. A.N.Q.M., QS(F), *Domina Regina v. Mathew Doyle* (26 July 1838) (surety).

the peace rather than with assault and battery.[681] Often, it appeared that it was the public nature of the act, more than the act itself, that led to condemnation.[682]

Other cases did not implicate physical violence, such as the husband arrested for quarreling with his wife."[683] Indeed, domestic disputes that fell short of assault and battery were not infrequently brought before courts.[684] Some of those forms of violence were more emotional than physical, as spouses could seek protection of the law for offenses such as 'threats and menaces.' Catherine Orleans, for example, had her husband committed for just that offence in 1830.[685]

The frequency with which wives as opposed to husbands were charged with the offense of 'uttering threats', 'threats and menaces' or the like is one of the striking divergences suggested by Figure 6. Statistically, wives were considerably more likely to be charged with uttering threats, which coincides with the truism that they were less likely to commit acts of violence than were their husbands. That observation is further borne out by the greater likelihood of wives being charged with breach of the peace (which commonly involved drunken carousing, singing, shouting or swearing),

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[681] A.N.Q.M., QS(F), *Domina Regina v. Joseph Hilton* (19 December 1838) (affidavit of Alexis Shiller).

[682] Compare *supra* note 828.

[683] A.N.Q.M., MP, *Domina Regina v. Daniel Salmon* (25 December 1839) (admonished and discharged).

[684] See generally Steinberg, *supra* note 16 at 48.

[685] A.N.Q.M., QS(F), *Catherine Orleans v. Paul Ouimet* (17 December 1830). Lepp, *supra* note 31 at 467, documented seventy-nine cases of Averbal abuse."

compounded by their absence from records of charges involving breach of the peace coupled with acts of violence. Wives were also less commonly charged with more serous violent offenses, such as aggravated assault, attempted murder or assault with intent to murder, which comports with their lesser visibility in homicides.[686] It is also possible that wives were more likely to be charged with those offenses because the types of behaviour involved were considered particularly unseemly for women and implicated insubordination against the head of the household.

Most interesting is the notable discrepancy between the frequency with which wives versus husbands were charged with insanity. A rare example of a husband alleged to have been insane is the 1825 prosecution of a husband in which his wife alleged that he is "actuellement dangéreusement malade de corps, et abolument dérangé dans son esprit et qu'il est même furieux...."[687] Another husband was committed on the charge of "threats towards his family, insane, &tc.," his wife alleging that he had "threatened to kill her and her children, that he is insane and dangerous, and that if [he] is allowed to go at large, she considers herself and her children in danger of their lives."[688] Three times as many wives were accused of lunacy, a divergence even more statistically striking when one contemplates that as a percentage of all charges

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[686] Women made up a somewhat-greater proportion of alleged spousal homicide cases, although they were still in the minority. Out of fourteen such cases, wives accounted for three, or 21.4%. See Chapter IV, *infra* at 417.

[687] A.N.Q.M., QS(F), *Dominus Rex v. Joseph Provost* (11 January 1825) (affidavit of Marie Petit).

[688] ANQM, QS(F), *Dominus Rex v. John Timmens* (27 July 1830).

they were roughly *eighteen* times more likely to be accused of that infirmity. While more will be said about those complaints in a later section, that observation begs the question: were violent wives more likely to be violent because they were insane, or, were they more likely to be viewed as insane because they were violent?[689]

If wives defended themselves against their husbands' violent outbursts, on occasion they were also aggressors. As indicated in Figure 6, nearly fifteen percent of all spousal violence complaints involved charges brought against wives by their husbands.[690] Given that acts of domestic violence have always been underreported, and given nineteenth century social mores, it is conceivable that husbands were equally or even more reluctant to prosecute. The prospect of alleging in a public forum that one's wife was violent may have dissuaded many husbands from doing so for, as J.M. Beattie has posited, "this too openly and clearly reversed a husband and wife's expected relationship." Beattie therefore suggested that husbands were loath to bring charges against their spouses as a result.[691]

Moreover, Harvey has pointed to a distinction between those cases, claiming that wives became violent as a response to male aggression, while men used violence as a

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[689] For further discussion of that issue, see *infra* at 333-337.

[690] That figure is generally in accord with that found in Harvey, *Wife Battery*, *supra* note 589 at 139 (citing ten percent of marital violence cases as involving husband battery). Many contemporary studies indicate that approximately five percent of spousal assault victims are men. See Frieze & Browne, *supra* note 655 at 182-183.

[691] Beattie, *Criminality*, *supra* note 154 at 205.

form of communication.[692] While that was probably true in some instances, categorizing wives' violence as responsive, and men's violence as instinctual, is to oversimplify. Husbands' affidavits do not support that assertion, although affidavits are by their nature one-sided judicial documents. Amid the rich diversity of human relationships, there were husbands who were harmed by their wives and not *vice versa.* Observing that wives were sometimes aggressors does not minimize the extent of the suffering endured by women at their partners' hands.[693]

It has been suggested that wives were viewed by society either as violent viragos or passive victims.[694] Women viewed as viragos were more likely to be treated as social deviants than their male counterparts, with a concomitantly higher level of social disapprobation.[695] Indeed, for that reason, many scholars have posited that Victorian wives were caught between a societal double standard. If charged with fighting back, they would often receive stiffer sentences than their spouses, and if they prosecuted their husbands they might be seen as provocateurs.[696] Pleck has provided further

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[692] See Harvey, *Wife Battery*, *supra* note 589 at 139.

[693] That was a point also made by D'Cruze, who went on to say that violence by men that "defended patriarchal privilege intersected with practices of dispute-by-violence, and was positioned within a broader culture of physically aggressive masculinity involving drink, male sociability and predatory heterosexuality." D'Cruze, *supra* note 698 at 21.

[694] See Hammerton, *supra* note 6 at 46-47.

[695] See generally Taylor, *supra* note 36 at 59.

[696] See *e.g.* Conley, *supra* note 35 at 72; Hammerton, *supra* note 6 at 53; Pleck, *Wife Beating*, *supra* note 593 at 60; Harvey, *Wife Battery, supra* note 589 at 134; Cobbe, *supra* note 539 at 69.

examples of brawling husbands being fined while wives were jailed, abused wives who fled the home being charged with desertion, and wives being charged with contempt of court for dropping charges against their husbands.[697] Evidence of such occurrences was not found in the Montreal sources, however.

Some husbands clearly lived in fear of their wives. John Cumming lost his sight in 1840 and was dependent on his wife's care, who he maintained was of a "violent and cruel disposition and [was] habitually addicted to the intemperate use of spirituous liquors."[698] Even husbands who were not incapacitated--including those who were agents of the law--were not immune from such acts, as evidenced by the experience of John George Dagen, bailiff, in 1829. Dagen's case also indicates that an informal separation was no guarantee of peaceable coexistence between spouses. As he deposed:

> Josephine Raymond, my wife, who has deserted from my Bed and Board and carried away all my moveable property...came in and without the least cause or provocation did assault, beat and other[wise] ill-treat me, in a malicious manner, and I verily believe and fear that she will do me some serious bodily injury--Wherefore, I pray that she may be arrested and Justice done in the premises.[699]

Nearly half of complaints against wives involved assault and battery, or some variant, with a further sixteen percent filed as misdemeanors. Uttering threats constituted fifteen percent of the total. Those figures, whatever their limitations, indicate that women were proportionately less likely to inflict serious assaults or grievous injury

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[697] See Pleck, *Criminal Approaches*, *supra* note 545 at 30.

[698] A.N.Q.M., QS(F), *Queen v. Ellen Hagan* (4 June 1842) (affidavit of John Cumming). She was bound to the peace for six months. QS(F), *Domina Regina v. Ellen Hagan* (22 June 1842) (surety).

[699] A.N.Q.M., QS(F), *John George Dagen v. Josephine Raymond* (16 February 1829).

that did not result in death. More serious assaults, those rising to aggravated assault, attempted murder or maiming, were only found in five cases. That is likely a result of husbands' greater physical strength, and to women's apparent reluctance to use, or threaten to use, deadly objects. Interestingly, however, there is a slight deviance when those figures are viewed against the backdrop of spousal murder cases. As shown in Chapter IV, fourteen cases of spousal homicide were found; of those, three homicides (or twenty-one percent of the total) were committed by wives.[700] Those facts warrant the following inferences: wives were less likely to commit assaults on their spouses than were husbands. When spousal assaults occurred, wives were less likely to use weapons or commit serious assaults than were their partners. Given the unquantifiable number of undetected and unprosecuted homicides, one must draw conclusions tentatively, but the evidence suggests that wives were proportionately somewhat more likely to kill their spouses in those cases where serious assaults were involved.

Complaints of the period leave little doubt that some domestic altercations were instances of mutual combat. The stereotypical view of Victorian wives as passive casualties in the face of their husbands' violence was not accurate in many cases, as mutual combat between spouses was a common feature in working-class households.[701] Court records in Montreal reveal many cases where both spouses were charged with

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[700] See generally Chapter IV, *infra* at 417.

[701] See generally Ross, *supra* note 616 at 592; Hammerton, *supra* note 6 at 47. Ross, *ibid.* at 577, also noted that the presence of wives as defendants in such cases indicates that "despite their physical, economic, and legal disadvantages, wives were ready to stand their ground." Cobbe referred to such cases as "wife-beating by combat." Cobbe, *supra* note 539 at 68.

brawling, usually at the behest of an exasperated neighbour or that of a policeman called to the scene. For example, one neighbour in 1840 filed suit against the Minnegins for recurrent breaches of the peace, alleging that:

> repeatedly heretofore and more particularly this seventeenth of December instant two persons known to Deponent as the Minnegins to be pointed out by Deponent are in the habit of disturbing the public peace and tranquility[,] the said Minnegins being constantly in a state of intoxication swearing screaming and incommoding and impeding peaceable persons in the public streets. That the man and wife are continually fighting and quarrelling together calling one another gross and abusive names and swearing and making such a noise as to be a nuisance to the whole neighbourhood....[702]

Other cases in which both spouses were caught up in the cogs of the criminal justice system involved cross-prosecutions. Examination of the judicial archives leaves the impression that the courtroom was viewed as an extension of the field of battle by some spouses, with cross-prosecutions filed either as a continuation of the conflict or as a way of intimidating a spouse into dropping an initial suit. A defendant's judicious use of cross-prosecution can be seen as evidence of his or her desire to exercise control over the prosecutorial process.[703] By way of example, Ralph Mellanby's spouse, Angelique, charged him in 1834 with assault and battery and uttering murder threats, although the couple was separated.[704] Indeed, several neighbours likewise filed affidavits documenting his violent behaviour, claiming they had witnessed his assaults on his wife

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[702] A.N.Q.M., QS(F), *Domina Regina v. Minnegin et al* (17 December 1840) (affidavit of Maria Quickley).

[703] Compare Steinberg, *supra* note 16 at 46.

[704] A.N.Q.M., QS(F), *Dominus Rex v. Ralph Mellanby* (14 August 1834) (affidavit of Angelique Desmarais).

or had themselves been assaulted by Mellanby.[705] He was bound to appear before the Court of Quarter Sessions in the amount of one hundred pounds.[706] Mellanby alleged, for his part, that his wife and three others assaulted him in his house, prompting him to seek justice in the premises, and they were likewise bound to appear in Court.[707]

Another example involved an affluent carriage maker named Peter Beauchamp and his wife, Mary Kilfinnen. On 6 October 1843 he had his wife arrested for threats, alleging that she was a habitual drunkard and that he had her arrested on several occasions. Beauchamp also averred that she posed a risk to their children and himself.[708] She was bound to keep the peace towards him for one year.[709] The same day that she was bound to the peace, she prosecuted her husband for assault and battery, alleging that he had inflicted a black eye and had assaulted her with a pair of iron tongs.[710] He was likewise bound to the peace three days later for a period of six months.[711] Susanna and David Miller were both bound to the peace after they prosecuted each other for

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[705] A.N.Q.M., QS(F), *Onesime Rousseau v. Raphael Mellanby* (12 August 1834) (affidavit of Onesime Rousseau); *Dominus Rex v. Ralph Mellanby* (14 August 1834) (affidavit of Onesime Rousseau); *ibid.* (affidavit of Regis Coretuerier); *ibid.* (affidavit of Germain Michon).

[706] A.N.Q.M., QS(F), *Dominus Rex v. Ralph Mellanby* (19 August 1834) (recognizance).

[707] A.N.Q.M., QS(F), *Dominus Rex v. Angelique Mellanby* (13 August 1834); *Dominus Rex v. Angelique Mellanby et al* (13 August 1834) (recognizance).

[708] A.N.Q.M., QS(F), *Queen v. Mary Kilfinnen wife of Peter Beauchamp* (6 October 1843) (affidavit of Peter Beauchamp).

[709] A.N.Q.M., QS(F), *Domina Regina v. Mary Beauchamp* (7 October 1843) (surety).

[710] A.N.Q.M., QS(F), *Queen v. Pierre Beauchamp* (7 October 1843) (affidavit of Mary Kilfillan).

[711] A.N.Q.M., QS(F), *Domina Regina v. Pierre Beauchamp* (10 October 1843) (surety).

assault and battery; she alleging that he had beaten, seized and kicked her, while he less convincingly alleged that she had abused and assaulted him with a house cloth.[712]

If, as one suspects, cross-prosecutions were occasionally used as a form of defense against spousal assault charges, such strategies were inefficacious in some instances. Courts would have had little difficulty in ascertaining who was the primary aggressor in most relationships. In January of 1841 Charles Jackson filed suit against his wife, Sarah Moore, on charge of having violently assaulted and threatened him, alleging that she was a habitual drunkard and violent when in such a state. His case was dismissed.[713] Sarah Moore, along with a neighbour, filed a complaint dated two days later in which they described him as a "habitual and abandoned drunkard lost to all sense of propriety," who had continuously used "the worst epithets" towards her and assaulted her on a regular basis. She further alleged that the week previous he had struck her with a plank of wood. According to that affidavit, Jackson had maimed his wife the year before by blinding her in the left eye, and since that time had threatened to put out her other eye, as well.[714] He was incarcerated for want of bail, and later bound to

[712] A.N.Q.M., QS(F), *Susanna Miller v. David Miller* (13 February 1829) (affidavit of Susanna Miller); *ibid.* (14 February 1829) (surety); *David Miller v. Susanna Miller* (14 February 1829) (affidavit of David Miller); *ibid.* (14 February 1829) (surety).

[713] A.N.Q.M., QS(F), *Queen v. Sarah Moore* (9 January 1841) (affidavit of Charles Jackson) (noting that "case discharged.").

[714] A.N.Q.M., QS(F), *Queen v. Charles Jackson* (11 January 1841) (affidavit of Sarah Moore and Ellen Cameron).

the peace for six months.[715] Seven months later she was to prosecute him again, for continuing to threaten her life and for having injured her with a pair of fireplace tongs as a result of his "ungovernable temper."[716]

Mary McKenzie's husband prosecuted her twice in 1838, for assault and battery as well as disturbing the peace. On the first occasion, her husband alleged that he was "repeatedly and violently struck and threatened [with] imprisonment" by his wife, who "for some time past has conducted herself in an improper and unbecoming manner and has repeatedly sold articles of furniture" and other items belonging to him.[717] That is one of the very few explicit references to a spouse threatening another with imprisonment as a weapon. The hypothesis that prosecutions could be driven by malice or other motives, or at least could be perceived as such, is given further credence by the number of affidavits in which an abused wife concluded by attesting that she had no ulterior motives for prosecuting her husband. Elizabeth Parker asserted that she "does not make this complaint...through any malice, hatred or ill-will...but merely for the

[715] N.A.C., MP(GR) vol. 33 (Charles Jackson committed 11 January 1841 for "threatening his wife's life"); QS(F), *Domina Regina v. Charles Jackson* (27 January 1841) (surety).

[716] A.N.Q.M., QS(F), *Domina Regina v. Charles Jackson* (4 August 1841) (affidavit of Sarah Moore); *ibid.*(4 August 1841) (arrest warrant).

[717] A.N.Q.M., QS(F), *Queen v. Mary McKenzie* (17 July 1838). The second charge, three months later, alleged that she "has been in the habit of disturbing the peace amongst her family and moreover that she very often takes the deponent's property and sells it without the leave or permission of the said deponent and that she is always more or less in a state of intoxication...." A.N.Q.M., QS(F), *ibid.*(29 October 1838). No information was found on either prosecution.

preservation of her life and also her person from bodily harm."[718] Similarly, another wife deposed that "she doth not make this complaint against, nor require such sureties from [her husband] from any malice or ill will, but merely for the preservation of her person from injury."[719] Perhaps those were assertions coaxed by questions raised by the Justice of the Peace filing the complaint, or statements made preemptively by a prosecutrix to allay suspicion. Notably, husbands made no such claims in their affidavits. It was much more common for all prosecutors to allege that they had been assaulted "without any just cause or provocation," presumably to foreclose a counterclaim of self-defense or the like.[720]

Tidbits of information occasionally surface that hint at coercion on the part of a spouse prosecuted for domestic battery. James O'Callaghan's wife charged him with misdemeanor on 26 March 1840; she alleged that he was in habit of ill-using her and had viciously beaten her two days before.[721] He was bound to appear in court on 21 April.[722] One of the co-sureties appearing on O'Callaghan's recognizance was Edward O'Hara, who on 27 March filed a complaint charging O'Callaghan's wife with suspicion of

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[718] A.N.Q.M., QS(F), *Elizabeth Parker v. Benjamin Robson* (19 January 1837) (affidavit of Elizabeth Parker); QS(F), *ibid.* (23 January 1837) (surety).

[719] A.N.Q.M., QS(F), *Queen v. Thomas Day* (12 March 1841) (affidavit of Mary Ann Turner).

[720] Compare Lepp, *supra* note 31 at 494-496. For wives who conceded culpability in spousal assaults, see *ibid.* at 492-494.

[721] A.N.Q.M., QS(F), *Domina Regina v. James O'Callaghan* (26 March 1840) (affidavit of Mary McGirty).

[722] A.N.Q.M., QS(F), *ibid.*(26 March 1840) (surety).

larceny, alleging that he suspected her of having secreted three planks of wood valued at four shillings.[723] The case against O'Callaghan was settled, and no further sign of the larceny case was found.[724] While it is impossible to tell with certainty, the facts suggest that O'Hara's prosecution was collusive, intended to compel O'Callaghan's wife to drop the charges against her husband.

Many abusive spouses continued their reigns of terror for the duration of the marriage.[725] It is likely that some spouses sought legal recourse after enduring systematic abuse for years, just as some never pressed charges. However, given the number of spousal violence complaints found during the period covered by this thesis, it should be supposed that a number of spouses were prosecuted on multiple occasions. While one cannot compile meaningful statistical data on repeat offenders, given the invisibility of many abusive spouses in the archives as well as the gaps in the sources themselves, analysis can nevertheless provide useful directional information.[726] As shown in *Figure 7*, a preponderance of defendants were identified as having been charged on one occasion. How often a single arrest was sufficient to curtail violent behaviour must be a matter of speculation, but it is likely that some violent spouses

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[723] A.N.Q.M., QS(F), *Domina Regina v. Mary McGirty* (27 March 1840)(affidavit of Edward O=Hara).

[724] *Domina Regina v. James O'Callaghan*, *supra* note 760.

[725] Compare Peterson del Mar, *supra* note 8 at 24 ("Most wives described more sporadic violence, but they also described husbands who used violence without much apparent reluctance."); Lepp, *supra* note 31 at 477-478.

[726] Many affidavits contain references to previous prosecutions, the records of which have not survived, or to numerous acts of barbarism that went unprosecuted.

were curbed in their behaviour by the intercession of the legal system. It is also likely that some abused spouses recognized the futility of further legal proceedings, or were unable to bring those proceedings for financial or other reasons.

Despite the limitations of the sources, it is striking that the percentage of wives as opposed to husbands who appeared once or twice was static. Approximately eighty-seven percent of husbands were charged once, while just over ten percent were charged twice, figures that are in accord with prosecutions against wives. The divergence is noticeable only when dealing with spouses charged on at least three occasions (in which wives were favoured), but no records of a wife prosecuted on four or more occasions were found.[727] The number of serial recidivists, as reflected in the records examined for this thesis, was extremely small. Five husbands were identified who appeared on four to six occasions, and only one was prosecuted ten or more times. One wife who appeared as prosecutor on multiple occasions was Marguerite Blais, who had the misfortune to be married to Charles Osteront, a Montreal joiner. Between 1831 and 1843, notwithstanding missing records, she prosecuted him at least six times. The charges against him included: assault and battery with a masse (probably a sledgehammer, given the context);[728] threats and menaces, in respect of which she reiterated that she had to

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[727] According to 1995 statistics, sixty-three percent of wives were assaulted more than once, with thirty-two percent assaulted eleven or more times, nine percent assaulted between six and ten times, and twenty-two percent between two and five times. Statistics Canada, *supra* note 535 at 105. Women victimized by their male partners today are more likely to be assaulted repeatedly than are men. See Frieze & Browne, *supra* note 655 at 179. Indeed, men are also more likely to be recividists. *Ibid.* at 184.

[728] A.N.Q.M., QS(F), *Marguerite Blais v. Charles Osteront* (30 May 1831) (affidavit of Marguerite Blais).

prosecute her husband in order to protect her life;[729] and four counts of assault with intent to murder, alleging that he attacked her on those occasions with a knife, hatchet, and with pieces of furniture he had destroyed.[730]

The worst serial recidivist was Antoine Legault *dit* Desloriers, who appeared in at least thirteen cases. The gaps in the records, particularly for the decade of the 1840s, prevent a complete reconstitution of his history. References to other prosecutions in his wife's affidavits leave no doubt that Legault's pattern of violence was more systematic

Frequency of Complaints Against Spouses Charged with Domestic Violence

	1x	2x	3x	4-5x	6+
Husbands n=487	419	49	13	5	1
Wives n=84	73	7	4	--	--
Total n=571	492	56	17	5	1
Total % Husbands	86.0%	10.1%	2.7%	1.0%	.002%
Total % Wives	86.9%	8.3%	4.8%	--	--

Figure 7.

[729] A.N.Q.M., QS(F), *Queen v. Charles Osteront* (9 August 1843) (affidavit of Marguerite Blais); QS(F), *Domina Regina v. Charles Ostront* (11 August 1843) (surety).

[730] A.N.Q.M., KB(F), *Queen v. Charles Osteront* (1 January 1837) (affidavit of Marguerite Blais); QS(F), *Domina Regina v. Charles Osteront* (26 January 1838) (surety); QS(F), *Domina Regina v. Charles Osterone* (24 August 1839) (affidavit of Marguerite Blais); *Domina Regina v. Charles Osteront*, *supra* note 715.

than even those extensive records suggest. Desloriers was a consistently abusive spouse, and his wife was an unusually persistent prosecutor. Her saga serves to illustrate both that the criminal justice system could not provide a significant deterrent to the most pathologically-violent spouses, and that some victimized spouses continued to repeatedly utilize the mechanisms of the law despite their limitations.

Marie Louise St. Aubin married Antoine Legault dit Desloriers in the parish of Saint Laurent *circa* 1821. From that day on, Marie Louise's life was to be characterized by recurrent acts of dehumanizing brutality, intimidation, and fear. The judicial archives has preserved a description of Legault from the jail records of the late 1820s: five feet seven inches in height, described as having a "dark complexion, grey hair, blue eyes, long visage," and at the time that description was recorded in the register of the Montreal Gaol, he was approximately forty years of age.[731] The jail warden could have recounted Legault's physical characteristics from memory, as over the ensuing twelve years Legault was to spend more time within the prison's walls than without.

The first complaint found for the period filed against Desloriers was on 2 November 1825, in which his wife alleged that over the preceding four years he had continually assaulted her. More specifically, she averred that on 29 October he had beaten her and dragged her across the floor by her hair. Desloriers was in the habit of becoming inebriated virtually every day, had menaced St. Aubin and their children with

[731] A.N.Q.M., MG. The description is found in the back of the prison register, and was likely recorded circa 1828.

a shotgun and an axe, destroyed household furniture, and threatened to burn down the house. Faced with his domestic reign of terror, she desperately pleaded that she might receive "justice in the premises."[732] Based on that affidavit, Legault was arrested, and before being released from prison was required by the Justice of the Peace to enter into a surety for his good behavior for a period of six months.[733] Most likely due to missing records, Legault did not resurface until July of 1828, when the register of the Court of Quarter Sessions showed him pleading guilty to a charge of assaulting his wife and being sentenced to three months' imprisonment. He was discharged on 20 October, and required to provide surety in the amount of fifty pounds for one year.[734]

Less than three weeks later Desloriers was again arrested for assault and battery and threatening to murder his wife with an axe. He spent the next four months in prison before being discharged during the second week of March 1829.[735] Imprisonment did little to dissuade Desloriers from his violent outburst, as the day of his release on 10

[732] A.N.Q.M., QS(F), *Dominus Rex v. Antoine Legault* (2 November 1825) (affidavit of Marie Louise St. Aubin).

[733] A.N.Q.M., QS(F), *ibid.* (5 November 1825) (surety).

[734] A.N.Q.M., QS(F), *The King v. Antoine Legault dit Desloriers* (19 July 1828); *ibid.* (July 1828 convictions); Register for the Court of Quarter Sessions, p.506 & 515 [hereinafter QS(R)] (14 & 19 July 1828) (record of guilty plea, sentence, and bail).

[735]A.N.Q.M., A.N.Q.M., KB(F), *Dominus Rex v. Antoine Legault dit Desloriers* (7 November 1828); MG no.394 (Antoine Legault dit Desloriers, arrested 7 November 1828 and "to stand committed to the common gaol for the space of 3 months and to give security to keep the peace for 12 months;" discharged 10 March 1829).

March 1829 he went home and tried to exact vengeance on his wife, and he was rearrested later the same day and lodged in prison until 31 August 1829.[736]

Due to the vagaries of the sources, Legault then seemingly vanished, only to reappear on November 6, 1834. St. Aubin again asserted that he had cruelly assaulted her, raining kicks and blows on her and threatening to kill her. Fearing that he might make good on his threats, she asked that a warrant be issued for his arrest.[737] Legault was apprehended and spent the following six weeks in prison, being released in January 1835. Less than a month later, the cycle was to repeat itself. Almost as an afterthought St. Aubin added a note to the bottom of her affidavit, stating that three days earlier Legault had staggered home drunk and had fallen over in the kitchen, thereby knocking over the stove and igniting a fire in the house.[738] Legault was apprehended by the Montreal Watch, and occupied a cell in the city jail for the following eight months.[739] Two months did not elapse before he was again arrested; St. Aubin then alleged that his brutality was no longer limited to his bouts of drunkenness, but also occurred during his moments

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[736] A.N.Q.M., MG (commitment of Antoine Legault dit Desloriers on 10 March 1829; discharged 31 August 1829 by Court of Oyer and Terminer). Amable Groux, widow of Louis St. Aubin, filed a complaint two days later alleging Legault had returned home from prison, found his wife lying on a sofa, and had proceeded to attack and threaten her; she summoned her son-in-law to secure him until the Montreal Watch arrived. QS(F), *Dominus Rex v. Antoine Legault* (12 March 1829).

[737] A.N.Q.M., MG no.131 (commitment of Antoine Legault on 6 November 1835); QS(F), *Dominus Rex v. Antoine Legault* (8 November 1834) (affidavit of Marie Louise St. Aubin).

[738] A.N.Q.M., QS(F), *Dominus Rex v. Antoine Legault* (17 February 1835) (affidavit of Marie Louise St. Aubin); MG no.236 (Antoine Legault dit Desloriers committed 15 February 1835 for assault and battery and threats; discharged 30 October by Quarter Sessions).

[739] A.N.Q.M., QS(R) p.332, *Dominus Rex v. Antoine Legault* (30 October 1835).

(however brief) of sobriety. In her affidavit, she emphasized that he was constantly in and out of prison and had provided numerous sureties for his good behavior, but persisted in his violence and threats towards her and her family. Knowing his "black and violent" character, she believed that he would eventually take her life.[740] He was arrested the following day and imprisoned for seven months, until July 1836.[741] He was once again arrested in October, that time for assault with intent to kill.[742] No record of him was found after that date.[743]

The story of Antoine Legault is illustrative of the legal response towards abusive spouses in many ways, but in other ways it is atypical. While repeat offenders were not uncommon, no other offenders who appeared before courts during this period could equal Legault's chronic abusive behaviour, or his wife's unflagging use of the judicial system to attempt to insulate herself and her children from his savagery. For more than a decade, he was recurrently bound to the peace and imprisoned. All told, extant court

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[740] A.N.Q.M., QS(F), *Marie Louise St. Aubin v. Antoine Legault* (5 December 1835) (affidavit of Marie Louise St. Aubin).

[741] A.N.Q.M., MG no.636 (commitment of Antoine Legault on 6 December 1835 for assault and battery and threats; discharged 19 July 1836); QS(F), *Dominus Rex v. Antoine Legault dit Deslauriers* (19 January 1836) (affidavit of Marie Louise St. Aubin).

[742] A.N.Q.M., MG no.1073 (Antoine Legault dit Desloriers committed 10 October 1836; discharged 17 March 1837). See also N.A.C., MG(GC) vol.6 (Antoine Legault dit Deslauriers committed 10 October 1836); KB(F), *Dominus Rex v. Antoine Legault dit Deloriers* (29 October 1836) (affidavit of Marie Louise St. Aubin).

[743] There is evidence that an Antoine Legault was fined £10 for assault, but it is unlikely that it was the same individual—although it might have been his son. See *The Montreal Gazette* (1 November 1850); *The Pilot* (1 November 1850); *The Montreal Weekly Pilot* (2 November 1850).

records indicate that he was prosecuted at least thirteen times by his wife between 1825 to 1829, and 1834 to 1837. Out of those seven years (the gaps due to missing records), Legault spent a total of over three and a half years in prison. While the inability of the law to rehabilitate or deter Legault is clear, at least the periods during which he was incarcerated provided his wife with respite from his brutality.

Eleven women were also identified as being recurrent defendants in charges related to domestic violence, and four of those defendants were identified in three separate complaints. Mary Ferris, for example, was charged three times in less than a year. In October of 1831 her husband charged Ferris with uttering threats against his life, and claimed that she was a "person of intemperate habits and when intoxicated is of a violent disposition and does disturb the public Peace and tranquility."[744] Seven months later he again charged his wife, that time with assault and battery:

> Mary Ferris…got drunk and smashed three panes of the glass in one of the windows of his dwelling house...and likewise broke several pieces of his crockery, for the purpose of annoying this deponent, and made such a noise as greatly to incommode his neighbours. And this deponent further saith that his said wife has, during the last two years, been in the habit of getting frequently intoxicated, and by reason of her intemperance and violence, makes him very unhappy and does not permit him quietly to follow his business, and annoys his neighbours, who have threatened to take legal proceedings against him in consequence of the said annoyance....[T]hat he has done all that he has been able to do in order to reclaim her by gentle methods, without success. And...Mary Ferris committed an assault and battery on him this deponent, and that he is not able corporeally to restrain her, as she is superior to him in personal strength, so that he is obliged to supplicate the aid of Public Justice....[745]

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[744] A.N.Q.M., QS(F), *Thomas Grantham v. Mary Ferris* (31 October 1839) (affidavit of James Grantham).

[745] A.N.Q.M., QS(F), *Domina Regina v. Mary Ferris* (27 May 1840) (affidavit of James Grantham).

On 8 August he again sought legal recourse, that time for assault and threats. The wording of the relevant document leaves little doubt that he filed it contemporaneously with the acts in question, as he deposed that she "is now at his house in a drunken state, making a great noise thereby disturbing the public peace and tranquility," and that she assaulted and threatened to kill him earlier in the day.[746]

Husbands and wives were, of course, not the only victims of domestic violence. A vicious spouse rarely limited his or her rage solely against a partner if children or other relatives also lived in the household.[747] While Chapter II concerned prosecutions brought against parents or guardians specifically on charges of ill-treating children, in the context of spousal violence complaints there are many references to brutality towards children, as well. Given that the administration of criminal justice during that period was largely based on a system of private prosecution, as well as the many obstacles that militated against children's access to the legal system, it is not surprising that allegations of violence directed towards children became peripheral in cases where spousal violence was also asserted.

A competing explanation may also be offered, as the affidavits suggest that women tolerated higher levels of violence against children than they did against

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[746] A.N.Q.M., QS(F), *Queen v. Mary Ferris* (8 August 1840) (affidavit of James Grantham).

[747] Cobbe noted that children often fell victim to abusive fathers, arguing that giving custody to men who abused their wives was akin to leaving the children "in the care of a wild beast...." Cobbe, *supra* note 539 at 85.

themselves. For example, one wife alleged that her husband was "addicted to liquor and when in a state of intoxication is exceedingly violent and dangerous," and that he frequently abused her and their five children, as well as threatening to take her life. Her prosecution of her husband for misdemeanor, however, was prompted by his attack on her the previous day, and she requested justice.[748] Sophie St. Sauveur grappled with Joseph Larouche's near-daily violence towards his family, and claimed that "souvent le dit Larouche arrive chez lui enivré, et frappe ses jeunes enfants." He was bound to the peace towards his wife alone for having assaulted her.[749]

Another husband, accused of having attempted to scald his children with boiling water and beating his wife, was charged only with disturbing the peace.[750] Ellen Nelson faced not only her husband's brutality, prompting her to live apart from him, but her children also suffered because when they "come visit she the deponent and...he gets intelligence of it, he invariably beats and illtreats them most unmercifully and inhumanely;" she charged him with assaulting her alone.[751] It might well have been the

[748] A.N.Q.M., QS(F), *Queen v. John Miller* (5 October 1840) (affidavit of Isabella Torrance).

[749] A.N.Q.M., QS(F), *Queen v. Joseph Larouche* (15 May 1841) (affidavit of Sophie St. Sauveur); QS(F), *Domina Regina v. Joseph Larouche* (17 May 1841) (surety).

[750] A.N.Q.M., QS(F), *Domina Regina v. Thomas Henderson* (17 July 1839) (affidavit of Ellen Hume).

[751] A.N.Q.M., QS(F), *Ellen Nelson v. James Thompson* (25 August 1837) (affidavit of Ellen Nelson).

case that, as has been suggested by other researchers, "violence deemed acceptable when directed toward children became unacceptable when directed towards wives."[752]

Other prosecutions were brought for acts of violence against spouses and children, as was the case with Mary Ann Foster's prosecution of her husband in 1837 on a charge of misdemeanor against her and her child. As she deposed before a local Justice of the Peace, "for many years past her said husband has been in the habit of illtreating the same deponent to such a degree as to have often placed her in fear for her life." She further claimed that the previous week her husband seized her and their six-month old child and "put her out of the House" and that she "stands in fear for her life on the part of her said husband."[753] Foster's prosecution was unusual in that the complaint listed both she and her child as victims, but the outcome itself was typical insofar as her husband was bound to the peace only against Foster--the infant was not mentioned in the surety.[754] A more atypical example was that of a husband charged with assault and battery against his wife and child in November of 1833, as he was explicitly bound to the peace towards both of them.[755]

It was rarer for wives to be implicated in violence against both a spouse as well as children. Ann Farmer was charged with assault with intent to murder her husband and

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[752] See *e.g.* Peterson del Mar, *supra* note 8 at 57.

