‘So Foul A Deed’: Infanticide in Montreal, 1825–1850

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

The preceding narrative is, in many ways, illustrative of the complex and contradictory phenomenon of infanticide in the district of Montreal during the first half of the nineteenth century. Although notices regarding the finding of infant bodies were frequent, discovery of twin infant bodies was not. This account was also unconventional in its tone: lacking the usual sterile narration typical of newspaper coverage of that topic, it cried out for the apprehension of the “perpetrator of so foul a deed.” Although the call for justice might have appeared strong, infanticide prosecutions were fairly rare and convictions rarer still. The prevalent view might have been to characterize

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

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the responsible party as an "unfeeling mother," but the reality surrounding infanticide was altogether more complicated, yet fully as tragic.

This article argues that infanticide, and the legal and social responses thereto, exhibited a compromise between conflicting sentiments, realities, and paradigms. As a result, the actions of defendants, prosecutors, judges and jurors, and the public at large were characterized by competing motives and countervailing sympathies. The infant victims were nominally the focus of the law, but in reality these acts were viewed as crimes against social conventions. The issue of infanticide during this period therefore presents a fascinating study in this heavily gendered area of nineteenth-century criminal law, reflecting stark differences between law and custom. This article will provide a brief discussion of the historiography and underlying methodology, followed by the political and historical context for the Montreal experience, before moving on to the issue of infant abandonment, coroner's inquests, and the legal mechanics of infanticide prosecutions.

Historiography and Methodology

A fundamental conceptual difficulty encountered in studying infanticide is one of definition. The contemporary terms used, besides infanticide, included "willful child murder" and other variations.[2] Infancy also had various legal definitions, as historically the common law did not distinguish between murder of adults and that of newborns or adolescents.[3]

Another obstacle, common to studies of criminality in general, is the difficulty in reconstructing social pathologies that tended to be deeply

2. See Cathy Sherill Monholland, "Infanticide in Victorian England, 1856–1878: Thirty Legal Cases" (MA thesis, Rice University, 1989) 83.

3. For other definitions of infanticide, see, for example, William Boys, *A Practical Treatise on the Office and Duties of Coroners in Ontario, With an Appendix of Forms*, 2nd ed. (Toronto: Hart & Rawlinson, 1878) 48 (defining it as the "murder of the child after birth."). See also Marie-Aimée Cliche, "L'infanticide dans la région de Québec (1660–1969)," *Revue d'histoire de l'Amérique française* 44 (1990): 34, n.8; William L. Langer, "Infanticide: A Historical Survey," *History of Childhood Quarterly* 1 (1974): 353; Kennth H. Wheeler, "Infanticide in Nineteenth-Century Ohio," *Journal of Social History* 31 (1997): 415–416, n.1; and Mary Ellen Wright, "Unnatural Mothers: Infanticide in Halifax, 1850–1875," *Nova Scotia Historical Review* (1987): 13. Other scholarshave used different ages. Compare Peter C. Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England, 1558–1803* (New York University Press: New York, 1981) xiii (using the Tudor definition of an infant as a child aged 8 years or younger); Judith Knelman, *Twisting in the Wind, The Murderess and the English Press* (University of Toronto Press: Toronto, 1998), 146 n.2 (using definition of infant as under 1 year of age). Infanticide is defined herein as the unlawful killing of a child under 1 year of age through acts of commission or omission.

closeted. Studies of infanticide are hobbled as many of the issues related to this crime—such as sexuality and single motherhood—were not deemed appropriate fodder for public discussion, whereas the gruesome nature of the crime further stifled commentary. The cases of infanticide discussed herein were not captured in trial reports or records of appeals, but were compiled from a comprehensive review of judicial records and contemporary newspaper accounts. For the period 1825–1850, the Montreal Archives holds voluminous records that offer the patient scholar a rich body of documents related to the administration of criminal justice. Examining these documents by year and then cross-indexing allowed for tracing the procedural history of trials, and for the reclamation of alleged crimes that were never prosecuted. Coroners' reports provide information on the frequency with which infant bodies were discovered, as well as the investigative and prosecutorial response. All extant criminal records for this period were examined, identifying thirty-one cases within the District of Montreal.[4]

Despite their incontrovertible value, there are myriad methodological issues raised by these sources. The collections suffer from obvious lacunae, including gaps where documents have not survived the ravages of time. Verbatim testimony was not generally recorded, despite appearances to the contrary within the depositions made before justices of the peace; therefore, locating the true authorial voice in these documents is daunting especially given linguistic, class, and power differentials.[5] The judicial apparatus was also class and gender driven, which has important repercussions on the reporting and prosecution of a crime that was overwhelmingly committed by women. There is also an element of self-interest in these

4. The records include Montreal Coroner's Inquests; Records of the Montreal Gaol; Registers of the Court of King's/Queen's Bench; and Files of the Court of King's/Queen's Bench (all found within the Bibliothèque et Archives nationales du Québec, Centre d'archives de Montréal, hereinafter BAnQ-M); and Applications for Pardons and Montreal Gaol Calendars (found at the National Archives of Canada in Ottawa, hereinafter N.A.C.).

5. As these documents were written by justices of the peace there is no way to measure their accuracy. Considerable filtering also took place between the act of a justice hearing a party's testimony and transcribing it, especially when language issues were implicated. Compare Christine L. Krueger, "Literary Defenses and Medical Prosecutions: Representing Infanticide in Nineteenth-Century Britain," *Victorian Studies* 40 (1997): 275; see also Donald Fyson, *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764–1837* (Toronto: University of Toronto Press, 2006) 250–53 (discussing formulaic language in depositions). Affidavits are filtered through the middle-class, male jurists who recorded them. Documents such as arrest warrants, sureties, and the like preserve much less of the authorial voice, and even more is lost when documents are translated.

depositions, and their perspectives are inherently unidimensional.[6] These sources only reflect cases of which some legal cognizance was taken, and therefore cannot encompass the "dark figure" of unrecorded crimes.[7] The sources preclude the historian from knowing what actually transpired in many instances; and even when known, one must concede that judicial sources are rarely reliable and objective illuminators of personal relationships.

During this period. numerous Montreal newspapers were in publication, representing a variety of political, socioeconomic, and ethnic agendas, but largely embodying white, middle-class, male sensibilities; as such they likewise pose significant interpretative issues and are rather more impressionistic than reliably statistical.[8] Nonetheless, they provide valuable context and allow for reclamation of detail lost within the judicial archives, including witness testimony, discussions of court procedures, and the events surrounding noteworthy trials, and are valuable repositories of "unconscious testimony" about social mores.[9] The extent to which they do so is prescribed, as mentioned earlier, but utilizing them in conjunction with judicial sources allows for a richer and more nuanced narrative. These

6. Compare Thomas E. Buckley, *The Great Catastrophe of My Life: Divorce in the Old Dominion* (Chapel Hill & London: University of North Carolina Press, 2002) 5 (noting bias in nineteenth-century divorce petitions).

7. Given that many prosecutions were privately driven, figures tend to reflect crimes for which someone chose to prosecute. See David Philips, *Crime and Authority in Victorian England* (London: Croom Helm Limited, 1977) 49; see also Peter King, *Crime, Justice and Discretion in England 1740–1820* (Oxford: Oxford University Press, 2000) 11. For discussion of the dynamics of such a system, see, generally, J.M. Beattie, *Crime and the Courts in England 1660–1800* (Princeton: Princeton University Press, 1986) 199–235; Fyson, *Magistrates* (showing that in Quebec most assault cases were privately driven but that this was not true for a wide range of other offenses).

8. Compare Buckley, *The Great Catastrophe of My Life*, 5 (noting their unreliability); Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991) 75 (noting editorial biases and omissions, while acknowledging their historical usefulness); R.W. Robert Malcolmson, "Infanticide in the Eighteenth Century," in *Crime in England, 1550–1800*, ed. J.S. Cockburn (Princeton: Princeton University Press, 1977) 190 (infanticide cases in newspapers); and Ruth Olson, "Rape—An 'Un-Victorian' Aspect of Life in Upper Canada," *Ontario Historical Society* 68 (1976): 75 (noting gaps in coverage of criminal trials). All extant copies of sixteen period newspapers were examined for this study.

9. For an example of analysis of unconscious testimony in an American murder trial, see Ian C. Pilarczyk, "'The Terrible Haystack Murder': The Moral Paradox of Hypocrisy, Prudery, Piety in Antebellum America," *American Journal of Legal History* 41 (1997): 25. Despite newspapers' usefulness, a comment by Jarvis is apropos: "The work involved in researching these sources is wistfully belied by the brief appearance they present on a printed page." Eric Jarvis, "Mid-Victorian Toronto: Panic, Policy and Public Response, 1857-1873" (PhD thesis, University of Western Ontario, 1978) 388.

documents help illuminate the actor's lives, backgrounds, and interaction with relatives, neighbors, and the criminal justice system, illustrating how "the public and private arenas were inextricably linked and gendered."[10]

The secondary literature on this topic is considerable and, as will be shown, the Montreal experience largely mirrored that of other jurisdictions. It is hoped that this study will be nonetheless a valuable addition to the historiography for several reasons: it analyzes all available primary source documents for the period rather than providing a general survey or focusing on reported cases;[11] it adds to our knowledge of the everyday administration of criminal justice in Montreal, which has traditionally been under-examined;[12] and it examines these issues during the first half of the nineteenth century, which has been largely forsaken for the latter half, perhaps as the rise later in the century of institutions, social care agencies, formalized police forces, court reporters, and the like facilitated reclamation of these issues to an extent not as easily done for the earlier half of the century. Moreover, Montreal offers an attractive setting given its demographic flux during the period and the general interplay and tension between its French roots and its English-based criminal law.

Studies have repeatedly demonstrated that nineteenth-century courts exhibited leniency and compassion toward women accused of infanticide, with concomitantly low prosecution and conviction rates in the United States, the United Kingdom, and elsewhere in Europe.[13] Canadian scholars

10. A point made explicit in a study of female vagrancy by Mary Anne Poutanen, "The Homeless, the Whore, the Drunkard, and the Disorderly: Contours of Female Vagrancy in the Montreal Courts, 1810–1842," in *Gendered Pasts: Historical Essays in Femininity and Masculinity in Canada*, ed. Kathryn McPherson, Cecilia Morgan, and Nancy M. Forestell (University of Toronto Press: Toronto, 2003) 31.

11. Focusing on reported cases has obvious limitations; see, for example, Constance Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada," *University of Toronto Law Journal* 34 (1984): 456, n.26 (indicating only three infanticide cases were reported in nineteenth-century Canada). Other studies use selective surveying; see, for example, Mary Beth Wasserlein Emmerichs, "Trials of Women for Homicide in Nineteenth-Century England," *Women and Criminal Justice* 5 (1993): 99–109 (surveys in 5- year increments of infanticide prosecutions in England).

12. In recent years there has been a growing literature on everyday criminal justice in Quebec. For an excellent recent example see Fyson, *Magistrates*.

13. For the United States, see, for example, Paul A. Gilje, "Infant Abandonment in Early Nineteenth-Century New York City: Three Cases," *Signs* 8 (1983) 580–90; and Kenneth Wheeler, "Infanticide in Nineteenth-Century Ohio," *Journal of Social History* 31 (1997): 407–18. For the United Kingdom, see, for example, George K. Behlmer, "Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England," *Journal of History of Medicine* 34 (1979): 403–27; Emmerichs, "Trials of Women," 99; John R.

have echoed those same themes. Marie-Aimée Cliche's work surveys the period 1660–1969, showing that although over time the frequency of infanticide prosecutions decreased, the underlying causes did not appreciably change. She was able to contrast this with a change from "merciless severity" to the leniency exhibited from the early nineteenth century onwards.[14] Constance Backhouse has chronicled like results in other parts of Canada;[15] Judith Osborne has offered a historical and contemporary study that reflects similar patterns;[16] and Mary Ellen Wright's study of Halifax shows the same.[17] All these works have enriched our understanding of this complex crime.

For, indeed infanticide *was* complex: the crime itself and the legal regime that governed it raise a multiplicity of issues, even more acutely reflected in the Montreal experience. Gender, sexuality, age, class, ethnicity, religion, justice, legal structure, power dynamics, geography, history; all these, and others besides, are implicated and reflected in infanticide with gender constructions being especially central. These cases followed a familiar pattern of men siring children and evading responsibility, whereas

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Gillis, "Servants, Sexual Relations and the Risks of Illegitimacy in London, 1801–1900," in *Sex and Class in Women's History*, ed. J.L. Newton et al. Judith L. Newton, Mary P. Ryan, and Judith R. Walkowitz (London: Routledge & Kegan Paul, 1983); Ann R. Higginbotham, "'Sin of the Age': Infanticide and Illegitimacy in Victorian London," *Victorian Studies* 32 (1989): 319–37; Krueger, "Literary Defenses"; Malcolmson, "Infanticide"; Lionel Rose, *Massacre of the Innocents: Infanticide in Great Britain, 1800–1939* (London: Routledge & Kegan Paul, 1986); and R. Sauer, "Infanticide and Abortion in Nineteenth-Century Britain," *Population Studies* 32 (1978): 80–93. For continental Europe, see for example, James M. Donovan, "Infanticide and the Juries in France, 1825–1913," *Journal of Family History* 16 (1991): 157–76. Some works offer a comparative perspective on time and place; see, for example, Hoffer & Hull, *Murdering Mothers*; and Langer, "Infanticide."

14. Cliche, "L'infanticide."

15. Backhouse, "Desperate Women"; Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991) 112.

16. Judith A. Osborne, "The Crime of Infanticide: Throwing Out the Baby With the Bathwater," *Canadian Journal of Family Law* 6 (1987): 47–59. For a survey work of early- twentieth-century Canada, see Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: University of British Columbia Press, 2005). For an account of the early eighteenth century, see André Lachance, "Women and Crime in the Early Eighteenth Century, 1712–1759," in *Lawful Authority: Readings in the History of Criminal Justice in Canada*, ed. R.C. Macleod (Toronto: Copp Clark Pitman, 1988) 9–21. For coroner's inquests and infanticide in Ontario during this period, see Janet L. McShane Galley, "'I Did It to Hide My Shame': Community Responses to Suspicious Infant Deaths in Middlesex County, Ontario, 1850–1900" (MA thesis, University of Western Ontario, 1998). For a recent survey of child murder in Quebec, not specifically focusing on infanticide, see Marie-Aimée Cliché, *Fous, ivres ou méchants? Les parents meurtriers au Québec, 1775–1965* (Montreal: Boréal, 2011).

