A Time Before 'the Cruelty':

Child Abuse and the Montreal Courts, 1825-1850

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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.[1]

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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[1] 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.[2]

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."[3]

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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[2] 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.)

[3] *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.[4]

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.[5]

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."[6] 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."[7]

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

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

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

[7] *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."[8] 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."[9] 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.[10] 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.[11] 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."[12] 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

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

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

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

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

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

guilty.[13] 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.[14] Granger was remanded to the local prison, and shortly thereafter was sentenced to three months' incarceration.[15]

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

[13] 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).

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

[15] 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.[16] In England, the courts of Henry I intervened when a child was killed by anyone other than a parent,[17] 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.[18] 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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[16] 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*].

[17] 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.

[18] *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.[19] 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."[20]

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.[21]

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

[20] *Ibid.*

[21] *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. [22] 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.[23]

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."[24] 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.[25]

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

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

[23] See generally *ibid*.

[24] *Ibid.* at 43.

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

in the Navy soon followed.[26] 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.[27] 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.[28]

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. [29] 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.[30]

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

[27] See generally *ibid.*

[28] 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*].

[29] 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.

[30] 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.[31] As the century progressed, a "romantic sensibility towards childhood" became predominant.[32] 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.[33]

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.[34]

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

[32] *Ibid.* at 74.

[33] *Ibid.* at 78.

[34] 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.[35] 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.[36] 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.[37] 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.[38]

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."[39]

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

[36] See generally *ibid.*

[37] See *ibid.* at 141.

[38] 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*].

[39] 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."[40] 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.[41] 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.[42]

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

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

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

[42] 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.[43]

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.[44] 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....[45]

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

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

[45] *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.[46] As has been famously stated about England in the nineteenth century, they "diminished cruelty to animals, criminals, lunatics and children (in that order)."[47]

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.[48] 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.[49]

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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[46] 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).

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

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

[49] 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.[50] 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.[51] 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.[52] 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.[53] 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.[54]

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[50] 14 & 15 Vict. c.11 (1851) (U.K.). See Rose, *Childhood*, *supra* note 38 at 42 and 234. See also Behlmer, *ibid.* at 305.

[51] 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.

[52] 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).

[53] 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.

[54] 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.[55] The stepmother was found guilty of felonious assault and sentenced to one year at hard labour, and Mary Ellen was sent to an orphanage.[56]

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.[57] 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'!

[55] 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.

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

[57] *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.[58] 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.[59]

By the early 1880s, the child protection movement had taken root in England, with social reformers and philanthropists crusading against child abuse.[60] Using the NYSPCC and similar organizations as a model, the Liverpool Society for the Prevention of Cruelty to Children was founded in 1883,[61] followed the next year by the London Society for the Prevention of Cruelty to Children.[62] 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.[63] 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

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

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

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

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

[62] 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*].

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

guardianship of relatives or institutions should their parents be convicted of cruelty.[64] 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."[65]

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

[65] 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.66 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

66 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.[67] 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."[68]

Children were also found neglected or abused in public areas. More often than not, their parents were found to be habitual inebriates.[69] 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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[67] For discussion of infant abandonment, see Pilarczyk, *Justice*, *supra* note 16 at 30-36.

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

[69] 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.[70]

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.[71] 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.[72] 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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[70] *L'Ami du Peuple* (30 November 1839).

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

[72] *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.[73]

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

[73] *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.[74]

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.[75] In Montreal, women figured prominently in judicial annals, making up a slim majority of defendants in child abuse prosecutions.[76] 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.[77]

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

[75] 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.

[76] 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.

[77] 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.[78] 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."[79] 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.[80]

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

[78] 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.").

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

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

the youngest victims of assault.[81] 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.[82] 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.[83] 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.[84] Similarly, in the summer of 1848 a father was brought before the Police Magistrate after

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

[82] *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.

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

[84] 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.[85] 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.[86]

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.[87] For example, in April of 1839 a mother was arrested, admonished, and discharged for assault and battery against her child.[88] Later that same year, a husband and wife were charged with "illtreating their child" and the same disposition ensued.[89] 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

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

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

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

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

[89] 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.[90] 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.[91] 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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[90] N.A.C., Records of the Montreal Police, General Register of Prisoners, vol. 33 [hereinafter MP(GR)] (John Paylor arrested 19 January 1841).

[91] 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.[92] 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....

[92] 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….[93]

She was accordingly arrested and lodged in the local prison.[94]

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."[95]

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

[94] 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...."

[95] 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.[96] Driscoll required Kennedy to provide a surety for her future good conduct in the amount of twenty pounds.[97]

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

[96] 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).

[97] 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.[98] 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 time was specified.

[98] 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.*

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.[99] 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

[99] 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.[100]

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.	Surety & Disc.	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

[100] 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.[101] 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.[102] 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.[103] 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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[101] See Pilarczyk, *Justice*, *supra* note 16 at 285-288.

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

[103] 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."[104] 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

[104] *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.[105]

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.[106]

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

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

[106] *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....[107]

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.[108]

Those affidavits apparently held sway with the authorities as, according to several newspapers, Birch was admitted to bail based on them.[109] One paper asserted

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

[108] *Ibid.*

[109] 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."[110] 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.[111]

> 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.

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

[111] *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.[112] 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.[113] 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

[112] 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.

[113] 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."[114] The further point has been made that domestic homicides were rarely treated as murders.[115]

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.[116] 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."[117] 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.[118] On the other hand, it has also been suggested

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[114] *Ibid*. at 142.

[115] 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.

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

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

[118] 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.[119] 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.[120] 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."[121] 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."[122] 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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[119] 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....