[753] A.N.Q.M., QS(F), *Dominus Rex v. James Cowan* (26 July 1837) (affidavit of Mary Ann Foster).

[754] A.N.Q.M., QS(F), *ibid.* (26 July 1837) (surety).

[755] A.N.Q.M., QS(F), *Dominus Rex v. Michel Guertin* (29 November 1833) (surety).

stepchild in 1836. Her husband, a shoemaker in Montreal, posited that his wife assaulted him the previous day "and moreover attempted to take the life of a young child...whom [he] had reared and has under his protection." According to the husband's affidavit, Farmer had attempted to strike the child with a sharpened piece of iron and would likely have killed her had he not interceded. In requesting legal intervention, her husband concluded his complaint by saying that his life "is likewise constantly exposed from the violent acts he is exposed to on the part of his wife, wherefore he prays for justice in the premises."[756] Likewise, Peter Beauchamp, a carriage maker, charged his wife with threats and menaces in his complaint, which read in pertinent part:

> several times heretofore deponent has had his wife Mary Kilfinnen arrested and confined in the Common Gaol of this District for being intemperate, and threatening this deponent's li[f]e and also that of her children. That for the last ten months the said Mary Kilfinnen has been out of Gaol under recognizance; That frequently since that time the said Mary Kilfinnnen has again threatened this deponent's life and that of her children, when in a state of intoxication. That last night about the hour of half-past nine of the clock whilst in a state of intoxication she turned out of her house into the public street her two youngest children, having nothing but their shirts and trowsers. That the said deponent from the intemperate habits of his said wife, he hath reasons to fear for his life and that of his children. That in fact the said Mary Kilfinnen is an habitual drunkard and dangerous to her family and public at large....[757]

Family violence was less likely to fall under the eye of the law than were more public offenses. The middle and upper classes were especially insulated from such

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[756] A.N.Q.M., *Dominus Rex v. Ann Farmer* (26 November 1836) (affidavit of William Lilly).

[757] A.N.Q.M., QS(F), *Queen v. Mary Kilfinnen* (6 October 1843) (affidavit of Peter Beauchamp). She was bound to the peace towards her husband for twelve months in the amount of thirty pounds. QS(F), *ibid.* (7 October 1843) (surety).

scrutiny, as greater resources and social standing brought with them concomitantly less public intrusion. That fact, no doubt, accounts in large part for the relative absence of the upper classes from studies of this kind. While Victorian conceptions of the family may have revolved around the assumption that the upper classes were likely to indulge in more genteel forms of mental abuse than in physical brutality, violence was not limited to the labouring classes. It was the labouring classes, however, that were least able to afford the luxury of privacy. Paper-thin walls, close living quarters, and shared common spaces served to carry the sounds of domestic altercations to neighbours, relatives, and passing policemen. Under such circumstances, both the frictions leading up to the altercation, as well as the violence itself, could not fail to be conspicuous.[758]

While one may reasonably assume that third parties were cognizant of many of the acts of domestic violence occurring around them, the question of how often they intervened in such cases is a separate question. One of the main obstacles hampering successful prosecution of spousal batterers has always been a victimized spouse's fear of vengeance, shame, economic distress or other factors.[759] There is no way of ascertaining how many spouses were too intimidated to press charges, but it must have been a common phenomenon given the power imbalances inherent in those relationships.[760]

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[758] Compare Tomes, *supra* note 7 at 328-329.

[759] Francis Power Cobbe, for example, was acutely aware that wives were reluctant to testify against husbands, and wanted courts to issue protection orders that would have acted as orders of judicial separation. Cobbe, *supra* note 539 at 83.

[760] Seventy-five percent of violent crimes against Canadian women in 1993 went unreported. Statistics Canada, *supra* note 535 at 103. Of these, seventy-two percent were committed by relatives or acquaintances of the victim. *Ibid.* at 102.

Especially in a legal system driven by private prosecutions, many battered spouses must never have been afforded any protection by the law. An abused wife's failure to prosecute her husband, for whatever reason, effectively served to foreclose a legal response to many cases of domestic violence.

Indeed, scholars have pointed to the conclusion that wife battery was treated with complacency among nineteenth century working-class communities.[761] Ross has argued that this demonstrated the "inevitability of violence between spouses, and the 'right' of husbands to beat up wives."[762] While notions of entitlement and inevitability no doubt contributed, non-intervention likely also reflected the deeply-entrenched ethos of family privacy, awareness of the dangers of intervening in family spats, and the human tendency to ignore situations involving strangers in distress, all of which militate against third-party intervention in crises even today. Bystanders were most likely to cast aside their indifference, it has been suggested, when men attacked women who were not their wives or partners.[763] Other exceptions posited by scholars have included aggravating factors, such as the use of deadly weapons, violence that was deemed to exceed 'acceptable' levels, or mitigating factors such as a wife's illness or pregnancy.[764]

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[761] See *e.g.* Hammerton, *supra* note 6 at 19; Peterson del Mar, *supra* note 8 at 25; Ross, *supra* note 616 at 59.

[762] Ross, *ibid.* at 591-592.

[763] See *e.g. ibid.* at 592. How it would be readily apparent to bystanders that the two protagonists were not a couple is a question she did not address.

[764] See generally *ibid.* (citing the "presence of a really dangerous weapon, the sight of a lot of blood, or sounds of real terror...."); Harvey, *Wife Battery*, *supra* note 589 at 138 (citing excessive violence, wife's illness, use of a weapon, or if the violence spilled out in public areas

Chirivaris and other public shaming rituals were used as an informal type of community policing. While history records instances of "rough music" being used to express a community's displeasure with a married couple, such actions were only seldom directed towards a wife-beating husband. References to chirivaris that were directed at violent spouses were not located in the court records of the period, or in the popular press.[765]

Acknowledging the limitations of the sources used for this thesis, it can nonetheless be said that third parties did intervene in cases of domestic abuse, but in many instances they failed to do so. Many wives would not have been fortunate enough to have an intermediary willing to press charges on their behalf. Third parties tended to counsel reconciliation over prosecution, and wives often lived in isolated homesteads far away from neighbours, friends, and family.[766] In all likelihood, those third parties were more willing to provide shelter and aid than they were to intervene in a private family matter.[767]

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or there was a likelihood of murder); Tomes, *supra* note 7 at 336 (citing age or infirmity, use of weapon, or the possibility of murder).

[765] For discussion of those communal shaming rituals and family violence, see generally Bryan Palmer, "Discordant Music: Charivaris and Whitecapping in Nineteenth-Century North America" (1978) 3 *Labour/Le Travail* 46-48; A. James Hammerton, "The Targets of 'Rough Music': Respectability and Domestic Violence in Victorian England" (Spring 1991) 3 *Gender & Hist*. 1.

[766] Compare Peterson del Mar, *supra* note 8 at 46; Buckley, *supra* note 34 at 179.

[767] Compare Tomes, *supra* note 7 at 336.

By their nature, complaints are no more than indicators of patterns of intervention in cases of spousal violence, given the frequency with which instances of domestic discord went unreported and unchallenged. If the references to acts of brutality towards spouses found in contemporary sources are any indication, including cases alluded to in period newspapers and judicial sources that were not otherwise identified, then the archives must be said to provide a poor sample indeed. Nonetheless, they do allow for patterns to be detected concerning the relationships between prosecutors and defendants. *Figure 8* sets out the identities of the primary prosecutors in domestic violence cases.[768] The preponderance of those cases were brought by spouses, accounting for just under eighty-seven percent of the complaints made against husbands, and ninety-four percent of the complaints made against wives. Police and members of the Watch were the second most common interveners, accounting for approximately five and half percent of these complaints, followed by neighbours.[769] Third parties played an even smaller role in prosecutions of wives, reflecting greater reluctance on their part to intervene in family matters when the head of the household was the putative victim.

[768] Only the initial or primary complaint was counted. Multiple affidavits in support of the primary prosecutor's charges were not counted, although those often involved corroborative evidence by neighbours and other family members.

[769] Lepp's figures for complaints against husbands in Ontario during the period 1830 to 1920 are analogous, showing that wives constituted eighty-two percent of complainants; police, twelve percent; neighbours and friends, four percent; and family, two percent. Lepp, *supra* note 31 at 469 & note 53.

Relatives were responsible for a minuscule number of prosecutions, and appeared as primary prosecutors before Montreal courts much less often than did neighbours.[770] Their role as interveners, however, was probably belied by that observation. Relations often filed corroborative affidavits to bolster a wife's case, and interposed themselves between an abusive spouse and his victim. Their very existence no doubt acted to dampen some husbands' malignant tendencies. Elizabeth Ellis, in charging her husband with misdemeanor for having assaulted her, attested that her husband had often stated "he would take her to some place where she would be seen by none of her relations and that then and there would take revenge" against her, reflecting the protective role that relatives could play.[771] Fearing such intervention, some husbands did all they could, in Peterson del Mar's words, "to make their home an island of unmonitored male authority."[772] Other husbands, however, remained under the scrutiny of their wives' relatives. For example, a Montreal furrier averred in his complaint that his sister was frequently abused by her husband. One morning, when sent for by his sister, he discovered that she had been "most brutally and inhumanely beaten and illtreated to...such a degree that she is unable to come out." His sister

[770] Compare Peterson del Mar, *supra* note 8 at 41 ("[w]ives more often relied on neighbors than family to intervene against violent husbands.").

[771] A.N.Q.M., QS(F), *Domina Regina v. John Dean* (16 June 1840) (affidavit of Elizabeth Ellis); *ibid.* (20 June 1840) (surety). Compare Buckley, *supra* note 34 at 97 (citing intervention by fathers and other relatives).

[772] Peterson del Mar, *supra* note 8 at 31.

"complained bitterly" of her treatment, prompting him to charge her husband with assault and battery in the hopes that he would be arrested and held to bail.[773]

Parents were among those relatives who attempted to protect their adult children from baleful spouses. In June of 1830 a miller named Thomas Maggison went to a local Justice of the Peace to charge Robert Maggison (who, in an interesting bit of consanguinity, was also his nephew) with ill-treating and threatening his daughter Catharine. According to his account, Robert, a whitesmith in the City of Montreal, had been married for just over a year. Thomas was informed that lately he had become abusive towards Catharine, and on the previous day stated in Thomas' presence that if she dared to lodge a complaint against him for assault he "would take her life as soon as he could be liberated from Jail, even if it was a year afterwards." Thomas feared that Robert would continue to maltreat her, and further added that she "will not dare to lodge an Information against her husband for fear that he would take her life."[774] By virtue of that complaint, Robert

Identity of Primary Prosecutors in
Domestic Abuse Complaints

Prosecutor	Complaints vs. Wives		Complaints vs. Husbands
Wife	n=418	85.8%	

[773] A.N.Q.M., QS(F), *William Mead v. Charles Mudford* (27 January 1835) (affidavit of William Mead). Mudford was bound to the peace for six months in the amount of ten pounds. A.N.Q.M., QS(F), *ibid.* (27 January 1835) (surety).

[774] A.N.Q.M., QS(F), *Thomas Maggason v. Robert Maggason* (3 June 1830) (affidavit of Thomas Maggison).

Husband			n=79	94.1%
Montreal Watch/police	n=28	5.9%	n=4	4.8%
Neighbour	n=27	5.4%	n=1	1.1%
Adult child	n=3	.6%	--	
Male relative	n=3	.6%	--	
Female relative	n=3	.6%	--	
Bystander	n=3	.6%	--	
TOTAL n=571	n=487		n=84	

Figure 8.

was arrested, and then discharged with Thomas' consent, who no doubt was hopeful that Robert's arrest would subdue his savagery.

The following day Thomas once again filed a complaint against Robert, alleging that after his release from prison he threatened to take revenge on him. When Thomas visited the house he owned on Wolf Street, where his daughter and Robert lived rent-free, he found that most of the furniture and household effects had been destroyed and his personal property had been removed. Based on Robert's threats and the nature of the property destroyed, Thomas feared that Robert might attack him or destroy his property. Accordingly, he requested that Robert be required to provide surety for his

good conduct.[775] Whether emboldened by Thomas' pursuit of legal intervention or simply out of fear, Catharine swore out a subsequent complaint:

> [Y]esterday my said husband...who was arrested yesterday for ill using me before his arrest, and in consequence of my life being in danger with him by his threats towards me, after his discharge threatened me again and said that I would suffer for swearing as I did and that I would have reason to reflect all my life for what I had sworn at the Police Office--Sunday last the said Robert Maggison beat me with his fist and kicked me and struck me with the handle of a table knife without any provocation on my part, he then said at the same time, "I would stab you for a copper," or words to that effect, having the knife lifted out at me, and the day before yesterday, he said if I had him arrested, and placed in gaol, he would plunge the knife in my body, if the knife was as long as a tea spoon he had in his hand and if he was to be hanged the next day. I believe from the above threats that my life is in danger, if the said Robert Maggison is not arrested; the said Robert Maggison also said in my presence and before William Sire that he would not leave Canada until he had made the house of my father in Montreal and at the grande line...worth nothing, and would have my father brought to the thaw (meaning to beggary) and that our portion would not be worth sixpence.[776]

Robert's threats were more colourful and detailed than those made by many spouses, but it cannot be said that his wife's experiences were otherwise unusual.

A mother likewise sought to protect her adult daughter from her husband in 1839, alleging that "depuis longtemps [il] est dans l'habitude de s'enivrer et alors maltraite son épouse Esther Labadie l'enfant de la dite déposante."[777]

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[775] A.N.Q.M., QS(F), *Thomas Maggison v. Robert Maggison* (4 June 1830) (affidavit of Thomas Maggison).

[776] A.N.Q.M., QS(F), *Catharine Maggison v. Robert Maggison* (4 June 1830) (affidavit of Catharine Maggison).

[777] A.N.Q.M., QS(F), *Queen v. Hyacinthe Sasseville* (28 September 1839) (affidavit of Marie Françoise Desautelle); *Domina Regina v. Hyacinthe Sasseville* (28 September 1839) (surety).

On some occasions, numerous relatives intervened against an abusive spouse, as evidenced by the prosecution of William Morley. On 20 April 1843 William's wife Mary filed suit against him for aggravated assault and battery for having struck her and kicked her on the legs and back the previous day.[778] William's son-in-law attested that his mother-in-law had requested he keep guard outside Mary's door, but that William had burst it open and seized Mary. A scuffle ensued, during which William stabbed his son-in-law in the arm and attempted to stab him in the neck, but was prevented from doing so by the prompt intervention of William's fourteen year-old grandson and another neighbour; he then charged William with stabbing with intent to maim.[779] William's grandson and the neighbour likewise charged him with intent to maim.[780]

Children were among the most common witnesses to relationship conflict, but their role in prosecuting such cases was limited by their age, vulnerability, and lack of ready access to the criminal justice system. Still, even minor-aged children played a role in securing "justice in the premises" by summoning the police or neighbours. For example, John Dwyer was prosecuted twice in two months of 1842. In August of that year his wife charged him with assault and uttering threats, alleging that he struck her repeatedly and threatened to murder her, and that he slept with a large knife under his

[778] A.N.Q.M., QS(F), *Queen v. William Morley* (20 April 1843) (affidavit of Mary Ryan).

[779] A.N.Q.M., QS(F), *ibid.*(20 April 1843) (affidavit of William Goulder).

[780] A.N.Q.M., QS(F), *ibid.*(20 April 1843) (affidavit of David Goulder); *ibid.* (20 April 1843) (affidavit of John Robillard). No record of a final disposition was found.

pillow; he was bound to the peace towards his wife for twelve months.[781] Two months later he was arrested on a complaint for assault and battery filed by a police constable, whose testimony revealed that Dwyer's young son had beckoned him:

> [O]n Saturday evening last a child aged about nine years came to the Hay Market Police Station…and informed deponent that one John Dwyer now a prisoner in the Police Station was...severely beating his wife the mother of the child so informing and was in the act of striking her with an ax whereupon deponent went to the residence of the same John Dwyer where he found the wife of the said John Dwyer on the stairs apparently suffering from illtreatment and the said John Dwyer was at the foot of the stairs with an ax in his hand.[782]

The following morning Constable O'Neil returned to the house to see if Dwyer's wife was able to swear out a complaint, but ascertained that she was too weak from her injuries to do so. Her husband was arrested and lodged in jail.[783]

Adult children, with greater physical and other resources, were better able to interpose themselves in domestic altercations or prosecute an abusive parent.[784]

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[781] A.N.Q.M., QS(F), *Queen v. John Dwyer* (10 August 1842) (affidavit of Ellen Reardon); *ibid.*(17 August 1842) (surety).

[782] A.N.Q.M., QS(F), *ibid.*(17 October 1842) (affidavit of James O'Neil).

[783] A.N.Q.M., QS(F), *ibid.*(17 October 1842) (arrest warrant). The arrest warrant read as follows:

> Office of the Peace. Charles Wetherall, Esquire, Police Magistrate, and one of the Justices of our Sovereign Lady the Queen, assigned to keep the Peace in the said District, to the keeper of the common goal of the said district, greeting. Whereas, John Dwyer of the Parish of Montreal in the County of Montreal in the said District, labourer stands charged upon oath with having on Saturday evening last at the said parish violently assaulted and beaten his wife Ellen Reardon and threatening to take her life with an axe, These are therefore to Authorize and Command you, to receive into your custody the said John Dwyer and him safely keep, for want of bail. Given under my Hand and Seal, at Montreal, this 17th day of October one thousand eight hundred and forty-two in the sixth year of Her Majesty's Reign.

The fact that children tended to develop a closer relationship with their mothers than their fathers might have been a source of tension between spouses, but it also gave abused wives an ally in many cases.[785] In some instances children intervened physically as well as legally. Charles Lusignan prosecuted his father in 1839, alleging that "depuis longtemps son père Hypolite Lusignan est dans l'habitude de s'enivrer et de violemment battre assailli et frapper sa mère...sans aucune causes ou provocation." Interposing himself between his parents during one of his father's drunken binges, Hypolite Lusignan redirected his rage towards his adult son.[786] Similarly, Catherine Cary's adult daughter saved her mother from serious injury by intervening when her father attacked her with a garden hoe.[787]

Perhaps the most telling aspect of intervention in domestic violence is the extent to which non-relatives became involved. Scholars have commonly pointed to the reluctance of neighbours or other third parties to become embroiled in domestic spats.[788] No doubt the reasons underlying the choice of whether to intervene were as varied as

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[784] Compare Peterson del Mar, *supra* note 8 at 40 (stating that "mature children from previous marriages offered wives particularly strong protection.").

[785] Compare Hammerton, *supra* note 6 at 45-46 (citing "the much closer alliance of wives with their children, who often defended their mothers physically as they grew older," as a factor leading to spousal battery).

[786] A.N.Q.M., QS(F), *Queen v. Hypolite Lusignan* (17 August 1839) (affidavit of Charles Lusignan).

[787] A.N.Q.M., QS(F), *Dominus Rex v. Daniel Collins* (12 October 1832) (affidavit of Catherine Cary alias Collins).

[788] See *e.g.* Conley, *supra* note 35 at 76; Peterson del Mar, *supra* note 8 at 43; Tomes, *supra* note 7 at 335-336. *Contra* Lepp, *supra* note 31 at 473 & 475 note 83 (stating that most neighbours intervened).

the people themselves. Of all the categories of non-related interveners, neighbors were the most prominent in Montreal of the period, constituting just over five and a half percent of all prosecutors. Neighbours who filed complaints commonly lived in the same house as the couple in question.[789] As such, their willingness to file suit may sometimes have been more reflective of their desire to preserve the tranquility of their surroundings, or the safety of their property, rather than an indication of disapprobation of the acts of violence.[790]

Domestic violence was often characterized as a form of nuisance in complaints, and that label accounts for the number of prosecutions brought under charges of breach of the peace and the like. Such a scenario is illustrated by the affidavit of James Clark, a lemon-syrup manufacturer, who prosecuted two neighbours and tenants, a cutler/whitesmith named William Beers and his wife, for disturbing the peace:

> [T]he said William Beers and his said wife do occasionally quarrel with each other, and during such quarrels, make so much noise, of which noise her screams sometimes form parts, as to disturb the peace of this deponent and of his family and of other tenants....And this deponent further saith that, while he was sitting in that part of another building used by deponent as a shop opposite the house occupied by him, on Saturday last at about five of the clock in the afternoon, he overheard a violent noise and quarrel...between the said William Beer and his said wife, and heard the noise of things seemingly thrown downstairs by him at her, and after she went out into the yard of the said house, this deponent heard the noise of things seemingly thrown by the said Beers out of the window of the said house at her, and overheard her daring her said husband to throw any more things at her....And this deponent further saith that the quarrels of the said Beers and his said wife disturb the peace of this deponent and of his family, and of his

[789] A similar observation was made by Peterson del Mar, *ibid.* at 41.

[790] A similar observation was made in Lepp, *supra* note 31 at 453-454.

> other tenants, notwithstanding his remonstrances of the said Beers. Wherefore he has recourse to the Public Justice.[791]

Also typical was the prosecution of James Finlay and his wife for misdemeanor, brought by exasperated neighbours who alleged that the couple was "continually more or less in a state of intoxication and fighting together." As frustrating as that must have been, the gravamen of the complaint was that the Finlay's drunken escapades made them "dangerous characters" and led the prosecutors "verily [to] fear that they may whilst in a state of intoxication set fire to the said house, thereby endangering their lives and that of the neighbours..."[792] Seeking the public justice in such instances often had more to do with suppressing a nuisance than it did with saving an abused neighbour from bodily harm.

In other instances, neighbours intervened to protect the abused spouse. For example, on 28 July 1836 in the Township of Granby, Edward Roberts made an unannounced visit to a neighbour named John Grant. Roberts discovered Grant standing in the barn near the prostrate body of his wife, who was covered in blood and sported a badly bruised face. In response to Robert's query as to what had happened, Grant admitted that he had pummeled his wife. Roberts berated him, telling him that he should be "taken care of for such conduct," to which Grant replied that he "would whip

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[791] A.N.Q.M., QS(F), *James Clarke v. William Beers and wife* (29 September 1840); *Domina Regina v. William Beers* (29 September 1840) (surety); *Domina Regina v. Margaret Sheridan* (29 September 1840) (surety).

[792] A.N.Q.M., QS(F), *Queen v. James Finlay et al* (16 May 1843) (affidavit of Mary Kelly); *Queen v. Ellen Hamilton* (17 May 1843) (surety); *Queen v. James Finlay* (surety).

him" just as he did his wife. Grant then fetched a musket with which he threatened to take Roberts' life, prompting Roberts to prosecute him for uttering murderous threats.[793] Another neighbour filed a supporting affidavit, alleging that she had overheard Grant threatening to "thrash" Roberts for his meddling, and that he would "put his hands or fists in [his wife's] heart's blood."[794]

Other neighbours took action not because of concerns about their own safety, but because abused spouses were too intimidated or injured to press charges themselves. In August of 1842 a labourer in the parish of Longue-Isle filed a complaint against a blacksmith named Baptiste Bienvenue on a charge of assault and battery and uttering threats against his wife Lizette Rasico. According to his complaint, Bienvenue's wife sent for the prosecutor and informed him that she had been severely beaten with a "long piece of plank" and that her husband "had a large table knife with which he threatened to take her life and which she dreads he would do unless he was bound over to keep the peace." He added that she had previously prosecuted her husband for attempted murder and that "he this deponent makes this deposition at the instance of the said Lizette Rasico who was afraid herself to come forward in dread of her said husband....[795]

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[793] A.N.Q.M., QS(F), *Dominus Rex v. John Grant* (3 August 1836) (affidavit of Edward Roberts).

[794] A.N.Q.M., QS(F), *ibid.* (31 July 1836) (affidavit of Mary Neal).

[795] A.N.Q.M., QS(F), *Queen v. Baptiste Bienvenue* (19 August 1842) (affidavit of François Duval). The prior charge of attempted murder was not found within the archives. Bienvenue was bound to the peace for twelve months. A.N.Q.M., QS(F), *Domina Regina v. Jean Baptiste de la Bienvenue* (27 October 1842) (surety).

Occasional examples of complaints were found that appear to have been filed contemporaneously with the acts of violence themselves. In one such instance, the private prosecutor alleged that the defendant, a Montreal confectioner, "is now, in the deponent's house in the act of beating his wife to a degree alarming to him this deponent, and to the neighbors gathered about the door, and he believes that the said John Cosgrove if not arrested, may be guilty of the Murder of his said Wife."[796] This affidavit is evocative in its depiction of neighbours crowded outside the door, illustrating that intervention had its limits--there is no indication that the other neighbours made any effort to enter the house or otherwise intercede. Perhaps they were unable to force entrance, or were too cowed to intervene.

Conversely, many neighbours did little more than crowd around an offender, even when they enjoyed numerical superiority over the perpetrator(s). Julie Palosse, who had moved in with her mother to avoid her abusive husband, learned a similar lesson first-hand in June of 1829. Her drunken husband accosted her at her mother's house, and proceeded to brutalize her and throw her personal effects outside onto the ground. A crowd of people soon gathered to witness that highly public display of violence, but there is no indication that they attempted to intervene or even summon the

[796] A.N.Q.M., QS(F), *John Nettles v. John Cooper* (10 September 1832) (affidavit of John Nettles). The affidavit identified the defendant as John Cosgrove rather than Cooper, illustrating one of the attendant difficulties in working with those sources.

Watch.[797] Another wife was assaulted in a neighbour's house in full view of her neighbours, but they failed to take action.[798]

Affidavits contain the occasional example of intervention on the part of passers-by. One wife, charging her husband with assault to intent to commit murder, attested that her husband "would have taken the life of this Deponent were it not for two men in the street who prevented him."[799] Another defendant was prosecuted by a blacksmith who happened upon a spousal assault in the street; the blacksmith apprehended the assailant and took him to the Peace Office, where he was arrested and lodged in jail.[800] In one of the most interesting examples, a tinsmith making a social call on a parish priest encountered the wife of a live-in domestic servant lying unconscious on the floor as the result of his violence. He prosecuted the servant for assault with intent to murder, and the physician called to attend to her attached a corroborating letter.[801]

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[797] A.N.Q.M., QS(F), *Dominus Rex v. François Leduc* (1 June 1829) (affidavit of Julie Palosse).

[798] A.N.Q.M., QS(F), *Dominus Rex v. Pierre Deschamps dit Hunault* (10 August 1829) (affidavit of Marie Louise Charbouneau).

[799] A.N.Q.M., QS(F), *Domina Regina v. Thomas Donnavan* (30 August 1837) (affidavit of Ann Campbell); *Domina Regina v. Thomas Dunnavan* (6 September 1837) (surety).

[800] A.N.Q.M., QS(F), *Dominus Rex v. Alexander McGarry* (28 August 1832) (affidavit of Richard Lee).

[801] A.N.Q.M., QS(F), *Queen v. Charles Webb* (17 May 1843) (affidavit of James Campbell). An attached note, signed W. Hall and dated the same day, stated as follows:

> Dear Sir: Mary Webb, though better than [when] she was sent to the hospital, must still be regarded in a precarious state; the injuries on her person, being I have not the least doubt, the result of personal violence; I conceive (?) that her husband should be arrested, pending at least the issue of the present situation of his wife.

Members of law enforcement, namely the Watch and the Montreal Police Force, also played a part in the suppression and prosecution of domestic violence. The Montreal Watch, a civilian police force in operation from 1832 to 1837, numbered only twenty-eight men at the end of its tenure.[802] While members of the Watch arrested malefactors when summoned to do so or when they happened on a crime in progress, they appeared only sporadically in prosecutions for domestic violence. In 1838 the Montreal Police Force was created, which originally numbered one hundred and two men with four mounted patrols (although subsequent budget cuts would greatly reduce that number), supplemented by a rural police force outside the city limits.[803]

However ineffective it must have been, the police force nevertheless became another visible organ of state control, and it was to play a small but growing role in the suppression of family violence.[804] Indeed, as one scholar has noted, "police inserted themselves into the well-established system of private prosecution, flourishing along side it for decades."[805] As an adjunct to the prosecutorial function of the courts, the

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[802] See generally Hereward Senior, *Constabulary: The Rise of Police Institutions in Britain, the Commonwealth and the United States* (Dundurn Press: Toronto, 1997) 64. For further discussion of the rise of the Montreal police force, see generally Allan Greer, "The Birth of the Police in Lower Canada" in Allan Greer & Ian Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: Toronto University Press, 1992) 17. For the Montreal Watch, see generally E.-Z. Massicotte, "Le guet á Montréal au XIXe siècle" (1930) 36 *Bulletin des recherches historiques* 68.

[803] See generally Senior, *ibid. at 67.*

[804] Its limited efficiency in the early years could not have been much greater in subsequent decades. In 1875 Montreal possessed only thirty-eight policemen for a city of 160,000. See Harvey, *supra* note 3 at 135.

[805] Steinberg, *supra* note 16 at 25.

police force patrolled the streets and manned Peace Offices in major areas of the city. Playing a multifarious role in the suppression of crime and disorder, they were most visible in the suppression of public acts such as breach of the peace, vagrancy, and public drunkenness.[806] In many instances they also happened upon, or were called to, an altercation in progress and must have proven a much more effective institution of policing than the Montreal Watch had ever been.[807]

Besides being prepared and empowered to intervene in cases of criminality, police officers had an obvious role to play in a system of criminal justice based on private prosecution. That dual-faceted role was to have important repercussions, particularly given the reluctance of bystanders to involve themselves in domestic disputes. The experience of James Millard, a member of the fledgling City Police in 1839, was typical. Millard had responded to the sounds of a public disturbance and found a crowd gathered on the street. Several persons present notified him that they had heard sounds of violence emanating from a nearby house. Entering the building, Millard saw the defendant cruelly beating his son, with his badly-bruised wife lying nearby on a bed. The wife informed Millard that her husband had struck her with a hatchet "thereby

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[806] See generally *ibid.* at 29.

[807] In discussing the utility of the police in suppressing domestic violence in Montreal later in the century, Harvey, *supra* note 3 at 135, stated that the chance of police intervention was remote, particularly during the winter. She further noted that:

> Often the law would be summoned by a relative or neighbour, but by the time help arrived the 'row' was over....If a husband was also found to be drunk and/or disturbing the peace, he was arrested and charged accordingly, but the original reason for which the police had been summoned went unpunished.

causing a bad wound upon her body." Millard took the defendant into custody and requested the wife appear at the Police Office and give evidence against her husband, which she assured him she would if she should recover sufficiently.[808]

Intervention was not without attendant risks. Then, as now, responding to a domestic incident was a dangerous undertaking, as a violent husband seldom showed reluctance to use force against a third party. Moreover, despite their violent disagreements, some couples resented intrusions in what they deemed to be personal squabbles. Intervention could prompt spouses to close ranks against police and prosecutors and defend themselves against the law's incursion. The prospect of becoming a victim oneself presumably dissuaded many neighbours and others from interference, and police officers must have been acutely aware that a badge provided little insulation from further violence.[809] In 1839 Sarah Blessing was prosecuted for aggravated assault and battery against her husband, after police officers responded to a domestic dispute on Wellington Street. When the three police constables arrived at the home of John Flinn, they found neighbours crying "murder" and the front door bolted. Entering through a back door, they found Flinn lying on the floor, incapacitated by a severe blow to the head inflicted by his wife. She immediately directed her rage at the

[808] A.N.Q.M., QS(F), *Domina Regina v. Barney Seery* (19 November 1839) (affidavit of James Millard).

[809] For examples of violent reactions to domestic abuse interventions, see *e.g.*, Lepp, *supra* note 31 at 475-477.

police officers, who subdued her with some difficulty and took her to the Peace Office.[810]

In most such instances, however, the arresting officer charged the violent spouse with assaulting him, rather than with the original act of spousal violence that triggered the police response. The relative absence of firearms prevented those encounters from having lethal consequences, but the number of prosecutions for assaulting an arresting officer attests to the fact that intercession was hardly risk-free. Constable Charles Labadie encountered Stephen Duffy on St. Joseph Street with his hands wrapped around his wife's neck, while his terrified wife cried out "are you going to murder me?" As Constable Labadie ordered Duffy to release his wife, Duffy knocked him to the ground before the Constable regained the upper hand. Duffy was indicted for "assaulting a constable in the execution of his duty."[811] Another constable, while walking his beat, saw a husband beating his wife inside their house. Entering the dwelling, the constable was attacked by the husband who attempted to knife him.[812]

Not all mutual cooperation was characterized by physical opposition. When a policeman was called to the residence of Peter Brice and Margaret Ferguson on the rue St. Marie by cries of "murder!", he found Ferguson covered in blood and her husband in

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[810] A.N.Q.M., QS(F), *Queen v. Sarah Blessing* (2 March 1839) (affidavit of Jean Baptiste Savoy); *ibid.* (2 March 1839) (affidavit of Pierre Poitras). She was bound to keep the peace towards her husband for six months. QS(F), *ibid.* (2 March 1839) (surety).

[811] A.N.Q.M., QS(F), *Queen v. Stephen Duffy* (26 April 1839) (affidavit of Charles Labadie); *ibid.* (30 April 1839) (indictment).

[812] A.N.Q.M., QS(F), *Queen v. Francis Timmons* (8 October 1838) (affidavit of Constable Abner Lambert).

the other room, undressed and making a row. Following their arrest, Brice acted as one of his wife's co-sureties after both were bound to the peace.[813] Through a variety of means, some spouses resisted the law's intrusion as they believed violence remained an issue best kept within the family premises.

Related to the institution of the Montreal Police Force was the Police Court, presided over by a Police Magistrate. The majority of offenses fell under the jurisdiction of the Court of Quarter Sessions, or of the justices of the Court sitting singly in summary jurisdiction. Justices of the Peace outside the city heard a small number of domestic abuse cases, as well, although many defendants who appeared before them were bound over for trial before the Court of Quarter Sessions in Montreal. While the surviving records possess too many lacunae to allow for a comprehensive analysis of the dispositions of cases heard before those respective courts, the records for the Police Court are much more complete, albeit only for June 1838 to December 1841.[814]

Figure 9 sets out the disposition of cases summarily heard before the Police Court. Those cases, fifty-six in total, represent slightly less than ten percent of all spousal violence complaints found for the period. The most common disposition was that the defendant was "admonished and discharged," occurring in sixty-four percent of the cases before that Court. What is more striking, however, is that this disposition replaced

[813] A.N.Q.M., QS(F), *Queen v. Peter Brice & Margaret Ferguson* (8 June 1840) (affidavit of Theophile Martineau); *Domina Regina v. Jane Ferguson* (16 June 184) (surety); *Domina Regina v. Peter Brice* (23 June 1840) (surety).