17. Wright, "Unnatural Mothers."

other men (generally from the "respectable" or middle class) dictated the legal response from within a male-dominated societal and institutional structure that established and enforced the hegemony of social standards to which women were expected to adhere. Fundamentally, the legal response to infanticide was designed rather more to regulate motherhood and sexuality than to protect a child's right to life.[18]

Montreal: Demographics and History

The phenomenon of infanticide was also impacted by the social, political, and other realities shaping Montreal. The Province of Quebec, and Montreal itself, went through a wide array of demographic and other changes in the eighteenth and nineteenth centuries.[19] At the time of the English conquest, Quebec was a colony of 70,000 inhabitants, the preponderance of whom were Roman Catholics of French ethnicity.[20] This number grew rapidly, with Quebec reaching a population of approximately 500,000 in 1831, and doubling again within 20 years.[21] In addition to population changes, there were alterations to the province's ethnic composition. Although Quebec in 1760 was largely populated by French-speaking Roman Catholics, by 1851 the province was a quarter non-French-speaking, including many English-speaking Protestants.[22] Demographic change was even more significant in Montreal. In 1825, the city's population was 22,540,[23] ballooning to over 90,000 less than 40 years later, making it the largest urban center in pre-Confederation Canada.[24] One third of

18. Elizabeth Rapaport, "Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth," *Fordham Law Journal* 33 (2006): 530.

19. The colony was known as "Quebec" from 1763 to 1791, when under the aegis of the Constitutional Act it was altered to "Lower Canada." In 1840, it was changed to "Canada East" and renamed the "Province of Quebec" under *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3. Herein, the term "Quebec" is used throughout.

20. For censuses from the founding of New France to 1871, see *Census of Canada*, 4 vols. (Ottawa: I.B. Taylor, 1871). For discussion of population, see Fernand Ouellet, *Economic and Social History of Quebec, 1760–1850* (Toronto: Macmillan, 1980); and H. Clare Pentland, *Labour and Capital in Canada, 1650–1860* (Toronto: J. Lorimer, 1981) 61–95.

21. Ouellet, *Economic and Social History*, 659; and Pentland, *Labour*, 64.

22. Paul-André Linteau, Jean-Claude Robert, and René Durocher, *Quebec: A History 1867–1929* (Toronto: J. Lorimer, 1983) 40.

23. G. Blaine Baker, Kathleen E. Fisher, Vince Masciotra, and Brian Young, *Sources in the Law Library of McGill University for A Reconstruction of the Legal Culture of Quebec, 1760–1890* (Montreal: McGill Faculty of Law & Montreal Business History Group, 1987) 9.

24. Ibid.

Montreal's inhabitants were English-speaking immigrants in 1825; however, by 1832, English speakers constituted a majority.[25]

The province of Quebec underwent fundamental economic transformations in addition to social and political upheaval. By the first decade of the nineteenth century, the fur trade—long an economic linchpin—was in rapid decline, offset by growth in timber and agriculture. Quebec remained an artisan-based economy, although the first half of the century saw major public works projects, namely canal construction, as well as the growth of other large manufacturing industries.[26] Montreal was the province's economic driver and main commercial and industrial region; by 1825, Montreal also reigned supreme as the commercial, transportation, construction, and manufacturing capital of Canada, presided over by an affluent English-speaking elite.[27] After 1840, the transition from an agrarian to an industrial economy accelerated, reflected in (and nourished by) the construction of industrial belts along the Lachine and other canals, and the growth of railway systems.[28] A busy port city with a large military garrison, Montreal also had the issues typical of cities with sizeable transient naval, merchant, and military personnel, coupled with thousands of peripatetic unskilled day laborers and immigrants; circumstances that promoted predatory and opportunistic sexual dalliances.[29]

In addition to economic and social flux, this period was marked by significant political change. Certainly the Conquest was a transformative event in the history of Quebec, but no less so were the Rebellions of 1837–1838, prompted by an increasingly chaotic and polarized political landscape. When pressed to enact reforms, the British government refused, leading to conflict with French-Canadian elites.[30] This, in turn, led to the

25. Jean-Claude Robert, *Atlas historique de Montréal* (Montreal: Éditions Libre Expression, 1994).

26. Baker et al., *Sources*, 13. See, generally, Jean-Claude Robert, *Montréal, 1821–1871: Aspects de l'urbanisation* (These de doctorat en histoire, Université de Paris I, 1977); Gerald Tulchinsky, *The River Barons: Montreal Businessmen and the Growth of Industry and Transportation, 1837–1853* (Toronto: University of Toronto Press, 1977); and Fernand Harvey *Revolution industrielle et travailleurs, Une enqûete sur les rapports entre le capital et le travail au Québec à la fin du 19e siècle* (Montreal: Boréal Express, 1978).

27. Baker et al., *Sources*, 13.

28. Baker et al., *Sources*, 13–14 and *Magistrates*, 8.

29. Women outnumbered men in Montreal during this period. D. Suzanne Cross, "The Neglected Majority: The Changing Role of Women in Nineteenth Century Montreal," in *The Canadian City: Essays in Urban History*, ed. Gilbert A. Stelter and Alan F.J. Artibise (McClelland and Stewart, Toronto, 1977) 67–68. Halifax shared the commonalities of being a thriving port city with a large military garrison. See Wright, "Unnatural Mothers," 22.

30. Fyson, *Magistrates*, 10.

Rebellions of 1837–1838 between reformers (largely French-Canadians) and loyalists (largely British). The end of military conflict ushered in political reform, leading to the union of Upper and Lower Canada in 1840.[31]

If Quebec underwent dramatic demographic, political, and social changes, the situation involving the administration of criminal justice was no less true. Although the civil law system was preserved in Quebec following the Conquest, English criminal law supplanted the existing ancien régime law under the terms of the 1763 Royal Proclamation.[32] A hierarchy of criminal and other courts was established, closely modeled after that of England, with English substantive and procedural law transplanted largely in its entirety.[33] Justice remained localized, but by the 1840s, the rise of modern police forces and a professional magistracy were the dominant forms of social and legal control.[34] Until the reforms ushered in following the Rebellions, little significant legislative overhaul of the criminal law or criminal justice system took place in nineteenth-century Quebec.

Infant Abandonment and Coroner's Inquests

In the winter of 1826, a group of boys skating on the creek discovered a female fetus lying under the bridge, indifferently wrapped in a cloth.[35] Every year saw a number of infant corpses discovered in and around the city of Montreal, most often of fully developed newborns. Some of the bodies bore evident marks of violence and had been unceremoniously dumped in garbage heaps and sewers, thrown down privies and wells, tossed into canals and rivers, and left in alleyways and fields. Others appeared to have been respectfully, even lovingly, dressed in baby clothes and buried in coffins of polished wood. As such, even their interments were suggestive of widely differing circumstances surrounding their births and deaths.

An unmarried woman facing an unwanted pregnancy in Montreal generally had limited options, often facing a desperate situation and desperate

31. Baker et al., *Sources*, 17–18 and *Magistrates*, 8.

32. See, for example, Fyson, *Magistrates*, 16.

33. See, for example, Douglas Hay, "The Meaning of the Criminal Law in Quebec, 1764–1774," in *Crime and Criminal Justice in Europe and Canada*, ed. Louis A. Knafla (Waterloo: Wilfrid Laurier Press, 1981). For the structure and jurisdiction of courts, see generally Fyson, Magistrates.

34. Fyson, *Magistrates*, at 7; for discussion of the police force and related institutions, see ibid. at 136–83.

35. *The Montreal Gazette*, November 27, 1826.

choices.[36] Adoption was generally an unattractive option given the importance placed upon blood lineage as well as legal impediments.[37] Until 1795, single mothers had recourse to bastardy prosecutions to enable them to secure financial support from recalcitrant fathers, but after that date this option was no longer available in Quebec.[38] Institutions that provided day care, the "salle d'asile," were established slightly later than this period. Run predominantly by Catholic charities, they were not open to unmarried women, generally did not assist non-Catholics, and did not take infants.[39] The civil law equivalent of seduction suits, "dommages pour seduction," was one alternative. Unlike common law seduction suits, the woman herself could act as plaintiff but typically faced onerous evidentiary requirements including a showing of misrepresentation, fraud, or trickery. Furthermore, damages were limited to payments for loss of reputation and only occasionally for lost wages, making it of limited utility.[40] Although there were most likely to have been informal systems of support open to some women, including the assistance of extended family, three of the most common options would have been abortion, abandonment, and infanticide.[41]

36. Some were driven to suicide. See, for example, *The Vindicator*, July 3, 1829: "Suicide—On Saturday last a woman named Ellen Brasil, a native of Ireland, put an end to her existence by hanging herself with a Silk Handkerchief. The Verdict of the Coroner's Inquest—felo de se. We learn that this unhappy female had for some time previous to her death, been cohabitating with one Patrick Shiels, a huckster. . .who, it would seem, had seduced her under promise of marriage. The wretched woman becoming pregnant, and finding no probability of Shiels performing his promise, formed the dreadful resolution of destroying herself. . ."

37. See, generally, Malcolmson, "Infanticide." For discussion of adoption, see, for example, Michael Grossberg, *Governing the Hearth, Law and the Family in Nineteenth-Century America* (Chapel Hill & London: University of North Carolina Press, 1985) 268–80.

38. See, generally, Fyson, *Magistrates*, 285–89.

39. Cross, *Neglected Majority*, 74–77. The oldest in Montreal was established in 1858. Ibid., 75. It is noteworthy that married English, Irish, and Scottish mothers appear to not have worked outside the home relative to their French-Canadian counterparts.

40. Backhouse, *Petticoats*, 44. For seduction in Quebec, see, generally, Marie-Aimée Cliche, "Fille-mere, famille et société sous le Régime francais," *Histoire Sociale/Social History* 41 (1988): 39–69; and Pierre-Basile Mignault, *Le Droit Civil Canadien* (Montreal: C. Théoret, 1901) 368–69. For Canada, see, generally, Backhouse, "The Tort of Seduction: Father and Daughters in Nineteenth-Century Canada," *Dalhousie Law Journal* 10 (1986): 45–80; Martha J. Bailey, "Servant Girls and Upper Canada's Seduction Act, 1837–1946," in *Dimensions of Childhood: Essays on the History of Children and Youth in Canada*, eds. Russell Smandych, Gordon Dodds, and Alvin Esau (Legal Research Institute: University of Manitoba, 1990) 159–82.

41. Compare Eric Jarvis, "Mid-Victorian Toronto," 132. But see Sauer, "Infanticide and Abortion" 84–85 (infanticide arising from illegitimate births was rare in Victorian Scotland);

Abortion was an illegal procedure and, unless self-administered, required that the mother disclose her situation to at least one other person, and involved issues of access, expense, and effectiveness, as well as personal safety, as many of the substances and procedures used were dangerous to mother and child alike.[42] For some unmarried mothers, abandonment and infanticide were more efficacious options, especially if alternatives had proven unavailing.[43] Abandonment, or "dropping," consisted of leaving the child in a public space such as a church, wharf, or market square. If left in an appropriate place and quickly recovered, the child's chances of survival were probably fair.[44] In many other instances, however, the child predictably died from exposure or other causes, and abandonment therefore should be seen as a coherent adjunct to

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ibid., 89 (infanticide rarely practiced by nineteenth-century Irish emigrants in England). No differences among ethnic groups are readily apparent here, unlike that of socioeconomic class. Irish defendants feature prominently, but they reside next to French-Canadians, Scots, and Brits. In later years, orphanages were used by parents in financial straits. See, generally, Bettina Bradbury, "The Fragmented Family: Family Strategies in the Face of Death, Illness and Poverty, Montreal, 1860–1885," in *Childhood and Family in Canadian History*, ed. Joy Parr (Toronto: McClelland and Stewart, 1982), 109–28.

42. See, generally, Malcolmson, "Infanticide," 187–188. For discussions of abortion, see, for example, Angus McLaren, "Birth Control and Abortion in Canada, 1870–1920," in *The Neglected Majority: Essays in Canadian Women's History*, vol. 2, ed. Alison Prentice and Susan Mann Trofimenkoff (Toronto: McClelland & Stewart, 1985), 84–101; Constance Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth-Century Canada," *Windsor Yearbook of Access to Justice* 3 (1983): 61–130; W. Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada," *Communications Historiques/ Historical Papers* (1981): 34–56; and Angus McLaren, "Abortion in England, 1893–1914," *Victorian Studies* 20 (1977): 379–400. For a rare example within the judicial archives, see BAnQ-M, Records of the Montreal Gaol (hereinafter MG), Donald McLean committed for "administering poisonous drugs for the purpose of creating primative (sic) abortion"; defendant acquitted (September 30, 1842). The only newspaper account involved a defendant who served his long-time paramour ergot of rye and was charged with poisoning with intent to produce miscarriage. *Montreal Gazette*, October 26, 1850. Its near invisibility in these sources, coupled with the research of McLaren and others, suggests abortion was not perceived as a significant social issue during the period.

43. Compare Malcolmson, "Infanticide," 188.

44. See, generally, Cliche, "L'infanticide," 36–37; Malcolmson, "Infanticide"; and Sauer, "Infanticide and Abortion," 82. See also Jarvis, "Mid-Victorian Toronto," 132–133: "The children, both male and female, were usually left where someone was sure to find them, such as on the doorsteps of churches, or the homes of prominent people. Usually they were well dressed, and in good health, cradled in a basket, sometimes complete with a nursing bottle of milk, a note telling the name, or instructions suggesting a possible name or requesting baptism. Often, it was noted, they came with rather expensive clothes, far beyond the means of poor parents, leaving the suspicion that this was not just a lower class phenomenon. Such deserted children generally survived and were sent to an orphanage or the House of Industry."

infanticide.[45] Abandonment was usually the preserve of a mother who had given birth out of wedlock, although not exclusively.[46] Dropping existed at the intersection of the private and public spheres; given the centrality of public spaces to laboring women, it is unsurprising that some infants ended up in these courtyards, gardens, squares, and streets as their mothers lived and worked there.[47] These were familiar and well-travelled areas chosen for the possibility of third parties retrieving the child, one example of the contradictions and tensions inherent in infanticide.