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

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

[122] *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."[123] 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.[124]

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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[123] *Ibid.*

[124] *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...."[125] 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

[125] 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.[126] 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.[127] 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.[128]

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

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

[128] 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.[129] 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.[130] Insofar as

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

[130] 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...."[131] 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

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

her life."[132] He was unable to provide surety for good conduct, and was therefore committed to jail.[133]

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.[134]

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

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

[134] 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."[135] 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.[136]

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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[135] 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).

[136] 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.[137] 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.[138] Her stepmother was charged with assault with intent to murder, and was bound to appear at the next session of the Quarter Sessions.[139] The grand jury, however, declined to indict, returning a finding of *ignoramus*.[140] 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."[141]

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

[138] 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).

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

[140] 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.

[141] 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."[142]

Not surprisingly, most allegations of child abuse at the hands of relatives were brought to the attention of authorities by third parties, typically neighbours.[143] 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.[144] 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."[145]

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

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

[145] 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.[146] 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.[147]

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....[148]

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

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

[148] 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."[149] Her mother was committed to prison for lack of bail,[150] 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.[151]

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.[152] 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.[153] Unfortunately, no institutions for neglected children existed during this period.

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

[150] *Ibid.*

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

[152] 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.

[153] *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.[154] 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."[155] Imprisoned on 29 May 1830, Burk spent just over seven weeks in prison until her release.[156] 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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[154] 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.

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

[156] 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."[157] Sutherland eventually removed his daughter and other children to the country to sequester them from their mother's violent impulses.[158]

During the period, many cases of spousal battery chronicled alcohol abuse on the part of one or both of the parties involved.[159] Another common feature was the existence of mental aberration or insanity.[160] 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."[161]

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

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

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

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

[161] 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.[162] One can, of course, draw a distinction between incest and rape insofar as the latter inherently implies a non-consensual act of violence.[163] However, the issue of consent is irrelevant. Even when incest falls short of rape, it is a crime perpetrated

[162] 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.").

[163] 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.[164]

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.[165] Historians grappling with issues related to family structure in the Victorian period therefore have tended to avoid delving into such issues.[166] 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.[167] Reanimating the history of

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[164] 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.").

[165] 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.

[166] 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.

[167] 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.[168]

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.[169]

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."[170] 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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[168] 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.

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

[170] *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.…"[171] Statutory prohibitions against incest were first promulgated during the reign of Henry VIII.[172] 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.[173]

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.[174] 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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[171] *Leviticus* 18: 6-18 (King James Version).

[172] 28 Henry VIII c.27 (1536) (U.K.).

[173] 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.

[174] 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.[175]

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.[176] 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.[177] 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.[178] That was in stark contrast to Scotland,

[175] 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).

[176] 20 & 21 Vict. c. 85 (1857) (U.K.).

[177] 24 & 25 Vict. c. 100 s. 42 (1861) (U.K.). See Rose, *Childhood*, *supra* note 38 at 234.

[178] 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.[179] 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.[180]

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.[181] 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.[182] 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.[183] In most of those jurisdictions, only the man was subject to

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

[180] 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.*

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

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

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

punishment for incest.[184] If force was used to commit the act, the defendant could alternatively be charged with rape.[185]

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."[186] The rulings, and language, of those courts left no doubt that incestuous behaviour was seen as destructive to the integrity of the family.[187] 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."[188] 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

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

[185] See generally *ibid.*

[186] *Ibid.* at 48.

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

[188] *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.[189]

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.[190] 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.[191]

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

[190] 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.

[191] 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."[192] 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;[193] 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.[194]

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.[195] 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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[192] 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).

[193] 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.

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

[195] 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.[196] 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."[197] 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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[196] 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.

[197] 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.[198] 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.[199] 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.[200]

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

[199] Compare *ibid.*

[200] 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.[201]

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.[202] In the latter case, while the family relationship was mentioned,

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[201] *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.

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

the discussion centered on the accusation of infanticide.[203] 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.[204] 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

[203] 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.

[204] 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."[205] 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.[206]

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

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

[206] 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.[207] 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."[208] 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.[209]

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.[210] Unfortunately, no other records of that case have survived. In the other

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

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

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

[210] 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.....[211]

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.[212] 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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[211] A.N.Q.M., KB(F), *Domina Regina v. Jean Baptiste Schnider* (15 October 1842) (affidavit of Mérante Schnider).

[212] 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.[213]

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.[214] 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

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

[214] 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.[215] 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.[216] A charge of abduction often masked consensual sexual relations, but that was not always the case.[217] 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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[215] 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.

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

[217] 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.[218] 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."[219]

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

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

[219] *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.[220] The jury withdrew for only a few minutes before rendering a verdict of guilty.[221]

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,

[220] *Ibid.*

[221] 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.[222]

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.[223]

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[222] *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).

[223] *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."[224] 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.[225]

Those cases, as limited as they are, allow for circumspect extrapolation as to their common features. In all instances, the malefactors were male.[226] Conversely, all alleged victims were female.[227] 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.[228] Among non-incest prosecutions that involved incestuous conduct, one malefactor was a stepfather and the other was an uncle.

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

[225] *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.*

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

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

[228] 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.[229] 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.[230] 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.[231] Disturbingly, it may well have been the case that families in which incest occurred were not otherwise unusual.[232] 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).

[229] 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).

[230] 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.").

[231] 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.").

[232] 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.[233] As children became more valued by society, there was more vociferous condemnation of such acts.[234]

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[233] 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.

[234] 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.[235]

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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[235] 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.

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