[814] For accounts of nineteenth century Police Courts, see generally Craven, *supra* note 299; Arthur Noyes, *Selections From the Court Reports Originally Published in the Boston Morning Post, From 1834 to 1837* (Boston: Otis Broaders & Company, 1837).

alternative judgments, particularly in 1839 and 1840. Prior to that time, a considerable number of defendants were required to enter into sureties to keep the peace, usually for the period of one year. William Welsh was admonished and discharged for beating his wife on 23 August 1838.[815] When prosecuted a little more than a week later on the same

Proceedings before The Police Court
for Spousal Assault and Related Offenses,
June 1838-December 1841

Year Comm.	Disc.	Settle	Imprisoned at Pros.'s Request	Discharged for Lack of Bail	Comm. to Peace	Bound & Discharge	Admonish for Trial
1838 n=15	1	2	2*	6	3	-	-	-
1839 n=12	-	-	-	-	11	-	1	-
1840 n=20	-	-	1	-	18	1	-	-
1841 n=9	-	1	-	1	4	1	1	1 (2 months)
TOTAL n=56	1	3	3	7	36	2	2	1
%	1.8%	5.4%	5.4%	12.5%	64.3%	3.6%	3.6%	1.8%

* defendant committed but later bound to the peace

Figure 9.

[815] A.N.Q.M., MP p.78, *Queen v. William Welsh* (23 August 1838).

charge, Welsh was "admitted to bail to keep the peace during twelve months."[816] Another defendant was likewise bound to the peace for one year after "having admitted the fact" of beating his wife the previous evening when arrested by the Watch.[817]

Nearly five and half percent of those cases before the Police Court resulted in discharge of the abusive spouse at the prosecuting spouse's request.[818] Imprisonment for spousal violence occurred with considerable regularity although not, apparently, before the Police Court. In 1841 a spouse was arrested on a warrant for having assaulted and threatened his wife and was sentenced to two months in the House of Corrections by the Police Magistrate, but that outcome was the exception in cases heard before that Court.[819] Most commonly, in 5.4% of cases, defendants were committed in lieu of posting bail.[820] In two other instances, they were committed to stand trial at the Court of

[816] A.N.Q.M., MP p.91, *ibid.* (2 September 1838).

[817] A.N.Q.M., MP p.8, *Queen v. John Flinn* (3 July 1838).

[818] See *e.g.* A.N.Q.M., PC(R) p.78, *Queen v. François Crouistière* (22 August 1838) ("The prisoner being Committed on Charge of Assault and Battery discharged at the request of his wife Scholastique Moyer.").

[819] A.N.Q.M., MP p.424, *Domina Regina v. Guillaume Falere* (30 December 1841).

[820] One defendant was first committed, but bound to the peace four days later after providing surety. A.N.Q.M., MP p. 45, *Queen v. Thomas Ollive* ("A Warrant of Arrest granted...on charge of Threatening to kill his wife with a Knife the prisoner was arrested and Committed for want of Bail."); MP p. 54, *ibid.* ("The prisoner was discharge[d] from Gaol and admitted to Bail to Keep the Peace.").

Quarter Sessions. One of those cases involved a charge of assault with intent to murder, while the other was likely an aggravated assault and battery case.[821]

Little effort was apparently made to encourage settlement of cases before Police Magistrates, if the extremely low formal settlement rate is any gauge--although the rate of informal settlements is unknowable. That is not wholly surprising given the benign nature of most of the dispositions, insofar as most defendants were merely admonished. In the absence of a more punitive approach, there was little incentive for parties to settle formally. The sole exception was for a defendant that was "[f]ound intoxicated and illtreating his wife" in 1838.[822] In their discretion to rule summarily on evidence presented before them, Police Magistrates also dismissed three cases for lack of evidence. One husband was arrested in January of 1841 on an affidavit filed by his wife on a charge of assault and battery, but he was discharged soon afterwards.[823] Despite the low level of formal settlements, it is likely that this Court saw its role as one of conciliation. As mentioned, settlements were not necessary if Police Magistrates scolded abusive spouses and then released them. Similar observations about such courts of

[821] A.N.Q.M., MP p.68, *Domina Regina v. Augustin Boucher (*"A warrant of arrest was granted on the affidavit of Narcisse Boucher on charge of an assault with intent to Murder[;] The Defendant was arrested and Committed for trial.") (28 February 1840); MP p.424, *Domina Regina v. Peter Kelly* ("warrant for assault and battery upon affidavit of Susan Kelly; bound to Quarter Sessions.") (30 December 1841).

[822] A.N.Q.M., MP p.60, *Queen v. Joseph Kinslar* (9 August 1838).

[823] A.N.Q.M., MP p.72, *Domina Regina v. Francis M. Lynch* (noting that "after Examination case discharged.").

summary conviction in other jurisdictions have been made, positing that they tended to act as "marriage menders" in the context of domestic violence.[824]

By the late-1840s the proceedings of the Police Court were covered sporadically in local newspapers, resulting in heightened public visibility of those social issues. Prior to that time, only the very occasional reference, involving a case that resulted in severe injury, found its way into Montreal papers.[825] The following account of Police Court proceedings, which appeared in the *Montreal Transcript* of 1849, is typical:

> Police Court 11/17: Edward Griffin, drunk and threatening his wife, was in default of bail committed until Quarter Sessions; warrants were issued to arrest Michael Higgins and Thomas Speer on the complaint of their wives, for aggravated assaults, to be tried summarily. Both parties were arrested during the day, and Speer fined five pounds and costs, or two months in the House of Correction. Higgins' trial was postponed until Monday.[826]

Those accounts do not appear with sufficient regularity to warrant reconstruction cases before the Police Court for later years. However, as the relevant judicial records have not survived past 1842, newspaper accounts provide valuable insight into the

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[824] Compare Lepp, *supra* note 31 at 514. See also Hammerton, *supra* note 6 at 39:

> A scrutiny of the legal process in magistrates' courts, where most of the convictions took place, gives some pointers to the difficulties involved in undue reliance on their records. Records of convictions, recording a genuine decline in violent assaults, still cannot be taken to reflect the true level of behaviour, for the simple reason that during the period of statistical decline these courts increasingly became courts of conciliation as well as summary conviction....

[825] As reported by Glenn, *supra* note 574 at 64-65, American newspapers of the 1860s "regularly reported violent family quarrels which resulted in the serious injury or death of the wife."

[826] *The Pilot* (20 November 1849). See also *The Montreal Transcript* (22 November 1849). For another such account in which a husband was fined five pounds or two months' imprisonment for kicking his wife unconscious, see *The Montreal Gazette* (18 June 1847).

workings of that Court of summary jurisdiction. The most striking distinction is that, in later years, the Court appears to have regularly levied fines for assaults against spouses. By way of further example, in December of 1850 another husband was fined ten shillings and costs of six shillings and threepence for having assaulted his wife and threatened to take her life while in a state of intoxication. Failure to pay the fine and costs rendered him subject to two months' imprisonment in the House of Correction.[827]

As indicated by *Figure 9*, the levying of fines is a disposition that is entirely lacking in the records of the Police Court for the years 1838 to 1842.[828] The reasons underlying that dichotomy are unknown, but it may have reflected a change in prosecutorial philosophy marked by the belief that fines offered greater dissuasion, with the added benefit of augmenting Crown coffers. No evidence was found of an alteration in statutory authority for Police Magistrates during the period that would provide an explanation for that change. It would be too much to say, however, that the Police Court's approach towards domestic violence had evolved from a mediation-orientated approach to a more punitive one over the span of a few decades. Clearly Quebec courts continued to favour reconciliation over punishment for a long time to come.[829]

IV.

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[827] *The Montreal Gazette* (16 December 1850).

[828] Harvey has noted that in her study of Montreal between 1869 and 1879, most committed husbands were fined and made to pay court costs. See *Harvey*, *Wife Battery*, *supra* note 589 at 137.

[829] Compare *ibid.* at 137-138.

Analysis of the mechanisms by which the law dealt with domestic battery illuminates the nature of the judicial response to it, but does not reveal a great deal about the causes and dynamics of spousal violence. Unlike other studies of later periods that provide comprehensive information of that type, the available sources for the period do not readily offer such information. Most often the prosecuting spouse merely alleged instances of unprovoked violence, and the aggressor spouse's vantage point was not normally recorded. In view of the much smaller numbers of complaints filed by husbands alleging spousal violence, it is even more difficult to ascertain the circumstances underlying attacks by wives. And, as has been noted elsewhere in this thesis, defendants did not testify in their own behalf, further limiting sources of information. There is also a danger in compiling unitary motivations that appear within the sources, as to do so runs the risk of offering facile explanations for the occurrence of violence in what were complex human relationships.

Despite those limitations, the sheer volume of cases allows one to reclaim some useful detail about the factors that precipitated domestic violence. Most striking is the continuity in themes, tensions, and dynamics between those cases and the modern experience.[830] First, the complaints illustrate the ubiquity of alcohol abuse in cases of domestic violence. References to the companionate nature between the two are widespread in the judicial archives, although that connection was only sporadically

[830] Compare Buckley, *supra* note 593 at 173-174. As Buckley observed, "[n]o doubt the reasons underlying many cases of domestic violence were complex phenomena," although in many instances the abusive husband "lacked the requisite social, economic, or personal assets" required to maintain control over the household. *Ibid.* at 164.

noted in the popular press. While discourses against the evils of intemperance were common, and emotive accounts of the misery that reigned in the alcoholic's household appeared in newspapers of-the-time, editorials condemning family violence in any form were rare. Indeed, the "drunken husband" article that introduced this chapter skirted the issue of spousal cruelty.[831] While the issue of spousal battery was more visible in the pages of the popular press than was child abuse, for instance, it surfaced infrequently and usually only when death resulted. An unusual episode of spousal cruelty that appeared within *The Canadian Courant* of 1825 offered the following account:

> Disgraceful--On Wednesday night…a Gentleman in returning to his lodgings…was surprised on meeting near the National School, a naked woman, with her arms pinioned, and strongly tied behind by a cord, looped, and bound in numerous folds. She begged him to unbind her, and assured him (in answer to some questions) that she was a married woman, the mother of six children, and that she was placed in the disgusting situation he then beheld her by her--husband!--The Gentleman…with much difficulty untied the cord and she conducted him to the place whence she had been driven by her unfeeling and savage husband, who was surprised at her return, and with many imprecations demanded how and by whom she had been released. The humane deliverer of this captive matron did not want for further explanation, as on being satisfied with the correctness of her story, he retired to his quarters.[832]

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[831] No articles were found that explicitly made that connection. Typically, such accounts contain ambiguous references like those found in "The Drunkard's Last Spree," *The Montreal Transcript* (29 October 1839), which noted without further elaboration that the "wretched being before her had neglected, and injured, and reduced her to beggary...."

[832] *The Canadian Courant* (12 November 1825). The account concluded by asking whether that incident was worthy of police attention and that, if so, the paper had "the authority of our informant to state his name, and to say that any information he can afford will be cheerfully given." It is worth noting that this account is as illuminating for the gentleman's reaction as for the incident itself. The woman's deliverer first insisted on posing questions to ascertain her background and the circumstances of her predicament before releasing her.

The air of complacency that surrounded the issues of domestic violence and alcoholism is illustrated by an 1836 issue of a Montreal newspaper that contained the following jest: "[w]hy is an intemperate man like a person in the habit of beating his wife? Because he is given to liquor (lick her)."[833] When viewed in the context of spousal violence, that joke possesses a resonance beyond its original meaning. There is little doubt that during the period such quips were more likely to label the speaker a clever wit than an unfeeling chauvinist. Viewed more presentistically, however, such a quip unintentionally alludes to the well-chronicled historic relationship between domestic abuse and alcohol abuse.[834] Alcohol consumption was probably a factor in a number of cases where it was not explicitly mentioned, and it was not coincidental that incidents of wife battery documented in those affidavits often occurred on weekends, probably following outings to the local pub. Those types of *bon mots* also unconsciously reflect the realities of-the-time: in the mid-nineteenth century, the issue of wife battery "was discussed in tones both jocose and solemn, uneasy and outraged."[835] As Frances Power Cobbe was to observe:

> [discussions of wife assaults are] surrounded by a certain halo of jocosity which inclines people to smile whenever they hear of a case of it (terminating anywhere short of actual murder), and causes the mention of the subject to conduce rather than otherwise to the hilarity of a dinner party.[836]

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[833] *The Montreal Transcript* (13 October 1836).

[834] See generally Harvey, *Wife Battery*, *supra* note 589 at 129; Lepp, *supra* note 31 at 451-454.

[835] Siegel, *supra* note 544 at 2122.

[836] Cobbe, *supra* note 539 at 57.

Indeed, the temperance movement itself did not begin in earnest in Lower Canada until the 1840s, and the movement against domestic violence remained decades away. [837]

Scholars have routinely pointed to the central role of drunkenness in cases of nineteenth century domestic abuse.[838] In fact, 'drunkenness' was often used as a code word for spousal violence, especially later in the century.[839] Alcohol abuse was one of main causes of wife-beating posited by Frances Power Cobbe, the noted women's rights crusader, along with other factors including poverty, disease and overcrowding, coupled with the basic premise that women were subordinate to men.[840]

No doubt "tavern culture" also played a part, in which men shared complaints about their wives and were goaded on by drinking companions to put their wives in their places when they returned home.[841] Many Montreal families were marred by alcoholism, and one cannot help but commiserate with the plight of wives who faced a chronically-drunk and abusive husband. Ann Quickly, charging her husband with

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[837] See generally Jan Noel, "Dry Patriotism: The Chiniquy Crusade" in Cheryl Krasnick Warsh, ed., *Drink in Canada: Historical Essays* (Montreal: McGill-Queen's Press, 1993) 27.

[838] See *e.g.* Tomes, *supra* note 7 at 332-333; Glenn, *supra* note 574 at 64-65. See also Buckley, *supra* note 593. That remains the case today. See Frieze & Browne, *supra* note 655 at 192-196.

[839] See generally Harvey, *Wife Battery*, *supra* note 589 at 135.

[840] See Cobbe, *supra* note 539 at 61-66.

[841] See generally Pleck, *supra* note 316 at 50; Harvey, *Wife Battery*, *supra* note 589 at 131. For discussion of tavern culture, see Peter DeLottinville, "Joe Beef of Montreal: Working-Class Culture and the Tavern, 1869-1889" (1981-1982) 8/9 *Labour/Le travailleur* 16.

aggravated assault, alleged that her husband had been "under the effect of liquor" for the past nine days and is "of a most violent and ungovernable disposition."[842] David Pellerin was described by his wife as "un caractère sauvage et mechant...adonné à la boisson, et est capable de se porter à toutes sortes d'exces."[843] Charles Jackson, whose wife described him as a "habitual and abandoned drunkard lost to all sense of propriety," has a great deal of company in the judicial archives.[844]

Another feature worthy of note is the frequency with which wives attested to their husbands being mild-mannered except when drunk.[845] That observation would have been of little consolation to wives whose husbands went on frequent binges. Implicit in such observations, however, is the notion that those husbands were not wholly responsible for their actions.[846] These remarks would appear to suggest that many wives believed their spouse to be a good husband except when drunk and abusive, rather than to say that he was not a good husband *because* he was drunk and abusive. It might also have delineated the boundaries of acceptable behaviour in the

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[842] A.N.Q.M., QS(F), *Domina Regina v. Francis Beatty* (17 December 1839) (affidavit of Ann Quickly).

[843] A.N.Q.M., QS(F), *Marie Anne Landrie v. David Pellerin* (21 February 1831) (affidavit of Marie Anne Landrie); QS(F), *ibid.* (22 February 1831) (surety).

[844] A.N.Q.M., QS(F), *Queen v. Charles Jackson* (11 January 1841); *Domina Regina v. Charles Jackson* (27 January 1841) (surety).

[845] Compare Harvey, *Wife Battery*, *supra* note 589 at 132; Hammerton, *supra* note 6 at 45.

[846] Peterson del Mar, *supra* note 8 at 25, noted that husbands often blamed their violence on intoxication or ungovernable tempers.

minds of many wives: deliberate violence inflicted when sober was more abhorrent to wives than violence inflicted when under the influence of drink.[847]

The overuse of intoxicating liquors was a more complex phenomenon in that context than might be readily apparent. The cause-and-effect relationship between violence and alcoholism was not necessarily as clear-cut as contemporary references suggest. Abusive spouses certainly viewed drunkenness as a justification for their violence.[848] There were legal consequences to such attitudes, as well, for drunkenness was often viewed as a mitigating factor in serious domestic assaults by judges and jurors, even in assaults that had lethal consequences. Drunkenness lessened the culpability of a murderous spouse, and drunkenness on the part of the victim could be viewed as a provocation.[849] Wives' drunkenness was much less tolerated than that of husbands, and their transgressions warranted harsher penalties than those meted out to husbands.[850] However, it is likely in many cases that alcohol only served to exacerbate already existing violent impulses, as alcohol decreased inhibitions.[851]

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[847] See Hammerton, *supra* note 6 at 45.

[848] See generally Harvey, *Wife Battery*, *supra* note 589 at 131.

[849] As discussed in Chapter IV, *infra* at 409. That remains true in the context of contemporary domestic violence. See Frieze & Browne, *supra* note 655 at 192.

[850] Compare Cobbe, *supra* note 539 at 63 & 69; Hammerton, *supra* note 6 at 47. Taylor, *supra* note 36 at 59, emphasized that drunken mothers were seen as worse, because they would beget a new generation of inebriates.

[851] Compare Buckley, *supra* note 593 at 175. Frieze & Browne, *supra* note 655 at 195, have noted that alcohol abuse might be more of a disinhibiting factor than a causal one in the context of domestic violence.

Overuse of intoxicating liquor was hardly unique to men, and studies have shown that the *per capita* consumption of hard liquor was staggeringly high during much of the nineteenth century.[852] Women had less ready access to spirits, and probably drank less than men.[853] However, they too became violent during alcoholic binges. One husband, a shoemaker by trade, sought legal redress against his alcoholic wife on at least three occasions. In July of 1835 he alleged that for the previous two months he had been struck by his wife, Ann Farmer, on several occasions while she was in a state of drunkenness, and that three days earlier she had attempted to strike him with a fire shovel while threatening to murder him.[854] He again sought "justice in the premises" against her the following year on a charge of assault with intent to murder, alleging continuing drunken attacks, although the gravamen of his complaint was that she had attempted to kill their foster daughter with a piece of iron.[855]

While no other complaints related to that couple were found, the records of the Montreal Gaol reveal that Farmer was arrested on 19 July 1838 based on her husband's assertions that she had again threatened his life.[856] Mary Ann Whittiker was charged with attempting to take the life of her husband with a razor; he alleged that she was a

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[852] See *supra* note 879 at 320.

[853] See generally Harvey, ***Wife Battery***, *supra* note 589 at 132.

[854] A.N.Q.M., QS(F), *Dominus Rex v. Ann Farmer* (29 July 1835) (affidavit of William Lilly). She was bound to the peace for six months. QS(F), *ibid.* (11 August 1835) (surety).

[855] ***Dominus Rex v. Ann Farmer***, *supra* note 438.

[856] A.N.Q.M., MG p.27, *The Queen v. Ann Farmer* (19 July 1838) (record of committal). According to the notation, she was bound to the peace for twelve months.

long-time alcoholic and "when in that state commits all kind of excesses...whereby [he] stands in bodily fear of her."[857] All in all, roughly one in three complaints against husbands or wives alleged alcohol abuse.[858]

A husband's unemployment or non-support has often been cited as a causal factor in domestic assaults.[859] Even when not explicit, many of the labourers who appeared in those records had to have struggled with the seasonal character and high unemployment rates endemic to non-skilled labour. Surviving accounts indicate that some wives grappled with abusive, alcoholic husbands who failed to support the family and whose actions must have placed an immense strain--psychological, emotional, physical, and financial--on their spouses.[860] Ann Green had been married to her tailor husband for six months in July 1843, and was already five months pregnant. As she asserted in her complaint charging him with assault and threats:

> [He] does not work at his trade and remains idle being supported by the deponent's industry who peddles goods in the said city....her husband is in the daily habit of beating and maltreating the deponent when she returns home at night without the slightest cause whatsoever on her part. That on Saturday night

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[857] A.N.Q.M., QS(F), *Samuel Millard v. Mary Ann Whittiker* (9 October 1837) (affidavit of Samuel Millard).

[858] References to alcohol abuse were found in 171 out of 571 (or thirty percent) of complaints by wives against husbands; twenty-four out of eighty-four complaints (28.6%) against wives. That figure is likely low, as some affidavits against recidivist defendants specified alcohol abuse, while other affidavits against the same defendants did not. Lepp cited sixty-five percent of complaints as alleging drunkenness in his study. See Lepp, *supra* note 31 at 480.

[859] See *e.g.* Ross, *supra* note 616 at 581 ("A husband's unemployment thus generated almost intolerable domestic tensions, and seems a factor in a large minority of the Old Bailey assault or murder cases."). See also Lepp, *ibid.* at 486-487.

[860] See Cobbe, *supra* note 539 at 70.

> last…her said husband after returning from market with Deponent, without any reason whatsoever, bolted and closed the door of the House and took a knife with which he threatened the life of deponent. That he then broke open the deponent's chest and took from it a dollar (the deponent's earnings) which the Deponent had put by to pay her rent. That the deponent had to call the aid of the Police who apprehended her said husband. That [her husband] has further threatened the deponent that when he regained his liberty he would kill the deponent. That the deponent is fearful that her said husband may put his threats to execution--wherefore the deponent prays for justice and that her said husband may be held to keep the peace. [861]

Other husbands abandoned their families for years, surfacing on occasion seemingly for the purpose of terrorizing their wives.[862] Less extreme examples than a husband's failure to provide for his family also involved domestic violence, as tensions over the family purse have been a commonly cited trigger for such pathological acts.[863] Research on other nineteenth century jurisdictions has shown that violence often erupted when a husband returned home after having spent much of his weekly wage, usually on drink.[864] Indeed, the pressures that alcohol consumption put on a family budget would have made issues related to alcoholism and the family economy inseparable.[865] Alcoholic spouses also routinely pawned household items to pay for

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[861] A.N.Q.M., QS(F), *Queen v. James Head* (31 July 1843) (affidavit of Ann Green).

[862] See *e.g.* A.N.Q.M., QS(F), *Queen v. Joseph Ray* (16 July 1839) (affidavit of Sophia Rowen); *Domina Regina v. Joseph Ray* (19 July 1839) (recognizance).

[863] Compare Tomes, *supra* note 7 at 331-332; Lepp, *supra* note 31 at 481.

[864] Compare Ross, *supra* note 616 at 582; Pleck, *supra* note 316 at 50; Harvey, *Wife Battery*, *supra* note 589 at 129; Hammerton, *supra* note 6 at 45; Cobbe, *supra* note 539 at 69.

[865] See generally Harvey, *ibid.* at 132.

drink,[866] while other spouses resorted to the pawning or selling of property as a survival strategy to prevent the family from starving.[867] Husbands frequently cajoled, extorted, threatened or even stole money from their wives, particularly when separated. Joseph Maçon, gentleman, witnessed the victimization of one wife after her husband accosted her on the street and demanded a half dollar, but was rebuffed.[868]

Husbands also viewed the contesting of their authority, in whatever form, as an egregious provocation.[869] Violence erupted not only because husbands attempted to bolster their authority, but also because wives resisted that authority.[870] William Lee, charged with misdemeanor in 1839, was angered that his wife had hidden his gunpowder.[871] Another husband, likewise charged with misdemeanor, admitted to having beaten his wife but alleged that she had struck him first.[872] A notary brutalized his wife and then threw her out of the house, swearing that she would never enter their house again nor ever see their ten month-old daughter; his sole complaint against his

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[866] Compare Tomes, *supra* note 7 at 331.

[867] Compare Hammerton, *supra* note 6 at 45.

[868] A.N.Q.M., QS(F), *Queen v. Thomas McQuillin* (6 December 1837) (affidavit of Joseph Maçon).

[869] See generally Peterson del Mar, *supra* note 8 at 29; Lepp, *supra* note 31 at 508-509.

[870] Compare Peterson del Mar, i*bid.* at 31.

[871] A.N.Q.M., QS(F), *Queen v. William Lee* (19 September 1839) (affidavit of Esther Baker); *ibid.*(20 September 1839) (surety); MG (William Lee committed 19 September 1839; bailed 24 September 1839).

[872] A.N.Q.M., QS(F), *Domina Regina v. Patrick Lynch* (17 April 1840) (affidavit of Captain William Brown).

wife was that she "was cross and on one occasion had called him a pig."[873] Failing to secure her husband's consent before pursuing a desired course of action or activity could also lead to a violent response, as independence was a *de facto* challenge to a husband's supremacy.[874] Husbands often alleged that they were provoked by aggravating behaviour, such as scolding and criticism.[875]

Failure to fulfill one's responsibilities was a common source of tension in relationships, and wives' alleged lapses in their domestic responsibilities were a commonly cited provocation by husbands.[876] The failure of a wife to mend clothing, to do the wash, or supply a satisfactory meal--even if the husband's spendthrift ways or the wife's ill health were responsible--were seen as serious lapses to which husbands often reacted violently.[877] The wife of a farmer found that being bedridden due to illness ("c'est à dire de son accouchement", as was explained in the complaint) neither prevented her husband from demanding she complete her domestic chores, nor

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[873] A.N.Q.M., QS(F), *Dominus Rex v. Joseph H. Jobin* (9 October 1835) (affidavit of William Annesley); *Dominus Rex v. Joseph Jobin* (affidavit of Rachael Charlotte Desautels) (9 October 1835); *ditto* (9 October 1835) (surety).

[874] Compare Tomes, *supra* note 7 at 331; Peterson del Mar, *supra* note 8 at 28.

[875] Compare Ross, *supra* note 616 at 577; Tomes, *ibid.* at 332. See also Cobbe, *supra* note 539 at 67-68 (describing these "harpies").

[876] Conley, *supra* note 35 at 78; Ross, *ibid.* at 580; Harvey, *Wife Battery*, *supra* note 589 at 132; Lepp, *supra* note 31 at 507-508; Tomes, *ibid.* at 331 (also citing a wife's request for the performance of errands that interfered with a husband's desired activities).

[877] Harvey, *ibid.* at 134 (noting that husbands did not always contribute to family finances but felt entitled to their wives' support).

insulated her from a beating.[878] Eliza MacIntosh sustained a razor-inflicted wound on her back, seven inches in length and an inch in depth, after her husband found fault with the manner in which she mended his stockings.[879]

But violence could also be triggered by a woman's assertion that a man was not living up to his responsibilities.[880] A respected Montreal lawyer named François Bruneau found himself involved in legal proceedings due to his relationship with an unmarried woman named Mary Nowlan. In April of 1834 she charged him with assault and battery, professing that she had been "seduced under promises--false and delusive" and had borne two children. According to her affidavit, Bruneau abandoned her with the second of those children and failed to provide for them. She was forced to go to his house often and entreat him "as a man of honour and principle to aid her by giving her some money to support herself and his child in her care," to which Bruneau would typically react with abuse. She alleged that on 2 April he did "violently strike abuse and illtreat" her and threatened to "knock her brains out."[881] Bruneau was bound to the peace on 4 April, the same day that he filed a complaint against Nowlan for uttering

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[878] A.N.Q.M., QS(F), *Domina Regina v. Julien Desgenait* (23 November 1841) (affidavit of Euphemie (?) Robin dit Lapointe); *ibid.* (23 November 1841) (surety).

[879] A.N.Q.M., QS(F), *Domina Regina v. John Lewis* (22 May 1840) (affidavit of Eliza MacIntosh).

[880] See generally Peterson del Mar, *supra* note 8 at 58.

[881] A.N.Q.M., QS(F), *Dominus Rex v. François P. Bruneau, Esquire* (2 April 1834) (affidavit of Mary Nowlan).

threats and menaces.[882] Another wife was not only saddled with an alcoholic partner who frequented houses of ill-repute and failed to provide for his family's maintenance, but also suffered severe beatings at his hands when she remonstrated with him for those failings.[883] Such scenarios were not unusual, and one can only imagine the sense of hopelessness and despair that marked a relationship in which poverty, drunkenness, and violence were constant companions.

Jealousy was also a precipitating factor, including husbands' resentment or disapproval of wives' friends and social partners.[884] Extramarital dalliances, for example, provided gist for violence within the family, although that behaviour usually involved a husband's attempt to protect his perceived right to such liaisons.[885] One wife, forced out of her home, returned to find her husband in the company of two women of dissolute character who threatened her with bodily harm.[886] Other cases amounted to concubinage. For example, Louise Charbouneau charged her husband, a Montreal merchant, with threats and menaces in 1841. According to her affidavit, her

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[882] A.N.Q.M., QS(F), *Dominus Rex v. François P. Bruneau* (4 April 1834) (surety); *François Pierre Bruneau v. Mary Nowlan* (4 April 1834) (affidavit of François Bruneau).

[883] A.N.Q.M., QS(F), *Domina Regina v. Joseph Gravelle* (14 April 1841) (affidavit of Marie Labelle); *ibid.* (15 April 1841) (recognizance).

[884] See generally Harvey, *Wife Battery*, *supra* note 589 at 129; Hammerton, *supra* note 6 at 45; Lepp, *supra* note 31 at 490-492.

[885] Compare Cobbe, *supra* note 539 at 65, who obliquely mentioned prostitution, referring to it as the other "great sin of cities," inciting cruelty and lust.

[886] A.N.Q.M., QS(F), *Jane Boice v. Thomas Langhorn* (30 May 1831) (affidavit of Jane Boice).

husband had maintained a concubine in the same house, whom she had arrested a few days earlier for disrupting the marital home. Following the arrest, however, her husband assaulted her and the children, and further threatening to kill her and raze the house. He was bound to the peace for twelve months.[887] Another wife filed a complaint against her husband and her husband's mistress, a woman of ill repute, for assault:

> Louise Hall épouse de Maxime Champagne....Que depuis quelques tem[p]s son époux le dit Champagne est dans l'habitude de fréquenter une mauvaise maison ou maison de débauche où reside une jeune fille du nom de Elmire Girard....Que la dite Elmire Girard est dans l'habitude d'inciter son dit époux à la battre, ce qu'il accomplis souvent, de plus la dite Elmire Girard reside vis à vis chez la dite deposante, et continuellement elle insulte et invective la dite déposante, de la manière la plus scandaleuse. Aujourd 'hui le dit Champagne est sortit de cette mauvaise maison et est venu chez lui et en entrant a violemment assaillit battu et frappé la dite déposante, lorsque la dite Elmire Gerard encourageait la dit Champagne à la battre en disant frapper la, frapper la, et alors le dit Champagne lui donna un autre coup, qui l'étourdit....[888]

Allegations of a wife's sexual license outside of the family home were not common. If domestic assault complaints are any indication, abusive husbands unjustly accused their wives of whorish behaviour often enough, although that typically took the form of uttering degrading comments rather than making specific accusations.[889]

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[887] A.N.Q.M., QS(F), *Queen v. Antoine Labelle* (29 November 1841) (affidavit of Louise Charbouneau); *Domina Regina v. Antoine Labelle* (29 November 1841) (surety).

[888] A.N.Q.M., QS(F), *Queen v. Maxime Champagne et Elmire Girard* (7 August 1840) (affidavit of Louise Hall) (emphasis in original). Similarly, five years earlier a prosecutrix alleged her husband abandoned her two years earlier to cohabitate with another woman; she prosecuted her husband for having attacked her and her husband's mistress for threatening her life. QS(F), *Dominus Rex v. John Stetham & Betsey Goodwin* (10 August 1835) (affidavit of Mary Blair).

[889] For discussion of battering husbands' accusations of infidelity, see generally Buckley, *supra* note 593 at 172; Lepp, *supra* note 31 at 503-505.

Indeed, overt accusations of infidelity were virtually non-existence in the records in issue, and given the preoccupation with female modesty and virtue endemic to the early-Victorian era, serious accusations of infidelity were probably not made lightly before judicial officials.[890] In fact, only one complaint was found in which a husband alleged that he discovered his wife *in flagrante delicto*, and that was in the context of a rebuttal affidavit filed by a husband---a defensive manoeuver that, incidentally, proved unavailing. In March of 1830, William Paul was charged with assault with intent to murder for having attempted to attack his wife with an axe.[891] Ten days after his arrest, Paul swore out an affidavit in which he deposed that while sitting in the bar room of his house his servant girl had approached him and wordlessly "looked at him as if she had intended to make him understand that there was something extraordinary happening in the house at that time." As he went on to state:

> The said Deponent having some suspicion of misconduct on the part of his wife, went to his bedroom and then and there found Mary McCooms his wife having carnal communication with a man of the name of James Black as between man and wife. And he the said Deponent further saith that the said Mary McCooms having taken from a box belonging to the said Deponent a sum of money of about fifty pounds and more and having been out of the house the most part of the night following, the said Deponent went in search of the money he had lost and took an ax[,] not with the intention of striking the said Mary McCooms his wife[,] but only to open the said box in which he had deposited the aforesaid sum of money. And the said Deponent saith further that the said Mary McCooms his

[890] *The Montreal Gazette* (28 August 1826) contains reference to a tragedy precipitated by a husband's suspicions of his wife's chastity. His accusations prompted her to leave him. His entreaties for her return were rebuffed, as his wife stated that she had given him no cause to doubt her fidelity, and that if she returned he would repeat his conduct. In despair, he committed suicide.

[891] A.N.Q.M., QS(F), *Dominus Rex v. William Paul* (20 March 1830) (affidavit of Mary Paul)

> wife is the mother of two young children, and that her conduct is in and out of the house such with other men and bad women that there is no expectation or hope for him the said Deponent to be able to live with her any longer. And the said Deponent saith further that he never committed assault and battery upon the said Mary McCooms, not withstanding he would have been justifiable in chastising her after what he had seen of her bad conduct.[892]

Paul's affidavit provides insight into nineteenth century mores related to marriage, most notably the view that a husband would have been justified in using violence against his wife due to her alleged infidelity. Whether the Court disagreed with that view of marital rights, or whether the wife's testimony was seen as more credible (or both) is unknown. What is known is that Paul was sentenced to the local prison for three months.[893] In view of the few abusive husbands who received prison terms of that length, it is tempting to speculate whether his accusations against his wife harmed rather than helped his case.