To better combat that phenomenon, foundling hospitals were established in major European and North American cities, with the Grey Nuns in Montreal establishing such an institution in 1754.[48] Foundling hospitals often met with controversy, as critics believed that they rewarded promiscuity by unmarried women.[49] The Grey Nuns took in thousands of infants during this period—4,400 between 1821 and 1850—with the numbers increasing decade after decade.[50] The foundlings they took in made up a steady eight to nine percent of all Catholic baptisms during this period, spiking dramatically after 1850.[51] The University Lying-in Hospital was founded in 1844 as an extension of the Faculty of Medicine of McGill University (then McGill College) to provide care for pregnant women.[52] The directors of the Lying-in Hospital repeatedly emphasized that their

45. Wright, "Unnatural Mothers," 18, observed that abandonment was probably a rationalization as it was theoretically possible that the infant could be rescued.

46. As pointed out by Peter Gossage, "Abandoned Children in Nineteenth-Century Montreal" (MA thesis, McGill University, 1983), 1–2, illegitimacy and poverty were key drivers of child abandonment. See also Peter Gossage, "Les Enfants Abandonnés à Montréal au 19e Siècle: La Crèche d'Youville des Soeurs Grises, 1820–1871," *Revue d'Histoire de l'Amérique Française* 40 (1986–87): 537–59.

47. For discussion of women and public spaces, see Mary Ann Poutanen, "The Homeless."

48. See, generally, Gossage, "Abandoned Children"; Gossage, "Les enfants." The Grey Nuns acted as a "depository for children that could not be raised in a traditional family unit for a number of reasons, the most common of which was illegitimacy." Gossage, "Abandoned Children," 10. For discussion of abandonment, see John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York: Pantheon Books, 1988); and Rachel Ginnis Fuchs, *Abandoned Children: Foundlings and Child Welfare in Nineteenth-Century France* (New York: State University of New York Press, 1984).

49. See Rose, *Massacre of the Innocents* 2–3; Christine Krueger, "Literary Defenses and Medical Prosecutions: Representing Infanticide in Nineteenth-Century Britain," *Victorian Studies* 44 (1997): 271.

50. Gossage, "Les enfants," 544 Table 1.

51. Ibid., 552 and Table 3. Not all children deposited with the Grey Nuns were illegitimate, but legitimate children could not have been more than a small minority. Ibid., 540–41.

52. *The Pilot*, September 12, 1846.

institution was not meant to foster immorality but rather to prevent pernicious acts:

> [T]he admissions of unmarried women form a very large proportion of the whole. . ..While every Christian and benevolent mind must deplore this fact, it will be some satisfaction to the public to know, that the cases by no means all belong to this city, but very many were strangers and emigrants, who fled from their homes to conceal their disgrace, and who were, generally speaking, in a most destitute condition. The Ladies of the Committee humbly believe that, through the medium of this Institution, many an unfortunate and guilty creature, has been preserved from being hurried prematurely into the presence of an offended Maker, from adding sin to sin, or perhaps from the commission of infanticide–and that many have been spared to repentance and restored to usefulness and happiness.[53]

As that passage makes clear, supporters of the Lying-in Hospital believed they were protecting unwed mothers from "vicious courses and eternal ruin;" most notably, prostitution, infanticide, and suicide. Although such institutions sought to save infant lives, they were largely ineffective, as staggeringly high mortality rates essentially reduced them to glorified mortuaries for the very young.[54] The age and vulnerability of these infants played a determinant role in their survival, and the preponderance of children abandoned to the Grey Nuns were less than 1 year old, with most being less than 1 week of age.[55]

53. Ibid. Similarly, their annual report 2 years noted they "have the happiness of firmly believing, that so far from this Institution having been the cause of inducing immorality, it has been the means of saving numbers from vicious courses and eternal ruin." Ibid., October 14, 1848.

54. Mothers may have preferred the "legitimacy" of foundling institutions, but the results were often equally tragic, see Gossage, "Abandoned Children," 11. The mortality rate for the Grey Nuns' Foundling Hospital, although horrifically high, was not unusual. During 1820–1840, 86.9% of the children in this institution died. Ibid., 116; and Gossage, "Les enfants," 549. "Baby farming" was similarly lethal, although often more premeditated. See, for example, Judith Knelman, *Twisting in the Wind: The Murderess and the English Press* (University of Toronto Press: Toronto, 1998), 157–80.

55. For the period from 1820 to 1840, 2,385 children were abandoned with the Grey Nuns; of these, the ages of 1,690 were recorded: 91.7% were less than a year old; 71.5% were less than a month old; and 51.2% were less than a week old. Gossage, "Abandoned Children," 106. Such was the privacy with which children could be deposited that only one newspaper reference was found: "A police man who was not far away from the Grey Nun's convent heard the cries of a child emanating near the wall that surrounded the building. After searching, he found a small newborn, wrapped in a few sheets. He brought it to the convent and the charitable sisters of this institution took it under their care." *La Minerve*, March 19, 1846 (author's translation). See also *The Pilot*, March 20, 1846 (citing *The Montreal Herald*). That the infant was left so close to the convent suggests the mother might have had a lapse of courage when dropping her child, or was terrified of discovery.

The frequency with which child abandonment was practiced is indeterminate, but it was a tangible reality during this era. Older children were left to fend for themselves, whereas younger children were deserted in the hope that charity would induce someone to intervene:

> Yesterday evening a female child apparently about six weeks old, was left in the passage of the house in Craig Street occupyd (sic) by Mr. McLean, Tailor, Mr. D.A. Smith, and others. The servant girl having been out on an errand saw. . .some woman leave the house in a great hurry and pull the hood of her cloak over her head. The servant supposed she had been stealing something, and immediately acquainted her master with what she had observed—when on going into the passage with a candle the infant was discovered. The child has a small bruise on the left temple, and laid so still that they thought it was dead. On being touched, however, the little innocent moved–as it did not at all cry, the family conceive that some sleepy potion had been administered.[56]

References to dropping near private homes were rare; it was much more common for infants to be dropped in areas frequented by the public and to be found some time after the fact.

Dropping was hazardous to the lives of these "little innocents" and as mentioned earlier "active" versus "passive" infanticide was often a distinction without a difference. For a mother, too, dropping had its attendant risks, including prosecution for abandonment, although such instances were decidedly rare.[57]

No doubt infanticide sometimes presented itself as the best option. Regardless of how it was brought about, "[a] distraught and desperate mother might, with luck, save herself and her reputation but her baby was almost always destined for an early death."[58] Infanticide did not entail the same risk to the mother's health as abortion, and her chances of escaping discovery, prosecution, and conviction were probably high, although this could differ greatly depending upon geographical, social and economic factors.[59] The stealthy nature of the offense worked to shelter the mother, and infants were readily disposed of-(metaphorically and otherwise) as

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

57. For discussion of such a prosecution, see footnote 226 below and accompanying text. A newspaper account portraying the abandonment of several adolescent children and which also identifies the mother, who was arrested but escaped from custody, appeared in *La Minerve*, April 3, 1845. This theme of fleeing justice was common.

58. Malcolmson, "Infanticide," 188.

59. See, generally, Jarvis, "Mid-Victorian Toronto," 133–34.

Table 1. Verdicts of Coroner's Inquests on Found Infants, 1825–1850.

Year	Dead/ Drowned	Murder	Visitation of God	No Finding	Stillborn	Unknown
1825 *n* = 2		1			1	
1826 *n* = 2				2		
1827 *n* = 0						
1828 *n* = 1				1		
1829 *n* = 1						1
1830 *n* = 2		1			1	
1831 *n* = 3	2	1				
1832 *n* = 1	1					
1833 *n* = 0						
1834 *n* = 4	3		1			
1835 *n* = 2	1			1		
1836 *n* = 2	2					
1837 *n* = 0						
1838 *n* = 2	2					
1839 *n* = 1						1
1840 *n* = 6	1	4				1
1841 *n* = 1	1					
1842 *n* = 2		1			1	
1843 *n* = 0						
1844 *n* = 3	1	1				1
1845 *n* = 1		1				
1846 *n* = 2	1	1				
1847 *n* = 6	1	1	3		1	
1848 *n* = 2		1	1			
1849 *n* = 5	2	1	2			
1850 *n* = 6	2	2	1		1	
TOTAL n = 57	20	16	8	4	5	4
% of Total	35.1%	16.0%	14.0%	7.0%	8.8%	7.0%
Adjusted %	37.7%	30.2%	15.1%	7.6%	9.4%	

they were easily hidden and decomposed quickly. There were generally no third parties to report the child's disappearance.[60]

When an infant body was discovered, it fell to the coroner to hold an inquest, a quasi-judicial proceeding tasked with determining cause of death when circumstances warranted investigation.[61] For that purpose,

60. See Wheeler, *Infanticide*, 407; James M. Donovan, "Infanticide and the Juries in France, 1825-1913," *Journal of Family History* 16 (1991):159–60.

61. Outside city limits, it was not unusual for other officials to preside over inquests, such as the Captain of Militia. See footnote 71 below.

twelve men constituting a jury of inquest were convened to hear medical and other testimony, with the aim of issuing a verdict on the supposed cause of death; were the verdict one of willful murder and the culprit identified, an arrest warrant would issue. As one historian wrote, inquests were "a lantern that uncomfortably illuminated the dark recesses of society's guilt over infanticide."[62] The records of inquests are of limited utility, as some coroners had little in the way of formal medical training, and their verdicts were often inconclusive given the limitations of forensic science. An infant body that was found in the river, for example, might leave little evidence of whether the child had died of natural causes, was murdered and then dropped into the water, or had drowned as the result of accident or intention.

As shown in Table 1, the coroner for the District of Montreal held inquests on the bodies of at least fifty-seven infants during the period from 1825 to 1850, as compiled from coroners' reports and newspaper accounts.[63] Because of the spotty nature of existing sources, these figures are inaccurate representations of the actual number of infants found in Montreal, and much smaller than those of illegitimate children left with agencies such as the Grey Nuns. Inquest juries were to reach a conclusion of willful murder in nearly a quarter of verdicts,[64] but the mothers were identified in only fourteen cases, such as the 1840 investigation that determined that an unmarried domestic's child had died because of her "negligence and ignorance." Nonetheless, the mother was not charged.[65] In seven other instances in which the inquest determined the infant was murdered, the mother was also identified.[66] Most commonly,

62. Rose, *Massacre of the Innocents*, 57.

63. Adjusted figures are derived by omitting cases for which verdicts were unknown. Many bodies of children older than a year came before inquests but I have excluded them as non-infants. For other jurisdictions, compare Higginbotham, "Sin of the Age," 319 (by the 1860s 150 infant bodies a year were found in London); Jarvis, "Mid-Victorian Toronto," 135 (in 1860s Toronto fifty to sixty infants were examined by the coroner); and Wright, "Unnatural Mothers," 17 (124 infant bodies were found in Halifax in 1850 to 1875).

64. Compare Galley, "I Did It To Hide My Shame," 33 (eight out of eleven inquests on infants during 1842–1850 resulted in murder verdicts).

65. BAnQ-M, Coroner's Inquests (hereinafter CR) no.233 (June 1, 1840) (child of Zoe Lorrain). Compare Cliche, "L'infanticide," 35 and Table I (forty-three Quebec City inquests on infants between 1820 and 1849, of which nine led to murder verdicts; the mother was identified in seventeen cases); Galley, "I Did It To Hide My Shame," 14 (twelve percent of eighty–two inquests involving suspicious infant deaths in late-nineteenth-century Ontario led to trial).

66. See, for example, *La Minerve*, July 24, 1845 (author's translation); see also *The Pilot*, July 24, 1845 ("[T]he jury convened last Monday to inquire into the body of a child found in the ditch near Campeau Street and rendered a verdict of voluntary murder. Sarah Fairservice, the mother of the child was put in prison yesterday upon a coroner's warrant accusing her of

the verdict was unedifying, simply stating the infant had been "found dead" or the like.[67] In other instances, the inquest concluded without a finding, and such verdicts obviated the need to pursue the matter further. As has been suggested, that inertia may have been motivated by a sense of futility, given very low prosecution and conviction rates, as well as by more chivalrous and charitable motives.[68] That contrasts vividly with the depictions of infanticide as "so foul a deed" committed by "unfeeling" and "unnatural" mothers."[69]

Although it may prove tempting to extrapolate infanticide rates from these sources, it should be emphasized that the statistical frequency of this crime is unknowable.[70] Many infant bodies were never recovered, and the limitations of forensic analysis often resulted in inaccurate findings. The results of coroners' inquests allow some additional detail to emerge with respect to the circumstances of infant deaths; in most cases, however, autopsies yielded no clues as to the identity of the guilty party.[71]

The fact that a child had not been interred in traditional fashion often led to suspicions of murder. The discovery of an infant cadaver found floating on the river in a coffin in 1848 resulted in a jury of inquest concluding that the child had been "maliciously destroyed by some person or persons

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'infanticide.'"). In another case, the mother was not prosecuted, because of insanity. BAnQ-M, CR no.2058 (February 1, 1850) (Marie Dufull (?), verdict that she was "suffocated by her mother being deranged."). Other accounts were ambiguous as to the mother's role in the infant's death; see note 94 below.

67. See also note 93 below and accompanying text. Table 1 above reveals that nearly all findings of "died by visitation of God" occurred for the years 1848 to 1850. Furthermore, twelve of fifteen findings of murder took place between 1840 and 1850. Those facts suggest that the findings were the result of a difference in techniques or philosophies, most likely because of a change of coroner. For similar experiences in Victorian England, see Rose, *Massacre of the Innocents*, 59–60.

68. Ibid., 59–62.

69. See, for example, *L'Ami du Peuple*, May 25, 1839: "A newborn's body was found Thursday morning by a small stream that crosses Bleury Street. . ..It is cruel to have to think that there could exist mothers so unnatural as to commit such an act." It is ambiguous as to whether the editor is condemning the discarding of the body or an assumed infanticide, or both.

70. Compare Malcolmson, "Infanticide," 191; Sauer, "Infanticide and Abortion," 82; and Wheeler, "Infanticide," 407. Wheeler, however, did attempt to reconstruct infanticide rates. For discussion of crime measurement from historical records, see, for example, J.M. Beattie, "Judicial Records and the Measurement of Crime in Eighteenth-Century England," in Knafla, *Crime and Criminal Justice*, 127–45; and Terry Chapman, "The Measurement of Crime in Nineteenth-Century Canada: Some Methodological and Philosophical Problems," in Knafla, *Crime and Criminal Justice*, 147–55.

71. For an example, see BAnQ-M, CR no.498 (April 4, 1825): The Inquisition taken. . .by James Glassford, Captain of Militia. . . on view of the body of an infant child found in a hole in the ice tied to a large stone. . .[T]he jury assembled [and declare]. . ..that the said infant child was willfully (sic) murdered by some person or persons unknown to the jurors. . ..

unknown;" not because of any signs of violence, but solely as the infant had been "ruthlessly thrown into the creek" rather than being accorded a customary burial.[72]

Whereas some of the bodies discovered in and around the city were the result of instances of dropping that ended tragically, the preponderance of those infants had been secreted after death. Some scholars have argued, perhaps naively, that the very fact that children were found in a sewer, buried near a cemetery or in a garden, or submerged in a river, points to the conclusion that they had been the victims of passive or active infanticide, a modern inclination that seems to mirror that of many nineteenth-century coroners.[73] Whereas in some instances the circumstances surrounding the discovery of infant bodies were indeed suggestive of murder, in others the truth was more elusive.[74] A newspaper account from 1842 depicts the ambiguity of one such discovery:

> On Sunday morning a Coroner's Inquest was held on the body of a male infant, about six weeks old, which was found floating in a box. . .. From its appearance, it could not have been dead above 24 hours. It was dressed in decent, though not handsome, attire. There being no external marks of violence, the body was opened by the medical attendant, who declared that it could not have come to its death by disease; and the Jury being of opinion that it must have been drowned in the box, brought in a verdict of wilful murder against some person or persons unknown. There is in this more mystery than usual in such occurrences; for, if the child had been illegitimate and that it was intended thus to conceal its birth, one would think that it would have been destroyed immediately after its entrance into the world. The infant was a remarkable fine boy.[75]

It was only in rare cases that the child was identified.[76] The circumstances surrounding most such deaths must therefore remain inscrutable, but two cases help in providing possible motivations for these untraditional interments. In March of 1830, a carter observed a small coffin being thrown into

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

73. See, for example, Malcolmson, "Infanticide," 191–92 ("When a dead baby was found in a pond, a barn, an outhouse, a box or buried in a garden, there is little reason to doubt that it had probably been murdered, or at the least deliberately not kept alive."); and Wheeler, "Infanticide," 407 ("Yet even when people found infant bodies in creeks or outhouses, they could not be certain they had uncovered an infanticide.").

74. For an overt example, see, for example, *The Vindicator*, May 29, 1829: "Mysterious Discovery—Two little children playing in the garret of a certain house in this city, discovered. . .the skeleton of an infant. . .That part of the dress covering the chest was of a bloody colour, from whence it is conjectured that the child had its throat cut. . .."

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

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

the St. Lawrence River, which was found to contain a "male infant neatly dressed in a white muslin frock, cap, etc."[77] A boy standing nearby identified it as his brother, whom he alleged had been stillborn. When confronted, his father admitted that he had paid a third party to deposit the coffin in the river: as his son was stillborn, he reasoned that his place of burial did not matter. At the inquest, a midwife corroborated the story and identified the infant by aid of a birthmark. The coroner decided criminal charges were not warranted, but reprimanded the father, ordering him to pay for the inquest and his child's interment.

Occasionally, these events illustrate the dynamics between the child's parents. During the summer of 1825, an infant was found lying in a box on a city street. Unusually, the inquest identified both parents, established that the child was stillborn, and explicated the circumstances surrounding the child's discovery:

> It appears that. . .the mother of the child. . .being without a husband sent to the reputed father for some pecuniary assistance, to enable her to have the infant interred; which request, the man refused to comply with, alleging that he was not bound to furnish any sum for such purpose, denying, at the same time, that he was the father. . ..Upon which some officious woman who was in the confidence of the unfortunate mother, wrapped the corps[e] up, and placing it in a box, sent it as a *present* to the man. . ..The box was left, and, like Pandora's, it produced curiosity in the landlady of the mansion. . .[and] she therefore opened the lid, and was horror struck on beholding the contents. She then resolved upon casting the whole into the street; an altercation took place between her and her husband, but the woman's arguments prevailed, and the box, and the child, were both committed to the pavement. At this moment a gentleman was passing who, on viewing the box, discovered an arm of the infant; he immediately. . .prevailed on the woman to permit the child to be returned to the house until he went for the Coroner. He also traced the maternal parent, and also the woman, whose inhuman and unfeminine behaviour casts so great a portion of obloquy upon her. . ..[78]

Every infant found buried in a box, lying in the street, or fished out of the river was therefore not necessarily the victim of murder; some were clearly legitimate children who had died prematurely but naturally, whereas others

77. *The Canadian Courant*, October 28, 1829. See also *The Montreal Gazette*, March 4, 1830.

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

were illegitimate stillbirths. A variety of reasons could account for such disposals: parties may have been unwilling or unable to pay for more conventional interments.[79] Still others may have denied responsibility for providing for the infant's burial; or acted out of panic, guilt, or a desire to prevent discovery. Many such cases share disrespect for an infant's physical integrity, emblematic of a view that the child had been less than fully human. This view was also reflected in the law's failure to regard children (especially newborns) as deserving of protection. For other parents, the rituals of infant death were simply unimportant.[80]

It is also true that the circumstances attendant to the discovery of infant bodies were not always suggestive of irreverence. Infants were found interred at various points around the city in coffins that were products of considerable craftsmanship, buried respectfully—perhaps even lovingly—in linen shifts or baby clothes. There are numerous such accounts; for example, the female infant found in the Common in a coffin "made with fine wood, and decently covered with a piece of linen;"[81] the male child found "thrust in a wooden coffin with handles" in a meadow outside the city;[82] and the baby found buried in a "very decent coffin" in the government garden.[83] These examples do not easily square with the view of these infants as being unwanted and unloved. Traditionally, unbaptized infants were commonly denied funerary rites and interment in consecrated ground, particularly in Catholic communities.[84] Whereas this tenet might have had currency in Montreal's Irish and French-Canadian Catholic communities, or even among Protestant cohorts, roughly twelve percent of births were recorded as illegitimate for this period, with few infant births or deaths going unrecorded. Infants in danger of death were promptly baptized,

79. The gravedigger who interred the female infant of Bridget McKane received 5s for burial expenses from the city coroner, ibid. See also Cliche, "L'infanticide," 36. In 1825, the cost of a child's grave in Montreal was 7s. 6d. Brian Young, *Respectable Burial: Montreal's Mount Royal Cemetery* (McGill-Queen's Press, Montreal, 2003), 9. As one scholar noted, "privation often forced families to approach death with pragmatism." Julie-Marie Strange, *Death, Grief, and Poverty in Britain, 1870–1914* (Cambridge University Press: Cambridge, 2005), 65.

80. Strange, ibid.

81. BAnQ-M, CR no.1039 (June 10, 1834) (finding of "found dead").

82. BAnQ-M, CR no.1213 (August 27, 1836) (ditto).

83. BAnQ-M, CR no.1202 (October 10, 1836) (ditto).

84. Joachim Whaley, ed, *Mirrors of Mortality: Studies in the Social History of Death* (New York: St. Martin's Press, 1981), 60; Peter C. Jupp and Clare Gittings, eds, *Death in England, An Illustrated History* (Rutgers University Press: New Brunswick, 1999), 150; Strange, *Death, Grief, and Poverty*, 106; David Field, Jeremy Hockey, and Neil Small, eds., *Death, Gender and Ethnicity* (New York: Routledge, 1997), 6; Alice Lovell, *Death at the Beginning of Life*, 32. The tension still exists today with miscarried, stillborn, and early neonatal deaths. Lovell, ibid.

even among Protestants, making unbaptized infants an unlucky minority.[85] Given the nature of these burials it is likely that other factors were in play. Some parents may have wished to avoid the potential shame of publicly burying an illegitimate child.[86] Custom often encouraged interring a child near home or a place of personal connection rather than in a cemetery, whereas working-class Irish immigrants often allocated scarce resources toward food and drink for funeral guests rather than on funerary trappings.[87] In some instances clandestine burials may have reflected a parent's wish to grieve privately.

The situation involving newborns that exhibited signs of violence was often simultaneously more and less ambiguous. On the one hand, many of those infants were disposed of in especially ignominious fashion, such as the infant tossed into the snowbank in the winter of 1844 and found by surveyors working on the Lachine Canal,[88] or the infant of nearly 1 year of age discovered in the river "wrapped up in a bag of bed tick… [with] a piece of tape tied under its chin. To the bag a stone of about 12 lbs. weight was attached by a rope." The coroner's jury reached a unanimous verdict that the child had been cast alive into the river.[89]

85. Patricia Thornton and Sherry Olson, "A Deadly discrimination among Montreal infants, 1860–1900," *Continuity and Change* 16 (2001): 99. In the 1860s, Irish Catholic infants were often baptized at 6 or 8 days old, French Canadians by the second day. Ibid., 129 n.10. The illegitimacy figure is for 1859. Ibid.

86. The informal burial of a child in a well-made coffin suggests that expense was not the main concern. For an example of an interment in Upper Canada, see *The Vindicator*, November 18, 1831 (citing *The Colonial Advocate*).

87. Strange, *Death, Grief and Poverty*, 89–90. Although no explicit examples were found in Montreal, Wright has pointed to the abandonment of infant bodies in graveyards in nineteenth- century Halifax as signifying concern about the disposal of dead infants by parents who could not afford burial expenses, also noting that cemeteries were one public area not frequented at night. Wright, "Unnatural Mothers," 17–18. For accounts of burials by affluent families, see, generally, Brian Young, "Death, Burial, and Protestant Identity In An Elite Family: The Montreal McCords," in *Negotiating Identities in 19th- and 20th-Century Montreal*, ed. Bettina Bradbury and Tamara Myers (University of British Columbia Press: Vancouver, 2005), 101.

88. *The Montreal Gazette*, March 16, 1844 (account of discovery of body); *The Montreal Gazette*, March 19, 1844 (inquest concluded the child died violently of bleeding or strangulation).

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

What is more curious, however, were those newborns whose appearance may have suggested violence, but who were interred more traditionally. In March of 1834, for example, a "neat coffin" containing a male infant was found near the wharf at the Old Market. The child displayed a deeply bruised forehead, leading to the conclusion that "the little innocent has been made away with."[90] But was there a more innocuous explanation for the premortem bruising, perhaps the result of an inexpert delivery? Was the coffin a sign of subconscious guilt, or did it illustrate a desire to preserve the integrity of an infant's body, even one who had been murdered?[91] More chillingly, was it evidence of premeditation? Did a party enlisted to inter the body properly fail to do so? A mother might have killed her infant and yet attempted to provide a decent burial that would still preserve anonymity. These found infants were buried in city cemeteries at public expense, thus alleviating parents from the attendant financial burden as well as public scrutiny. Those cases suggest that the circumstances surrounding the disposing of an infant body were no less diverse than those leading up to the birth and death itself, although other infants must have been disposed of in secret and remained so.[92]

When found, infant bodies tended to provide coroners with little information. In many inquests no findings were made even if the infant had been found under suspicious circumstances, such as the "abortive [male infant] of five or six months old," whose inquest resulted in no finding because "how, when, and by what means he came to his death, no evidence thereof doth appear to the jurors."[93] The circumstances under which remains were found often foreclosed a determination of the cause of

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inquest's verdict was "in accordance with the appearance which this victim of inhuman violence presented.").

90. *The Montreal Gazette*, March 15, 1834.

91. Compare the horror with which vivisection was commonly viewed. See Peter Linebaugh, "The Tyburn Riot Against the Surgeons," in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, ed. Douglas Hay and & E.P. Thompson, eds., (London: Allen Lane, 1975), 65–117.

92. Jacqueline Simpson, "The Folklore of Infant Deaths: Burials, Ghosts and Changelings," in *Representations of Childhood Death*, ed. Gillian Avery and Kimberley Reynolds (New York: St. Martin's Press, 2005), 15 ("The infant burials. . .however surreptitious and curtailed, nevertheless must be seen as a 'lucky' minority. Far more numerous must have been the miscarried or abortive foetuses, the illegitimate stillbirths, the victims of infanticide who were disposed of in total secrecy.").

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

death, as was the case with the mutilated cadaver of a newborn discovered in a city street in 1844; as the *Montreal Transcript* recorded, the remains had, "shocking to say, been taken from the jaws of a dog, and nothing but the upper part of the body and two arms remained."[94]

The inability of inquests to provide determinative findings no doubt resulted in some miscarriages of justice, and certainly their failure to shed light on infant deaths was not without criticism.[95] Between the limitations of forensics and the reluctance of coroners to make findings of murder, many inquests delivered verdicts that were as unedifying as they were inimical to prosecution.[96] To aid coroners in their professional responsibilities, commentators compiled manuals that explained their legal duties as well as the nuances of dissection techniques and tests. In all such works, infanticide constituted a prominent topic; as one Canadian commentator noted, "the importance of the subject to Coroners requires that it should be dwelt upon at greater length and with more particularity. . .."[97] As stated in one 1842 work:

> That a young female of character and reputable connexions (sic) may be betrayed by the arts of a base seducer, and when reduced to a state of pregnancy, to avoid the disgrace which must otherwise be her lot, may stifle the birth of the womb, or after it is born, in a state of frenzy imbrue her hands in the infant's blood, in the expectation of throwing the mantle of oblivion over her crime, is a case which too frequently occurs; but even such a case, with all its palliations, cannot be considered as less than wilful murder, and as such demands exemplary punishment.[98]

These statements served as reminders to physicians of their central role in prosecuting such crimes, but however much they may have sought the imposition of "exemplary punishment," the legal outcome tended to be

94. *The Montreal Transcript* (November 23, 1844). It went on to say that the "number of cases of this kind which have occurred lately calls for serious attention."