In other instances, allegations of sexual dissipation were made in conjunction with claims of vagabondage, alcoholism, desertion, and the like. Jean Détouin, in charging his wife with assault and battery in 1831, alleged that she "aurait laissé son lit et sa maison et abandonné ses enfans et serait adonnée á la boisson, vivrait errante et comme une vagabonde et une prostituée." Following her release from prison on a charge of disturbing the peace, she returned home and assaulted and threatened her husband. Fearful that she would set fire to the house or make an attempt on his life, he

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[892] A.N.Q.M., QS(F), *ibid.* (30 March 1830) (affidavit of William Paul).

[893] After his release, Paul was bound to keep the peace for six months towards his wife and all others or forfeit fifty pounds. A.N.Q.M., QS(F), *ibid.* (1 July 1830) (surety to keep the peace).

"requiert justice en consequence."[894]

As mentioned in the analysis of the various charges under which domestic violence was subsumed during the period, violence against the family was sometimes the result of, or alleged to be the result of, mental illness. There is an intriguing distinction between those complaints alleging insanity and others filed by wives: five percent of complaints alleged insanity, a figure that rises to eight percent if one counts affidavits that alluded to insanity. In contrast, wives rarely made that allegation.

In a time before mental institutions and procedures for civil committal were common, the criminal law remained the primary method for dealing with the insane. In June of 1838 a gentleman living in Hull was entreated to go to the home of a neighbour, being told that the neighbour had lost his senses and that his wife, "confined in child-bed," was scared for her life. On visiting the house in question, the deponent alleged that he found his neighbour "in a state of mental derangement, and deponent positively swears that the [neighbour] is a dangerous person and is utterly unfit to be left at large," and furthermore that he "verily believes that if [he] is suffered to go at large he will murder some of his family...." He was charged with being a "dangerous lunatic against wife and family."[895]

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[894] A.N.Q.M., QS(F), *John Détouin v. Julie Daigneau* (5 May 1831) (affidavit of Jean Détouin).

[895] A.N.Q.M., QS(F), *Queen v. Joseph Darby* (1 June 1838). For general discussion of abusive husbands who were alleged to be insane, see Lepp, *supra* note 31 at 461-462.

In most such cases there is no information on what happened to the defendant.[896] Contemporary accounts leave no doubt that prior to the Montreal Asylum being constructed, lunatics were housed in the city's jail.[897] In July 1831, Frederick Clarke, Armourer to the His Majesty's Fifteenth Regiment, filed an affidavit against his wife:

> [Ellen Clarke] was confined in the Gaol of Montreal on the 14th May 1831, charged by this Deponent upon oath with having made various attempts to do him personal injury, in one of which she inflicted a deep wound on his hand with a sharp instrument--such conduct on the part of his wife deponent attributed to repeated fits of mental derangement originating in Ireland, and aggravated by habitual intemperance since the arrival of the Regiment in this country. She was released, and returned to his residence on the nineteenth instant, and in a few hours after began to talk incoherently, asking one of his children if she understood witchcraft....[S]he struck him several times, saying "I will finish you at any rate"; deponent was obliged to seek the protection of the Guard, and to have her confined in a separate apartment where she now is, and he humbly prays that she may again be committed to Gaol or to some lunatic asylum, having every reason to believe that his life is in imminent danger from her violence if she is permitted to go at large.[898]

Ellen Clarke was lodged in the city jail for several months, but her imprisonment appears to have had negligible therapeutic value. Shortly after her release, Frederick alleged that she had "made several gross attacks upon this deponent and some of his children with the intent to do them bodily injury," and had "wantonly destroyed several articles of his wearing apparel and household furniture." He further alleged that she

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[896] See *e.g.* A.N.Q.M., JP (Argenteuil), *Elizabeth Kerr v. Levy Liller* (11 April 1840) (defendant "deranged and tryed to kill the prosecutor his wife with a knife and to attempt to burn a mill;" warrant issued).

[897] This phenomenon was also the case elsewhere. Compare James Edmund Jones, *Pioneer Crimes and Punishments in Toronto and the Home District* (Toronto: George N. Morang, 1924) 78-82.

[898] A.N.Q.M., QS(F), *Dominus Rex v. Ellen Clarke* (20 July 1831) (affidavit of Frederick Clarke). The first complaint was not found.

had struck him with a poker and broken a mirror over the head of one of their children, and requested she be rearrested, "it being the opinion of this deponent and of every person acquainted with the woman that she is at the present moment absolutely mad...."[899] Ellen was again imprisoned, and in February her husband filed a terse affidavit, stating that since her release she had behaved in a "most furious and unruly manner, attacking him and his children at uncertain times...." He accordingly requested that she again be committed until the spring, when he would be able to send her to an asylum in England, and she was accordingly arrested again.[900]

Following the construction of the Montreal Lunatic Asylum, prisoners were transferred to that facility following their arrest, as evidenced by the experience of Ann Foster in March of 1841. Foster had been incarcerated in the Montreal Gaol for being "violent towards her family (insane)", and was transferred four months later to the city's mental institution.[901] John Miller, a stonemason, was incarcerated and then institutionalized for insanity in 1841. Miller's wife filed a complaint against him on 18 June, alleging that he assaulted and threatened her and other members of the family, and that he "requires to be strictly guarded to prevent him doing injury and bodily harm to deponent."[902] A fellow boarder in the same house, a corporal in the second

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[899]A.N.Q.M., QS(F), *ibid.* (23 November 1831) (affidavit of Frederick Clarke).

[900]A.N.Q.M., QS(F), *ibid.* (18 February 1832) (affidavit of Frederick Clarke).

[901] A.N.Q.M., MG (19 March 1841) (committal of Ann Foster). No supporting documentation was found.

[902] A.N.Q.M., QS(F),*Queen v. John Miller* (18 June 1841) (affidavit of Margaret Owens).

battalion of the First Royals, deposed that he had observed firsthand Miller's violent and threatening behaviour, and that he could not be "at large without the greatest danger of bod[il]y harm to his said wife, and to the other members of her family."[903] Miller was arrested and lodged in the Montreal Gaol, and then transferred to the Montreal Lunatic Asylum. Three months later, the Superintendent of the Asylum deposed that Miller was deemed to be "sane and capable of taking care of himself."[904]

As was discussed earlier, wives were roughly eighteen times more likely to be accused of insanity than were husbands.[905] That divergence is conspicuous, but the nature of the sources precludes conclusive explanations as to why that was the case. It is eminently possible, however, that violent wives were more likely to be seen as mentally aberrant, since they violated social norms of female behaviour. It is also possible that husbands may have used allegations of insanity to bolster their chances of success, or to minimize their embarrassment about seeking legal protection--an insane wife was less an inversion of the accepted family hierarchy than was a violent and insubordinate one, and such allegations were more likely to produce sympathy than ridicule. Furthermore, given common assumptions that women were more prone to hysteria, mania, and

[903] A.N.Q.M., QS(F),*ibid.* (18 June 1841) (affidavit of Thomas Miller).

[904] A.N.Q.M., QS(F), *ibid.* (17 September 1841) (affidavit of Edward Worth).

[905] See *supra* at 332-334.

myriad other mental and nervous disorders, claims of insanity were easily made and commonly believed.[906]

In respect to the manner of violence used against spouses, husbands most often brutalized their wives by kicking them, striking them, and choking them; the use or threatened use of weapons or other objects was relatively rare.[907] Husbands were generally capable of inflicting egregious physical harm without weapons. Mary Hale, married to a common labourer, charged her husband with assault and battery after he began to beat her a few weeks earlier. The previous evening, her husband had kicked her in the mouth and broken several of her teeth, then he threw her on the bed and struck her repeatedly before a neighbour intervened.[908] Catherine Rutherford, married to an affluent comb maker in the city, chronicled her husband's frequent abusive conduct, including jumping on her with his feet and thereby causing her to have "vomited shortly after about two quarts of blood."[909] Her domestic servant and a

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[906] Lepp, *supra* note 31 at 531, noted five men and eight women were certified as insane, but further noted that such allegations were rarely questioned when made against wives. For examination of mental illness and the involuntary committal of women in the nineteenth-century, see generally Cheryl Krasnick Warsh, "The First Mrs. Rochester: Wrongful Confinement, Social Redundancy, and Commitment to the Private Asylum, 1883-1923" (1988) *Hist. Papers* 145-167. For Victorian conceptions of women's physiology, see generally Wendy Mitchinson, *The Nature of Their Bodies: Woman and Their Doctors in Victorian Canada* (Toronto: University of Toronto Press, 1991).

[907] Compare Lepp, *ibid.* at 470.

[908] A.N.Q.M., QS(F), *Queen v. Michael Clancey* (20 October 1842) (affidavit of Mary Hale).

[909] A.N.Q.M., QS(F), *The King v. David Robertson* (1 March 1830) (affidavit of Catherine Rutherford).

neighbour corroborated Rutherford's claims.[910] One husband sat with his knees on his wife's back and struck her, and "after tying her with a rope, and taking hold of her neck, afterwards threw her on the bed, and then threw a quilt and pillows on her face and body so that she...became nearly suffocated."[911]

Likewise, Agnes Kirkpatrick, who had the misfortune of being married to an affluent grocer named Charles Smith, was said to have sustained head trauma as a result of her husband's severe beatings. Kirkpatrick prosecuted her spouse for assault and battery, alleging that besides his more recent acts of violence he had inflicted grievous head injuries on her, and that she "yet labors under the effect of [those] wounds."[912] Two domestic servants, both of whom were employed by Smith at different times during the previous year but had left his service after a short period of time, filed corroborating affidavits graphically detailing Smith's brutality towards his wife. Both maintained that Smith falsely accused his wife of drunkenness, saying that she was a teetotaler, and both also asserted that Kirkpatrick had suffered head trauma as a result of those beatings, the one servant saying she was left "disturbed in the head" and the other asserting she was "injured in her mind" in consequence.[913] Other

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[910] A.N.Q.M., QS(F), *ibid.* (1 March 1830) (affidavit of Nancy Corr); *ibid.*(affidavit of Andrew Watt).

[911] A.N.Q.M., QS(F), *King v. James Boyle* (8 June 1833) (affidavit of Ellen Doherty).

[912] A.N.Q.M., QS(F), *Queen v. Charles Smith* (19 June 1843) (affidavit of Agnes Kirkpatrick).

[913] A.N.Q.M., QS(F), *ibid.* (20 June 1843) (affidavit of Ann Coynne); *ibid.* (20 June 1843) (affidavit of Sarah Johnston). Smith was bound to the peace in the amount of £200, the largest single surety for any domestic abuse prosecution. *Ibid.* (20 June 1843) (surety).

husbands seemed to target their wives' sexuality or reproductive capacity, attacking them while pregnant or shortly thereafter.[914] Margaret McDermott was beaten so severely by her husband in 1839 as to cause a miscarriage.[915] Another husband cruelly used his wife as she recuperated from childbirth.[916]

No doubt innumerable acts of mental abuse were also perpetrated on Victorian spouses, but those acts presented little opportunity to sustain a legal charge. Husbands' cruelty towards their wives could take numerous forms other than battering them, as surviving affidavits attest. One wife contended that in addition to repeatedly assaulting her, her husband had taken an iron chain and fastened her to a chest in their bedroom before fellow lodgers in her house freed her.[917] The more "genteel" forms of mental torture to which the respectable classes presumably resorted would not have appeared before the courts, given the invisibility of that social class in prosecutions alleging domestic violence.

A minority of spouses used, or threatened to use, weapons or other objects in assaulting their partners, with less than twelve percent of all complaints making

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[914] Compare Lepp, *supra* note 31 at 470-471; Buckley, *supra* note 592 at 173. Abused wives today are often assaulted by their partners while pregnant. See Frieze & Browne, *supra* note 655 at 181.

[915] A.N.Q.M., QS(F), *Queen v. Thomas McDermott* (21 November 1839) (affidavit of Margaret McDermott); *ibid.* (21 November 1839) (recognizance).

[916] *Domina Regina v. Julien Desgenait*, *supra* note 916.

[917] A.N.Q.M., QS(F), *Dominus Rex v. Paschal Falmont* (12 September 1825) (affidavit of Marie Louise Lariviere).

reference to weapons.[918] Of those, most cases involved husbands as aggressors. Weapons, including household implements that could be used to deadly purpose or lead to the infliction of bodily harm, generally elevated the offense to that of aggravated assault, attempted murder, or the like. One husband opened a large gash in his wife's back with a razor,[919] while another attempted to cleave his wife's neck with an axe but was prevented from doing so by a neighbour's timely intervention.[920] Indeed, axes were common weapons, no doubt reflecting their importance in everyday life.[921] Samuel Cawthers stands out in the legal archives of the period; he attacked his wife in the middle of a city street with a horsewhip.[922]

Given the diversity of weapons used, the only seeming commonality was ease of access to them.[923] Indeed, of all the objects used or brandished by husbands, sticks were the most common, so Robert Gibbons' prosecution for having "cruelly beaten [his wife]

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[918] Weapons were cited in sixty-seven out of 571 complaints, or 11.7%. Men continue to be much more likely to use weapons against their partners than are women. See Frieze & Browne, *supra* note 655 at 181.

[919] A.N.Q.M., QS(F), *Domina Regina v. John Lewis* (22 May 1840) (affidavit of Eliza MacIntosh).

[920] A.N.Q.M., QS(F), *Dominus Rex v. William Paul* (20 March 1830) (affidavit of Mary Paul).

[921] See *e.g.* A.N.Q.M., QS(F), *Margaret Little v. Peter Murphy* (10 July 1825) (husband took up an axe with which to strike wife).

[922] A.N.Q.M., QS(F), *Dominus Rex v. Samuel Cawthers* (11 March 1835) (affidavit of Jane Cubbane).

[923] Compare Lepp, *supra* note 31 at 470.

with a stick" was not unusual.[924] Sarah Moore was wounded in the head by a pair of fireplace tongs,[925] while Jemina Williams was attacked with tongs and a poker.[926] Baptiste Bienvenue used a plank of wood,[927] while another husband was bound to the peace for three months after threatening to kill his wife with a fork while at the dinner table.[928] Husbands also used everyday tools of their trade; as their occupations differed, so too did their weapons of choice. Thus, one farmer attacked his wife with a hoe.[929] George Gibson, a Montreal shoemaker, struck his wife with a shoemaker's hammer and broke one of her fingers.[930] A butcher seized his wife by the throat and "alors armé d'un couteau aurait menacé d'en frapper la dite déposante et de la tuer, et aurait ajouté, que si la Déposante sa femme ne laissait sa maison, il allait la détruire."[931]

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[924] A.N.Q.M., QS(F), *Elizabeth Gibbons v. Robert Gibbons* (30 October 1834) (affidavit of Elizabeth Gibbons); *ibid.* (4 November 1834) (surety).

[925] A.N.Q.M., QS(F), *Domina Regina v. Charles Jackson* (4 August 1841) (affidavit of Sarah Moore). See *infra* at 346.

[926] A.N.Q.M., QS(F), *Dominus Rex v. Anthony Metcalf* (23 September 1834) (affidavit of Jemina Williams).

[927] A.N.Q.M., QS(F), *Queen v. Baptiste Bienvenue* (19 August 1842) (affidavit of François Duval); *Domina Regina v. Baptiste Bienvenue* (27 October 1842) (surety).

[928] A.N.Q.M., QS(F), *Dominus Rex v. James Dogherty* (5 September 1825) (affidavit of Mary Flynn); *ibid.* (14 September 1825((surety).

[929] A.N.Q.M., QS(F), [*Dominus Rex v. Daniel Collins*] (12 October 1832) (affidavit of Catherine Cary); MG no.3032 (Daniel Collins committed 22 October 1832; discharged 23 October 1832).

[930] A.N.Q.M., QS(F), *Dominus Rex v. George Gibson* (15 November 1836) (affidavit of Ann Taylor).

[931] A.N.Q.M., QS(F), *Dominus Rex v. Joseph Maranda* (31 August 1829) (affidavit of Amable Blondin); *ibid.* (1 September 1827) (surety).

However, some spouses who had access to more conventional weapons were not loath to use (or threaten to use) them. John Brown, a soldier in the 85th Regiment of Foot, assaulted his wife with a bayonet; he was arrested and sent to the barracks to appear before a court martial.[932] Robert Moore was charged with aggravated assault and battery for having threatened his wife with a sword in 1838.[933] Firearms are absent from all cases that resulted in death, as will be discussed in the following chapter, and are conspicuous in their near absence from spousal battery complaints, as well.[934] A rare exception is the case of Robert Alexander, who was apprehended on a charge of "threats, etc." by Serjeant Daniel Farell and three other policeman in March of 1839 for having "loaded his musket and threatened to shoot [his wife] and any other person who would attempt to approach him." The Serjeant examined the musket following Alexander's arrest and attested that it was loaded "to the best of the opinion of this deponent with a leaden ball."[935] Likewise, when confronted by a neighbour about his ill-usage of his wife, John Grant fetched a firearm from the house and made violent

[932] N.A.C., MP(GR) vol.34 (John Brown committed 28 June 1841).

[933] A.N.Q.M., QS(F), *Queen v. Robert Moore* (23 October 1838) (affidavit of Flavie Denaige).

[934] For further discussion, see Chapter IV, *infra* at 383. See also Philips, *supra* note 16 at 265.

[935] A.N.Q.M., QS(F), *Queen v. Robert Alexander* (11 March 1839) (affidavit of Serjeant Daniel Farrell). He was bound to the peace for six months in the amount of twenty pounds. QS(F), *ibid.* (11 March 1839) (surety).

threats but did not discharge the weapon.[936] Another husband "presented" a loaded pistol to his wife and threatened to kill her; he was held to bail.[937]

The relative unavailability of firearms, coupled with the seeming reluctance of defendants to use them, kept the mortality rate lower than it might otherwise have been. Similarly, most affidavits in which weapons were mentioned indicate that husbands typically assaulted their wives with fists and feet, but wielded knives, swords, guns, or axes as a means of elevating the threat and further terrorizing their wives. Many more instances of wife murder and maiming would likely have come before the courts if a few more of those husbands had put their threats into execution. Such behaviour suggests that most husbands wanted to dominate and intimidate their wives, not kill them.

While the sample size of wives charged with family violence was much smaller, they were statistically less likely to use implements of any sort. Ann Farmer, prosecuted by her husband on two other occasions, was charged in 1835 with attempting to strike her husband with a fire shovel.[938] One wife was prosecuted for aggravated assault and battery after having attacked her husband with a knife,[939] while another threatened to

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[936] *Dominus Rex v. John Grant*, *supra* note 831.

[937] *Jane Dervin v. John McGuire*, *supra* note 654.

[938] A.N.Q.M., QS(F), *Dominus Rex v. Ann Farmer* (29 July 1835) (affidavit of William Lilly); *ibid.* (11 August 1835) (surety).

[939] A.N.Q.M., QS(F), *Domina Regina v. Ann Lentry* (19 March 1841) (affidavit of George Leslie); *ibid.* (19 March 1841) (recognizance).

run her husband through with her fork and knife.[940] One wife attacked her hapless husband with a knife, an empty blacking bottle, and a stone.[941] Threats to poison were occasionally made by wives, but virtually never by husbands.[942] Such threats may have reflected, or helped shape, the historical stereotype of wives as poisoners, but also likely reflected the domestic nature of women's work.[943] Assaults could also border on the laughable: Susanna Miller was bound to the peace for six months after a charge of assault and battery was brought against her by her husband in 1829. Her assault, however, was unlikely to do more than bruise her husband's ego, as her weapon of choice was a house cloth.[944] Given the strength differentials in many marriages, one might expect that wives would have been relatively more likely to use weapons. However, wives seem to have been more restrained in their use of violence towards their spouses, even in self-defense. A rare exception was a case involving the wife of Joseph Gregoire who cut her husband with a knife as he attempted to strangle her; he

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[940] A.N.Q.M., QS(F), *William Newth v. Ann Queen his wife* (20 September 1825) (affidavit of William Newth).

[941] A.N.Q.M., QS(F), *Dominus Rex v. Jane Porter* (31 August 1835) (affidavit of Richard Fougherty); *ibid.*(31 August 1835) (recognizance).

[942] See e.g. A.N.Q.M., QS(F), [*Dominus Rex v. Josephte McFarlane*] (24 March 1829) (affidavit of Jean Barbier); *Domina Regina v. Mary Pillon* (19 May 1839) (affidavit of André Marquis); *ibid.* (20 May 1839) (surety).

[943] For discussion of wives' use of poison to murder their husbands, see Chapter IV, *infra* at 442-444.

[944] A.N.Q.M., QS(F), *David Miller v. Susanna Miller* (14 February 1829) (affidavit of David Miller); *ibid.* (14 February 1829) (surety).

was charged with assault with intent to murder while she was not charged.[945] Accounts of repeated and systematic abuse by wives--as was common at the hands of husbands--was decidedly rare, if surviving judicial records are any indication.

A partner's use of indecorous language seems to have injured some spouses almost as severely as acts of physical brutality. Sarah Moore, routinely assaulted by her husband and blinded by him in her left eye, filed suit against him for assaulting her with a pair of fireplace tongs. Alongside her claim that he routinely threatened her life was the assertion that he also continuously used "gross and unbecoming language to her such as prejudice her character by calling her whore and other names."[946] Another partner emphasized that her drunken husband engaged in scandalous as well as abusive conduct, including uttering "les blasphèmes les plus terribles, ce tout en présence de ses enfans et de sa famille."[947] Even more striking is the prosecution by Charles Grant, Esquire, of his wife for assault and battery and threats, in which he began his complaint by emphasizing that during their eight years of married life his wife had "always been exceedingly disrespectful to the deponent as a husband by using the most insulting, vulgar and abusive language to him and this in the presence of his children

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[945] A.N.Q.M., QS(F), *Queen v. Joseph Grégoire* (18 January 1840) (affidavit of Flavie Grégoire); *ibid.* (18 January 1840) (affidavit of Marie Hurot). Contemporary experiences likewise reflect that men are more likely to use severe violence against partners than are women. See Frieze & Browne, *supra* note 655 at 181.

[946] *Domina Regina v. Charles Jackson*, *supra* note 963.

[947] A.N.Q.M., QS(F), *Mary Ann Landreville v. Vincent Labelle* (18 July 1837) (affidavit of Mary Ann Landreville).

and other members of his household."[948] It is striking that Grant began his complaint not with allegations of violence, but rather with assertions of fractious conduct and foul language. A husband's harsh language may have been seen as ungallant and deeply hurtful, but a wife's sharp tongue implied insubordination and flew in the face of a husband's accepted role as head of the household.[949] The behaviour of Grant's wife in threatening to "dance on his grave," hurling a knife at him, and destroying furniture, was merely incidental to her general defiance towards him.

The law, then as now, allowed for charges to reflect the relative gravity of the transgression. However, the distinction between cases in which a charge of assault and battery was levied, and those leading to a charge of aggravated assault or the like, is not readily discernible.[950] More of a pattern is evident in complaints of assault with intent to murder or attempted murder, but even then the distinctions often appear to have been at best discretionary, and at worst arbitrary. As a percentage of complaints those charges were uncommon. Cases of aggravated assault, assault with intent to do grievous bodily harm, or cruel assault constituted 3.7% of complaints against husbands and 2.5%

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[948] A.N.Q.M., QS(F), *Charles Grant Esquire v. Amelia Williams* (8 November 1839) (affidavit of Charles Grant, Esquire).

[949] Compare Tomes, *supra* note 7 at 332; Harvey, *Wife Battery*, *supra* note 589 at 134.

[950] In regard to the mid-to-late nineteenth century English context, Nancy Tomes has cited the contemporary definition of aggravated assault as an act of violence "attended with circumstances of peculiar outrage or atrocity," in which a deadly weapon was used or serious physical injury resulted. Tomes, *supra* note 7 at 330. See also Philips, *supra* note 16 at 263.

of complaints against wives.[951] The corresponding figures for the charges of assault with intent to murder or attempted murder were 4.9% and 2.5% of complaints against husbands and wives, respectively.[952]

By definition, the charge of assault with intent to murder or that of attempted murder was a serious one. Whether Samuel Cawthers' act of assaulting his wife in the street with a horsewhip, for example, led to a charge of assault with intent to murder less because of the potentially lethal character of the act, and more because of its shocking and public nature, is unknown but remains a possibility.[953] In other cases, the prosecution was triggered by an assault with a deadly weapon, even if contact was not made. One wife was charged with attempting to take the life of her husband with a razor. In her affidavit her husband attested that she had brandished a razor and threatened him, "whereby the Deponent stands in bodily fear of her."[954] Several husbands charged with serious assaults were repeat offenders. Antoine Legault *dit* Desloriers, that incorrigible offender who appeared in the archives year after year, was charged with assault with intent to murder in 1836.[955]

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[951] See Figure 6, *supra* at 261. *But see* Tomes, *supra* note 7 at 330 (noting that "when a woman was beaten, she was more likely to be beaten severely," leading to a greater incidence of aggravated assaults than charges of assault and battery).

[952] See Figure 6, *ibid.*

[953] *Dominus Rex v. Samuel Cawthers*, *supra* note 960.

[954] A.N.Q.M., QS(F), *Samuel Millard v. Mary Ann Whittiker* (9 October 1837) (affidavit of Samuel Millard).

[955] *Dominus Rex v. Antoine Legault dit Desloriers*, *supra* note 780.

Not only were the abstract legal distinctions leading to those kinds of charges often illusory, but in practice such cases did not merit stiffer sentences than ones that did not involve weapons. Indeed, except that a small minority of them resulted in prison sentences of several months' duration, the dispositions in those cases appear similar to those in routine assault cases. Since the final disposition in many of those cases is unknown, it is not possible to provide an accurate breakdown of conviction rates for various offenses, but cases for which dispositions are known indicate that many defendants were bound to the peace. By way of example, George Wurtele, gentleman, prosecuted his wife for aggravated assault in 1832. He alleged that "without any cause or provocation" she assaulted him with a four-pound weight in her hand, while using menacing language towards him. As a result, he claimed to have "just cause to be apprehensive for his life and verily believes that his said wife meditates him some bodily harm...." As he explained:

> she has often threatened to take the life of the deponent, that a large sharp pointed knife was discovered hid under her Bed, and a razor was found in one of her drawers, that she roams about the house during the night time, sleeps apart from the deponent against whom she entertains a rancorous hatred, she appears wholly regardless of his interests and wantonly upon many occasions has destroyed his property and effects that this deponent provided her with means to live apart from him and her family, that she left his House with that intent but that against the will of him the Deponent she has returned, with feelings increased in hostility towards him, that unless the said Elizabeth Ratters is apprehended and secured this deponent is afraid that his life will be endangered, as he cannot with safety allow her any longer to occupy the same House with himself and his family.[956]

[956] A.N.Q.M., QS(F), *George Wurtele v. Elizabeth Ratters* (23 February 1832) (affidavit of George Wurtele).

Despite this "rancorous hatred" and assault, Ratters was required only to provide surety in the amount of twenty pounds for six months.[957]

In two instances, charges of assault with intent to murder or attempted murder made against husbands resulted in a prison term. In 1840 Augustin Boucher, a resident of the Parish of Berthier, was arrested based on his wife's affidavit and committed for trial.[958] A true bill was found against him before the Court of Oyer and Terminer in November of the same year;[959] and he was tried and convicted.[960] The Court imposed a sentence of three months.[961] The other defendant was likewise given the identical sentence in 1847 for "attempting to kill his wife."[962]

One wife was also sentenced to prison for a related offense, and hers was to be the harshest penalty levied against a spouse for an assault that did not result in a homicide. Fanny Burnside, the wife of a trader in the Township of Grenville, was charged with 'maiming' in 1835. Her husband's complaint alleged that:

> Fanny Burnside...did with a sharp instrument put out his left eye with intent to murder and did also swear on the prayer book, that she would either take a life or lose a life that night, and at many other times threw such deadly instruments at him as many times endanger'd his life, at one particular time split the ear on

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[957] A.N.Q.M., QS(F), *ibid.* (25 February 1832) (surety).

[958] A.N.Q.M., MP p.68, *Domina Regina v. Augustin Boucher* (28 Feb 1840).

[959] *The Montreal Gazette* (10 November 1840).

[960] *Ibid.* (26 November 1840); *L'Aurore* (4 December 1840).

[961] *The Montreal Gazette* (8 December 1840); *L'Aurore* (7 December 1840).

[962] A.N.Q.M., MG (Charles Heney committed 3 February 1847, sentenced to three months from 23 April 1847; discharged 23 July 1847).

> his head, and on Tuesday the 3 February inst. repeated her usual violence by giving him the deponent several blows, and threatening to take out his other eye, which put him in great fear, and caused the deponent to abandon his house, and take refuge with his neighbours, and this deponent craveth Justice in the premises, and further saith not.[963]

The Justices issued an arrest warrant,[964] and required her husband to enter into a recognizance in the amount of fifty pounds to appear before the Court of King's Bench on 24 February 1835.[965] His wife was "placed at the bar" on 7 March, with her husband as the sole prosecution witness. While his wife had benefit of counsel, no witnesses were called on her behalf, and she was convicted.[966] On 10 March she was sentenced to provide surety for her good behaviour for six months in the amount of fifty pounds, and was sentenced to six months' imprisonment.[967] The charge of 'maiming,' and Fanny Burnside's sentence, reflected the fact that her repeated attacks had resulted in permanent physical injury and as such a distinction may be made between that case and other instances of grievous assaults.

The information provided in those complaints also provides background on the socio-economic backgrounds of the families involved. The majority of parties to those

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[963] A.N.Q.M., KB(F), *Dominus Rex v. Fanny Burnside wife of Benjamin Patterson* (4 February 1835).

[964] A.N.Q.M., KB(F), *Dominus Rex v. Fanny Burnside* (4 February 1835) (arrest warrant).

[965] A.N.Q.M., KB(F), *ibid.* (5 February 1835) (recognizance for Benjamin Patterson).

[966] *The Montreal Gazette* (12 March 1835). See also N.A.C., James Reid Papers, Criminal Cases [hereinafter Reid], M-8562, *Dominus Rex v. Fanny Burnside* (7 March 1835).

[967] *The Montreal Gazette* (10 March 1835). Curiously, the sentence for that offense appeared in the paper two days earlier than did the trial synopsis.

suits for most of the period under examination were French Canadians, but by the mid-1830s a greater number of Irish surnames began to appear, presumably reflecting immigration patterns. Mixed marriages between English and French-speaking individuals appear to have been rare in the complaints in issue, although it must be acknowledged that the maiden names of wives were not always specified.[968]

More can be said about the issue of social class. Many scholars have focused on the working-class in their studies of nineteenth century family violence, while making the observation that one should not assume violence was only a working-class phenomenon.[969] Victorian commentators themselves superciliously (and naively) concluded that domestic violence was limited to the labouring classes.[970] Even Frances Power Cobbe, while maintaining that it was more prevalent in the upper and middle classes than generally recognized, qualified her observation by noting that "it rarely extends to anything beyond an occasional blow or two of a not dangerous kind."[971] In her view, the "dangerous wife beater" was found almost exclusively in the "artisan and

[968] While wives retained their maiden names under the civil law, court records during the time were not consistent when identifying the names of the parties to judicial proceedings. Thus, in many instances, wives' maiden names were not given in the complaints. Furthermore, one must be careful when drawing general conclusions from a limited cross-section of marriages.

[969] See *e.g.* Harvey, *Wife Battery*, *supra* note 589 at 139.

[970] See *e.g.* Hammerton, *supra* note 6 at 3 ("Most Victorian commentators... associated the stigma of domestic assault almost exclusively with the degraded lives of the very poor, assuming smugly that the middle classes subjected each other mostly to more genteel forms of mental torture."). See also Doggett, *supra* note 6 at 119-120.

[971] Cobbe, *supra* note 539 at 58.

laboring classes."[972] Wife battery was clearly among the most visible forms of conflict among the lower classes, and the one most likely to survive in the historical record.[973]

The affidavits found in this study were sworn by members of a wide cross-section of social strata, as shown in Figure 10, with the exception that the most affluent city Brahmins never appeared in those records. Indeed, skilled and unskilled craftsmen are nearly equally represented within the sources. By a small margin, the largest social class represented belongs to artisans and tradesmen, constituting approximately forty-three percent of all complaints.[974] Listing those occupations would serve little purpose other than to illustrate their heterogeneity. Indeed, virtually every conceivable occupation was found, including ones as diverse as lastmaker and boottray maker (a variant of cobbler), hairdresser, whitesmith, dance master, musician, and varnisher. Unskilled labourers--identified as labourers, farmers, ditch diggers, domestic servants,

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[972] *Ibid.*

[973] Compare Hammerton, *supra* note 6 at 14. Hammerton made the interesting, albeit debatable, claim that respectable working class women were more vulnerable than their poorer, as well as wealthier, peers. *Ibid*. at 51.

[974] See Hammerton, *ibid.* at 35-36:

> We should not be surprised to find butchers, and similar men well removed from the ranks of the labouring poor, charged with wife-assault. Poor, unskilled men, certainly, were most often vilified for abuse of their wives, but skilled workers, shopkeepers and men with a variety of occupations from the lower middle class appeared no less frequently in the Preston police court on wife-assault charges.

See also King, *supra* note 16 at 37 (reporting that two-fifths of assault defendants were tradesmen or artisans; one-quarter laborers; one-fifth farmers; ten percent gentry or professionals); Philips, *supra* note 16 at 167 (seventy-five percent were unskilled laborers, and twenty to twenty-five percent were skilled labourers).

and the like--are close behind at thirty-eight percent. The occupations of nearly fifteen percent of the husbands in those affidavits were not specified.

The issue of middle-class visibility in records of this type also merits special mention. While members of the 'respectable classes' appeared only sporadically, they nevertheless did appear.[975] The occupations found in that group include notaries, advocates, inn owners and men identified with the title "esquire" or "yeoman," all men who were propertied and therefore can be distinguished from non-skilled or skilled laborers.[976] Joseph H. Jobin, a prominent notary, was charged with assault and battery and threats to kill by his wife in 1835, and bound to the peace in the amount of fifty pounds.[977] Other defendants' social status can be better gleaned from the company they kept, in concert with their occupation. Vincent Brazeau, a Montreal innkeeper, was prosecuted by his wife twice in August of 1837; his sureties on those two occasions included two gentleman identified as an "esquire" and a "yeoman."[978] The wife of a

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[975] *Contra* Steinberg, *supra* note 16 at 128 (noting that respectable classes' infractions could be overlooked as "the larger problem of public disorder was a problem of the lower classes."); Philips, *ibid.* (noting the near-invisibility of middle and upper class); Lepp, *supra* note 31 at 464-465 (reporting the comparative absence of middle-class women as prosecutors). For discussion of violence in middle-class marriages, see generally Hammerton, *supra* note 6 at 73-133.