95. See, for example, Charles Dickens, *Oliver Twist* (Oxford: Oxford University Press, 1999), 5.

96. One observer penned doggerel verse after witnessing an inquest held on an infant suspected of being murdered: "Placed round the child, two certain Doctors stand/Waved handsome wigs, and stretched the asking hand/State the *grave* doubt, the cause they cannot see/ And both do claim-–though none deserve the fee." *The Montreal Gazette*, July 18, 1850 (emphasis in original). The suspected murderess was a domestic servant to the family. Wright, "Unnatural Mothers," 24, states that Halifax inquests were criticized for their expense, given that so little effort was expended in discovering the offenders.

97. Boys, *Practical Treatise*, 48. See, for example, A. S. Taylor, *A Manual of Medical Jurisprudence*, 8th ed. (London: John Churchill & Sons, 1866) 456–503 (discussion of infanticide and medical tests to be employed).

98. Krueger, "Literary Defenses," 275 (citing Theodric Romeyn Beck and John Brodhead Beck, *Elements of Medical Jurisprudence*, 7th ed., 1842).

much more muted. Indeed, medical and legal definitions of infanticide differed. Medically speaking, infanticide involved either the destruction of a baby in utero, or after birth ex utero. Legally, however, infanticide was more narrowly construed: it was only after birth that the infant became a "life in being;" prior to that its destruction could not constitute murder.[99]

Infants who showed overt evidence of mistreatment were the most obvious examples of infanticide, but rarely surfaced in these records. The fragility of infant life meant that little effort needed be expended to extinguish it, and in most cases there was insufficient evidence to indicate whether an infant had been stillborn. As Boys stated, the "hydrostatic" test had traditionally been used to ascertain whether an infant had breathed, respiration being considered the "best test of a child having been alive."[100] That test involved immersing the lungs (or portions thereof) in water, the logic being that if the lungs floated the child had breathed.[101]

Seen from the vantage point of modern forensics, the hydrostatic test was highly dubious, and even by the early eighteenth century, English practitioners were doubtful about its efficacy.[102] In his work, Boys emphasized that the hydrostatic test should only lead to an inference weighed in conjunction with other evidence.[103] The pressures facing a coroner in such situations were obvious: application of the hydrostatic test could theoretically make the difference between conviction and acquittal. As another treatise writer stated, the question of whether a child was born alive was "of great importance" in allegations of infanticide, and the issue "is unfortunately one which, in respect to the proofs upon which medical evidence

99. That requirement was interpreted literally, so that if any part of the infant remained inside the birth canal at the time of death, a murder charge could not be sustained. Krueger, "Literary Defenses," 274; Rose, *Massacre of the Innocents*, 70–72. For contemporary discussion of that nuance, see Boys, *Practical Treatise*, 48.

100. Ibid., 49. Discussion of the full range of period medical procedures falls beyond the scope of this article, but that test played an indispensable part in many such inquests.

101. See ibid., 50. The test was described by Boys as follows: "The lungs are removed from the chest in connection with the trachea and bronchi, and placed on the surface of water, free from salt or other ingredient which would increase its specific gravity—pure distilled or river water is recommended. If they sink, notice whether rapidly or slowly. Then try if each lung will sink separately; cut them into several small pieces, and see if these pieces float or sink. If the lungs float, note if they float high above the surface, or at or below the level of the water, and see if the buoyancy is due to the lungs generally, or only to the state of particular parts. By considering the general result of these experiments, an inference may be drawn as to whether respiration has taken place at all, or partially, or perfectly." Ibid., 91.

102. See Malcolmson, "Infanticide," 199–200; and Rose, *Massacre of the Innocents*, 72.

103. Boys, *Practical Treatise*, 50–51 & 91. As Cliche pointed out in the context of Quebec City, the immersion test was questioned but remained in use by mid-century coroners. Cliche, "L'infanticide," 50, n.75. Problems with detection of infant murder still exist today. Rapaport, "Mad Women," 535 n.39.

is commonly founded, has given rise to considerable controversy."[104] The importance of the medical evidence lay in the fact that "[w]hen it is stated that in most cases of alleged infanticide which end in acquittals in spite of the strongest moral presumptions of guilt, the proof fails on this point only, it must be obvious that this question especially claims the attention of a medical jurist."[105] In the context of eighteenth-century English infanticide trials, hesitation on the part of medical witnesses offered juries another source of reasonable doubt of a defendant's culpability,[106] and many coroners and doctors likely wished to avoid implicating women in crimes of infanticide.[107]

Conversely, however—and despite the warning—these tests may have also resulted in "false positives" that led to inquest prosecutions. A century after many English physicians were discounting the importance of the immersion test, a local physician by the name of Dr. Archibald Hall held an autopsy on the body of a 6-month-old male infant found in a hole in the ice. Immersing the infant in water for several hours to thaw, he observed:

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

Dr. Hall concluded that the appearance of the infant's organs, "coupled with the evidence afforded by the hydrostatic test, indicated with certainty that it never respired."[108] Notwithstanding the emphatic nature of his conclusions and his efforts to "obviate a fallacy" that occurred with the misapplication of that test, Dr. Hall was nonetheless conducting an experiment that proved nothing. Perhaps, as Malcolmson has stated, the doubts expressed by medical witnesses about the usefulness of such tests "clearly favoured the cause of the defendant;" but it is equally possible

104. Taylor, *Manual*, 461. See also Rapaport, ibid. at 550 n.136 (contemporary difficulties associated with determining live births).

105. Ibid.

106. See, for example, Malcolmson, "Infanticide," 199–200.

107. Rose, *Massacre of the Innocents*, 43 (juries of inquest) and 59 (coroners).

108. BAnQ-M, CR no.331 (March 17, 1841) (finding: "found dead without marks of violence.").

that the certainty espoused by practitioners such as Dr. Hall could have a non-salutary effect if an innocent defendant was identified and charged.[109]

Ascertaining the cause of death was daunting, but identifying the party responsible for abandoning an infant body was virtually impossible. Even when it was evident an infant had been murdered, the culprit usually remained unknown.[110] As was the case for homicide in general, if an initial investigation did not easily yield a suspect, further efforts to pursue justice were rarely made.[111] In the occasional case in which there were strong suspicions about the mother's identity, indictments could still be difficult to obtain. An inquest held to determine the cause of death of a newborn found near the city locks featured testimony from several witnesses who identified a domestic servant named Ann Murphy as the parent, including a fellow servant who observed a "visible change in her size" during the 2 months she was employed, and attested to her bad character. The grand jury nonetheless declined to indict.[112] Likewise, in succeeding years two inquests were held in which deaths were attributed to violence, and the alleged mothers named, but in which neither were prosecuted.[113]

Not all unmarried mothers were so fortunate, however. In November of 1845, an investigation was held into the death of a male infant, supposed to be the son of Bridget Cloone, a young, unwed live-in domestic servant. Three weeks earlier she had begun to feel unwell, and obtained medicine for chronic indigestion. Cloone became bedridden a week

109. Ibid. For the view that coroners were known to be inaccurate, see Higginbotham, "Sin of the Age," 323.

110. See, for example, *The Pilot*, December 24, 1847 (citing *The Montreal Courier*): "*Infanticide*—An infant male child was found dead on Monday last in a wood-shed off Bleury Street. After a careful examination of the body by Dr. Hall, the Coroner's Jury returned a verdict that death had been caused by violence inflicted by some person or persons as yet unknown."

111. See, generally, Martin J. Wiener, "Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England," *Law and History Review* 17 (1999): 479, n.38.

112. BAnQ-M., Files of the Court of Quarter Sessions (hereinafter QS[F]), *Queen v. Ann Murphy* (August 14, 1841) (notes of inquest); *The Montreal Gazette*, September 7, 1841 (inquest verdict).

113. BAnQ-M, CR no.1836 (May 22, 1849) (male child of Henrietta Miles, finding "premature delivery by violence."); BAnQ-M, CR no.2427 (October 31, 1850) (female child of Emelie Legault, finding "death from violence."). For an example in which a mother was arrested on suspicion of murder but was exonerated by the inquest, see N.A.C., Records of the Montreal Police, Rural Returns (Napierville) (hereinafter MP[RR]), *Domina Regina v. Maria Atkins* (August 23, 1840); Registers of the Court of King's Bench, 4 (hereinafter KB(R)) (coroner's report no.276, "infant child of Maria Atkins. . .died for want of necessary care") (August 27, 1840).

before the inquest, and a local physician ascertained that she was in the advanced stages of pregnancy. She was conveyed to the University Lying-in Hospital, where she persisted in denying her pregnancy even while in labor, and despite "appearances… which led to the belief, that a twin had been already born."[114] That supposition having been confirmed following her delivery, her bedroom was searched and the dead twin was found stashed in a wooden clothes chest. The coroner determined that he had been born alive and subsequently strangled, and the jury returned a finding of "wilful and intentional suffocation"[115] Cloone was convicted of concealment and sentenced to six months' imprisonment.[116]

The condition in which many infant bodies were found made it impossible for coroners to ascertain such rudimentary details as age or even gender. Table 2 displays statistics regarding those characteristics, including absolute percentage and adjusted percentage, the latter derived by omitting the unknown or "not identified" figures. It is not possible to determine the actual number of found infants who died as a result of active or passive infanticide. It can be observed, however, that a majority of these infants were males. Some scholars have posited that as males had more economic value than females during the period, such a disparity suggests that gender was an irrelevant consideration, at least compared to the socioeconomic circumstances of the mother.[117] However, a counter (and perhaps stronger) argument is that daughters were of greater usefulness to their mothers in terms of performing household duties and may have been easier for a single mother to raise than sons.

It is evident that a significant percentage of those children, and a majority by adjusted percentage, were newborns. That fact is unsurprising, as not only were mortality rates for newborns notoriously high, but unwanted children tended to be prone to early deaths. In the context of infanticide prosecutions, the majority of victims were also newborns.[118] Children were always at their most vulnerable, for many different reasons, shortly after birth.

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

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

116. See also footnote 181 below.

117. That conclusion mirrors observations by other scholars. See, for example, Malcolmson, *Infanticide*, 192 (nineteenth-century England).

118. Admission figures for the Grey Nuns for 1820–1840 show a similar pattern: fifty-one percent were less than a week old; twenty percent were aged 8 days to 1 month; twenty percent were aged 1 month to 1 year. Gossage, *Les enfants*, 548.

Table 2. Characteristics of Found Infants from Coroners' Inquests, 1825–1850.

	Gender			Age			
	Male	Female	N/I	Fetal	Newborn	Less Than 1 year	N/I
$n = 57$	31	14	12	4	34	3	16
% Of Total	54.4%	24.6%	21.1%	7.0%	59.7%	5.3%	28.1%
Adjusted %	68.9%	31.1%		9.8%	82.9%	7.3%	

The Law of Infanticide

In those cases in which a victim was found and a culpable party identified, the law provided mechanisms that were designed to deal with infanticide and the related offense of concealment. However, the manner in which this law was administered in the nineteenth century and, to a lesser extent the circumstances surrounding the amendment of the criminal law regarding infanticide, were reflective of tension between conflicting moral dictates and societal norms. Historically, the English common law did not differentiate between infanticide and other conventional forms of homicide.[119] Infanticide remained an "invisible evil" in England for centuries, and rarely fell under the purview of the criminal law at all. Some historians have suggested that the reign of Queen Elizabeth I (1558 to 1603) was a turning point, when heightened attention was drawn to that crime.[120]

The first legislative provision to specifically address infanticide was enacted in 1624, and sought to address the evidentiary hurdles that hampered infanticide prosecutions through enlarging the offense's scope.[121] Under the Act of 1624, a woman who gave birth to an illegitimate child

119. See, generally, Constance Backhouse, "Desperate Women."

120. See, for example, Hoffer and Hull, *Murdering Mothers*, 3: "That epoch saw a burst of prosecutions and the emergence of new attitudes and laws on the crime. The cause of this shift in practice and opinion lies in a combination of jurisprudential, religious, economic, and social forces. With their confluence begins the history of modern Anglo-American infanticide law." See also Paul A. Gilje, "Infant Abandonment in Early Nineteenth-Century New York City: Three Cases," *Signs: Journal of Women in Culture and Society* 8 (1983): 582. Historically, the illegitimate child who survived had no legal status, being considered under the common law as 'filius nullius'—nobody's son.

121. 21 James I, c. 27, s. 2 (1624) (U.K.) (hereinafter the "Act of 1624"), which read: Whereas many lewd women that have been delivered of bastard children, to avoid their shame and to escape punishment, do secretly bury, or conceal the death of their children, and after if the child be found dead the said women do allege that the said children were born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said child or children were murdered by the said women their lewd mothers, or by their

who died, and attempted to conceal that fact, was statutorily presumed to have committed the capital felony of murder. That presumption could only be rebutted by the testimony of a witness attesting that she was present at the birth and that the child had been stillborn. Given the secrecy that attended most such births, that presumption would have been impossible to overcome in most instances.[122]

French legislation of the period governing the offense of concealment was similar to that of England. The Edict of Henri II was applied in the province of New France (later Lower Canada and Quebec) and provided that "each woman who hides her pregnancy and delivery and the infant dies, is held responsible for the death and punished by death. . .."[123] Following the Conquest, the Act of 1624 replaced the Edict of Henri II, as it was received in British North America through an act of Parliament that introduced the general criminal law of England into the colonies.[124] Whereas there were sea changes in other areas of criminal law, the law governing infanticide in the pre-and post-Conquest period were not appreciably altered, because of the similarities between French and English legislation.[125]

The draconian Act of 1624 resulted in few convictions but it was to have a lengthy lifespan. In practice, the legislation's intent was largely undermined by shifting the burden of proving live birth onto the Crown.[126] It

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assent or procurement: For the preventing therefore of this great mischief, be it enacted. . .that if any woman. . .be delivered of any issue of her body, male or female, which being born alive, should by the laws of the realm of England be a bastard, and that she endeavour privately either by drowning or secret burying thereof, or in any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, in every such case the mother so offending shall suffer death as in the case of murder except such mother can make proof by one witness at the least, that the child (whose death was by her so intended to be concealed) was born dead." See also Backhouse, "Desperate Women," 449; Arthur Rackham Cleveland, *Women Under the English Law, from the Landing of the Saxons to the Present Time* (London: Hurst & Blackett, 1896), 177; Malcolmson, *Infanticide*, 196; and Osborne, "Infanticide," 49.