[976] But see King, *supra* note 16 at 37 (noting problems with titles such as "gentleman" and "esquire" because of people's tendency to self-aggrandize). He further noted that there are problems distinguishing social class among occupations--whether an individual was semi-skilled, a master, poor, or highly-capitalized, etc. See *ibid.*

[977] *Dominus Rex v. Joseph H. Jobin*, *supra* note 911.

[978] A.N.Q.M., QS(F), *Marie Leduc v. Vincent Brazeau* (10 August 1837) (affidavit of Marie F. Leduc); *ibid.* (12 August 1837) (surety); *Marie F. Leduc v. Vincent Brazeau* (14 August 1837) (affidavit of Marie F. Leduc); *Marie Leduc v. Vincent Brazeau* (14 August 1837) (surety).

carriage maker, charged with uttering threats, provided two co-sureties for her good conduct, one of whom was a bailiff, the other an advocate.[979] A cooper named David Robertson, accused of a "cruel assault and battery," was affluent enough to have a domestic servant, who incidentally corroborated her mistresses' claims of abuse at Robertson's hands.[980] Charles Smith, a grocer, also employed several domestic servants and provided bail of two hundred pounds for his good conduct.[981] It is impossible to know the relative social standing of many of those skilled craftsmen and farmers, so the known figure of middle class defendants is artificially low.

Some of those middle class defendants appeared in the judicial archives because of altercations that grew out of non-conjugal relationships. Numerous examples of unmarried women claiming to have been seduced by respectable men were found, and those women's claims of filial responsibility often triggered violent repercussions. Mary Nowlan, who had two illegitimate children with a Montreal lawyer named François Bruneau, claimed that her supplications for assistance caused him to assault her and

Occupations of Male Defendants in Spousal Violence Complaints

Occupational Class	Number and % of Total

[979] A.N.Q.M., QS(F), *Queen v. Mary Kilfinnen* (6 October 1843) (affidavit of Peter Beauchamp); *Domina Regina v. Mary Beauchamp* (7 October 1843) (surety).

[980] A.N.Q.M., QS(F), *The King v. David Robertson* (1 March 1830) (affidavit of Andrew Watt); *ibid.* (1 March 1830) (affidavit of Catherine Rutherford); *ibid.* (1 March 1830) (affidavit of Nancy Corr).

[981] See *supra* note 951 at 335.

Artisans and tradesmen	n=211 43.3%
Unskilled labourers (farmers, labourers, servants, etc.)	n=187 38.4%
Propertied (gentlemen, yeomen, innkeepers, etc.)/ Professional (notaries, lawyers, etc.)	n=18 3.7%
Unknown	n=71 14.5%
TOTAL	n=487

Figure 10.

threaten her life.[982] Margaret Doherty bore a daughter out of wedlock with Edward Kegan, a Montreal innkeeper. She took the child to Kegan, who put the child under the care of the Grey Nuns. On 23 August 1843 Doherty went to visit her daughter at the nunnery, and was informed that she had died. Accosting Kegan as he sat on his brother-in-law's stoop, she informed him of their child's death. According to her account, that conversation triggered a violent reaction by Kegan, who called her a "damned infernal bitch of a whore" and attacked her with a stick. She grabbed the stick and gave Kegan a spirited kick, which prompted his brother-in-law to seize and shake her violently.[983]

Cases of non-conjugal relationships were a minority, however. More typical is the prosecution brought by Charles Grant, Esquire, for assault and threats in 1839. In an

[982] *Dominus Rex v. François P. Bruneau*, *Esquire*, *supra* note 919.

[983] A.N.Q.M., QS(F), *Queen v. Edward Kegan & Francis Hughes* (24 August 1843) (affidavit of Margaret Doherty); *Dominus Rex v. Edward Kegan* (25 August 1843) (recognizance); *Dominus Rex v. Francis William Hughes* (25 August 1843) (recognizance).

elegantly-worded complaint, Grant alleged that he and his wife had several children during the course of their eight-year marriage, and that she was repeatedly violent:

> [S]he has frequently threatened violence to the deponent and has of late become so violent and furious as to put her threats in execution by casting and throwing at his person any article of furniture she happened to lay her hands upon. That she behaves in the same manner, without any shadow of cause to the Deponent's children and thereby endangers their lives. That she yesterday without any justifiable cause whatsoever cast and threw at the deponent a most deadly weapon thereby placing his life in the most imminent danger. That she has frequently threatened that she would take the life of the deponent and dance upon his grave. That the Deponent knowing the bad and violent disposition of the said Amelia Williams is in a state of perpetual fear both for his own life and that of his children. That the Deponent has long forbore but now sees himself compelled to seek the protection of the laws of the Country which he now craves praying that justice may be done in the premises.[984]

As wives were rarely identified as having an occupation, an equivalent study of their backgrounds cannot be made. Angelique Desmarais, legally separated from her husband Ralph Mellanby, a Montreal cabinetmaker, was an exception in that she ran a store. She alleged that she and her shop clerks were subject to her estranged husband's ferocity:

> qu[e] la dite Déposante est séparée de Biens d'avec son dit mari par l'contrat de mariage; qu'elle tient un magasin en son nom en la cité de Montréal depuis plusieurs années; que pour faire ce commerce elle employe plusieurs commis, que depuis longtemps le dit Ralph Mellanby la bat et la maltraite et qu'il a souvent mis sa vie en danger, que le dit [Mellanby] la souvent menace se la tuer elle et ses commis....que la dite déposante croit sincèrement que si le dit [Mellanby] continue d'avoir sa liberté qui la vie de la dite déposante ainsi que celles de ses commisest dans un grand danger--Que ses commis même ne veulent

[984] A.N.Q.M., QS(F), *Charles Grant Esquire v. Amelia Williams* (8 November 1839) (affidavit of Charles Grant).

> plus rester dans le magasin, si le dit [Mellanby] n'est pas appréhénde. Pourquoi elle demande qu'il soit appréhénde et traité suivant la loi.[985]

For comparison, the occupations of men who charged their partners with violence have also been compiled in *Figure 11.* Again, skilled labourers made up a majority, although by a slightly larger margin than unskilled labourers. Among the defendants were those responsible for enforcing the laws and security of the city's inhabitants. One wife, married to a member of the Montreal Watch, alleged that he was "dans l'habitude constante de la battre et maltraiter et aurait hier sans aucune cause quelconque assailli et battu la déposante et aurait troublé la paix et la tranquillité."[986]

The number of defendants found within the solidly middle class, however, was considerably larger, comprising nearly sixteen percent of the total. That might merely be statistical anomaly, although it could also reflect the fact that middle class men were more likely to prosecute their spouses for brutish deportment than were their wives. Perhaps abused middle-class wives felt they would receive less sympathy than their working-class counterparts, or were reluctant to involve public officials (some of whom were lower on the social scale) in their family affairs.

Occupations of Male Prosecutors in Spousal Violence Complaints

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[985] A.N.Q.M., QS(F), *Dominus Rex v. Ralph Mellanby* (14 August 1834) (affidavit of Angelique Desmarais); *ibid.* (14 August 1834) (affidavit of Germain Michon); *ibid.* (14 August 1834) (affidavit of Regis Coretuerier); *ibid.* (14 August 1834) (affidavit of Ouisine Rousseau); *ibid.* (19 August 1834) (recognizance).

[986] A.N.Q.M., QS(F), *Dominus Rex v. Louis Desjardins* (23 July 1835) (affidavit of Angelique Lefort); *ibid.* (4 August 1835) (surety).

Occupational Class	Number and % of Total
Artisans and tradesmen	n=35 41.7%
Unskilled labourers (farmers, labourers, servants, etc.)	n=25 29.8%
Propertied (gentlemen, yeomen, innkeepers, etc.)/ Professional (notaries, lawyers, etc.)	n=13 15.5%
Unknown	n=11 13.1%
TOTAL	n=84

Figure 11.

All of those cases, brought by husbands and wives alike, indicate that in Montreal during the years 1825 to 1850 abused spouses frequently sought legal protection, sometimes repeatedly. Under a system driven by private prosecution, it was an abused spouse who retained primary responsibility for instigating legal action, although records indicate relatives, neighbours, and the police also stepped in to prosecute malefactors. Despite the importance of the sanctity of the private sphere, many abused spouses and others were not adverse to inviting public scrutiny of their households by bringing those prosecutions in the highly-public fora of the Montreal courts. [987]

[987] As Fyson, *supra* note 17 at *iii* observed, the "willingness of people to bring their most intimate conflicts before the justices with little delay" is one factor that militated against the marginality of the criminal justice system.

Jurists hearing those cases made relatively benign dispositions like requiring bail, although prison sentences were also a common outcome, either in lieu of bail or as punishment. While providing a surety was an imperfect solution--and in all probability was far less effectual than it might have been in cases involving two non-related parties --it nevertheless offered some measure of protection by offering the possibility of further coercive action by the state if an abusive spouse transgressed its terms.

In a time before the formation of societies for the protection of women and wide-spread cognizance of the evils of spousal abuse, a significant number of the personal violence cases that appeared before Montreal courts involved spousal assaults. Society, and courts by extension, may not then have recognized a spouse's right not to be beaten. However, by attempting to mediate and even punish such acts, they were reflecting and solidifying the premise that there was no right of marital chastisement. The private prosecutors who brought such suits—whether they were spouses, relatives, neighbours, bystanders, or policemen--were signaling by their actions that they believed such acts to fall under the purview of the criminal courts, and that those acts were cognizable by the courts. With only rudimentary and haphazard institutions of law enforcement in place, and in a period before issues of domestic violence had penetrated public consciousness, some abused spouses in early-to-mid-Victorian Montreal were nevertheless able to achieve a measure of "justice in the premises."

'There Is No Killing Like That Which Destroys the Heart': Spousal Murder in Early Nineteenth Century Montreal

He did not wear his scarlet coat,
For blood and wine are red,
And blood and wine were on his hands
When they found him with the dead,
The poor dead woman whom he loved,
And murdered in her bed.[988]

Oscar Wilde's 1897 poem, "The Ballad of Reading Gaol," is a work of poetic paradox that is an apt metaphor for the phenomenon of family violence in nineteenth century Montreal. A poem that depicts the last days of a wife murderer sentenced to death, the account of that "monstrous parricide" nonetheless is a sympathetic -- if saccharine -- account of a man who murdered the woman he professed to love. Rife with allegory about the dehumanizing effects of incarceration, the hands of inexorable justice appear no less bloody than those of the condemned murderers who were subjected to the law's ultimate sanction. In Wilde's words, which repeated so often as to become a cliché, "each man kills the thing he loves." It is strange to think of the person one loves in terms that objectify; it is stranger still to contemplate a love that kills, in whatever manner, the object of its affections.

It is perhaps equally strange, but no less accurate, to observe that the family remains one of the most dangerous places in society. One simply cannot study the modern family or its antecedents without also studying domestic violence. This article is

[988] Oscar Wilde, *The Ballad of Reading Gaol* (New York: Brentano's, 1904) 1.

an attempt to contribute to historical knowledge of that issue in an under-examined context, namely the nineteenth century Canadian family, by examining the criminal justice system's response to family violence in Montreal during the period 1825 to 1850. Part I analyzes prosecutions brought against husbands charged with killing their wives, while Part II examines the issue of husband murder. In so doing, this article will outline similarities and differences between those two groups of murderous spouses.

I.

"DIABOLICAL ATTEMPT AT MURDER!" cried the headlines of *The Montreal Herald* and *The Vindicator* in early-1833.[989] "ATTEMPT TO COMMIT MURDER!" trumpeted *The Canadian Courant*, describing an assault "which for heartless cruelty has scarcely a parallel in the criminal annals of our city."[990] The brutal assault by Adolphus Dewey on his wife would eventually snowball into one of the highest profile murder trials in nineteenth century Montreal.[991] During the span of six months, local and international newspapers alike recounted the morbid details of a case that included the lingering death of a loving wife, the flight of her husband to the United States, and his eventual capture and extradition that culminated in a public execution. Indeed, there

[989] *The Montreal Herald* (25 March 1833); *The Vindicator* (26 March 1833) (citing The *Herald*).

[990] *The Canadian Courant* (27 March 1833).

[991] Indeed, Douglas Borthwick noted in his 1907 work, published nearly seventy-five years later, that the Dewey case was "sometimes spoken of at the present day." 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) [hereinafter Borthwick, *Darkness*].

was much about the Dewey case that was unusual. His trial was unprecedented during the period for the extent of the media coverage it elicited, due in part to the crime having been committed, as one newspaper averred, "under circumstances of peculiar atrocity and diabolical premeditation."[992] Dewey's attack was also extraordinary in that it resulted in the death of his unborn baby as well as his unsuspecting spouse. The volume of press coverage allows reclamation of his case to an unusual degree, including the events leading up to his apprehension, witnesses' testimony at his trial, the Court's sentencing remarks, and Dewey's last words as he stood on the gallows.

By all accounts, Dewey was a handsome and respectable twenty-three-year-old who operated a successful dry goods store on St. Paul Street in downtown Montreal.[993] During the summer of 1832 he began courting Euphrosine Martineau, a young woman from a well-connected local family. The two were married in January of 1834, with her father's blessing. While it appeared to be a good match, thereafter Martineau's family subsequently became aware that she lived unhappily due to Dewey's controlling nature and violent temper. Despairing of her husband's behaviour, Martineau sought refuge

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[992] *The Montreal Gazette* (26 March 1833).

[993] The presence of a defendant who was solidly middle class was not unusual in spousal murder cases. While not enough is known about the social class of most of those defendants, many of them were from the respectable classes. Compare Annalee Golz, "Murder Most Foul: Spousal Homicides in Ontario, 1870-1915" in George E. Robb & Nancy Erber, eds., *Disorder in the Court: Trials and Sexual Conflict at the Turn of the Century* (New York: New York University Press, 1999) 167 (in spousal murder cases forty-two percent of husbands were middle class or professionals, and forty-six percent of wives were married to prosperous farmers). See also Annalee E. Lepp, "Dis/membering the Family: Marital Breakdown, Domestic Conflict, and Family Violence in Ontario, 1830-1920" (Queen's University, Ph.D. thesis, 2001) 530.

first with her uncle and then with her father. After appearing suitably contrite, Dewey was eventually allowed to visit her at her father's house.

While Martineau's forgiving nature facilitated a *rapprochement* between the couple, it ultimately proved to be her undoing. Consenting to attend mass with Dewey one Sunday in late-March, her husband prevailed upon her to make a short detour to his shop after the conclusion of the service, ostensibly to view some new merchandise. Contrary to his usual practice, he had obtained the key to the premises from his clerk the night before. After closing the door behind them, he suddenly seized an axe and attacked Martineau. Dewey, enraged that she managed to fend off the full effects of his blows, then with "the most sanguinary rage...drew a razor from his pocket and inflicted four dreadful wounds on her neck, throat, and breast, one of which nearly divided the windpipe."[994] His bloody work concluded, Dewey locked the shop door and mounted a cariole he had hired to take him to Champlain, New York. Martineau, however, was not dead—she regained consciousness and, with what must have been nearly superhuman effort, crawled to the back door, unbolted it, and made her way to the property of a neighbouring shopkeeper named Roy. Roy summoned medical treatment, and her wounds were sewn-up in his living room by two local surgeons. When Martineau was deemed safe to move, she was taken to her father's home in the St. Laurent suburbs.

Despite hopes for her recovery, she succumbed to her grievous injuries ten days later. *The Montreal Gazette* of 2 April performed its "painful duty" in reporting

[994] *The Montreal Gazette* (26 March 1833).

Martineau's death, noting that "her constitution sank under the effects of the brutal and sanguinary assault of her ferocious husband, whose turpitude was also encreased by the additional and unnatural crime of *infanticide*."[995] Another paper offered an equally fervent albeit more decorous account: "[w]hat renders the foul deed if possible more fiendish, is the fact, that Mrs. Dewey was in that situation, which of all others calls for the tender attention of a husband."[996] A day later, it was reported that a man matching Dewey's description had been arrested in Plattsburgh, New York, followed by more newspaper accounts of the extradition proceedings and Dewey's return to Montreal under police guard.[997]

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[995] *The Montreal Gazette* (2 April 1833) (emphasis in original). Medically speaking, infanticide involved the destruction of a baby in utero, or ex utero. Legally speaking, however, no charge of infanticide could have been brought, as the child had not been "fully delivered" of the mother and was therefore not considered a life-in-being. For contemporary discussion of that nuance in medical jurisprudence, 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. For discussion of infanticide prosecutions, see generally Ian C. Pilarczyk, "'Justice in the Premises': Family Violence and the Law in Montreal, 1825-1850" (McGill, Ph.D. thesis, 2003).

The *Montreal Gazette* account also noted that by virtue of the ever-forgiving Martineau's entreaties, "no steps were taken to pursue the murderous fugitive during her lifetime." That inaction reflects the deeply-entrenched notion of a private prosecutor's discretion in pursuing, or refusing to pursue, justice. Not surprisingly, that prerogative was deemed to have lapsed following her death. The *Gazette* went on to express hope that the "unnatural monster" would be apprehended to face the full fury of the law.

[996] *The Canadian Courant* (3 April 1833)

[997] See *The Montreal Gazette* (4 April 1833) (report of his arrest); ***ibid.*** (9 April 1833) (extradition proceedings); ***ibid.*** (16 April 1833) (Dewey lodged in Montreal jail). See also *The Canadian Courant* (3 April 1833) (report of wife's death and Dewey's arrest in Plattsburgh); *The Montreal Herald* (15 April 1833) (account of his being lodged in Montreal jail after extradition; he purportedly requested the presence of his priest, two lawyers, and his sister). His apprehension was facilitated by newspapers that offered descriptions of the fugitive to aid in his capture, such as *The Montreal Herald* (1 April 1833) (describing him as "a good looking young

Dewey's trial began at 9 a.m. on Friday, 16 August 1833, and concluded at 4 p.m. the next day.[998] As the *Gazette* observed, "[n]o trial which we can remember has excited more public interest in Montreal."[999] A competing periodical stated that his trial "discloses a scene of blood and crime unparaleled in the history of this Colony," involving a husband "in the bloom of youth when the conjugal affections are warmest, destroying the life of his young bride who evinced every symptom of a boundless, deep and intense affection for her husband...."[1000] A large crowd clamoured for admittance to the courtroom, but it was already filled and many potential spectators were disappointed. Dewey was dressed in mourning clothes, a fact that must have appeared morbidly ironic, if not downright shameless, to many of those in attendance.

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man, about 22 or 23 years of age, 5 feet 8 or 9 inches high, with very light coloured hair...[who] stands very erect.").

[998] This account of his trial has been synthesized from seven newspaper accounts: *The Montreal Gazette* (19 August 1833); *The Montreal Herald* (19 August 1833); *L'Ami du Peuple* (21 August 1833); *La Minerve* (19 August, 22 August, & 26 August 1833); and *The Canadian Courant* (21 August 1833). Those accounts differ in detail, particularly where 'verbatim' transcriptions or translations of statements are concerned, but generally they are in accord.

[999] *The Montreal Gazette* (17 August 1833). The *Gazette* reminded its readers that it would spare no effort in providing coverage of the trial, but also took the opportunity to cast aspersions on one of its competitors, noting dryly that:

> The principle of gratifying a morbid curiosity upon such occasions, by detailing every gesture, look and action, of the unfortunate culprit, we, at this stage of the proceeding at least, must decline. It is an unfair and premature exterior criterion of the probable guilt or innocence of the parties, and is more suitable to a journal, we believe the only one in this city, distinguished for the profundity of its pathos, and the acknowledged sublimity of its bathos.

[1000] *The Canadian Courant* (21 August 1833).

The indictment charging him with the fatal deed contained six counts, reflecting the redundant cataloguing of injuries common to early nineteenth century indictments.[1001] Unlike other defendants charged with capital crimes during this period who were fortunate to secure counsel at the last moment at the court's behest, Dewey retained the services of *three* attorneys: William Walker; Charles Mondolet; and C. S. Cherrier. Arrayed against Dewey's impressive legal talent were the Attorney General and the Solicitor General for Lower Canada.

During the course of the proceedings, nearly two dozen witnesses were called. There were few surprises during the trial, although there were moments of drama. When the axe with which Dewey had attacked his wife was introduced into evidence, speckled with blood and bearing the bloodstained outlines of his hand, members of the audience recoiled visibly. As one newspaper reporter was to describe the moment, "[t]he production of this horrible instrument all spotted with blood produced a thrill of horror throughout the vast assemblage."[1002]

Two more legally-pertinent aspects of the evidence deserve mention. The first was the testimony of the attending physician, to whom Martineau had allegedly

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[1001] Without any clear forensic indication of which blow or injury was the ultimate cause of death, charges were commonly repeated in indictments with slight variations to cover all possible causes. Dewey was charged in a six-count indictment with having caused Martineau's death by: inflicting a blow from an axe on the left side of her head near the temple; inflicting a similar wound on the right side of her head near the temple; inflicting a similar wound on the left side of her head above the ear; inflicting those three wounds combined; inflicting several wounds on her throat with a razor; and inflicting several wounds on the back of her neck with a razor. See *The Montreal Gazette* (19 August 1833); *L'Ami du Peuple* (21 August 1833); *The Canadian Courant* (21 August 1833).

[1002] *The Montreal Herald* (19 August 1833).

recounted the details of her husband's attack. The defense strongly contested the admission of such evidence under the equivalent of the 'dying declaration' exception to the hearsay rule of evidence, arguing that Martineau did not have an apprehension of her impending death, but rather was buoyed by the hopes of those around her that she would survive. Twice the physician's testimony was interrupted by defense assertions that an insufficient foundation had been laid to admit that hearsay testimony, but the Court viewed the fact that Martineau had received the Last Rites as tipping the scales in favour of the testimony's inclusion.

Eventually, the Court ruled that it had been sufficiently shown that Martineau had the requisite state of mind to allow the testimony to be admitted, and Martineau's account of her husband's assault was therefore recounted to the jury, albeit filtered through the words of the testifying physician. No doubt his account of Dewey's words to his wife as he attacked her --"we have lived so long in difficulties, we must finish them here"-- resonated with the jury.[1003]

Another damning piece of prosecution testimony was Dewey's lack of surprise at his arrest, and his alleged confession following his arrest in New York. Several prosecution witnesses, including a magistrate from Plattsburgh as well as the man who was responsible for filing the complaint against Dewey before the arresting magistrate, testified that he had confessed. Dewey's main defense was that he had suffered from a form of mental derangement immediately prior to the murder, and several witnesses

[1003] *L'Ami du Peuple* (21 August 1833). See also *The Montreal Gazette* (19 August 1833) and *The Montreal Herald* (19 August 1833) (English translation).

were sworn who presented anemic evidence that he had acted distracted, out of sorts, or agitated prior to the attack.

The Court, as well as the jury, was to find the defense's testimony unconvincing. In his charge to the jury, Chief Justice James Reid reiterated several main points of evidence: Dewey's mistreatment of his wife; the evidence pointing to his having attacked Martineau in his store; his flight to New York; his confession following his arrest; and the declarations made by his wife. Moreover, noted the Chief Justice, despite their efforts to the contrary no tangible evidence of mental derangement had been presented by the defense. The jury deliberated for fifteen minutes before finding Dewey guilty of murder.

Receiving the verdict, Chief Justice Reid asked Dewey if there was any reason that a sentence of death should not be entered against him. Rising to his feet, Dewey began to address the Court in English, but at the whispered suggestion of an audience member switched to his native French tongue. Dewey took that opportunity to rant about the evidence presented against him, characterising the testimony of various prosecution witnesses as base perjuries. Chief Justice Reid interrupted, chiding Dewey about the futility of contesting the jury's findings at that stage in the proceedings. Dewey responded by curtly stating that he welcomed death, and that he had nothing else of importance to say unless it were to expose witnesses whose testimony had been purchased "for the price of a glass of wine or rum."[1004]

[1004] *The Montreal Herald* (19 August 1833).

Dewey's outburst did not sway the Court. Donning the black cap that was customary when imposing a sentence of death, Chief Justice Reid delivered an impressive and impassioned speech:

> It has never yet fallen to our lot to address a prisoner, under circumstances so truly afflicting and heart-rending as those which mark your case, nor to see before us the cool and deliberate assassin of an innocent and unoffending wife, a crime so horrible and appalling and of so deep a dye, that it is scarcely possible to find its parallel in the sad history of human depravity--a deed, which filled with painful horror and astonishment the entire population of this Province, and made the most remote and obscure inhabitant of our forests to shudder--Scarcely three months united to the young and affectionate woman of your choice, whom you had at the altar of the Most High sworn to protect, love, and cherish, when unconscious of your horrible design, and full of love and confidence, she was from that altar, where she had been to worship, led by you like a lamb to the slaughter, and in the most brutal manner mutilated and sacrificed to some hidden and dark passion you had indulged, thus hurrying an amiable and unoffending wife to an early grave, carrying with her to the just tribunal of her God, the most terrific marks of the murderous violence of her husband....[1005]

The Chief Justice's sentencing remarks reflected the time-honoured tradition of offering a highly-ritualized, emotionally-charged final judgment. Judges' actions were replete with meaning and spectacle, and every aspect of the pomp and procedure common to the higher courts was designed to lend public awe to the administration of justice. Nowhere was this more evident than in the imposition of the death sentence. The death

[1005] *Ibid.* Modificatiosn and corrections to texts of affidavits, newspaper account, and other primary sources have not been made expect where they contribute to ease of comprehension, so as to allow the texts to reflect as much as possible the voices of the parties.

sentence served, in Douglas Hay's words, as the "climatic emotional point of the criminal law--the moment of terror around which the system revolved."[1006]

The imagery in Reid's statement--such as the religious imagery found in the allusions to altars and the "sacrifice" of a loving wife "led like a lamb to the slaughter" due to Dewey's "hidden and dark passion"--were common elements in sentencing remarks.[1007] Such sentences were designed to bring home the full enormity of the criminal's actions against God, country and the law, and to show the terrible majesty of the law as it extracted its price for violation of its tenets. Reid's statements also emphasized that Dewey's only remaining hope was to seek forgiveness from his offended Maker and thereby save his soul, because his mortal body was forfeit. For his act of "murderous violence," Dewey was to be "taken to the gaol from whence you came, and from thence to the place of execution, on Monday next...and that you be there hanged by the neck until you be dead, and that afterwards your body be dissected and anatomized."[1008] He was respited by the Court's order until 30 August.

[1006] Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay & E.P. Thompson, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975) 28.

[1007] Hay, *ibid.* at 29, has noted that:

> In its ritual, its judgements and its channelling of emotion the criminal law echoed many of the most powerful psychic components of religion. The judge might...emulate the priest in his role of human agent, helpless but submissive before the demands of his deity. But the judge could play the role of deity as well, both the god of wrath and the merciful arbiter of men's fates.

[1008] *The Montreal Herald* (19 August 1833)*; The Montreal Gazette* (19 August 1833); *The Canadian Courant* (21 August 1833). His body was to be delivered to the medical faculty of the University of McGill College, as McGill University was then known.

The day before Dewey was to "pay the forfeit of his life to the insulted laws of his country," he was described as resigned to his fate and reconciled with his God.[1009] The evidence seems to support that conclusion, as when he left his cell on the morning of 31 August 1833 he handed his astonished jailer a double-bladed knife. Dewey had somehow managed to conceal the weapon during his incarceration, despite the hourly checks that were conducted on death row inmates.[1010] At ten a.m. Dewey mounted the scaffold before a crowd of thousands gathered in the jail yard at the Champ de Mars, with several newspapers noting that no execution in Montreal had ever attracted such an audience. With a deportment described as "firm, resolute and manly, without any approximation to hardihood, or heroic effrontery," he delivered his last words following the prayer and benediction offered by the priest in attendance.[1011]

Like the sentencing statements made by presiding justices, the last words uttered by condemned felons were a prominent part of the law's ritual. With their final breaths, it was expected that condemned felons would take full responsibility for their transgressions. By acknowledging the heinous nature of the offense they had committed, and the just nature of the penalty they were to endure, convicted murderers were performing their part in the law's 'passion play.' Dewey performed his final rôle

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[1009] *The Montreal Gazette* (29 August 1833).

[1010] *Ibid.* In referring to the constant surveillance of death-row inmates, Wilde wrote, "[Yet every man] does not sit with silent men/Who watch him night and day/Who watch him when he tries to weep/And when he tries to pray/Who watch him lest himself should rob/The prison of its prey." Wilde, *supra* note 1 at 4.

[1011] *The Montreal Gazette* (31 August 1833).

perfectly: taking the unusual step of transcribing four copies of his speech to be distributed to the local press, he delivered his speech from memory notwithstanding the obvious pressure of the situation. Dewey fully acknowledged the enormity of the wrong he had committed, stating that "I will not leave this world without repairing, to the best of my ability, the mistakes I have made, after asking God's forgiveness from the bottom of my heart."[1012] Admitting that his crime was a transgression against society at-large, and not merely against his victim, Dewey's speech implored the public for forgiveness:

> I ask for your forgiveness, and the forgiveness of the entire city for the scandal of which I am the author; I also ask the forgiveness of all those which I may have hurt or harmed; also for the way in which I behaved in front of the Court at the time of my sentencing. I hereby admit having lacked charity towards some: I ask their forgiveness also; for my part I wholeheartedly forgive everyone for the harm they may have caused me.[1013]

Dewey's speech reflected the public nature of his iniquity, and his acknowledgement that casting aspersions on the veracity of the witnesses against him violated accepted tenets of behaviour. Dewey had breached the social compact not once, but twice: most egregiously by murdering his wife; but also by having the effrontery to assassinate the character of the citizens who played a part in bringing him to justice.

Faced with the belief that he would soon be held accountable before the throne of his God, Dewey regretfully noted that had he followed the precepts of the Roman Catholic religion in which he had been raised, he would not have ended his days on a

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[1012] *La Minerve* (2 September 1833) (author's translation).

[1013] *Ibid* (author's translation).

scaffold. He was prepared to offer his life in partial atonement for the terrible wrongs he had committed, and asked for the public's prayers for his soul. He concluded "merciful Jesus, Jesus, save me." A moment later, in the parlance of the time, he was launched into eternity.[1014] Dewey's ritualized exit from this world was far from painless.[1015] The unusually severe death throes he suffered were attributed to his "great lightness of body."[1016] Dewey's execution thus served justice by also serving as a moralistic tale, illustrating the terrible penalty for violating society's laws.[1017]

The spectre of violence cast its pall over many households in nineteenth century Montreal. The case of Adolphus Dewey, however, crossed the threshold in one important respect: what was involved was not merely assault and battery--an offence seemingly committed against wives so often as to be commonplace--but rather a case of premeditated homicide. While countless instances of domestic battery remained hidden

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[1014] *L'Ami du Peuple* (31 August 1833). See also *The Montreal Gazette* (31 August 1833) (English translation). For another account of his execution, see *La Minerve* (2 September 1833). His execution was noted in typically terse style in the records of the Montreal jail. Archives nationals du Québec à Montréal [hereinafter A.N.Q.M.], Records of the Montreal Gaol [hereinafter MG] no. 3288 (13 April 1833) (noting that Adolphus Dewey was sentenced to be hanged on 30 August 1833 and was "discharged by death."). For discussion of public executions, see generally Peter King, *Crime, Justice, and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000) 340-352; V.A.C. Gatrell, *The Hanging Tree, Executions and the English People 1770-1868* (Oxford University Press: Oxford, 1994).

[1015] For description of the "religious and secular ritual" of executions in nineteenth century Canada, see Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815", 42 *U.Tor.L.J.* 401 (1992) at 418.

[1016] *The Montreal Gazette* (31 August 1833).

[1017] As Wilde wrote, "For man's grim justice goes its way/And will not swerve aside:/It slays the weak, its slays the strong/It has a deadly stride:/With iron heel it slays the strong/The monstrous parricide!" Wilde, *supra* note 1 at 22.

from public notice, spousal murder was different. As Pleck has observed, "[m]urder is the one form of disharmony in the home that least escapes the notice of authorities...."[1018] And while Victorian beliefs in the sanctity of the domestic sphere might have led credence to the belief that most such murders were committed by strangers skulking in the shadows, it was members of the immediate family who tended to pose the greatest risk of harm.[1019] Then, as now, women were the most likely victims of lethal violence in the family, and when they died of murder it was often at their spouse's or partner's hands.[1020] For spouses, like children, the family premises were sometimes a killing ground rather than a sanctuary.

[1018] Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence From Colonial Times to the Present* (New York: Oxford University Press, 1987) 19; Lepp, *supra* note 6 at 443. As Golz has stated spousal murder was the "most heinous violation of the marriage contract and gravest transgression of the gendered obligations assigned to each spouse." Golz, *supra* note 6 at 344.

[1019] Compare *David Taylor, Crime, Policing and Punishment in England, 1750-1914* (New York: St. Martin's Press, 1998) 29:

> Belief in the sanctity and safety of the family made it attractive to believe in the unknown murderer from outside, but he (and to a much lesser extent she) was a less common figure whose alleged existence shored up domestic ideology rather than illuminated the nature of this particular crime.

See also Roger Lane, "Urban Homicide in the Nineteenth Century: Some Lessons for the Twentieth", in Jane A. Inciardi & Charles E. Faupels, eds., *History and Crime: Implications for Criminal Justice Policy* (Beverly Hills: Sage Publications, 1980) 106 (stating that twenty-two percent of homicides in Philadelphia between 1839 and 1901 involved family members). Wiener's study noted that nearly fifty-six percent of murders in England and Wales between 1835 and 1905 were spouse murders. See Martin J. Wiener, "Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth Century England," 17 *Law & Hist. Rev.* (1997) 467 at 468.

[1020] In 2001, for example, 32.2% of female murder victims in the United States were killed by their spouses or boyfriends. *Crime in the United States, 2001* (Washington: Federal Bureau of Investigation, U.S. Department of Justice, 2002) 22. In Canada, that figure was more

Dewey's attack may have been unusual in the judicial annals, but homicide was a foreseeable consequence of spousal brutality. In the heat of an argument, involving a spouse with little concern about the other's bodily integrity, murder could be just a step (or a kick, push, or blow) away. As one scholar has categorized it, homicide may be seen as a form of "successful assault."[1021] A sarcastic retort, physical resistance, a handy kitchen or farm implement, drunkenness, or any number of other factors could serve as an accelerant in a volatile situation, turning an 'ordinary' assault into something more lethal.[1022] The wife murderer of Wilde's poem, found with "The poor dead women whom he loved/And murdered in her bed," had many real-life counterparts.[1023]

Still, relative to the apparent frequency of violence against wives, wife murder (or "uxoricide") was rare. A variety of suppositions may be advanced to explain that fact, including a lack of ready access to firearms and community intervention.[1024] As the

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than 50%. Myrna Dawson, *Examination of Declining Intimate Partner Homicide Rates: A Literature Review* (Ottawa: Research and Statistics Division, Department of Justice Canada) 8.