122. Backhouse has stated that legislators must have been aware of that fact and hence knew they were convicting women who had concealed the birth of a stillborn infant or one who died of natural causes. Backhouse, "Desperate Women," 450. See also Gilje, "Infant Abandonment," 582. However, as Backhouse also acknowledged, few were convicted.

123. Cliche, "L'infanticide," 45.

124. 14 Geo. III c.83 (1774) (U.K.). See also 40 Geo. III, c.1 (1800) (U.C.) (establishing English criminal law as it stood on September 17, 1792 was deemed received into Upper Canada, following the division of Quebec into Upper and Lower Canada).

125. See Cliche, "L'infanticide," 45.

126. See, generally, Backhouse, "Desperate Women," 448. See also Osborne, "Infanticide," 50.

was not until nearly two centuries later, in 1803, that the Act's provisions respecting infanticide were repealed shortly after it was received into Lower Canada.[127] The statutory presumption of live birth was removed from the Act of 1803, thus bringing the law in line with the practice of requiring the Crown to prove that fact as an element of the crime. The law as modified, although more equitable, was not changed out of concern for the accused but rather to "relieve the judges from the difficulties they labor under in respect to the trial of women indicted for child murder, in the case of bastards," according to its sponsor, as "[a]t present the judges were obliged to train the law for the sake of lenity, and to admit the slightest suggestion that the child was stillborn as evidence of the fact."[128]

Sensitive to the ever-present challenges associated with proving the Crown's case, the Act provided that should a defendant be acquitted of murder, the charge of concealment (similar in substance to that provided for in the Act of 1624) could be substituted. Conviction for murder remained a capital offense, but the lesser-and-included offense of concealment was punishable by a maximum of 2 years' imprisonment.[129] Lower Canada was to enact similar legislation in 1812.[130]

In England, the next significant amendments were made in 1828, expanding the statute's reach to encompass married women and allowing for the freestanding charge of concealment rather than requiring an accused

127. 43 Geo. III, c. 58 (1803) (L.C.) (hereinafter the Act of 1803). See, generally, Gilje, "Infant Abandonment," 582; Krueger, "Literary Defenses," 274; and Rose, *Massacre of the Innocents*, 70; Sauer, "Infanticide and Abortion," 82. But also see Cleveland, *Women Under the English Law*, 178–79 (the 1803 Act reflected the fact that Parliament "saw the injustice" of the earlier statute).

128. *Parliamentary History of England*, 36, (London: R. Bagshaw, 1820), 1245–47 (cited in Hoffer and Hull, *Murdering Mothers*, 87 and n 25).

129. The Act of 1803 stated in pertinent part: "The Jury by whose verdict any Prisoner charged with such murder as aforesaid shall be acquitted, to find, in case it shall so appear in Evidence that the Prisoner was delivered of Issue of her Body, Male or Female, which, if born alive, would have been Bastard, and that she did, by secret Burying, or otherwise, endeavor to conceal the Birth thereof, and thereupon it shall be lawful for the court before which such Prisoner shall have been tried, to adjudge that such Prisoner shall be committed to the Common Gaol or House of Correction for any Time not exceeding two Years." See, generally, Emmerichs, "Trials of Women," 104. The current Criminal Code of Canada provides for a 5-year maximum sentence for infanticide. R.S.C. 1985, C-46, s.237.

130. 52 Geo. III, c.3 (1812) (L.C.). The statute's preamble stated that "the [previous statute] hath been found, as well in England as in this Province, in sundry cases, difficult and inconvenient to be put in practice. . .." Ibid. at s.1. These statutes only included illegitimate infants within their purview. Backhouse, "Desperate Women," 450. A number of American jurisdictions had acted to reform infanticide laws even earlier. Shortly after the Revolution, many of the existing English statutes were replaced. For example, Massachusetts changed the law in 1784, and Pennsylvania in 1787 placed the burden of proof on the prosecution. See Hoffer and Hull, *Murdering Mothers*, 90–93; and Gilje, "Infant Abandonment," 582.

first be tried and acquitted of murder.[131] The crime of concealment as it was interpreted left considerable discretion to judges and jurors, and anti-concealment laws were "vitiated by the courts' notorious aversion to convicting mothers."[132] The amended Act took effect in Lower Canada on January 1, 1842 and governed the concealment of both legitimate and illegitimate infants.[133] It is the manner in which these laws were applied in Montreal to which we now turn.

Infanticide Prosecutions in Montreal

In April 1840, Elizabeth "Betsey" Williams was arrested for a crime that was characterized (inaccurately) by one newspaper as "until the present unknown in the criminal annals of Canada."[134] Fortunately for historians, her story can be reclaimed from a number of sources.[135] Williams, a 20-year-old mulatto woman, was accused of having left her illegitimate infant son, François Xavier, to die in the forest. As she attested:

> I have two children living with my father the eldest of which will be three next Spring. I gave birth roughly five weeks ago at the said René's, a native

131. 8 Geo. IV, c. 34 (1828) (U.K.). See also Hoffer and Hull, *Murdering Mothers*, 87; and Rose, *Massacre of the Innocents*, 70.

132. Rose, *Massacre of the Innocents*, 71. See also J.M Beattie, "The Criminality of Women in Eighteenth-Century England," in *Women and the Law, A Social Historical Perspective*, vol. 1, ed. D. Kelly Weisberg (Cambridge: Schenkman Publishing Company, 1982), 197, 203. English juries often acquitted if the infant's body had been disposed of in a public thoroughfare, or in such a haphazard way as to guarantee discovery. Rose, *Massacre of the Innocents*, 71. See also Krueger, "Literary Defenses," 274.

133. 4,5 Vict. c. 27 s.14 (1841) (L.C.), which read: "And be it enacted, That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a Misdemeanor, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at or after its birth: Provided always, that if any woman, tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury. . .[to find] she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if she had been convicted. . .for the concealment of the birth." Therefore, until December 31, 1841, an accused could only be charged with concealment following an unsuccessful prosecution for infanticide.

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

135. But see Frank W. Anderson, *A Dance With Death, Canadian Women on the Gallows 1754–1954* (Fifth House Publishers: Saskatoon & Calgary, 1996), 186 (until 1914 such cases were not newsworthy and Williams' case did not merit mention in period newspapers).

> living in the native village of the Lake of Two Mountains, where the male child in question was baptised by the resident priest. I left the lake… with my child to return to my father's where I arrived around one in the afternoon. Along the way, fearing that my father would mistreat me if I arrived at his house with my child, I came up with the idea…to leave it in the woods and…I left it under a pine in the area called "le petit brulé". I was taken prisoner at my father's, in St. André, by the police last Monday the 13th of this year, and returning from Montreal I saw my child, dead, at the [J]ustice of the [P]eace's…. It was purely fear of my father [that] caused my child's death. My child was in good health when I abandoned it.[136]

In corroborating affidavits filed before the same justice, a farmer's daughter attested that on Saturday morning an unknown mulatto woman arrived at her father's house, cradling a young infant swaddled in a piece of blanket and waistcoat fabric. She stopped for about 2 hours to warm up the infant and suckle it, tenderly washing the baby and wrapping it in cast-off clothing, and stated she was headed for the Lake of Two Mountains to meet a native named René. The deponent later heard that the woman had stopped at the premises of a blacksmith, some 2 miles away, but without the child.[137] The farmer's testimony was similar but added that when he later saw her walking in the distance she was alone. Suspicious, the farmer retraced her route and found the body of the child, which he subsequently delivered to town for autopsy, lying near a fallen tree.[138] Her tenderness towards her child, juxtaposed against the horrific of act she committed moments later, is a stark example of the contradiction and complexity inherent in infanticide.

Williams benefitted little from her anonymity as she was quickly apprehended and charged.[139] Foreshadowing sentiments that were to surface after her trial, the editor of *L'Ami du Peuple* wrote that "[w]e have only provided below the facts that are public and would be angered if they were to caution the public against this poor creature, the trial of whom

136. BAnQ-M, Files of the Court of King's Bench (hereinafter KB(F)), *Queen v. Betsey Williams* (April 16, 1840) (voluntary examination of Betsey Williams) (author's translation). Monholland, "Infanticide," 72, stated that fifty percent of infants were killed on journeys away from the mother's workplace or, as in Williams' case, en route to visiting family.

137. BAnQ-M, KB(F), *Queen v. Betsey Williams* (April 15, 1840) (affidavit of Domithild Charlebois).

138. BAnQ-M, KB(F), *Queen v. Betsey Williams* (April 15, 1840) (affidavit of François Augustin Menard).

139. Although this differed in certain areas outside the city, blacks and natives generally constituted only a small part of the population of the District of Montreal. Fyson, *Magistrates*, 303.

may disclose certain circumstances which attenuate a crime we believe to be completely out of keeping with the Canadian nature or sentiment."[140] It would be 5 months before she was tried, during which she did not have benefit of counsel and offered no defense.[141] Williams also did not testify, as defendants were incapable of testifying under English law until 1898.[142] Presented with no alternative narrative, the jury returned a guilty verdict without deliberation.[143] In the absence of a defense, and given her socially marginal status as an impoverished mulatto woman who had borne an

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

141. There was no right to counsel for felons in English jurisdictions during the first several decades of the nineteenth century. There was, however, a convention that English and British North American courts would secure the services of defense counsel for defendants charged with capital crimes. Counsel could cross-examine witnesses and argue points of law, but could not address the jury. As was the case with Williams, some Montreal defendants were not represented by counsel. The statutory right to counsel in felony cases was established in 1836, along with the right of counsel to address juries. See 6 & 7 Will. IV c.114 (1836) (U.K.); 5 Will. IV c.1 (1836) (L.C.). See, generally, David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800–1865* (Oxford & New York: Hambledon Press & Oxford University Press, 1998); David Philips, *Crime and Authority in Victorian England* (London: Croom Helm Limited, 1977), 104; David Taylor, *Crime, Policing and Punishment in England, 1750–1914* (New York: St. Martin's Press, 1991), 114; F. Murray Greenwood and Beverley Boissery, *Uncertain Justice: Canadian Women and Capital Punishment 1754–1953* (Toronto: Osgoode Society, 2001), 84; and Wiener, "Judges v. Jurors," 474. For discussion of lack of counsel in such cases, see, generally, Monholland, "Infanticide," 154–159. In Quebec, the reality was mixed in terms of accused felons having professional assistance; see Fyson, *Magistrates*, 245–49.

142. See, generally, Patrick Devlin, *The Criminal Prosecution in England* (New Haven: Yale University Press, 1958), 108; Taylor, *Crime*, 115; Philips, *Crime and Authority*, 106. This did not preclude defendants from giving unsworn testimony, but such statements were typically seen as self serving. There was no indication in any of these cases that the defendants testified. It should be noted that defendants in felony cases generally were shown significant solicitude. See, for example, Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, 32. Moreover, the weightiness of capital crimes worked against the Crown, particularly as jurors feared committing "judicial murder." Ibid., 23. These factors did not hold true in the Williams trial.

143. *The Montreal Gazette*, September 10, 1840. The newspaper account read as follows: "Elizabeth Williams, for the murder of her infant (male) child, aged five weeks, was tried, and found guilty, the Jury not even withdrawing to deliberate. It appeared in evidence, that the unfortunate prisoner had deposited her child in the bush at *Grand Brulé*, under a tree, in very inclement weather in the month of April last. She acknowledged she had been induced to this act from the fear she entertained of her father, to whose residence she was repairing, having been away at the Indian village of the Lake of the Two Mountains, for about a year. The child was illegitimate. The prisoner offered no defence." For accounts of the short time spent in deliberation by juries in such cases in nineteenth-century England, see Monholland, "Infanticide," 193–95.

illegitimate child with a member of the First Nations, Williams' fate was likely sealed from the first moment. Following the verdict, the chief justice followed the venerated custom of donning a black cap before delivering a solemn invocation of the law's authority and retribution and sentencing her to hang, a punishment for infanticide that was exceptional for its severity during this period.[144]

Despite the jury's alacrity in convicting Williams, more than a dozen of her neighbors delivered their "humble petition of the notables and other inhabitants of the County of Two Mountains" to the governor general. Pointing to the circumstances of the crime as "demonstrating her imbecility of mind, more clearly, than a wilful intention of depriving her infant of life," the petitioners felt compelled to "recommend her as an object of commiseration" and "implore the extension of the Royal Clemency. . .."[145] The petition proved successful as her sentence was commuted to 3 years in the provincial penitentiary, a vivid example of the primacy of custom over law in infanticide cases.[146] Williams' conviction, sentence, and commutation therefore made her case both eminently typical as well as highly aberrant. The phenomenon of defendants convicted of infanticide or other capital crimes routinely having their death sentences commuted was well established.[147] Prior to the creation of the provincial penitentiary in Lower

144. BAnQ-M, KB(R), 77–78, *Queen v. Elizabeth Williams* (September 8, 1840) (verdict); KB(R), 94–95, ibid. (September 10, 1840) (sentence). The sentencing remarks have not survived. Those rituals were important symbolic components of the "majesty, justice and mercy" of the law although they may not all have been transplanted to Quebec. For discussion of rituals, see, generally, Hay, "Property"; King, *Crime, Justice and Discretion*, 334–40. For Quebec court's attempt to impose the terror and majesty of the law, see, generally, Fyson, *Magistrates*, 310–31.

145. N.A.C., Applications for Pardons (hereinafter AP), vol. 24, 10776–77, "Pray mercy for Elizabeth Williams sentenced to death for murder" (September 28, 1840).

146. *The Montreal Gazette*, October 10, 1840. See also N.A.C., AP, vol. 24, 10776–77 (September 28, 1840) (Williams given conditional pardon and sentenced to 3 years); 10778–79 (November 14, 1840) (Sheriff's receipt of Williams' pardon). See also J. Douglas Borthwick, *History of the Montreal Prison from A.D. 1784 to A.D. 1886* (Montreal: A. Feriard, 1886), 265; and J. Douglas Borthwick, *From Darkness to Light, History of the Eight Prisons Which Have Been, Or Are Now, in Montreal, from A.D. 1760 to A.D. 1907—Civil and Military* (Montreal: The Gazette Printing Company, 1907), 79–80. Compare Cliche, "L'infanticide," 49, Table III (the sole conviction for murder in Quebec City was punished by 6 months' incarceration).

147. See, generally, Rainer Baehre, "Imperial Authority and Colonial Officialdom of Upper Canada in the 1830s: The State, Crime, Lunacy, and Everyday Social Order," in Knafla, *Crime and Criminal Justice*, 185 (capital punishment in Upper Canada and the U.K.); J.M. Beattie, *Attitudes Towards Crime and Punishment in Upper Canada, 1830–1850: A Documentary Study* (Toronto: University of Toronto Press, 1977), 56–73 (Upper Canada); J.M. Beattie, "The Criminality of Women," 8; Higginbotham, "Sin of the Age," 323; and Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749–1815,"

Canada, banishment was the customary alternative.[148] Commutation of capital punishment was a central adjunct to the criminal law. With a large number of capital crimes inhabiting the "Bloody Code" until the first quarter of the century, the law alternated between a showing of its terrible majesty and its boundless mercy.[149] Gender was a significant factor, as women were more likely to be pardoned for capital crimes in general. Clemency tempered the law's severity in individual cases but ultimately did little to redress more systemic inequalities.[150]

Williams was one of a small number of Montreal defendants charged with infanticide and related offenses during the years from 1825 to 1850. These thirty-one cases, involving twenty-eight defendants, offer varying levels of detail.[151] Many merited only passing reference in the popular press, reflective of newspapers' reluctance to divulge details that were considered too sordid for public consumption. However, in canvassing those cases through a variety of sources, a clearer picture of this crime emerges.

University of Toronto Law Journal 42 (1992): 401–49. For discussion of pardons, see Phillips, "Operation of the Royal Pardon"; Hay, "Property," 43–49; R. Roger Chadwick, *Bureaucratic Mercy: The Home Office and the Treatment of Capital Cases in Victorian Britain* (New York: Garland, Modern European History Series, 1992); King, *Crime, Justice and Discretion*, 297–333 (pardons for property offenses); and Jonathan Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872–1880," in *Essays in the History of Canadian Law*, vol. 6, ed. Hamar Foster and John McLaren (Toronto: Osgoode Society, 1995), 204. For Canadian infanticide prosecutions in which death sentences were not commuted, see Anderson, *A Dance With Death*, 185–210.

148. Greenwood and Boissery, *Uncertain Justice* 16; Phillips, "Operation of the Royal Pardon," 406.

149. See, generally, Hay, "Property"; Beattie, "The Criminality of Women," 8–9 (discussing mercy and clemency in administering Britain's "Bloody Code"); Beattie, *Attitudes*, 8–10 (discussing similar experiences in Upper Canada); Chapman, "Measurement of Crime," 150–153 (nineteenth-century Canada). An Act of 1827 reduced the scope of capital punishment significantly, the first major English legal reform that would eventually leave only a few capital crimes. Beattie, "The Criminality of Women," 10. In Canada, this reform occurred under 3 Will. IV c.3 (1833), ibid. In 1841, the scope of capital punishment was essentially limited to murder and treason, ibid.

150. See, generally, Carolyn Strange, "Wounded Womanhood and Dead Men: Chivalry and the Trials of Clara Ford and Carrie Davis," in *Gender Conflicts: New Essays in Women's History*, ed. Franca Iacovetta and Mariana Valverde (Toronto: University of Toronto, 1992), 176. For discussion of gender and pardons, see Beattie, "Criminality of Women," 436–38 (seventy-five percent of women were pardoned); Philips, "Crime and Authority," 257.

151. For comparison, see, for example, Jarvis, "Mid-Victorian Toronto," 134 (seven cases in 1860s Toronto); and Malcolmson, *Infanticide*, 191–92 (sixty-one cases tried in 1730–1774 London).

Women historically have comprised a smaller criminal class than men, especially in respect to violent crimes,[152] but were much more likely to harm intimates, including husbands and children.[153] Infanticide was one of a handful of violent crimes in which women constituted a clear majority of offenders, and in Montreal twenty-three of the twenty-five alleged perpetrators were female.[154] Given that women paid the price for societal disapprobation of unmarried motherhood, and bore the brunt of caregiver responsibilities, it is unsurprising that they were more likely than men to commit infanticide.[155] Some scholars have suggested that infanticide was one of the most common violent crimes for which women were prosecuted during the nineteenth century.[156]

152. See Greenwood and Boissery, *Uncertain Justice*, 17 and n.15 (during the half-century after 1812, female convictions in Montreal constituted approximately 5.4% of all convictions); Lachance, "Women and Crime," 158 (fifteen percent of crimes were committed by women after the mid-nineteenth century); see also King, *Crime, Justice and Discretion*, 283. Recent historiography has begun focusing on women as offenders rather than as victims. See, for example, Patricia Pearson, *When She Was Bad: Violent Women and The Myth of Innocence* (Toronto: Viking Press, 1997).

153. See, for example, Greenwood and Boissery, *Uncertain Justice*,18; King, *Crime, Justice and Discretion*; Ann Jones, *Women Who Kill* (New York: Fawcett Columbine, 1980), xv–xvi. There is evidence that most homicide trials involving women implicated the killing of children rather than husbands or lovers. See, for example, Emmerichs, "Trials of Women," 99. In Canada in 2001, whereas most child homicides were committed by fathers and stepfathers, biological mothers were more likely to murder children aged 3 years or less. *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: Statistics Canada, 2001) 16.

154. Compare Donovan, "Infanticide," 169, n.11 (5.5% of defendants were men in France during the period from 1826 to 1913); Hoffer and Hull, *Murdering Mothers*, 98 (ninety percent of infanticide defendants were women); Malcolmson, "Infanticide," 192; and Lachance, "Women and Crime," 159. Three putative defendants were never identified and as such they are not counted.

155. See, generally, Osborne, "The Crime of Infanticide," 56. See also Hoffer and Hull, *Murdering Mothers*, 98 (arguing that as women performed virtually all of the child care, "[w]hen they felt anger, the nearest object was not another adult but a child. . ..It was in this sense inevitable that infanticide would be a woman's crime."). That latter view suggests that infanticide was primarily a crime of passion rather than an act of desperation or a survival strategy, with which I disagree. For the view that it was a much more evenly balanced crime in terms of the gender of perpetrators; see, for example, Rapaport, "Mad Women," 536 (nearly equal number of mothers and fathers who kill children under 5 years of age).

156. See, for example, Emmerichs, "Trials of Women," 99 (a mistaken assumption that women in nineteenth-century England were most often charged with killing husbands or lovers, whereas they were most often arrested for murdering their children); Jones, *Women Who Kill*, xv–xvi (women usually killed intimates, including husbands, lovers, and children); Knelman, *Twisting in the Wind*, 145 (infanticide as the most common type of murder by women). Women were commonly implicated in cases involving assault, vagrancy, petty larceny, prostitution, and the like. See generally Fyson, *Magistrates*.

The reluctance of juries to convict women of infanticide, abundantly documented in other jurisdictions, was also evident in Montreal.[157] As set out in Table 3, only four out of thirty-one complaints for infanticide-related offenses resulted in trial and conviction, or approximately thirteen percent. For murder, only one case resulted in conviction for the full offense, whereas the rate of conviction for the lesser crime of concealment was closer to ten percent.[158] At least three known defendants thwarted justice by fleeing the jurisdiction, although the figure for unknown dispositions may include others. It is also possible that prosecutors simply chose to discontinue those cases or to ignore the indictments outright.[159]

It is apparent that significant pretrial filtering took place, as grand juries returned "no bills" in forty-five percent of the cases.[160] Just such an instance occurred in 1840 in the Parish of Laprairie. A farmer's wife swore out an affidavit attesting that on the evening of November 9 between

157. Compare, generally, Backhouse, "Desperate Women" (nineteenth-century Canada); Osborne, "The Crime of Infanticide" (ditto); Higginbotham, "Sin of the Age" (nineteenth-century England); Beattie, "Criminality," 203 (ditto); and Philips, "Crime and Authority," 261 (ditto). For a contemporary reference, see *The Pilot*, May 15, 1847 ("Of the many women tried at the recent assize circuits in England and Wales for the murder of their infant children, not one was convicted, although the evidence against several of them was indisputably clear."). For a modern-day analogy, see Osborne, "The Crime of Infanticide," 47 (arguing that the provisions of the Canadian Criminal Code reflect "reluctance to find the mother guilty of murder. . .").

158. Compare Backhouse, "Desperate Women," 456 n.26, 461–62, 465, 468 (in 1840 to 1900 Ontario, of twenty-seven murder cases, eighteen, or 66.6%, resulted in acquittals, six, or 22.2%, in convictions on lesser charge, two, or 7.4%, in convictions on initial charge; two out of six, or 33%, of manslaughter cases resulted in conviction; and 43% of concealment cases resulted in conviction, 46.7% in acquittals); Cliche, "L'infanticide," 49 (one out of nineteen murder cases, or 5.2%, resulted in conviction; eleven out of eighteen concealment cases, or 61.1%, resulted in conviction; zero out of four infanticide cases resulted in conviction; and zero out of one manslaughter cases resulted in conviction); Higginbotham, "Sin of the Age," 331 (68% conviction rate if charged with murder first; 73% for concealment only); Wright, "Unnatural Mothers," 27 (two out of eleven murder cases, or 5.5%, resulted in acquittals, two resulted in conviction for infanticide, seven, or 15.7%, resulted in conviction for concealment); Conley, *The Unwritten Law* 110–111, 117 (62% of women charged with infanticide were convicted of concealment); and Philips, "Crime and Authority," 261 (fifteen out of thirty-nine infanticide and concealment cases, or 38.5%, resulted in a guilty verdict).

159. Compare Higginbotham, "Sin of the Age," 331.

160. See *La Minerve*, February 8, 1847 (no bill found on February 3, 1847 against Elizabeth Scott on charge of concealing the birth of her child). Compare Taylor, *Crime*, 118 (in the context of seventeenth- and eighteenth-century England, twenty-seven percent of infanticide indictments were ignored).

Table 3. Dispositions of Proceedings for Infanticide and Related Offenses, 1825–1850.

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

the hours of 11:30 and midnight, she had entered the home of Françoise Coullard, a widow, and found her in bed: "[The deponent] heard something crying in the cellar. . .the aforesaid [Coullard] replied, she put [the child] there to keep it from the knowledge of her brother in law, and told her she might take it out, she (the deponent) found it under a little hole in the floor in front of her bed, it was a male child, said, why did you bring forth your child by yourself and call no person to be with you, she replied, she did not want [assistance as] she was well. . ." The deponent further claimed that she prepared to wash the child, but was "so much afraid that she ran away and brought another neighbour woman, and afterwards washed and dressed the child, and put it into the bed in its mother's arms." Coullard declined further assistance or company. The next morning, the deponent found the child had died. She finished her deposition by stating that Coullard had concealed her pregnancy and refused to disclose the father's identity, and that " although her neighbours might suspect [his identity] they could not be sure, as there were many men [who] went about her house. . .."

A warrant was issued for Coullard 3 days later for "infanticide and concealment of pregnancy" and she was committed to jail.[161] In her examination, she admitted to having had an illegitimate child and that "fearing discovery by her brother-in-law who lived with her in the same house-. . .she put the child in a trunk wrapped in linens: and realizing that the child's cries could be heard she put the child in the cellar to stifle its voice; that she sent for a neighbour to help her take care of the said child. That the neighbour by name of Marguerite Doré came at her request and in the evening and that nonetheless the child died during the night." A grand jury declined to indict.[162]

Despite the fact that, unusually, she had requested a neighbor's assistance, the undercurrent of fear that runs through this account is vivid: the neighbor's terror; Coullard's dread of discovery by her brother-in-law. These emotions must have been shared by many mothers, too petrified to confide in others, and fearing the rage and condemnation of relatives as was the case with Coullard and Williams. It is unlikely that they would have been comforted by the low conviction rate for these offenses.

161. BAnQ-M, KB(F), *Domina Regina v. Françoise Coullard dit Lestrase* (sic) (November 15, 1840) (affidavit of Margaret Doré); ibid. (November 18, 1840) (arrest warrant); MG (Françoise Coullard dit Lestrase (sic) committed November 20, 1840 for infanticide). Doré's affidavit serves as an excellent example of the transcriptive/descriptive nature of many of these documents.

162. BAnQ-M, KB(F), *Domina Regina v. Françoise Coullard* (November 20, 1840) (voluntary examination); *The Montreal Gazette* (December 1, 1840) (no bill); BAnQ-M, MG, note 161 above (including notation of her discharge on December 6, 1840).

Women charged with these crimes were clearly a small minority of perpetrators; in most instances the culprit was never identified.[163] Furthermore, many illegitimate infants were delivered and disposed of without a trace; however, the undercurrent of fear in these cases is palpable.

At least three suspects during this period fled before they could be arrested. A 42-year-old widow came to the attention of authorities after neighbors discovered a dead infant in her home; she had apparently been pregnant during the previous autumn.[164] An inquest resulted in a finding of murder, but she defaulted on her court appearance. A neighbor provided identifying information to authorities to facilitate her apprehension, alleging she had fled with her cousin during the night to the United States, but she never stood trial.[165] Some women clearly evaded prosecution with the collusion of third parties, and indeed flight might have been the expedient outcome for all concerned.[166] In 1830, an unmarried domestic servant secretly gave birth to, and disposed of, her child in the privy of the boarding house where she lived and worked. Her claims of stillbirth were negated by the coroner, and the inquest returned a finding of willful murder after an autopsy ostensibly revealed that the child had respired.[167] Left to recuperate, she escaped from house arrest because of her guardian's laxity. One newspaper, making sarcastic mention of the "watchful" constable on duty, pointedly asked: "[w]e understand that both the physicians examined on the inquest gave their opinion that her removal to the Gaol was practicable and not dangerous to her life, so why was she not removed accordingly?" Sniffed the editor, "[t]his is the second instance of escape from an accusation of infanticide which has fallen under our observation."[168]

In addition to the offenses of murder and concealment, a mother could find herself facing the charge of attempted murder, a non-capital offense that carried with it harsher penalties than did concealment. Only one

163. Compare Emmerichs, "Trials of Women," 105 (in England in 1860, eighty-one women were charged with infanticide but 126 dead infants were found); Jarvis, 'Mid-Victorian Toronto," 134 (in Toronto in the 1860s, seven women were charged but fifty to sixty infants were found).