[1021] Lane, *supra* note 32 at 91 (quoting James Q. Wilson).

[1022] Compare Pleck, *supra* note 31 at 222-223 (noting that husbands who murdered their wives tended to follow previous patterns of behaviour, but escalated its level). See also Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991) 73; Lepp, *supra* note 6 at 525-526.

[1023] Wilde, *supra* note 1 at 1.

[1024] In discussing one case of uxoricide found in her study of late-nineteenth century domestic violence in Montreal, Harvey stated that:

> The fact that it is the only case of a woman beaten to death suggest(s) that formal and informal mechanisms of control generally succeeded in preventing this most extreme form of abuse. Another possible explanation is that most attacks happened in the home and were not premeditated. In the absence of a really lethal weapon...the damage most men could inflict with their fists fell short of murder.

century progressed, however, spousal murder was to become an ever-greater component of family homicides.[1025] For the years 1825 to 1850, eleven cases of wife murder were identified for Montreal, as shown in *Figure I*. Despite the gravity of those charges and the breadth of the primary sources, there can be no guarantee that this list is complete. Newspapers are full of accounts of crimes, including murder, that are inexplicably and frustratingly missing from official sources.[1026] One incident in 1833 does not appear in the archives for the reason that the suspect avoided prosecution by fleeing to the United States.[1027]

Other potential prosecutions did not survive the process of coroners' inquests, as was often the case in Quebec and other jurisdictions.[1028] Primitive investigative and

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Kathryn Harvey, "'To Love, Honour and Obey': Wife-Battering in Working-Class Montreal, 1869-1879" (Université de Montréal), Ph.D. thesis, 1991) 138.

[1025] See generally Pleck, *supra* note 31 at 222. Conley, *supra* note 35 at 80-81 also has observed that by the late 1860s, the sentences imposed for domestic homicides became more severe.

[1026] Compare Jeffrey S. Adler, "'My Mother-in-Law is To Blame, But I'll Walk On Her Neck Yet': Homicide in Late Nineteenth-Century Chicago," 31 J.Soc. Hist. 253 (1997) at 254; Lane, *supra* note 32 at 93.

[1027] See *infra* at 39 (case of Taylor).

[1028] That was more likely the case in instances of non-familial violence. For discussion of the role of coroners in that process, see generally Lane, *supra* note 32 at 95:

> From the viewpoint of the coroner himself, neither the time nor the effort involved made "homicide" findings as rewarding as the "suicide" or "accident" alternatives. And from a wider, functional viewpoint, the society as a whole presumably had no wish to be reminded of the existence of problems its institutions were unable to solve. In the absence of a "smoking gun" or its equivalent, then, and an obvious and easily arrested suspect, there was considerable indirect pressure at the inquest for verdicts other than

enforcement techniques meant that many murderers were never apprehended, even though relatives and neighbours probably ensured that most spousal murders were reported and pursued.[1029] Studies of other nineteenth century jurisdictions have likewise suggested that the number of husbands who murdered their wives was fairly small.[1030] The conviction rate, however, was a clear majority, as at least seven out of ten known uxoricides resulted in conviction: forty percent on the full charge; and thirty percent on a lesser charge.[1031]

Prosecutions for Uxoricide, 1825-1850

Year	Offense	Disposition	Sentence
1830	Murder	convicted	death (executed)
1833	Murder	convicted	death (executed)
1833	Murder	fled jurisdiction	--
1837	Murder	convicted manslaughter	1 year imprisonment
1840	Murder	convicted	death (transported for life)
1842	Murder	convicted assault with intent to murder	3 years' imprisonment with 1 month per year in solitary

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> homicide....[For example] the fact that both hands were found tied behind the back was no sure key to a "homicide" verdict....

[1029] For discussion of third party intervention in instances of domestic violence in nineteenth century Montreal, see generally Pilarczyk, *supra* note 8.

[1030] Compare David Peterson del Mar, *What Trouble I Have Seen: A History of Violence Against Wives* (Cambridge: Harvard University Press, 1996) 23-24 (noting that in Oregon in 1850 to 1866, three husbands killed their wives). See also Lepp, *supra* note 6 at 443-526 (106 suspected wife murders in Ontario between 1830 and 1920).

[1031] *Contra* Lane, *supra* note 1058 at 94 (noting that "prosecutors even during the last decade of the century never succeeded in convicting as many as half of those for whom indictments were drawn" on a charge of spousal murder in Philadelphia.)

			confinement
1842	Murder	convicted	death (transported for 14 years)
1848	Murder	convicted manslaughter	life imprisonment
1848	Murder	acquitted	--
1850	Manslaughter	acquitted	--
1851*	Murder	acquitted	--

* offense occurred in 1850

Figure I.

Unlike the atypical scenario seen in the Dewey murder case where his actions were clearly premeditated, a wife's death usually ensued from an altercation that suddenly escalated into severe violence, or from a beating that had unanticipated lethal consequences. However, the fact that a history of abuse tended to precede the last lethal dispute means that one can characterise those murders as foreseeable despite the fact that most husbands did not intend to bring about their wives' death.[1032] Interestingly, while there was usually a history of ongoing violence, no evidence was found that any of the husbands charged with killing their wives had been charged with prior incidents of domestic battery. Perhaps legal intervention, as halting as it was during that period, saved some wives' lives.

[1032] Compare Adler, *supra* note 39 at 259. Unlike cases found by Adler in late- nineteenth century Chicago, other signs of premeditation, including the uttering of public threats, legal separations, the use of firearms, and the settling of financial matters prior to the act, were not generally found herein. Compare Adler, *ibid.* at 260-261.

One such example is that of James Dunsheath from the Township of Hatley who, in 1840, was prosecuted for having brutally kicked his wife and dragged her out of doors in the dead of winter. She sought refuge at a neighbour's house but died a few hours later of internal injuries. He was arrested immediately afterwards and lodged in the Sherbrooke jail, then the Trois-Rivières jail, while jurisdictional issues were argued. The wheels of justice turned slowly to a resolution of that issue, and by the time a decision was made that Montreal was the appropriate venue for his trial, nearly two years had elapsed. The evidence presented by the Crown against Dunsheath was deemed "very conclusive," according to one truncated newspaper account, and the jury returned a verdict of guilty after only a few minutes' deliberation. He was sentenced to hang on 9 October.[1033]

The ninth of October was planned as a busy day for executions. The gallows erected in front of the new jail in order to carry "the awful sentence of the law into effect," were intended not only for Dunsheath but also for two other felons. The sentences of the other two were suspended, while Dunsheath was respited for a

[1033] A.N.Q.M., Registers of the Court of King's Bench [hereinafter KB(R)] p.74, *Queen v. James Dunsheath* (8 September 1840) (indictment withdrawn); p76, *ibid.* (verdict). See also *The Montreal Gazette* (10 September 1840) (sentence). Defense counsel moved to set aside the verdict on the grounds that a juror was asleep during part of the prosecution's case, but the motion was denied. KB(R) p.96, *ibid.* (10 September 1840).

week.[1034] Dunsheath, however, was not so fortunate. Escaping the imposition of the death penalty, he was transported for life to New South Wales.[1035]

The circumstances leading up to Dunsheath's assault on his wife are unknown. However, it is apparent from other cases that a husband's rage was typically triggered by perceived transgressions on the part of his wife, most often trivial. One husband in 1833 was alleged to have murdered his wife after a night of mutual drinking and card playing with a neighbour after she refused to go home with him because she wanted to continue the revelry.[1036] A soldier fractured his wife's skull in 1850 following her failure to provide him with breakfast at the barracks.[1037] Hugh Cameron attacked his wife for "provoking" him while both were drunk.[1038]

The methods by which wives perished at their husband's hands differed dramatically, and no particular type of modal killing is discernable for the period. Indeed, in many ways, each homicide was unique.[1039] Adolphus Dewey dispatched his wife by slashing her throat with a razor in an attack that he had clearly planned

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[1034] See *The Montreal Gazette* (10 October 1840).

[1035] National Archives of Canada [hereinafter N.A.C.], Applications for Pardons [hereinafter AP] p.10709-12 (warrant to Sheriff to deliver Dunsheath for transportation) (17 October 1840); p. 10713-17 (Attorney General's warrant to convey Dunsheath to England) (17 October 1840); p. 10718-22 (reprieve) (17 October 1840). See also Borthwick, *supra* note 4 at 265.

[1036] See *The Montreal Gazette* (4 April 1833) (case of Taylor). See *infra* at 39.

[1037] See *The Montreal Gazette* (23 October 1850) (case of John Charlton). See *infra* at 35.

[1038] For discussion, see *infra* at 25 & 42-43.

[1039] Compare Philips, *supra* note 28 at 256.

beforehand. Most often, however, the attacks did not involve weapons, although the results were equally tragic. Several wives were murdered by being beaten, stamped upon, and kicked with hob-nailed boots. In only one instance was an uxoricide not due to an eruption of violence, but rather to a sustained failure to provide the necessities of life. In this Victorian catalogue of horrors, the death of Ellen Goodwin in a pig-stye adjacent to her home was among the most terrible, exhibiting a callousness that remains shocking even to contemporary sensibilities.[1040]

Spousal homicides were indictment-driven offenses, and the role of private prosecutors was less central than in child abuse or domestic battery cases. Given that those were acts of extreme violence that occurred within the confines of the family, it is not surprising that close relatives often played a pivotal role in the prosecution of murderous husbands. For example, one defendant was convicted largely on his mother's testimony before a police magistrate.[1041] Hugh Cameron was convicted in 1843 principally as the result of the inculpatory testimony of his thirteen year-old son.[1042]

A common theme was the role of intoxicants in spousal violence. Alcohol proved to be a potent accelerant in already volatile relationships, and frequently at least one, if not both, of the spouses had imbibed prior to the deadly altercation having taken

[1040] See *infra* at 30-32 (case of James Goodwin).

[1041] See *infra* at 22-25 (case of Alexis Boyer).

[1042] See *The Montreal Register* (9 March 1843); *La Minerve* (9 March 1843).

place.[1043] In an article entitled "The Drunken Husband" appearing in an 1834 issue of *The Montreal Gazette,* the misery, wretchedness, and brutality that often characterized the household of the alcoholic was documented. Seen through the eyes of a long-suffering wife, the man she married--the "ardent lover" and "enraptured father" of years past--slowly succumbed to the ravages of alcohol, devolving into a "sunken being, who has nothing for her but the sot's disgusting brutality." Faced with penury, abuse, and despondency, she was heard to despair that "there is no killing like that which destroys the heart...."[1044] While intended metaphorically, that phrase rings with particular poignancy in the context of the nineteenth century family. In households marred by violence, as many were, it was foreseeable that brutality could have lethal consequences. The experience of the drunken wife murderer in Wilde's poem, for example, was hardly unique.[1045]

One such case occurred on a Tuesday evening in late-September of 1830. Alexis Boyer, a Laprairie farmer described as being of "comparatively affluent circumstances," had been drinking at a neighbour's wedding party in Laprairie. On returning home, an argument ensued between him and his wife Hyacinthe, the daughter of a respectable farmer from the same parish, to whom he had been married for four years. Boyer flew

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[1043] As *The Montreal Transcript* (8 November 1836) observed, "The crime of drunkenness...lies not in drinking liquor, nor in feeling merry, but in rendering ourselves liable to commit theft without covetousness, adultery without love, and murder without malice." For the relationship between drunkenness and spousal homicides, see generally Golz, *supra* note 6 at 168-181.

[1044] *The Montreal Gazette* (1 May 1834).

[1045] Wilde, *supra* note 1 at 1.

into a drunken rage and attacked his twenty-three year-old spouse with his fists and feet. His eighty-year-old mother desperately interposed herself between the couple, suffering severe injury herself as she tried vainly to shield her daughter-in-law from Boyer's wrath. Hyacinthe did not survive her husband's savage assault and, following a coroner's inquest, a verdict of wilful murder was found against him.[1046]

Boyer's trial five months later was greeted with considerable interest, as were most cases involving spousal murder. *The Montreal Gazette* accounted for that fact by making the debatable assertion that it was based on "the nature of the offence, as from its being (fortunately for the character of the country) an unusual circumstance to see a man placed on his trial for slaying the woman he had sworn to protect."[1047] The principal witness was Boyer's elderly mother, whose presence caused a stir in the courtroom, but her addled and contradictory testimony on both direct and cross-examination threatened to undermine the Crown's case. The Attorney General therefore called on the magistrate who had taken down her initial deposition to substantiate its

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[1046] See *The Montreal Gazette* (4 October 1830). The paper prefaced its account of that murder by observing that:

> [i]t is again our lot to detail the destruction of a human being by another, while labouring under intoxication, and that too by one who was bound by ties of the strongest nature to protect and support the victim of his ferocity.

See also *The Canadian Courant* (9 April 1831) (referencing Boyer's background).

[1047] *The Montreal Gazette* (8 March 1831); *The Canadian Courant* (5 March 1831). For more concise accounts in the French Canadian press, see *La Minerve* (3 March 1831) (account of trial in progress); *ibid.* (7 March 1831) (conviction); *ibid.* (14 March 1831) (execution date set). Golz, *supra* note 6 at 165, has observed that those homicides were seen as "relatively isolated acts for which explanations must be found."

contents, and read into evidence her account of the tragedy "at the time when her memory might be expected to be clearer, and before her mind was probably weakened by the contemplation of the misfortunes and crimes of her son."[1048]

Another particularly effecting witness was a neighbour of the deceased, who averred that Boyer and his wife went out to a wedding earlier that day; the neighbour baby-sat the children at the Boyer household in their absence. Hyacinthe returned from the party without Boyer, claiming that he was drunk. When the neighbour started to leave the house, Hyacinthe burst into tears, saying that she was afraid her husband would harm her when he returned. Hyacinthe pleaded with the neighbour to stay the night--even offering her a loaf of bread as an inducement--but to no avail, although the neighbour stayed to have soup. As they ate together, Hyacinthe turned to her and said, in words that were to be eerily prescient, "this will be the last soup I will sup."[1049]

The jury deliberated for an hour before finding Boyer guilty of murder. Justice George Pyke was said to appear "deeply affected" as he delivered the death sentence while "an awful stillness pervaded the densely crowded audience."[1050] Boyer's

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[1048] *The Canadian Courant* (5 March 1831) (testimony of Josette Bertrand).

[1049] *Ibid.* (testimony of Josette Bisaillon).

[1050] *Ibid.* See also Borthwick, *supra* note 4 at 261 (noting Boyer's conviction and execution); A.N.Q.M., KB(R), *The King v. Alexis Boyer* (3 March 1831) (verdict and sentence). Unfortunately, an account of the sentencing remarks has not survived. For accounts of judges being visibly moved as they imposed sentence, see Hay, *supra* note 19 at 29-30.

execution was ordered to occur in three days, but the Court respited the sentence until 8 April. In the interim Boyer petitioned for clemency, but was rebuffed.[1051]

Boyer's appointment to suffer the "awful penalty of the law" was witnessed by hundreds of spectators who huddled against the driving rain. Sniffed *The Montreal Gazette*, "[a]s is too common on such occasions a large proportion of those present were females."[1052] In his last words, the text of which has not survived, Boyer admitted to being guilty of having abused his wife on the night in question but adamantly denied being responsible for her death, claiming she died "by falling in fits."[1053] His final words having concluded, the hangman dutifully did the law's bidding. As was common in a day before the trapdoor was in widespread use, the crowd watched in morbid fascination as Boyer writhed in the hangman's noose for several minutes before expiring.[1054] One newspaper married religious imagery with references to murder and

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[1051] For discussion of Boyer's unsuccessful petition for clemency, see *infra* at 40-41. See also *La Minerve* (7 April 1831).

[1052] See *The Montreal Gazette* (9 April 1831).

[1053] *The Canadian Courant* (9 April 1831). See also *The Montreal Gazette*, *ibid.*; *The Vindicator* (8 April 1831); *La Minerve* (11 April 1831).

[1054] See *The Canadian Courant* (9 April 1831). Boyer's death struggles prompted the paper to protest against hanging:

> If the bloody and revengeful system of capital punishment will be continued (for which we fearlessly assert man has no Divine authority), why is not some less barbarous method than hanging adopted? Life may be instantly destroyed by decapitation, or by inflicting a deep wound in the brain. Would not this be merciful, compared with the protracted tortures and convulsive agonies often accompanying strangulation?

drunkenness, concluding that "[t]hus has Intemperance sacrificed another victim on its blood-stained altar."[1055]

Indeed, intemperance was a common factor in many wife murders. It might have been the case, as one of Hugh Cameron's acquaintances put it, that "with the exception of being under the influence of liquor [he] was a very peaceable man," but that was surely of little solace to his wife given his frequent binges.[1056] During one such episode in March 1842, in which Cameron's wife was also drunk, he bludgeoned her to death with a wooden poker. His wife's drunkenness, however, was seen as a provocation that resulted in his sentence being commuted to fourteen years' imprisonment, as it was shown that she was an alcoholic who pawned household objects to pay for drink.[1057] Indeed, being under the influence of alcohol was sometimes seen as a mitigating factor in the trials of wife murderers. Such an outcome resulted in a Quebec City trial in 1850, prompting the following critique by the *Montreal Weekly Pilot*:

> John Munro, tried at the late Criminal Term at Quebec for the murder of his wife, was acquitted, because when he committed the deed he was in a state of delirium tremens, produced by his habits of intoxication. That he killed his wife, was an unquestioned fact; but he was a drunken fellow and drunk himself (mad?)--and

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[1055] *Ibid.* The *Courant* also used the Boyer case as a vehicle to rail against intemperance, arguing that if he had been teetotaler he would have been unlikely to have suffered such a fate. See also *The Canadian Courant* (2 October 1830), containing that paper's initial account of Boyer's crime under the heading "AWFUL CONSEQUENCE OF INTEMPERANCE."

[1056] A.N.Q.M., Files of the Court of King's Bench [hereinafter KB(F)], *The Queen v. Hugh Cameron* (1 March 1843) (affidavit of Thomas Crane). For further discussion of that case, see *infra* at 42-43.

[1057] See *The Montreal Transcript* (11 March 1843) (testimony of John Cameron). The jury had recommended Cameron to mercy. A.N.Q.M., KB(R) p.52, *Queen v. John Cameron* (8 March 1843) (verdict).

> so he was acquitted. He has since been discharged from gaol, and let loose upon society. He may get drunk again--relapse into the same state--and murder some one else; but if it can be proved that the deed was done, not during the fit of intoxication, but under the influence of the madness that followed, acquittal will again ensue! Some provision ought to be made for such cases. The drunkard should be punished for the crimes committed in his drunkenness--the madman should be taken care of, and prevented from doing further mischief. He should not be suffered to be at large.[1058]

In the Munro case, the defense was based on the effects of *delirium tremens* rather than the fact of intoxication itself, but the centrality of drunkenness to parricides cannot be overstated. As will be discussed, intoxication could, and often did, provide a mitigating factor for defendants charged with such crimes. Even in cases where alcohol may not have played a part, wives who were murdered at their husband's hands often had been victims of chronic and systematic abuse. Adolphus Dewey may have been sober, industrious and respectable, but he nevertheless brutalized his wife during the three months of their married life. The violent tendencies of spouses, especially husbands, were frequently well known to family and members of the community. In some instances, relatives or neighbours provided assistance and refuge, however futile that protection ultimately proved.[1059] Dewey's wife sought sanctuary with her uncle and then with her father, but was killed when she agreed to accompany her husband to church.

[1058] *The Montreal Weekly Pilot* (30 November 1850). That case was not counted as it was tried in the judicial district of Quebec City. For an English example, see A. James Hammerton, *Cruelty and Companionship, Conflict in Nineteenth-Century Married Life* (London & New York: Routledge, 1992) 35 (citing an 1888 case in which a husband kicked his wife to death while she was drunk; her drunkenness was seen as a provocation that lessened his culpability to manslaughter rather than murder).

[1059] For discussion, see generally Pilarczyk, *supra* note 8.

Indeed, wives most in need of third-party intervention were often the least likely to receive it. Husbands who had reputations for being ferocious and unpredictable were typically given a wide berth. Hugh Cameron's son saw his parents "quarrel and wrangle together"while they were in bed. Cameron then began "beating [the] deceased merily with his hand not sufficient to cause any bodily injury" but then struck her several times with a wooden poker. The son and his sister sought assistance from their neighbours, all of whom refused to intervene due to their fear of Cameron. Cameron's son was obliged to go to town to secure assistance, and brought back with him three men (including a shoemaker named Thomas Figsby who later served as a juror) who ascertained that Cameron's wife was dead, and conveyed him to the local jail.[1060] According to several deponents who subsequently filed complaints against Cameron, he had a reputation in the Parish for extreme brutality towards his wife.[1061]

When the criminal system took cognizance of wife murder, the conviction rate, either for the offense charged or a lesser change, was high. Out of eleven cases, only two cases resulted in acquittal; in another instance the defendant fled the jurisdiction. Four out of the ten defendants charged with murder were found guilty of the full offense. Of those, two defendants (twenty percent of the total) were executed in the 1830s. The following decade, two defendants were sentenced to death but transported to New

[1060] See A.N.Q.M., KB(F), *The Queen v. Hugh Cameron* (1 March 1842) (affidavit of John Cameron).

[1061] See A.N.Q.M., KB(F), *The Queen v. Hugh Cameron* (1 March 1842) (affidavits of John Cameron, Thomas Figsby and Hamilton Forrest).

South Wales, and one was sentenced to life in prison for manslaughter. That sequential progression was not coincidental, but rather mirrored a growing popular revulsion towards imposing capital punishment. Montreal courts may have imposed the death sentence even less frequently than in other jurisdictions. For example, Carolyn Conley in her study of Kent County in England for the period 1869 to 1880 noted that while only twenty-three percent of those convicted of killing a spouse were executed, all those convicted of killing an employer or superior officer suffered death.[1062]

In cases where husbands were convicted of lesser offenses than murder, such as manslaughter, sentences were typically short. For much of the century, the common law distinction between murder and manslaughter remained ambiguous, although that distinction had important consequences as murder was a capital felony. In general, defendants were found guilty of manslaughter due to extenuating circumstances or to the absence of a crucial element required to constitute the legal offense of murder, namely premeditation or malice.[1063] In England, Parliament began to address that

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[1062] See Conley, *supra* note 35 at 60.

[1063] A contemporary legal manual defined manslaughter as:

> (1) such killing of a man as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention or doing any mischief at all. 1 Haw. 76. (2) The difference between murder and manslaughter is, that murder is committed upon malice aforethought, and manslaughter without malice aforethought upon a sudden occasion only. 3 Inst. 55.

W.C. Keele, *The Provincial Justice, or Magistrate's Manual, Being a Complete Digest of the Criminal Law of Canada, and a Compendious and General View of the Provincial Law of Upper Canada, with Practical Forms, for the Use of the Magistracy* (Toronto: H. & W. Roswell, 1843) 324. Under 4 & 5 Victoria c. 27 s.7 (1841) (L.C.), it was punishable by a minimum of seven years' imprisonment and a maximum of life imprisonment in the Provincial Penitentiary; or

ambiguity in 1857, eventually arriving at the consensus that manslaughter involved a lack of intent to kill or an immediate response to a provocation.[1064]

Two defendants during the period were convicted of manslaughter after having been charged with murder, although their sentences differed significantly. The first of those accused, a ship's carpenter named John Barker who lived with his wife and several children near the Merritt ship-yard, was charged in 1836 with having kicked his wife to death.[1065] Neighbours had heard him reproach his wife with "severe language" on the Sunday evening in question, and concluded from her cries that she was being badly beaten. Both spouses were known to be habitual inebriates, and their neighbours had long since become accustomed to the sounds of fighting in the household. When the noise stopped, the neighbours complacently assumed that the couple had gone to bed. In reality, Barker's wife lay dying on the floor.[1066]

"imprisonment elsewhere for no more than two years, and such fine as court shall award."As Taylor stated, lack of premeditation was commonly alleged in wife murders, while mental aberration was commonly asserted in infanticide cases. See Taylor, *supra* note 32 at 29.

[1064] See generally Conley, *supra* note 35 at 45-46. Conley also noted that "intent," "provocation," and "immediate" were terms that were not legislatively defined. For the present-day definition of manslaughter, see Henry Campbell Black, *Black's Law Dictionary* (St. Paul: West Publishing Company, 1991, 6th ed.) 664.

[1065] See *The Montreal Gazette* (11 October 1836) (citing *The Courier*); *L'Ami du Peuple* (12 October 1836) (case of John Barker).

[1066] See *The Montreal Transcript* (11 October 1836); *L'Ami du Peuple* (12 October 1836). *The Montreal Gazette* (15 October 1836) likewise noted that the two were "much addicted to the use of ardent spirits," and also claimed that they had been intoxicated at the time of the altercation.

That trial, like most such cases, endangered great public interest, and was observed by an overflow crowd (described by one newspaper as "very anxious") before the Court of King's Bench five months later. At trial, Barker's counsel mounted a vigorous and skilled defense, and while the facts indicated that the wife's injuries were the cause of her death, defense counsel was able to raise sufficient doubt as to the defendant's culpability, or whether he had caused her injuries by accident or carelessness, that the jury returned a verdict of manslaughter after half an hour.[1067] He was sentenced to one year's imprisonment, the shortest term of incarceration for any husband convicted of having killed his wife during the period.[1068] The absence of a lethal weapon, as well as drunkenness on the part of both spouses, were factors likely responsible for the lenient sentence.

The other such instance, the case of James Goodwin, deserves mention for the defendant's extraordinary culpability. Goodwin was tried before the Queen's Bench during its February 1848 term, on indictment for having caused his wife's death between 1 December 1846 and 25 February 1847, by having "turned her out of his house and prevented her from returning, obliging her to inhabit a pig-pen, neglecting to give her sufficient food, clothing, and fire."[1069]

[1067] A.N.Q.M., KB(R) p.132-133, *Dominus Rex v. John Barker* (3 March 1837). See also *The Montreal Gazette* (4 March 1837). For an account of the verdict, see *The Montreal Transcript* (4 March 1837); *L'Ami du Peuple* (4 March 1837).

[1068] A.N.Q.M., KB(R) p.166, *Dominus Rex v. John Barker* (10 March 1837). See also *L'Ami du Peuple* (11 March 1837); *The Montreal Gazette* (11 March 1837).

[1069] *The Montreal Gazette* (4 February 1848).

From the evidence, it appears that Goodwin and his wife had argued and that she had absented herself from home a few months earlier. On her return Goodwin refused to allow her to live in the house, instead banishing her to a contiguous pigpen where food was passed to her through a small aperture. The Parish priest, on hearing about Goodwin's treatment of his wife in December, confronted him about his inhumanity. Goodwin admitted that his wife was living in the pigpen, but maintained that she was there of her own accord and that her conduct "had been such as to deprive her of any claim upon him" but that he had no objection if others took care of her.

Ellen Goodwin remained in the pigstye until nearly the end of February, when she died of exposure. She was found in pathetic circumstances, emaciated and naked save for a cap, a piece of linen wrapped around her torso, rags on her feet, and a cloak thrown over her body. Her body was frozen, but Goodwin resisted initial attempts to thaw her body before his hearth so as to allow the coroner to conduct an autopsy, saying "he had sworn she should never enter his house, dead or alive; and, that he would keep his word."[1070] Eventually, Goodwin consented, and the examination disclosed, among other things, that Ellen had lost the toes of one foot to frostbite, while the other leg ended in a stump.

Ellen's sister Mary attested that she had begun living in the pigpen in the first week of November, and twice had entered the house to obtain a drink or warm herself by the fire. On the first occasion, she was ordered out by Goodwin; on the second

[1070] *Ibid.* (testimony of John Alexander Sturgeon, M.D.)

occasion she left of her own accord. Her family fed her three times a day, and Mary testified that Goodwin neither begrudged her food nor had ever used violence against her. Mary further maintained that Ellen admitted to having "wronged" Goodwin by her behaviour, and that she remained in the pigpen of her own volition. Two of Ellen's daughters also testified, both claiming that she was of sound mind, was well-fed, and that their father had never ill-treated her. Other witnesses added more detail, alleging that for years prior to the events in issue Ellen had been a vagrant, deserting her home and travelling about with shantymen and others for months at a time. The defense's strategy was to show that Ellen had been a classic example of a woman of abandoned character--the implication being that she was therefore undeserving of her husband's protection. After the judge's summation of the evidence, the jury retired for about an hour before finding Goodwin guilty of manslaughter.[1071]

The verdict did not appear to sit well with the Court. At the sentencing two weeks later, Justice Samuel Gale "severely commented on the enormity of the offence," and noted that the jury had been merciful in finding Goodwin guilty of manslaughter. It was a most "aggravated manslaughter" indeed, noted Gale, with "nothing…to mitigate it in the slightest degree." He sentenced Goodwin to life imprisonment in the provincial penitentiary, the maximum allowable penalty.[1072]

[1071] A.N.Q.M., KB(R) p.216, *Queen v. James Goodwin* (3 February 1848). See also *ibid; The Pilot* (4 February 1848).

[1072] *The Montreal Gazette* (16 February 1848). See also *The Montreal Transcript* (17 February 1848) (stating that Goodwin, the "man who suffered his wife to die so horribly in a pig-stye," was sentenced to life imprisonment, the "heaviest penalty the law could inflict.").

In the other such cases, the convictions were for offenses other than manslaughter. Henry Norman was charged with murder and assault with intent to murder in 1842 following the death of his wife, Amelia. A neighbour, married to a private in Her Majesty's Eighty-Fifth Regiment of Foot, resided across the hall from the couple. Around six p.m., as she tended the fire in the hallway, she heard the couple arguing. Suddenly, Amelia cried out, "Henry, my dear! Do not kill me!" She ran into the neighbour's room, bleeding, and was followed by her husband, who struck her a blow in the back with an object that appeared to be a knife. The neighbour's affidavit, in a curious linguistic juxtaposition, asserted that she "then begged of the said Norman not to kill his wife in deponent's room, but to take her back to his own room," perhaps subconsciously indicating her desire that the couple keep their arguments private.[1073] Depositions by other neighbours, however, left no doubt that the argument and its aftermath was heard, if not witnessed, by many people. The city coroner deposed several neighbours during the inquest, all of whom attested to numerous arguments between the spouses, and who heard Amelia beseech her husband not to kill her on the night in question.[1074] Another witness added that a fortnight earlier the defendant had struck his wife on the side with a hammer.[1075]

[1073] A.N.Q.M., KB(F), *Domina Regina v. Henry Norman* (26 August 1842) (affidavit of Martha Brown).

[1074] See A.N.Q.M. KB(F), *ibid.* (undated) (deposition of witnesses in coroner's inquest) (testimony of Margaret Mitchel and Martha Cooper).

[1075] See A.N.Q.M., KB(F), *ibid.* (26 August 1842) (testimony of Francis Simmonds).

The testimony of a labourer who also resided in the house reflects the sense of entitlement that Henry Norman felt in 'correcting' his wife. The defendant had invited James Badgley to dinner at his house, and on his arrival he was summoned into a room by Amelia, where she lay crying and bleeding heavily from the arms and back. As he peered in, she said "look how he has served me." Shocked, Badgley expressed sympathy and said that this should not have happened had he been present. Norman responded by asking Badgley "what had I to do with their quarrels...he would treat her as he liked."

Badgley's sense of outrage was mitigated by his reluctance to get involved. Declining to stay for dinner, his testimony nonetheless gave no indication that he attempted to aid Amelia, although he returned the following morning to borrow Norman's shoemaker knife. Norman responded that he had disposed of the knife, adding darkly, "I think I have done enough with it."[1076] Clearly Norman had, as Amelia died two days later at the Montreal General Hospital.

Following the inquest, Norman was arrested on a coroner's warrant.[1077] The evidence of the witnesses had left some ambiguity--none of them had actually seen a

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[1076] A.N.Q.M., KB(F), *ibid.* (26 August 1842) (testimony of James Badgley).

[1077] See A.N.Q.M., KB(F), *ibid.* (26 August 1842?) (warrant of Joseph Jones, Coroner):

> Henry Norman...late husband of the said Amelia Brooke not having the fear of God before his eyes but moved and seduced by the instigation of the devil on the eighteenth day of August instant in the year of our lord 1842 with force and arms...in and upon the said Amelia Brooke his said late wife in the piece of God and aforesaid lady the [Q]ueen then and there being feloniously wilfully and of his malice aforethought did make an assault....

knife used, although several saw a knife handle in Norman's hand but could not be sure it had a blade attached to it, Amelia's wounds notwithstanding. An attending physician also testified at the inquest that shortly after Amelia's admission to the hospital, she began to suffer from *delirium tremens*. That affliction, he believed, was the ultimate cause of her death, although it was aggravated by the injuries she suffered.[1078] While all witnesses testified that Norman was frequently drunk, only a single witness testified that she had seen Amelia drunk, and that on only one occasion. The true facts will never be known, and no account of the trial has survived. It is likely that allegations of Amelia's alcohol use surfaced in Norman's defense, however. Charged with murder and assault with intent to murder, he was convicted of the lesser charge.[1079] He was sentenced to three years' imprisonment but, in an interesting twist, the Court required

[1078] See A.N.Q.M., KB(F), *ibid.* (19 August 1842) (deposition of Olivier C. Bruneau, M.D.).

[1079] A.N.Q.M., KB(R) p.75-76, *ibid.* (8 September 1842). See also *The Montreal Gazette* (10 September 1842); *The Montreal Transcript* (10 September 1842). The newspaper account of his trial that appeared in those two papers was cursory:

> Henry Norman, for the murder of his wife, was tried and acquitted of the capital part of the offense. The indictment contained two counts, one of murder, and the other for assault with intent to murder. The Court, in charging the Jury, told them that the first count was not supported and that they therefore must render a verdict on the second count only. The Jury, after withdrawing a few minutes, returned a verdict of guilty of assault only, acquitting the prisoner of the capital part of the second count....Mr. Hart acted as Counsel for the prisoner.

that Norman spend every August in solitary confinement. That peculiar provision was no doubt intended to give him pause to reflect on each anniversary of his dark deed.[1080]

It has been remarked by some scholars that a preponderance of charges brought against husbands for killing their wives in the nineteenth century was for manslaughter rather than murder.[1081] In Montreal during the period 1825 to 1850, however, such acts nearly always precipitated an initial charge of murder, perhaps joined with a charge of assault with intent to murder as a way of taking all legal eventualities into account. In only one instance was a husband initially charged with the non-capital crime of manslaughter and, perhaps not coincidentally, that case ended in an acquittal. John Charlton, a soldier with the Royal Canadian Rifles stationed in Sorel, was arrested after he struck his wife while they were embroiled in a violent argument. The defendant confronted his wife over her domestic failings, saying "you might have had your children dressed and been at church like any other woman; instead of that I don't see that breakfast is ready." The defendant struck her one or two blows to the head with his fist before the two were separated. Several witnesses testified that the defendant's wife had attempted to attack him with a knife, injuring his face, although they disagreed as to whether she had picked up the knife before or after her husband struck her.

[1080] See A.N.Q.M., MG p.870, *Domina Regina v. Henry Norman* (26 August 1842) (Norman "sentenced to 3 years from 10 September with the month of August in each year to be allotted to solitary imprisonment."); KB(R) p.87, *Queen v. Henry Norman* (10 September 1842).

[1081] Compare Conley, *supra* note 35 at 59-60; Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London: Weidenfeld & Nicolson, 1992) 127.

While one fellow soldier asserted that he had "looked upon the affair as a mere squabble," its outcome was grave: the blows inflicted by her husband fractured the wife's skull, and within two days she was dead.[1082] After hearing the evidence, the jury acquitted Charlton of manslaughter. Several factors likely led the jury to acquit, including evidence of his generally peaceable nature, his wife's possible use of a deadly weapon, and the belief that she had failed to fulfill her marital duties and was therefore rightly deserving of chastisement. A physician's testimony that the victim's death was due to mischance, as the same blow anywhere else on her skull would not have been lethal, would have provided further justification for the jury to acquit.[1083]

The other alleged murder for which a husband was acquitted took place in late-1850. In the Parish of St. Jerome, the body of Jean Martin Jr.'s wife, Julienne Filion, was found in the middle of the day in a two-and-a-half foot deep well. In keeping with protocol, the Captain of Militia assembled a jury of inquest and, in the absence of any suspicion, the jury reached a finding of accidental death. Some time thereafter, inculpatory circumstances came to light, and a warrant was issued for his arrest. Martin was lodged in the local jail and, at the coroner's request, Filion's body was disinterred to conduct a *post mortem.* The corpse proved to be too badly decomposed to enable the

[1082] *The Montreal Gazette* (23 October 1850) (case of John Charlton).

[1083] See *ibid; La Minerve* (28 October 1850); *The Pilot* (24 October 1850).

coroner to determine the cause of death, however, thereby pre-empting discovery of a crucial piece of evidence.[1084]

Martin was tried before the Court of Queen's Bench in March 1851, in a trial that was doubtlessly as confounding to the jury as it was to the Justices who presided at it.[1085] Over a span of three days, the jurors wrestled with many seemingly unanswerable questions. Did Martin's wife die as a result of misadventure? If her death was intentional, was it at her own hands? Or was there a more sinister explanation? The mystery of the death of Julienne Filion was perhaps best depicted by Justice Rolland's summation to the jury following the close of the defense's case:

> [The jury] had heard all the evidence, and they could not help thinking with him, that this must certainly be considered as one of the most extraordinary cases which had occurred in the judicial history of the country--a case fit to excite indignation against the murderer, if murderer there were; or excite wonder, if [it] turned out that there were none. At 30 feet from the high road, in mid-day, a woman was said to have been done to death, in a shallow well, by a husband, to whom she had been married only seven months, and while she was bearing in her womb the child, of which he was about to become the father.[1086]

If the Dewey case had proven that a wife was not insulated from murder by virtue of having been recently married and by carrying her husband's child, that lesson had been lost on Justice Rolland. It was the place and timing of Filion's death that was inexplicable, not the possibility that her husband had murdered her under such circumstances.

[1084] See *The Montreal Gazette* (29 August 1850).

[1085] For the account of his trial, see *The Montreal Gazette* (24 & 26 March 1851).

[1086] *Ibid.* (26 March 1851).

As Justice Rolland phrased it, however, the issue for the jury was the cause of the victim's death. In considering whether her death was a natural one, he again made reference to Filion's pregnancy. Reiterating conventional wisdom regarding women in that situation, he stated:

> [S]he was with child, and like all young women in that case, was subject to swoons. At any rate, she went to the well, and there was no reason to suppose she was taken there by force. Well, then, being there, she might have fainted; but the cold water would...have probably restored her. She might have fallen into the well, however, in a fainting fit, and she might not have been restored by the water; but it seemed difficult to understand how, even if that were so, she could have fallen into so narrow a space.

"Then could she have committed suicide?", asked Justice Rolland rhetorically. The judge apparently shared the prevailing view of women as creatures ruled by emotion and subject to the caprices of hysteria and melancholy, aggravated by conditions such as pregnancy. Filion had acted melancholic, noted Justice Rolland, "like most young women in her position." But the thought that she had taken her own life was difficult to be believed, as "a case of suicide by a pregnant woman was hardly known." Moreover, Filion was known to be a pious woman, and according to the Court's logic, therefore not a candidate to commit the mortal sin of *felo de se.* On those occasions when women did drown themselves, added Rolland, they were most likely to do so for affairs of the heart. Under the facts, the judge expressed doubts that Filion had caused her own death.

Justice Rolland concluded by expounding at length on the evidence related to the husband's conduct, including seeming inconsistencies in his testimony that he had not accompanied his wife to the well. On the other hand, the husband was also a pious man

of good character--and "so young" that it "seemed hardly possible for him to have arrived at the pitch of villainy necessary for the commission of such a crime as was imputed to him."[1087] Again, the lesson taught by twenty-three-old Dewey, who lured his wife to her death following Divine Mass, apparently had been forgotten. With that edifying summation behind him, Rolland left the jury to their deliberations. They spent less time deliberating than Rolland did in summarizing the testimony, acquitting the defendant almost immediately.[1088]

Another prosecution for parricide involved Jean-Baptiste Pilleau *dit* Sanschagrin, who was arrested on a charge of having murdered his wife, following the issuance of a coroner's warrant in November of 1848:

> Murder charge – Saturday last, a coroner's inquest was held in the parish of Longueuil , on the corpse of a woman named Marie Dilleur, wife of Jean-Baptiste Pilleau dit Sanschagrin. The autopsy was performed by Dr. Sabourin of Longueuil, the jury's verdict was that this woman's cause of death was inflammation of the lungs resulting from the blows she received to her chest. Since her husband was under serious suspicion, a warrant for his arrest was issued by Mr. Coursol, he was arrested yesterday afternoon and brought to the city under the Grand Constable's guard, he was sent to prison accused of murder for having caused his wife's death through the blows he dealt her. We are unaware of what caused this excessive brutality.[1089]

[1087] *The Montreal Gazette* (26 March 1851).

[1088] A.N.Q.M., KB(R) p.150, *Queen v. Jean Martin fils* (24 March 1851). See also *ibid; The Pilot* (25 March 1851).

[1089] *L'Aurore* (21 November 1848) (citing *La Minerve*) (author's translation). See also *La Minerve* (20 November 1848). Newspaper accounts such as this can be a good source of 'unconscious testimony' of contemporary mores and beliefs. Note that the newspaper account stated that "[w]e are unaware of what caused this excessive brutality"—not only implying that she was responsible, but that 'lesser' levels of brutality directed towards the wife would have been acceptable. For discussion of such unconscious testimony in Victorian murder trials, see generally Ian C. Pilarczyk, "The Terrible Haystack Murder: The Moral Paradox of Hypocrisy, Prudery and Piety in Antebellum America," 41 *Amer. J.Legal Hist*. 25 (1997).

While no affidavits, recognizances or other documents related to that case have survived, the newspaper references are not apocryphal: Sanschagrin was acquitted of murdering his wife on 9 February 1841 before the Court of Queen's Bench.[1090]

In another case in 1833, a husband avoided prosecution for causing his wife's death by fleeing the jurisdiction. After an evening of drinking and playing cards at a neighbour's house, the husband wished to depart for home but his wife refused. Enraged by that act of insubordination, he kicked her to death in the neighbour's parlour. Not only did the neighbour not intervene, but he and Taylor contrived to have a coffin made the following morning, which prompted uncomfortable questions. When Taylor's wife's disappearance became known, an arrest warrant was issued for his apprehension, but he had fled to the United States.[1091] No record of his apprehension or prosecution was found.

In cases that did proceed to trial, the prospect of sending a man to the gallows was presumably a heavy burden for many jurors. When the facts seemed confused and admitted of various interpretations, and no clear motive presented itself--as was the case with the trial of Jean Martin, Jr., for example--juries displayed a natural tendency to acquit. Indeed, it was a common experience in many jurisdictions of-the-period that the possibility of capital punishment obfuscated matters rather than illuminating the dark

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[1090] A.N.Q.M., KB(R) p.331-332, *Queen v. Jean Baptiste Pilleau otherwise called Sanschagrin* (9 February 1848). No other information on this case was found.

[1091] *The Montreal Gazette* (4 April 1833); *L'Ami du Peuple* (3 April 1833) (case of Taylor).

recesses where crime lurked. Jurors were not alone in their reluctance to facilitate the imposition of the death penalty, and convicted murders faced the ultimate sanction with increasing infrequently as the century advanced. The mercy and majesty of the law were always apparent--never more so than when a capital crime had been committed--and it was far from uncommon for convicted felons to petition the Governor General, as the Crown's representative, for clemency. [1092]

Alexis Boyer used the intervening weeks between his sentencing and the date of his execution in 1830 to petition the Governor General for a reprieve as well as for a hearing by his defense counsel before the Court's justices, alleging that he had been falsely convicted and had "fallen a sacrifice to the opinions of prejudiced witnesses." He further claimed that he had been deprived of the benefit of his mother's exculpatory testimony by an "incorrect" decision of the Court, and that he would have been acquitted otherwise as "there was not the slightest shadow of Positive Proof, inculpating your Petitioner...." Boyer further claimed to have a sworn affidavit from a witness that would have corroborated his mother's testimony, but that this witness had been unknown to his attorney at the time of trial. Boyer ended his petition with an emotional plea, referring to his two young children "whose names must ever be stained with infamy and disgrace if Your Petitioner is brought to an Ignominious end," and once

[1092] For sources related to clemency, see Ann R. Higginbotham, "'Sin of the Age': Infanticide and Illegitimacy in Victorian London" 32 *Vict. Stud*. 319 (1989); King, *supra* note 27 at 297-333; Phillips, *supra* note 28; Hay, *supra* note 19 at 43-49; R. Chadwick, *Bureaucratic Mercy: The Home Office and the Treatment of Capital Cases in Victorian Britain* (New York: Garland, 1992).

again asserting "his innocence of the Horrible Crime for which he has been convicted and sentenced to undergo a Disgraceful death."[1093] As was previously mentioned, however, a disgraceful and anguishing death was to be his fate.[1094]

Petitions for clemency such as that filed by Boyer are intrinsically valuable because of the light they shed on the administration of justice. They are among the few sources that offer insight into the process as seen from a defendant's perspective, providing information about their perceptions of judicial fairness and evidentiary issues, as well as offering an alternative view of events. Furthermore, unlike affidavits and other judicial documents, clemency petitions were generally written by defendants. While it is not known how many of those defendants (or third parties on their behalf) sought clemency following their convictions, petitions were found for three of the four known cases in which they were made.

James Dunsheath, whose murder trial was delayed for two years due to jurisdictional issues, was one defendant who was reprieved from the gallows. Among the surviving records there is a "memorial" drafted on his behalf by his attorney. In it, Dunsheath's counsel stated that the main Crown witness was a nine-year-old child who had offered testimony about events that had occurred nearly two years earlier, testimony that must be "subjected to the suspicion of having been influenced by the

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[1093] N.A.C., AP vol. 16, pp. 6582-6583 ("Petition of Alexis Boyer") (26 March 1830).

[1094] At least one newspaper took notice of his appeal. *La Minerve* (7 April 1831) observed that "Boyer…has still not received the pardon that they said he was expecting; as such if he does not receive the pardon today or tomorrow, his harsh legal sentence will be carried out." (author's translation). His conviction and execution were noted by Borthwick, *supra* note 4 at 261.

efforts of enemies and the idle talk of others." Among other exculpatory facts alleged by his counsel was that Dunsheath's wife had fallen out of bed from a considerable height, and that a testifying physician could not rule out the possibility that she might have died from her fall onto the floor. Furthermore, Dunsheath's attorney claimed that one Crown witness was not a licensed physician at the time he participated in the autopsy, and emphasized that Dunsheath was at home when arrested, having made no effort to flee justice--the implication being that this was not the conduct of a guilty person.

Unusually, Dunsheath's counsel also emphasized his own shortcomings and lack of prior trial preparation, noting that "the humanity of the Court alone requested [him] to act in [Dunsheath's] behalf to prevent his being sacrificed without even the form of a trial." Montreal courts during the period usually ensured that defendants had counsel in capital cases, mirroring general English practice of appointing them immediately prior to trial if the defendant had not secured representation on his or her own. One suspects that under such circumstances attorneys could only rarely hope to mount a truly efficacious defense.[1095] To hear such sentiments espoused by a barrister himself was unusual. Dunsheath's counsel further observed in his petition that Dunsheath had appeared completely disinterested in the proceedings, and suggested that this was

[1095] Martin J. Wiener, "'Judges v. Jurors': Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England" 17 *Law & Hist. Rev*. 467 (1999) at 474 note 22. That, of course, has modern parallels with the institution of court-appointed defense attorneys.

perhaps evidence of a mental defect.[1096] In keeping with common practice in Montreal during the 1840s, Dunsheath was reprieved and transported for life to New South Wales.[1097]

In 1843, Hugh Cameron likewise had been sentenced to death for the murder of his wife. He had been recommended to mercy by the jury due to "provocations" on the part of his wife, who was often inebriated, and his request for clemency resulted in his sentence being commuted to fourteen years in the Provincial Penitentiary.[1098] Cameron's drunkenness was seen as a mitigating factor that lessened his responsibility, while his wife's drunkenness was seen as an aggravating factor that increased her own fatal culpability.[1099]

[1096] See N.A.C., AP, vol. 24, p.10717h-u ("Memorial on behalf of James Dunsheath" (31 Oct 1840).

[1097] See N.A.C., AP, vol. 24, p.10709-10712 ("Attorney General's draught of a warrant to the Sheriff of the District of Montreal to deliver James Dunsheath to be transported") (17 October 1840); p.10706-10708 ("Attorney General's draught of a warrant to the Sheriff of the District of Montreal to detain James Dunsheath in pursuance of a conditional pardon") (17 October 1840); p.10697-10705 ("Attorney General's draught of a conditional pardon in favor of James Dunsheath") (17 October 1840); 10713-10717 ("Attorney General's draught of a warrant to receive and convey James Dunsheath to England") (17 October 1840); p.10718- 10722 ("Attorney General's draught of a Reprieve for James Dunsheath under sentence of death for Murder") (17 October 1840). Some contemporary accounts suggest that felons might have come to regret being reprieved, given the harshness of penal life in Australia. See *The Montreal Gazette* (26 August 1842) (article detailing the horrors of transportation).

[1098] *L'Aurore* (14 March 1843) (noting jury's recommendation to mercy due to wife's provocations); *ibid.* (6 April 1843); (noting clemency due to jury's recommendation); *The Montreal Register* (6 April 1843) (noting commutation of sentence). Cameron's petition was not located within the archives.

[1099] Wiener, *supra* note 108 at 484-488. See also Lepp, *supra* note 6 at 537-548. As Wiener stated, by later in the century "a greater emphasis on self-control gradually brought drunkenness-as-defence into disrepute." *Ibid.* at 481.

John Barker, the ship carpenter convicted of manslaughter in 1837 for kicking his wife to death, likewise sought clemency. In a document described as obsequious even in comparison to most petitions, Barker pleaded for early release from his one-year prison term. Stressing that his wife had been an alcoholic for several years, he maintained that for the three days previous to her death she had been seen lying outside the door of their house. Perhaps tellingly, however, he did not claim to have carried her inside. Barker averred that he had been away since the month of May 1835, returning only two weeks before her death the following October. In attempting to explain his wife's injuries, including eight broken ribs, Barker maintained that:

> he never gave his wife any hard language tho she had given him sufficient reason for the few last days when on this unfortunate day your petitioner came home after being on some business and found his wife lying on the floar in the same state as aforementioned[;] he asked her where she had got the liquor to make herself so helpless and rose her from the floar; she attempted to walk but could not[;] she fell [and] she attempted a second time and succeeded in rising but only to receive the second fall which he believes might have been the occasion of her death which was with all the waight of her body against the edge of his toolchest laying not far from her....[1100]

His initial petition having been denied, Barker reiterated his claims of innocence and emphasized the grave hardship his incarceration worked on his children in yet another petition dated four months later:

> Your petitioner humbly begs leave to remind your Excellency that he was induced by absolute distress to petition your Excellency some time in April last for a mitigation of sentence giving your Excellency as near as possable the general facts connected with the unfortunate circumstance of his wife's Death[,] also his being the father of three helpless children the eldest not exceeding twelve

[1100] N.A.C., AP, vol. 21 p.9072 ("John Barker prays for remission of part of the time") (29 April 1837).

> years of age who are all dependent on their poor disconsolate parent for support, who in spite of all his endeavours has been since his confinement indebted in a great degree to his neighbours for the subsistance of his poor children who now joyn their unhappy parent in the prayer of this petition begging your Excellency will condicend to give the aforementioned circumstances in his petition your...humain and gratious consideration....[1101]

This application was also unsuccessful and Barker served the entirety of his sentence.[1102] Given the unusual brevity of his term of incarceration, it would have been highly unlikely that the Governor General would ever had considered shortening his sentence.

By the 1840s, it is clear that convicted wife murderers were more likely to be granted the Royal mercy than in previous decades. The files (which, it should be noted, appear far from complete) contain little indication as to the rationale underlying the decisions, but certain conclusions are suggested. Goodwin's failure to provide his wife with the necessities of life was clearly inimical to Victorian conceptions of a husband's obligation towards his wife, and was such an extreme example of malfeasance and callousness that it was virtually inevitable he would receive the harshest possible sentence. Dewey, for his part, would have been unlikely to benefit from being tried a decade later, as the sheer ferocity and premeditation of his assault admitted of no ambiguity. Alexis Boyer's case, however, is not so clear. Using no weapons other than his fists and feet, and having assaulted his wife while drunk, it is very possible that he would have been transported rather than executed, as was the fate of James Dunsheath.

[1101] N.A.C., AP, vol. 21 p.9063 ("John Barker, sentenced 12 months manslaughter of wife, prays to be released from gaol") (21 August 1837).

[1102] N.A.C., MG(GC) (John Barker committed for twelve months from March 1837).

Cameron's sentence of transportation for fourteen years reflected that his wife's drunken conduct was deemed a sufficient provocation to mitigate his sentence. As for Barker, it is difficult to conceive that his twelve-month sentence would have been less harsh in subsequent years, although it is also possible that his case is slightly aberrant. But what of Norman, sentenced to three years' imprisonment with one month per year in solitary confinement? The uncertainty as to whether he had used a knife, and the allegations that his wife's demise might have been due at least in part to chronic alcoholism, would have likely left sufficient doubt as to his culpability in the minds of this, or a subsequent, jury. Any theories on why clemency was or was not granted in individual cases must be undertaken tentatively, particularly as more systemic considerations (such as the perceived need to provide exemplary punishment, or alternately to show mercy) undoubtedly could play a determinant role. While the period during which a defendant was tried before Montreal courts surely exerted some influence on the outcome, all those cases reflect Victorian norms common to the period.

II.

Writing about female murderers in 1980 in her work *Women Who Kill*, Ann Jones concluded:

> This year more women will kill their children than will be appointed to the judicial bench. More women will kill their husbands than will sit in the halls of Congress. A baby girl born tomorrow stands a chance of growing up to stick a kitchen knife into an assaultive husband, but her chances of becoming President are too slim to be statistically significant. The story of women who kill is the story of women.[1103]

[1103] Ann Jones, *Women Who Kill* (New York: Fawcett Columbine, 1980) at *xvi*.

It may be an overstatement to say that studying murderous wives in nineteenth century Montreal is to study wives in general. Nevertheless, they remain an important component of any discussion related to family violence.

In discussing cases of murderesses, three distinctions should be made. The first is the observation that women were less likely to engage in murderous violence than were men.[1104] Victorian wives, like their modern-day counterparts, were more likely to be victims of spousal murder than perpetrators.[1105] Notwithstanding that fact, some commentators have noted that women were charged with homicide at proportionately greater levels.[1106] Each such instance was deeply unsettling to public sensibilities, as the wife who armed herself against her husband flew in the face of convention and the cult of Victorian womanhood. Secondly, women traditionally tended to commit private rather than public acts of mayhem; that is, they were much more likely to direct their rage against intimates rather than members of the public.[1107]

[1104] Compare Mary S. Hartman, *Victorian Murderesses* (New York: Schocken Books, 1977) 5 (nineteenth century England and France).

[1105] In 1995, thirty-eight percent of domestic homicides involved women killed by spouses and partners, in contrast to fifteen percent for men. See *Women in Canada: A Statistical Report* (Ottawa: Statistics Canada, 1995) at 103. Women committed fourteen percent of all homicides, and fourteen percent of all attempted murders. See *ibid.* at 101.

[1106] See *e.g. ibid.* at 100; Hartman, s*upra* note 117 at 5.

[1107] See generally F. Murray Greenwood & Beverley Boissery, *Uncertain Justice: Canadian Women and Capital Punishment 1754-1953* (Toronto: Osgoode Society, 2001) 18; J.M. Beattie, *Attitudes Toward Crime and Punishment in Upper Canada, 1830-1850, A Documentary Study* (Working papers of the Centre of Criminology: Toronto, 1977) 201 (arguing that wives tended to kill people in their domestic circle or neighbours) [hereinafter *Attitudes*]. Some scholars have argued that while women were most often charged with killing intimates,

There was also an important legal distinction in cases of husband murder--for most of the period under examination that act constituted the crime of "petit treason" or "petty treason." Treason first became a statutory offense in England during the reign of Edward III.[1108] That offense, traditionally viewed as one of the most villainous imaginable, took two forms: high treason, an offence against the Crown; and petit treason, an offence against one's lord.[1109] Those were inherently crimes against the social order, disrupting balances of power and treacherously striking at the heart of hierarchal relationships based on fealty and responsibility. The offence of petit treason was limited to quite specific circumstances, such as when a "servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience."[1110]

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children were their most likely victims rather than husbands or lovers. See e.g. Mary Beth Wasserlein Emmerichs, "Trials of Women for Homicide in Nineteenth-Century England," 5 *Women & Crim. Just*. 99 (1993) at 99-100. Emmerichs further noted that men were most often charged with killing strangers, wives or acquaintances. See *ibid.* at 100. For examples of women executed for killing their husbands, see Patrick Wilson, *Murderess: A Story of the Women Executed in Britain Since 1843* (London: Michael Joseph Limited, 1971) 21-25 & 136-142.

[1108] *Statute of Treasons*, 25 Edward III, st. 5, c.2 (1351) (U.K.). Cleveland has noted that it was probably an offense under the common law before that time. See Arthur Rackham Cleveland, *Women Under the English Law, From the Landing of the Saxons to the Present Time* (London: Hurst & Blackett, 1896) 95.

[1109] William S. Holdsworth, in *A History of English Law* (London: Methuen & Co, Ltd, 1923) vol. 2 at 449-450, observed that the offence of petit treason helped preserve "an interesting survival of the old Anglo-Saxon idea that treason is a form of treachery." See also S. A. M. Gavigan, "Petit Treason in Eighteenth Century England: Women's Inequality Before the Law" *Can. J. Women & Law* 335 (1989/1990) at 345; Cleveland, *supra* note 121 at 95.

[1110] *Statute of Treasons*, *supra* note 121.

In keeping with the view of treason as involving treachery, petit treason required a showing of the related element of premeditation or malice aforethought. If the murder was the result of sudden passion or self-defense, the appropriate charge was manslaughter.[1111] It has been suggested that the law of petit treason was a "logical extension" of the law related to married women, as under the common law a wife was deemed to become a *fem[m]e covert* and lost her legal identity to her husband.[1112] As such, their identities became merged into one, represented by the husband. However, wives were not the only persons subject to that charge, or even the only family members, as the crime also encompassed sons who murdered their fathers.[1113]

Petit treason, like all forms of treason, was more ignominiously punished than other offenses. The traditional punishment for treason was drawing-and-quartering.[1114] For women convicted of any form of treason, the applicable punishment was traditionally death by burning at the stake, and that remained the law in England from 1351 until 1790.[1115] Common law jurists, among them the eminent William Blackstone,

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[1111] See Gavigan, *supra* note 122 at 348-349.

[1112] See *e.g. ibid.* at 341.

[1113] See *e.g.*, A.N.Q.M., KB(F), *Domina Regina v. Romuald Brault dit Pominville* (19 January 1842) (son charged with petit treason for killing his father found not guilty by reason of insanity). See also *The Montreal Gazette* (3 April 1842).

[1114] That ghastly form of execution involved drawing, hanging, disemboweling, and beheading, followed by quartering of the body. See generally F. Pollock and F. W. Maitland, *The History of English Law*, vol. 2 (Cambridge: Cambridge University Press, 1978, 2nd edition) 500-501; Cleveland, *supra* note 121 at 95. This mode of execution gradually gave way to hanging.

[1115] "An Act for discontinuing the Judgment which has been required by Law to be given against Women convicted of certain Crimes and substituting another Judgment in lieu," 30

postulated that this difference in penalty was prompted by societal conceptions of female modesty that militated against the spectacle of women's' bodies being publicly mutilated.[1116] While the benefit of strangulation was not an official part of the sentence, many women so condemned were mercifully garrotted before the fire was lit. Others, however, were all too alive as they were slowly consumed by the flames.[1117]

The mode of punishment imposed on conviction may have been one factor that fueled the traditional prosecutorial strategy of charging an accused with petit treason as well as murder, as prosecutors and juries may have been loath to subject an accused to the possibility of such a barbarous death.[1118] A late-eighteenth-century English case established that murder was an included offence in a charge of petit treason.[1119] Reciting both charges in an indictment may also have provided evidentiary advantages for prosecutors, as the crime of petit treason required the testimony of two witnesses to the

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George III c.48 (1790) (U.K.). See also Gavigan, *supra* note 122 at 365-366; Ruth Campbell, "Sentence of Death by Burning for Women," 5 *J.Legal Hist*. 44. (1984) at 44; Maeve Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London: Weidenfeld & Nicolson, 1992) 50; Anna Clark, "Humanity or Justice? Wifebeating and the Law in the Eighteenth and Nineteenth Centuries" in Carol Smart, ed., *Regulating Womanhood, Historical Essays on Marriage, Motherhood and Sexuality* (London & New York: Routledge, 1992) 188; Cleveland, *ibid.* at 176.

[1116] See generally Gavigan, *ibid.* at 336; Campbell, *ibid.* at 54; Cleveland, *ibid.* at 95. That explanation is unconvincing, as the form of execution was gruesome and, unless the condemned was strangled first, also excruciating. By the mid-1700s the punishment for men convicted of treason was hanging, a mode of punishment preferable to burning at the stake.

[1117] See generally Campbell, *ibid.* at 44-45; Doggett, *supra* note 128 at 50; Gavigan, *ibid.* at 359-361; Jones, *supra* note 116 at 19.

[1118] Compare Gavigan, *ibid.* at 350.

[1119] *King v. Henrietta Radbourne*, (1787) 168 Eng. Rep. 330; 1 Leach 456 (cited in Gagivan, *ibid*.).

crime, an evidentiary hurdle not required to make out a charge of murder.[1120] It was not until 1828 that the English Parliament reduced the crime of petty treason to that of murder.[1121] After that time, the procedure and concomitant penalty were identical to those of an ordinary murder prosecution. Petit treason was repealed in Upper Canada in 1833;[1122] similar changes in the law took effect in Lower Canada in 1842, superseding a provincial statute passed in 1801.[1123]

As reflected in *Figure II*, the number of cases of husband murder that came to the attention of Montreal authorities was small, amounting to three cases, comporting with the general experience of other jurisdictions.[1124] Women accounted for three out of

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[1120] See generally Gavigan, *ibid*. For an example of a Montreal case where that heightened evidentiary burden resulted in acquittal on a charge of petit treason, see *infra* at 60-65 (case of Elizabeth Ravarie dit Francoeur).

[1121] "Offenses Against the Person Act," 9 George IV c. 31 s.2 (1828) (U.K.). See also Doggett, *supra* note 128 at 49; Gavigan, *ibid.* at 367; Campbell, *supra* note 128 at 44. Campbell noted that usage of the term "petty treason"declined in popularity in England during the eighteenth century. See *ibid.* at 51.

[1122] See Greenwood & Boissery, *supra* note 120 at 98.

[1123] "An Act for Consolidating and Amending the Statutes in this Province Relative to Offences Against the Person," 4 & 5 Vict. c. 27 s. II (1841) (L.C.):

> And be it enacted, That every offence, which before the commencement of this Act would have amounted to Petit Treason, shall be deemed to be Murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried and punished as principals and accessories in Murder.
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> That Act superseded 41 Geo. III c. 9 (1801) (L.C.) (legislation governing punishment for murder and treason).

[1124] Compare Lepp, *supra* note 6 at 443 & 526 (twenty-six alleged husband murderers in Ontario between 1830 and 1920).

fourteen (21.4%) of identified cases alleging spousal homicide in Montreal during the years 1825 to 1850. As shown, only one such case resulted in conviction, and that on the lesser charge of manslaughter. Statistics for various English jurisdictions during the late-eighteenth to early-nineteenth century record a handful of convictions for that crime,[1125] while Gavigan found fourteen cases of women convicted of petit treason in England from 1551 to 1763.[1126] In cases of family homicide, the crime of husband murder was historically a poor runner-up to the crime of uxoricide.[1127]

Prosecutions of Wives for Murder, 1825-1850

Year	Offense	Disposition	Sentence
1827	Petit treason	Acquitted	--
1840	Petit treason	Convicted of manslaughter	2 years' imprisonment
1847	Murder	Acquitted	--

Figure II.

[1125] Compare Gavigan, *supra* note 122 at 368 and notes 189-191.

[1126] See *ibid.* at 373 (Appendix I). Compare *La Revue* (18 January 1845) (citing 159 wives accused of murdering or attempting to murder their husbands in France during 1844 to 1845).

[1127] Compare Pleck, *supra* note 31 at 222 (noting that family murder usually involved male aggression against females, and that the most common variety was uxoricide, followed by husband murder); Wilson, *supra* note 120 at 23. Wiener has indicated that the ratio of wife killings to husband killings was four to one in early-nineteenth century England, rising to twelve to one in the 1890s. See Wiener, *supra* note 108 at 489 note 77. See also *Crime in the United States, supra* note 33 at 25 (stating that in 2001, 142 husbands were murdered by spouses, versus 600 wives).

The first of the Montreal defendants charged with petty treason was Mary Hunter, accused of having strangled her husband in 1827. That case is anomalous insofar as the surviving primary sources are concerned, as only one perfunctory account was found. Given the high degree of public interest that typically attended such cases, that absence of coverage likely reflects gaps in surviving newspapers. Fortuitously, the file related to that case in the archives of the Court of King's Bench is voluminous and includes correspondence that provides important context relating to the circumstances leading up to Hunter's trial. In addition, Chief Justice Reid's bench book for that period has survived, which contains his transcriptions of the testimony of witnesses and thereby affords an additional source of information on the trial itself.

The case is also a fascinating one, insofar as the Crown had significant difficulty in prosecuting Hunter due to a lack of cooperation by several of the people involved. The case file contains a variety of correspondence indicating that some parties to the investigation were working at cross-purposes. One such letter was from Dr. William Woods, a surgeon who was also the Justice of the Peace who committed her. His letter not only evidences sympathy for Hunter, but also his belief that she was insane at the time of the crime. Indeed, Dr. Woods' reluctance to prosecute her was to cause considerable controversy. As he wrote to Samuel Gale, a prominent Montreal jurist, on 4 January 1827:

> I have been under the most painful necessity of committing an unfortunate woman Mrs. Mary Hunter for the murder of her husband William Hunter, from what I have observed (and I saw her about sixteen or twenty hours after the accident) it was done in fits of insanity and she still seems to labour under mental derangement. It is about a year since they were married and seem to have lived

> happily, her conduct heretofore from what I can learn from the witnesses who are acquainted with her has been the most mild and exemplary. [B]y the first post Capt. Hagan will send in the verdict of the jury and coroner on the inquest and the depositions of witnesses. I shall likewise send in the names of the witnesses to be summoned on the part of the crown. I have the honour to be sir your most ob't servant, William Woods J.P.[1128]

Captain Hagan, the local Captain of the Militia, played a central role in this prosecution. It is clear, however, that he felt stymied by the uncooperative attitude of various protagonists in that case, most notable Dr. Woods. In a letter Hagan wrote four days later, he asserted that subsequent to the jury of inquest's verdict, Dr. Woods was in a room with Mary Hunter. When Hagan asked Dr. Woods what she had said, he told Hagan that she had admitted strangling her husband with a rope that she later burnt. Hagan closed his letter by emphasizing that he would be willing to testify to the above, and that the bearer of the letter (whose identity was not specified) could also provide "more satisfaction" if examined. In a postscript, Captain Hagan added, "[h]ave the goodness to examine the bearer closely." Apparently, Samuel Gale did so but was unimpressed, as an annotation was added in a different hand that read, "the bearer knew nothing except from hearsay. S.G."[1129]

Dr. Woods, however, was not the only obstacle faced by those such as Captain Hagan who wanted to see justice done. One of the Hunter's neighbours deposed that it

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[1128] A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (4 January 1827) (letter from William Woods, J.P.). A postscript added, "I think that the jailor should be informed that she is suspected of being insane that he may keep his eye on her and act accordingly."

[1129] A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (8 January 1827) (letter from Hugh Hagan).

was his "candid opinion" that William Hunter (no relation) and his wife Margaret Kerney, two of the Crown's principal witnesses, were intending to flee the province in order to avoid testifying.[1130] Allegations such as these would not have made Captain Hagan more assured about the prospects of successful prosecution, and his frustration was clearly to grow with time. In a letter dated 20 February 1827, he wrote:

> From the period that this murder happened I assure you I have had a great deal of trouble & lost time in order to sift the bottom of it & to secure witnesses for the trial; add to which that as I could not place confidence in Doctor Woods to bring this unfortunate woman to justice from his kind treatment to her; I consulted Colonel Byrne in whom I could place every confidence & whom I have always found ready to interfere as a magistrate where the public good is concerned. I have this day bound myself and Mr. Beaudreau Notary Public to attend, but on Colonel Byrne, and mine going to bind over the rest, we were interrupted by Doctor Woods who came where we were and told some of the witnesses that he was to get summonses from you and that unless they were summoned they would not be paid, by this means some of them said they would not go till summoned, and to close this scene took wholly on himself to have them summoned for the 25th instant[,] therefore, Colonel Byrnes thought well to decline proceeding to take steps till he hears from you; if summonses be sent here we shall do our duty but I thought best to write in order to inform you that we dread Doctor Woods will...by any means keep back the trial, from his extraordinary kindness to that woman subsequent to the murder, a narrative of which you shall hear on my going to town.[1131]

The "extraordinary kindness" shown by Dr. Woods obviously was seen by Captain Hagan as hampering the administration of justice. Captain Hagan, however, was trying to fulfill the responsibilities of his position, while Dr. Woods arguably had greater latitude to follow the dictates of his conscience.

[1130] See A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (5 February 1827) (deposition of Owen Barry).

[1131] A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (20 February 1827) (letter from Captain Hugh Hagan).

In fulfilling his role as a minor judicial official, Captain Hagan diligently went about securing sworn statements from witnesses that could be used in building up a dossier against Mary Hunter. Several of those depositions added little except the deponents' belief, based on their observation of the marks around William's neck, that he likely had been strangled.[1132] A deposition by a juror present at the inquest stated that, during the examination of the body, Dr. Woods opened the victim's neck and "shewed for the satisfaction of the said jury, a large vein...filled up with dark coloured stagnated blood." The medical evidence, as well as the marks around his neck, led him to believe that William had been murdered.[1133]

Several of the affidavits contain more information helpful in recreating the circumstances surrounding William's death. One such affidavit contains more second-hand information on what had transpired that fateful night. John Ashton had likewise served as one of the coroner's jurors, but was also a close neighbour of the Hunters. He claimed that the morning following William's death, Mary told him that the previous evening the two of them had returned home from the Gordons'. As William seemed ill, she gave him a glass of liquor, which made his condition worsen.

[1132] See A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (28 February 1827) (deposition of Mary Ashton) (stating that she "knows nothing of the manner in which he came by his death" but that a "dark mark on his neck" caused her to suppose he could have been strangled.); *Dominus Rex v. Mary Hunter* (28 February 1827) (deposition of George Gardner) (appearance of the deceased's neck led him to believe he was "choaked by a rope placed round his neck."); *Dominus Rex v. Mary Hunter* (1 March 1827) (deposition of Patrick Murray).

[1133] A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (1 March 1827) (deposition of William Breakey).

Shortly afterwards Mary returned to the Gordons' home to seek assistance, and when she arrived back at her own home after twenty minutes' absence she claimed that her husband was dead. As one of the jurors at the inquest, Ashton had examined the body and found an imprint on William's neck that appeared to have been caused by a small cord or rope. He further alleged that Dr. Woods told him that Mary had confessed in the presence of another witness, stating that she had choked William with a rope and then disposed of it in the stove. In light of those circumstances, Ashton deposed that he "verily believes that the said William Hunter, deceased, was so strangled and murdered by the said Mary Hunter."[1134]

Another neighbour, John Gordon, had spent a pleasant evening with the Hunters at his home shortly before William's death. The four had shared tea and reduced rum, and all appeared to be in good spirits. Gordon further maintained that he had "never observed any thing but cordiality and good will" between the couple for all the time they lived as neighbours. Approximately two hours later, Mary returned to the house and said "I wish you to come over, Billy is very bad." He went to her house and saw William lying dead by the stove, fully clothed except for shoes and stockings and wearing a nightcap. His lips were swollen, bloody and covered with froth, and his tongue protruded between his teeth. At Mary's behest he fetched John O'Keefe, another neighbour, and the two then shaved and laid out William's body.

[1134] A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (28 February 1827) (deposition of John Ashton).

Gordon, for his part, seemed reluctant to ascribe responsibility for William's death to his wife, but was explicit that he believed William had been strangled; apparently he found Mary's statement that he always tied his nightcap tight around his neck to be unconvincing.[1135] O'Keefe's deposition comported with that of Gordon, but added that Mary told him that "she did not hang him and that deponent should cover [the body] over by putting on a dickey or half shirt to conceal it, adding that he had no particular friends in this country that wanted to see him." O'Keefe, in keeping with all of the other depositions, expressed his belief that Mary was a murderess.[1136]

Another memorandum found in the files but without date or identifying information, purported to be a list of actions taken by Dr. Woods that demonstrated his disinclination to help prosecute Mary Hunter:

> 1st. That Doctor William Woods....on the 31st of December last the night of the inquest held on the deceased William Hunter did wish to get the concurrence of Captain H. Hagan to let Mary Hunter escape.
> 2nd. That he the said William Woods Esquire did speak to George Gardner to tell Mary Hunter to go away if she were guilty of the murder.
> 3rd. That the said Woods took Mary Hunter in his sleigh the next morning to his own house and kept her there two nights, after agreeing to put her into the custody of the Bailiff and carried along with him a quantity of tea and sugar belonging to the deceased as a remuneration for his services;
> 4th. That Woods slept the subsequent Saturday night in the house where the murder had been committed and from that carried along with him a quantity of butter[,] witness John O'Keefe.

[1135] See A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (28 February 1827) (deposition of John Gordon) (stating that the "deponent thinks that the deceased was strangled which however is only his opinion from the appearance of the corpse.").

[1136] See A.N.Q.M., KB(F), *Dominus Rex v. Mary Hunter* (26 February 1827) (deposition of John O'Keeffe).

5th. That Woods took charge of some cash which he said Mary Hunter had given him being all her wealth in money[,] witness H. Hagan.
6th. That the aforenamed Woods, did someday this week, tell some of the witnesses for the Crown that they were to attend at the Court house at five o'clock in the evening after which he brought them to Mr. O'Sullivan to be examined by him. Witness George Gardner, etc.
7th. That Woods did interfere with some of the witnesses while Colonel Byrne was about binding them over to attend the Court of King's Bench, and told them that they would be fools, were they to bind themselves over, asserting they would be paid for their attendance at Court. Witness John O'Keefe etc.
8th. That Woods, some days after preventing Colonel Byrne from doing his duty in binding over some of the witnesses, through Woods investigation, bound them over himself in order to save his reputation as it were.
9th. That Woods asserts that were this to be done over again he would do the same.[1137]

Despite personal misgivings, Dr. Woods nevertheless committed Mary to prison on 5 January 1827.[1138] A true bill was found against her, and she was remanded to stand trial.[1139] On 9 March 1827 her trial commenced before the Court of King's Bench. The proceedings "naturally excited the most intense interest, and the Court House was crowded to excess."[1140] There is no information on whether she was represented by legal counsel, although it is clear that witnesses were cross-examined. The testimony appears to have mirrored that found in the depositions. One witness was not represented in the depositions in the files of this case, although she testified at trial. The crux of her evidence as recorded by Justice Reid was her opinion that William had tied

[1137] A.N.Q.M., KB(F), *Rex v. Woods* (undated & unsigned memorandum).

[1138] See A.N.Q.M., MP(GR) no. 705 (Mary Hunter, charged with "feloniously killing her husband," committed 5 January 1827).

[1139] See *The Montreal Gazette* (1 March 1827).

[1140] *The Canadian Courant* (14 March 1827).

his nightcap on too tightly. On cross-examination Mrs. Gordon noted that the Hunters had "passed the evening at their house very happily and that there had been no indication of any discord." John O'Keefe reiterated that he was strongly of the opinion that William had been strangled, as the injuries did not look self-inflicted nor did the body appear to be in a position that would suggest an accident.[1141]

The principal witness at trial was Dr. Woods. He testified that a good deal of violence had to be applied to cause such injuries, and that after the inquest he had shared his suspicion with Mary that she had murdered her husband. Her reply was that "God was powerful and she had prayed to him to assist her," a response that could be interpreted in different ways. When asked if she used a rope to strangle him she allegedly replied in the affirmative, adding that she had incinerated the evidence. She seemed indifferent, he claimed, to the events that had taken place. Dr. Woods testified that he told her that she "had forfeited her life to the law of her country and that she would have been better off if she had effected her escape and that she might do so still," at least confirming Captain Hagan's assertions that the physician had attempted to avoid prosecution. She refused, however, saying she had done nothing wrong and would not leave her house. As the doctor took her home, she broke into hysterical laughter and said it was not possible that William was dead, promoting Dr. Woods to question whether she was pretending to be insane. At the funeral she steadfastly maintained that her husband still lived, and appeared to be "in a stupor and insensible

[1141] N.A.C., Bar of Montreal, James Reid Papers, Criminal Cases [hereinafter Reid], *King v. Mary Hunter* (9 March 1827).

to the cold." While these actions might be feigned "to cover a crime," as far as Dr. Woods could tell that was not the case.[1142]

The parts of Dr. Woods' testimony recorded by Justice Reid would seem to have been damning insofar as Mary's guilt was concerned, but left open the possibility that she was mentally unbalanced. *The Canadian Courant*, however, had a different analysis of his testimony, stating that the "testimony of the Physician who examined the body of the deceased was in favor of the pannel at the Bar as it evidenced that he was not strangled." Given the truncated forms of Justice Reid's notes and that of *The Courant's* coverage, it is not possible to unqualifiedly establish what Dr. Wood actually said at trial. However, Reid's notes, coupled with Wood's deposition and correspondence, belie the *Courant*'s assertion that he testified William Hunter had not been strangled. The paper went on to observe that the jury "had a most serious task to perform," as notwithstanding the doctor's testimony there were a "number of concurring circumstances in the examination of the witnesses," as well as the evidence of her own confession.[1143] Obviously Mary's mental competency was at issue, although Reid's notes merely indicate that witnesses attested that she was a "childish woman, but knew right from wrong" and that the defence demonstrated that she was of "weak intellect."[1144]

[1142] *Ibid.*

[1143] *The Canadian Courant* (14 March 1827).

[1144] N.A.C., Reid, *King v. Mary Hunter* (9 March 1827).

The jury grappled with the evidence for the nearly unheard-of period of twenty hours.[1145] It then returned but the jurors were not agreed on a verdict, and requested that Wood's testimony be read to them again, which was done. They deliberated for a further ten minutes before returning a verdict of acquittal.[1146] While Reid's notes give no indication of his thoughts on this outcome, the sole newspaper article states that the Court "expressed their cordial approbation" with the verdict.[1147] Mary Hunter was discharged from jail that same day, and thus ended her strange saga.[1148] Whatever the import of Dr. Woods' testimony, he proved to be the bane of some of the law's servants, most notably Captain Hagan. Woods' saga, unlike that of Mary, did not end there. Scarcely a year later, his obstructionism was again to be an issue, as proceedings were brought against him for "refusing to appear and give evidence at a Court of Criminal pleas" in a case against an unrelated defendant for assault with intent to murder.[1149]

In 1847 another high-profile trial of a wife charged with killing her husband resulted in acquittal. The prosecution of Deborah Cowan featured several unusual

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[1145] See *The Canadian Courant* (14 March 1827) (figure italicized in original for emphasis).

[1146] *King v. Mary Hunter*, *supra* note 157; KB(R) (February 1827 minutes book), *King v. Mary Hunter* (10 March 1827) (verdict).

[1147] *The Canadian Courant* (14 March 1827).

[1148] See A.N.Q.M., MG no.705, *Dominus Rex v. Mary Hunter* (5 January 1827) (on conviction of having "feloniously killing her husband...March 10 discharged by [Court of King's Bench]".)

[1149] A.N.Q.M., KB(F), *Dominus Rex v. Dr. William Woods, J.P.* (3 March 1828) (case brought by Thomas Cliff against George Patrick on charge of assault with intent to murder).

facets, including considerable pre-trial publicity that suggested she was wrongly accused. When news spread about Robert Cochrane's death, initial accounts characterized it as an obvious murder. *The Pilot*, under the heading "A Man Killed by his Wife," stated that Cochrane had "an altercation with his wife when she stabbed him in the abdomen with a chisel. The unfortunate man died in less than fifteen minutes."[1150] As the article also matter-of-factly stated, his wife Deborah Cowan and two of her children were all lodged in jail.[1151] That latter fact was incidental to the case, yet it is shocking to modern sensibilities. Prison conditions would have been inimical to children's health, by virtue of inadequate ventilation and heating, poor diet, and exposure to disease. One can only imagine the emotional pressure on Cowan as she awaited her trial, particularly so if she were blameless in her husband's death.

As subsequent newspaper accounts would reveal, whether she was culpable in her husband's death was by no means clear. *The Montreal Gazette*, citing *The [Morning] Courier*, published the following account about the "recent catastrophe in Griffintown":

> We have reason to believe that our contemporary is accurately informed, that the unfortunate man lived on the best terms with his wife, and that his death was purely accidental. If this be so, a poor woman, not merely deprived of her husband, but labouring under the imputation of his murder, must be the object of everyone's sympathy. We do not think that, in such a case, the Jury did right in returning a verdict of "Wilful Murder". Unless there was some evidence more distinct than mere suspicion, they might have adjourned their verdict, or given a

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[1150] *The Pilot* (9 March 1847).

[1151] See *The Pilot* (9 March 1847); *The Montreal Transcript* (9 March 1847). For references to children being lodged in jail with relatives in nineteenth century Ontario, see James Edmund Jones, *Pioneer Crimes and Punishments in Toronto and the Home District* (Toronto: George N. Morang, 1924) 72-74.

> special one, merely alleging the fact of death under circumstances unknown, which would not have prevented the committal of the guilty party, if there were one when evidence was obtained.[1152]

The Gazette, for its part, noted that other newspapers had characterized the event as a "horrible murder" but opined that the death was accidental, underscoring that the couple had lived together happily. *The Pilot,* in a brief addendum several days later (which, confusingly, cited to *The Montreal Gazette*, which in turn cited to *The Courier*) stated that they "also heard a good character of the women charged with murder. If innocent her case is a very hard one."[1153] Those articles suggested that the jury of inquest's finding of murder might have been hasty.

It was against that backdrop that on 10 August a true bill was found against Cowan for murder, and her trial was scheduled for the following day.[1154] The Crown Prosecutor opened the trial by noting that the circumstances of the case were "singular" insofar as it involved death inflicted by a chisel. As he described the facts, the couple were at tea, talking normally with the children playing around them, when suddenly Cochrane rushed from the room exclaiming "I'm done for! The woman has stabbed me!" Even more striking, he told the jury, was that Deborah did not rush to assist him, but a minute later came out and said "Oh Robert, sure I haven't harmed you?"--as if she had inflicted the mortal wound, but without intending to kill. As Driscoll observed:

[1152] *The Montreal Gazette* (12 March 1847) (citing *The Courier*). One such heading prefaced an article in *The Montreal Transcript* of 9 March 1847.

[1153] *The Pilot* (16 March 1847).

[1154] See *The Montreal Gazette* (11 August 1847).

> It is a case requiring investigation, and for the Jury to exercise their utmost powers of discrimination. It cannot, for a moment, be supposed that it was done in playfulness, or by accident, for, though a chisel is a sharp instrument, the depth of the wound forbids the supposition.

But Driscoll also noted that there were other circumstances incompatible with guilt, and he emphasized the jury's need to weigh those factors carefully.[1155]

One of the alleged facts that confused the matter was a difference of opinion as to what Cochrane had exclaimed as he rushed out the room before collapsing. One neighbour remembered that he blurted out, "I am ruined for ever!" and "the woman has struck me with a knife." He also alleged Cowan came out after a minute or so, saying "What will I do? What will I do?" and merely stood looking at him as he lay dying on the floor.[1156] Another neighbour at the scene recalled Cochrane's last words differently—"I'm a gone man! I'm stabbed." As she put wool in his wounds to try to stem the bleeding, Cowan came out and said "Robert, Robert, what's happened?" and "Robert, sure I've done nothing to you?" The neighbour believed Cowan had nothing to do with the homicide, and added that she had never heard them quarrel.[1157] Several other witnesses corroborated that evidence.

[1155] See *The Montreal Gazette* (14 August 1847); *The Montreal Transcript* (17 August 1847).

[1156] *Ibid.* (testimony of James Connel).

[1157] *Ibid.* (testimony of Isabella Barry). *The Montreal Transcript* of 17 August 1847 noted that the evidence of those witnesses indicated that Cochrane had made "some exclamations on the precise meaning of which there was a difference of opinion among the persons present."

A former Army physician named James Crawford conducted the post mortem on the body, and found a wound that had severed three arteries on the front of Cochrane's thigh near his groin. He showed the jury a section of the arteries that he had excised and placed in a jar of alcohol, indicating the damage caused by the chisel. Given that the wound was horizontal and ran upwards, he testified that Cochrane was probably holding the chisel in his own hands. When cross-examined, he stated it was more likely caused by a self-imposed accidental blow than by a blow from another. The Court itself sought clarification on a number of points, eliciting commentary to the effect that it would take considerable force to cause the wound, but that Cochrane's falling down on the chisel or striking the table while holding it in his hand might have been responsible.

After the Crown rested, the defense counsel presented its case-in-chief. While they may have called more than one witness, the only witness mentioned in the records was Reverend Adamson, the couple's priest, who spoke in glowing terms about Cowan's character. She had always acted with the "utmost propriety of conduct," he noted, and was a "kind and affectionate wife and mother."[1158] After the defense concluded its case, the jury quickly found Cowan not guilty and she was discharged.[1159] The ambiguity of the injury sustained by Cochrane, as well as the circumstances surrounding the incident and lack of any discernable motive, probably led the jury to

[1158] *The Montreal Gazette*, *ibid*; *The Montreal Transcript*, *ibid.*

[1159] A.N.Q.M., KB(R) (August 1846-August 1849) p.185, *Queen v. Deborah Cowan* (verdict).

conclude that the injury, if not self-inflicted, was more likely due to misadventure than to malice.

The third such prosecution for husband murder was that of Elizabeth Ravarie *dit* Francoeur, who in 1840 was arrested for having killed her husband, Augustin Legault Desloriers, a farmer in the Seignory of Soulanges. What makes that case intriguing is the fact that Ravarie's husband survived for several weeks after the assault. The highly unusual consequence of his survival was that Desloriers had occasion to swear a complaint against his wife before a local Justice of the Peace, thus supplying historians with his account of the events leading up to the attack and facilitating her conviction.

According to Desloriers' affidavit, on 20 April 1839 at approximately eight o'clock in the evening, the couple was alone at home after she had returned from a neighbour's party.[1160] While he was lying on the floor, she admonished him to say his prayers. As he knelt on the floor to pray, he noticed that she appeared agitated. While he continued to pray, she "suddenly struck him a blow to the right side of his head with an axe, inflicting a large wound." As he attempted to raise himself from the floor he found Francoeur poised to strike him again, but was able to wrest the axe away from her. Desloriers called for help from two men nearby, and those bystanders helped him inside and applied pressure to stop the bleeding, during which time his wife made no attempt

[1160] There was some confusion over the date of the attack, the husband alleging it was 20 April, the prosecutor at trial claiming it was 21 April, while Francoeur's deposition gave a date of 22 April, the latter of which coincides with the information provided in Dr. Lay's affidavit.

to approach him. In light of those facts, he dryly deposed, he no longer felt safe living with her and requested "justice in the premises."[1161]

While the wound was not perceived to be immediately life-threatening, Dr. Lay, Desloriers' attending physician, was uncertain about the prognosis for his recovery. As his rather equivocal note reads:

> I have attended Augustin Legault said Deslauriers for a wound in the head being a slight fracture of the scull since…about thirty hours after the wound was inflicted[;] [I] examined the wound at the time and found it very dangerous, the man was then in his perfect senses[;] I have attended him since, and hope his life is not in danger but at [present] I cannot pronounced him out of danger [as] should any inflammation arise his life would be in great danger I therefore cannot say he is not in danger.[1162]

The same day that Dr. Lay attested to Desloriers' condition, his wife underwent a lengthy voluntary examination before John Simpson, Esquire. Several weeks had elapsed before Francoeur was arrested, much to the chagrin of at least one newspaper.[1163] Francoeur's affidavit, sworn to after her arrest, was a disjointed four-page account uninterrupted by punctuation and containing few internal markers of time. As a consequence, it is not always clear when the events alluded to occured. Despite those handicaps, Francoeur's affidavit, like that of her husband, provides an

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[1161] A.N.Q.M., KB(F), *Domina Regina v. Elizabeth Ravarie dite Francoeur* (8 May 1839) (affidavit of Augustin dit Desloriers).

[1162] A.N.Q.M., KB(F), *ibid.* (11 May 1839) (deposition of J.J. Lay, M.D.).

[1163] *The Montreal Transcript* (4 May 1839) ("Yet strange to say, although this occurred on the night of April 21st, the woman was residing with her father and mother at Coteau du Lac on May 2d, without any steps having been taken to bring her to justice.").

invaluable portal into her case. Francoeur's account leaves little doubt that she viewed their marriage as severely troubled:

> [E]ver since I have been married to my husband we have been quarrelling. I never had time to leave the house[;] he called me a whore….I was not even allowed to sing[,] he said I sang bad songs and wanted to throw me out….I was not allowed to read my prayer books which he said were bad books and threatened to toss into the fire....[1164]

Desloriers' husband was deeply disapproving of Ravarie's lifestyle, accusing her of being sexually dissipated. While her affidavit does not provide a clear time-line, she apparently averred that on the day of the incident her husband arrived home, opened the front door and made the sign of the cross, saying that "the devil is in the house." He then "grabbed me and threw me out of the door three times, the last time he threw me to the ground in the mud."1165

While Ravarie did allege that her husband threw his shoes at her that evening, and had slapped her before throwing her out of the house, her account barely addressed the substance of the charges against her. Indeed, her version of events is not clear, although she denied having attacked her husband with the axe in question:

> [W]hen I went to leave the house, the axe was next to him[;] I cannot say for certain that he grabbed the axe to do something to me or whether the axe fell into his hands when opening the door, after he refused to let me into the house[,] saying that I was going to kill him[,] I stayed around the house for roughly three hours, barefoot, someone had to go get my shoes as I was freezing, after that I went to

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[1164] A.N.Q.M., KB(F), *Domina Regina v. Elizsabeth Ravarie dit Francoeur* (11 May 1839) (voluntary examination of Elizabeth Ravarie dite Francoeur) (author's translation).

[1165] *Ibid.* (author's translation).

> embrace him and he said stay away I don't want you to embrace me and that he would be just as happy with my absence as with my presence....[1166]

Although Desloriers appeared to be on the path to recovery, he succumbed to his injuries on 27 May, five weeks after the assault. Francoeur was then charged with petit treason and a grand jury found a true bill against her during the fall term of the Court of Queen's Bench.[1167] Her trial was fixed for the March 1840 term, but was postponed due to the absence of a material witness.[1168] Following the postponement, Ravarie--who had been imprisoned for nearly a year by that time--petitioned the Court for a writ of *habeas corpus* securing her release on bail:

> [Y]our petitioner is detained in the common goal of the said district charged with the crime of Petit Treason. That she is altogether guiltless of the offence imputed to her. That she has been confined upon the said charge since the spring of the year 1839 and has in consequence suffered materially in her health. That she was desirous of being brought to trial in the cause of the last criminal session of the said court--that a day was in fact fixed for the trial, but on the application of her Majesty's Attorney General founded upon the alleged absence of a supposed witness [the trial was postponed]....That your petitioner conceiving that under all the circumstances that she ought to be enlarged upon bail humbly prays that your Honors will be pleased to award to her a writ of Habeas Corpus addressed to the Keeper of the Common Gaol.[1169]

[1166] *Ibid.*

[1167] See *L'Ami du Peuple* (2 October 1839).

[1168] A.N.Q.M., KB(R) p.48, *Queen v. Elizabeth Ravarie* (2 March 1840). See also *The Montreal Gazette* (3 March 1840).

[1169] A.N.Q.M.; KB(F), *Petition of Elizabeth otherwise called Betsy Ravarie dit Francoeur* (21 March 1840).

The Attorney General, according to a notation found on that petition, consented to her being bailed in the amount of £500 with two sureties of £250 each.[1170]

Ravarie was finally tried before the Court of Oyer and Terminer and General Gaol Delivery, an irregular court of criminal jurisdiction, on 16 November 1840--more than one and a half years after the assault had taken place. She was represented by no less than two defense attorneys, while Henry Driscoll, Esquire, Q.C., appeared for the Crown. The witnesses' testimony disclosed that the two spouses had a volatile relationship during their short marriage. Ravarie was known to have had a propensity for violence, and frequently socialized with a group of young men and women of whom her husband disapproved. In fact, the evening of the incident, her husband had apparently forbidden Ravarie from visiting a neighbour's house where a group of her friends were gathered. While Desloriers was recuperating from his injuries, a neighbour was called on to act as mediator to "effect a reconciliation between them," an undertaking that unsurprisingly proved futile. That neighbour was the only prosecution witness, as he had heard Ravarie confessing the details of the assault during a conversation between the two spouses.[1171]

After the Crown rested its case, based largely on the testimony of that neighbour, Ravarie's counsel rose to present her defense. In what must have been a moment of high

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[1170] *Ibid.*

[1171] Identical accounts were found in *The Montreal Gazette* (19 November 1840) and *The Montreal Herald* (19 November 1840). The Court of Oyer and Terminer and General Gaol Delivery was convened in 1840 in order to deal with the backlog of criminal cases due to the suspension of civilian courts during the Rebellions of 1837-1838.

drama, Justice Pyke interrupted the proceedings. Under the existing law, the Justice explained, the crime of petit treason--like all forms of treason--required the inculpatory testimony of at least two witnesses in the absence of a defendant's confession. In the instant trial, he continued, the Crown had offered the testimony of only one witness, and therefore could not prove the offense as charged. As such, Pyke stated, the defense would be presenting their evidence at their peril.[1172]

The defense followed the Justice's admonition and rested its case, probably assuming that the disadvantages of not defending against the allegations were outweighed by the possibility of unwittingly strengthening the Crown's case. In sending the case to the jury, Justice Pyke reiterated that they could not find Ravarie guilty of petit treason under the facts as presented, but only of murder or manslaughter. The jury withdrew for a short time before returning a verdict of guilt on the lesser charge of manslaughter. The Court sentenced Ravarie to two years in the House of Correction. Unfortunately, no account of the Justice's sentencing remarks has survived.[1173]

[1172] See *The Gazette* and *The Herald*, *ibid.* To clarify that fine point of law, the newspapers went so far as to include the following legal footnote:

> Blackstone's Commentaries, vol. 4 page 324--In all cases of High Treason, Petit Treason, and Mis-prision of Treason, by Statute 1 Edward VI. C. 12 and 3 and 6 Edward VI c. 11, two lawful witnesses are required to convict a prisoner; unless he shall willingly by and without violence confess the same.

[1173] A.N.Q.M., KB(R) p.53-54, *Queen v. Elizabeth Ravarie* (17 November 1840) (verdict); p.117, *ibid.* (5 December 1840) (sentence). See also *The Montreal Gazette* (8 December 1840); *The Montreal Transcript* (8 December 1840); *L'Aurore* (22 November 1840) (conviction); *L'Aurore* (7 December 1840) (sentence).

If the popular press is any indication, there was considerable surprise and perhaps even dismay at the jury's verdict.[1174] Perhaps members of the public felt that the murder charge was fully supported. Regardless, the Francoeur case was an instance where the complexities of the common law were an important factor shaping the ultimate outcome, although the fine points of the law were complimented by mercy on the judge and jury's part.[1175] If not for the technical requirements of a finding of petit treason, or if she had been charged with murder rather than petit treason, one would assume Francoeur would likely have been convicted under the facts as presented. After all, a husband who survived long enough to swear out a complaint, as well as a witness who had attempted to broker a reconciliation between the two estranged spouses, was powerful evidence for the prosecution. Why Francoeur had not been indicted for murder, in place of or in conjunction with the charge of petit treason, is not known.

The number of cases found for this period is too small to allow for meaningful extrapolation, but commentators have shown that wives usually were victimized for years before exploding into murderous violence, while husbands typically escalated familiar patterns of violence.[1176] Historically, a woman like Ravarie who was found to have killed a family member (that is, other than a newborn) was viewed with revulsion,

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[1174] See *The Montreal Transcript* (8 December 1840); *L'Aurore* (22 November 1840); *L'Aurore* (7 December 1840), all of which italicized the verdict of "manslaughter" in their accounts.

[1175] For discussion of mercy recommendations in cases of husband murder, see Greenwood & Boissery, *supra* note 120 at 95-97.

[1176] See Pleck, *supra* note 316 at 222-223. See also Wilson, *supra* note 120 at 25 (citing great provocation in cases of husband murder).

not only for breaching the social compact, but also for having defiled the ideal of femininity. Ironically, however, the incomprehension with which such acts were typically viewed may have benefited some Victorian defendants, as judges and jurors alike were often loath to believe that wives could commit such heinous acts – suck unladylike conduct was inexplicable in the absence of some other explanation, such as extreme provocation, mental illness, or the like. Many juries were reluctant to convict women of homicides, regardless of whether the victims were infants or spouses.[1177] While the sample size of Montreal spousal murders committed by wives is small, it indicates that gender-based leniency or 'chivalric justice' also played a part in Montreal during this period, in much the same way as it surfaced in infanticide prosecutions. This notion of 'chivalric justice' appears to have been deeply-entrenched in many jurisdictions during this century, but should not be confused with evidence of egalitarianism. Not only did it perpetuate stereotypes, but it also served to obscure systemic inequality rather than ameliorate it.[1178]

[1177] With respect to husband murders, Carolyn Strange noted:

> Residents of Toronto in the late nineteenth and early twentieth centuries might quite legitimately have assumed that women could get away with murder. In two highly publicized trials in that period, female defendants were acquitted on charges of murder in spite of the fact that both had confessed to the deed.

Carolyn Strange, "Wounded Womanhood and Dead Men: Chivalry and the Trials of Claire Ford and Carrie Davis" in France Iacovetta & Mariana Valverde, eds., *Gender Conflicts: New Essays in Women's History* (Toronto: University of Toronto, 1992) 149 at 149 [hereinafter *Womanhood*]. See also Wilson, *ibid.* at 24-25; Golz, *supra* note 6 at 168; Lepp, *supra* note 6 at 531.

[1178] Strange, *Womanhood*, *ibid.* at 151.

It was also commonly assumed that when women did commit murder, they tended to use untraditional methods such as poisoning, either to compensate for their lack of physical strength or in keeping with their supposed inclination to crimes of stealth.[1179] Mary Hartman in her study of Victorian murderesses indicated that twenty-nine out of the forty-three had used poison in the commission of their crimes.[1180] Contemporary Canadian accounts of husband poisonings were not unknown.[1181] However, assumptions about the frequent use of poisons as murder weapons are not borne out by Montreal cases of this period, notwithstanding the difficulties associated with a sample so limited in size, or the surreptitious nature of the crime.[1182] That is not to say that evidence of cases alleging poisoning was not found. For this period,

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[1179] For the use of poisons by husband murderers, see generally Frank W. Anderson, *A Dance With Death, Canadian Women on the Gallows 1754-1954* (Saskatoon & Calgary: Fifth House Publishers, 1996) 1-32; Hartman, *supra* note 117 at 10-50; Judith Knelman, *Twisting in the Wind, The Murderess and the English Press* (Toronto: University of Toronto Press, 1998) 71-84, 93-100, and 113-120; Golz, *supra* note 6 at 167; Lepp, *supra* note 6 at 533-536.

[1180] See Hartman, *ibid.* at 6. Wilson pointed to seven out of sixty-eight women in his study as being poisoners. See Wilson, *supra* note 120 at 24. See also Lepp, *ibid.* at 530 (ten out of 101 husbands used poison, and ten out of twenty-six wives did so in 1830 to 1920 Ontario).

[1181] See *The Montreal Gazette* (19 May 1847):

> At Bytown, on the 3rd instant, Margaret Dooley was indicted for attempting the murder of her husband by poison, which it was insinuated was supplied to her by a paramour named Hart. She had been sixteen years married to her husband, and he and their daughter and the husband's sister were the principal witnesses against her. The Jury did not consider the evidence of any poison having been administered conclusive, and acquitted her.

[1182] Compare Beattie, *Criminality*, *supra* note 120 at 83:

> Nor is it apparent that when women in the eighteenth century resorted to murder...they turned naturally to devious methods, as has been suggested of their modern counterparts, or they favoured weapons, like poison, that compensated for their lack of physical strength.

references to two such cases were located, both of which alleged that the wives had accomplices, although neither case appeared to go to trial. The first of those cases, in 1839, involved allegations that the suspect had "aided to assasinate and murder her husband....", while her accomplice was charged with having "attempted to poison and assasinate and of having administered poison" to the victim in question.[1183] The second such instance, in 1848, reveals that a wife was charged with being an "accomplice in administering poison to her husband" but was bailed ten days later; no record was found of her putative accomplice.[1184]

As is typical in respect to nineteenth century criminal law, no clear correlation between charges of spousal murder and the rate of such incidents can be provided. Even cases of spousal homicide were lost to the court system between the time of the act's commission and the indictment stage. Problems of definition, including ambiguity surrounding the distinction between 'murder' and 'manslaughter,' could only have served to hamper prosecution of such cases.[1185] Where family violence was concerned,

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[1183] A.N.Q.M., MG (9 February 1839) (Josephine Destimauville committed for having "aided to assasinate and murder her husband Achille Taché;"; bailed 26 February by the Court of King's Bench); (9 February 1839) (Aurelie Prevost dit Tremblay committed for having "attempted to poison and assasinate and of having administered poison to Achille Taché;" released 22 March and sent to Quebec by order of Attorney General).

[1184] A.N.Q.M., MG (17 July 1848) (Lucye Beaulne committed for being an "accomplice in administering poison to her husband;" bailed 24 July).

[1185] But see Pleck, *supra* note 31 at 217:

> Family murder is the one form of family violence about which relatively reliable historical statistics exist. Of all the types of family violence, it is always recognized as a serious crime. If thought of as 'successful assault,' the rate of domestic murder provides a rough indicator of the overall level of severe family violence.

however, the biggest obstacle to community intervention was (and remains) respect for familial privacy. Spousal homicide might not have been tacitly accepted in the same manner as was domestic violence at large, but that was mainly a matter of degree. The murdering husband was depicted as a monster, while the murdering wife was viewed as an aberration. Those characterizations prevented society from recognizing that such violence was often a linear progression, serving to differentiate between the 'normal' closeted family where the existence of domestic discord was a badly kept secret, and the 'anomalous' high-profile murders that led to the very public process of prosecution.

Given the ubiquity of violence in many Victorian households, it should be no surprise that justice was reserved for a minority of household killings, namely those in which it was apparent that the culpable spouse had intended to cause mortality. In the context of the family there may have been "no killing like that which destroys the heart,' but is equally clear that courts viewed the heart as providing a plethora of extenuating circumstances, provocations, and justifications. For some early-to-mid-Victorian spouses, a marriage license amounted to a license to kill.[1186]

[1186] 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.).