164. BAnQ-M, KB(F), *Domina Regina v. Geneviève Clouthier* (December 29, 1840) (affidavit of Joseph Desjardins and Rosalie Leroux); ibid, (affidavit of Noel Clouthier).

165. BAnQ-M, KB(F), *Domina Regina v. Geneviève Clouthier* (December 25, 1840) (name of deponent illegible) (author's translation); KB(R), 29, *Queen v. Geneviève Clouthier* (March 3, 1841) (true bill); KB(R), 32, ibid. (March 5, 1841) (defendant defaulted and process issued). See also *The Montreal Gazette*, March 4, 1841; *The Montreal Herald*, March 8, 1841.

166. See, generally, Galley, "I Did It To Hide My Shame," 51.

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

168. *The Canadian Courant*, April 21, 1830.

prosecution for attempted murder was found, no doubt reflecting the fragility of infant life and the ease with which an infant could be dispatched. That prosecution, of an unmarried domestic named Marie Carmel, also reflects the reality that even in those cases in which indictments had been secured, juries remained loath to convict.

On a June morning in 1846, a boarding house lodger on Great St. James Street heard the wail of a newborn infant emanating from the courtyard. Summoning the landlord and the police, they discovered a male infant "feebly struggling" at the bottom of a 10-foot-deep privy. A search of the house quickly pointed the finger of suspicion at Carmel, who was found lying unconscious in a pool of blood on the floor of her room. At first denying culpability, she confessed when the attending physician confronted her with the infant. Too ill to be moved following her arrest, she was not incarcerated for some weeks.[169] While Carmel recuperated, the child was placed in the care of the Grey Nuns.[170] She was committed to prison on June 29, 1846 and a true bill found against her for attempted murder on August 6.[171] She languished in jail for 6 months before her trial. As was common—despite Williams' experience to the contrary—counsel had been secured for her. The prosecution called as witnesses the lodger at her boarding house who had first heard the infant's cry, and two physicians whose testimony was said to have "supported the medical part of this case."[172] Carmel's purported confession was to play no role at trial. Defendants could not testify under oath in their defense but neither were they commonly allowed to incriminate themselves through their pretrial statements: judges evidenced an institutionalized distrust of confessions grounded on the common law principle that "no man shall convict himself."[173]

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

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

171. BAnQ-M, MG (Marie Carmel committed June 29, 1846 for "throwing her child into the privy."); *The Montreal Gazette*, August 7, 1846 ("true bill Marie Carmel for attempting to murder her child.").

172. *The Montreal Transcript*, February 23, 1847. Presumably this means they verified that she had recently given birth.

173. See, generally, Taylor, *Manual*, 115; King, *Crime, Justice and Discretion*, 225–26. This distrust also extended to cases implicating child abuse and domestic violence prosecutions. See, generally, Ian C. Pilarczyk, *Justice in the Premises: Family Violence and the Law in Montreal, 1825–1850* (DCL thesis, McGill University, 2003). Confessions that were induced, prompted, or coerced by police or other agents were thrown out. Monholland, "Infanticide," 138–43; but also see Galley, "I Did It to Hide my Shame," 54–55 (confessions to the crime of infanticide guaranteed conviction). During this period, several Montreal defendants first confessed but pled not guilty at trial and were acquitted. If those defendants

Carmel's attorney presented a two-pronged defense in which he argued that she was feeble minded, and furthermore that there was insufficient evidence to tie her to the crime. Two "gentlemen" men were called as witnesses who testified that they "considered the prisoner to have been always of weak intellect, in fact a kind of idiot"; to this the Crown offered no rebuttal. After the defense rested, the chief justice summed up the evidence to the jury, which quickly acquitted her in the face of what appeared to be strongly inculpatory circumstances.[174] The difference in result between this case and that of Williams is striking. Carmel benefitted from a spirited defense, an anemic Crown prosecution, and a sympathetic jury. Why Williams did not have the same experience is a matter of speculation, but without legal representation at trial she had no one to advocate on her behalf until after her conviction and sentence.

Unlike both Williams and Carmel, the most common related offense with which these mothers were charged was concealment of birth.[175] At least prior to 1842, when it became a freestanding misdemeanor, concealment was a lesser-and-included offense. Generally, defendants tried for infanticide were much more likely to be convicted of concealment.[176] Even so, only three defendants were convicted of that crime during this period, and then only after having been unsuccessfully prosecuted for murder. The charge of concealment was a gendered compromise that prevented women from evading legal penalties completely, while still ensuring that judges and jurors did not have to grapple with a capital charge.[177]

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are representative, then confessions did little to increase the chance of conviction. Judges generally erred on the side of exclusion rather than risk admitting a confession that was induced by promises of leniency, a practice that had its critics. See, for example, *The Times and Daily Commercial Advertiser*, February 2, 1844 (condemning the practice of suppressing confessions, even those made by defendants "in the confusion of guilt or in the despair of concealment."). Guilty pleas to capital felonies were likewise discouraged as being inimical to justice. Wiener, "Judges v. Jurors," 473, n.15 (murder trials).

174. *The Montreal Transcript*, February 23, 1847; see also *La Minerve*, February 11, 1847. Her trial appeared to have received short thrift in the local press. Her case is recorded in BAnQ-M, KB(R) (August 1846–August 1849), 112–13, *Queen v. Marie Carmel* (February 11, 1847) (trial and verdict); MG (Carmel discharged February 11, 1847).

175. Compare Backhouse, "Desperate Women," 468; and Higginbotham, "Sin of the Age," 327. But see also Cliche, "L'infanticide," 49, Table III (nineteen murder, eighteen concealment, four infanticide, and one manslaughter charges brought in Quebec City during 1812 to 1892).

176. Compare Higginbotham, "Sin of the Age," 331.

177. Compare Emmerichs, "Trials of Women," 108, who has opined that the charge of concealment "by the middle of the nineteenth century represents. . .the kind of 'pious perjury' so common in English law, used to prevent the capital punishment of offenders for whom the courts had some sympathy." Emmerichs went on to note that most of the women in England charged with concealment after 1862 were young, unmarried domestic

Among those few convicted was Jane Hughes, against whom a grand jury found a true bill for the suffocation death of her illegitimate son. A "well looking genteelly dressed young woman," Hughes pleaded not guilty before the Court of King's Bench in September 1834.[178] The evidence presented against her was largely medical, and revolved around the issue of whether the child had been born alive. She was acquitted of murder but found guilty of concealment, and was sentenced to 12 months at hard labor. In another example of custom trumping law, she was granted a full pardon 3 months later.[179] A young woman tried in 1840 for murdering her illegitimate infant son was sentenced to 4 months' hard labor for concealment, the *Montreal Gazette* observing that the "particulars of this affair are of a nature which cannot with propriety be placed before our readers."[180] A third defendant received a 6-month sentence after pleading guilty to "having hidden the birth of her male infant" in 1846.[181]

It was rarer still for a defendant to be charged outright with concealment rather than infanticide, which the law explicitly allowed in Lower Canada after 1841. During the period 1841–1850, two such cases were found, as detailed earlier in Table 3. The charge of concealment implied a belief the child had died of natural causes or been stillborn. In the absence of

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servants; faced with loss of their livelihood it was likely that many did actually murder their infants, ibid. See also Backhouse, "Desperate Women," 467–68; Higginbotham, "Sin of the Age," 328.

178. *The Montreal Gazette*, September 6, 1834; *The Montreal Herald for the Country*, September 8, 1834 (not guilty plea).

179. BAnQ-M, KB(R), 15–17, *Dominus Rex v. Jane Hughes* (September 9, 1834) (trial and verdict); KB(R), 92, ibid. (September 10, 1834) (sentence). See also *The Vindicator*, September 12, 1834; *The Montreal Gazette*, September 11, 1834. The latter newspaper described concealment as a "minor offense." For her pardon, see N.A.C., AP, vol. 19, 7884–86, "The Attorney General's Draught of pardon in favour of Jane Hughes" (December 18, 1834). The language of the pardon reflects the ritualized aspects of the law: the attorney general on behalf of the Crown exercised his "Grace and mercy" and with their "special Grace, certain knowledge and mere motion" did "pardon, remit and release" Hughes from her sentence.

180. BAnQ-M, KB(R), 8, *Queen v. Anastasie Lepine dit Chevaudier* (November 5, 1840) (true bill); KB(R), 24–35, ibid. (November 10, 1840) (trial and verdict); and KB(R), 14, ibid. (December 5, 1840) (sentence). See also *The Montreal Gazette*, November 10, 1840; and *The Montreal Herald*, November 12, 1840 (noting her conviction and stating that the "facts which we cannot lay before our readers were such as to excite a great interest in the fate of the prisoner."). Such societal conventions frustrate the efforts of the historian in reclaiming these stories.

181. BAnQ-M, KB(R), 67, *Queen v. Bridget Cloone* (February 14, 1846) (author's translation). See also *La Minerve*, February 16, 1846. The eleven convictions in Quebec City resulted in the following sentences: (1) 2 years hard labor; (1) 1 year hard labor; (2) 1 year in prison; (1) 6 months hard labor; (3) 6 months in prison; (1) 4 months in prison; (1) 2 months in prison; and (1) 6 weeks in prison. See Cliche, "L'infanticide," 49.

corroborative witnesses—and with many such women having every incentive to lie—one might assume that concealment charges would not have been brought without convincing evidence. In the case of Sarah Thomas, however, her claims went unquestioned. When interrogated by a justice of the peace, she alleged that she had secretly delivered a stillborn infant and secreted the body under a tree stump.[182] A physician attested that he went to her home in the company of several other persons, "it being expected that Sarah Thomas had been secretly delivered of a child and that she had disposed of the said child with a view to conceal the birth," which his examination confirmed.[183] She was bound to trial but no evidence of further proceedings were found and it seems likely that she, like others before her, felt that flight was the most expedient option. The experience in other jurisdictions was that concealment charges were often brought when facts pointed clearly to infanticide; however, this was not the case in this instance.[184] It is interesting to contemplate that the conviction rate, as low as it was, could have been considerably lower had many cases—ostensibly the weakest of them—not failed to pass the indictment stage.[185]

Analysis of the infanticide prosecutions brought during this period demonstrates that the circumstances leading up to most of those cases were similar, and that the Montreal experience mirrored that of other Western jurisdictions. As shown in Table 4, nearly all of the twenty-eight victims had been born to single women or widows, with only one having been born within a legal marriage.[186] Second, the impact of gender on a child's survival was murky as these cases and coroners' reports both indicate that a majority of victims were male.[187] Third, nearly all were

182. BAnQ-M, KB(F), *Queen v. Sarah Thomas* (July 7, 1843).

183. Ibid. An improbably named male relative, Thomas Thomas, was implicated in the case but there were no legal grounds to charge him as an accessory.

184. Compare Cliche, "L'infanticide," 50–51; Sauer, "Infanticide and Abortion," 82.

185. Compare Donovan, "Infanticide," 162.

186. See footnotes 207–10 and accompanying text (case of Susan Pengelly). Five pairs of twins were alleged within those court documents, but only two pairs of twins appeared in trial evidence. Perhaps in the other cases, one of the siblings was deemed to have died a natural death. For comparable observations about other jurisdictions, see, for example, Backhouse, "Desperate Women," 448, 457 (nineteenth-century Canada); Higginbotham, "Sin of the Age," 321 (nineteenth-century London); Malcolmson, "Infanticide," 192 (eighteenth-century England); Monholland, "Infanticide," 68 (nineteenth-century England); and Philips, "Crime and Authority," 261 (ditto).

187. See Table II at 602, above. See also Backhouse, "Desperate Women," 450, n.12 (noting no significant difference between murder rates of male versus female infants); Malcolmson, "Infanticide," 124 (noting that in English infanticides "the circumstances of the mother provided the rationale for infanticide, not the sex of her infant"). Contemporary experience follows the same pattern. See *Crime in the United States, 2001*

Table 4. Characteristics of Infant Victims in Infanticide and Related Prosecutions, 1825–1850.

	Birth			Gender			Age			
	Illeg	Leg	N/I	Male	Female	N/I	Newborn	Less Than 1 yr.	Over 1 yr.	N/I
$n = 28$	24	1	3	15	4	9	25	2	–	1
% of Total	85.7%	3.6%	10.7%	53.6%	14.3%	32.1%	89.3%	7.1%	–	3.6%
Adjusted %	96.0%	4.0%		79.0%	21.1%		92.6%	7.4%	–	

newborns, suggesting that the greatest risk to unwanted children occurred shortly after birth.[188] Only two children had survived more than a few days, one living to 5 weeks of age, and another surviving nearly a year.[189] As far as can be determined, nearly all of the women came from underprivileged socioeconomic backgrounds.[190]

In cases of illegitimate births, the mothers had all attempted to conceal their pregnancies and generally gave birth unaided.[191] Williams' case was unusual because of her race and sentence, but otherwise was characteristic of a young, unmarried, working-class woman who took drastic action when faced with an unwanted pregnancy. No doubt social condemnation of illegitimacy played a large part, but so too did the prospect of destitution.[192] A child borne out of wedlock could not only foreclose future employment opportunities, but if known would also likely result in the mother's dismissal. That child was also another mouth to feed and could easily strain a mother's resources past the breaking point.[193] The physician's account of his visit to Sally Ann Armstrong vividly portrays the privation experienced by some of these mothers: she was "dying with cold" while "very ill-covered in bed"; on the table "the body of a male child [lay] frozen."

(Washington: Federal Bureau of Investigation, United States Department of Justice, 2002) (stating that of 220 infanticide cases in 2001, 126 were male infants, 92 were female, and 1 was unidentified). But also see, generally, Langer, "Infanticide," 47, for the view that female infants were historically the most likely to be murdered; see also Samuel X. Radbill, "Children in a World of Violence: A History of Child Abuse," in *The Battered Child*, ed. Ray E. Helfer and Ruth S. Kempe (Chicago: University of Chicago Press, 1987), 6.

188. See Table II at 602. See also Higginbotham, "Sin of the Age," 324; Malcolmson, "Infanticide, "192; and Rose, *Massacre of the Innocents*, 7. That fact holds true, as pointed out by Rose, ibid., 1. See also *Family Violence in Canada*, 18.

189. See footnotes 134–46 above and accompanying text (case of Betsey Williams) and footnotes 186 and 207–10 above and accompanying text (case of Susan Pengelly). No children were older than 1 year of age, reflecting the fact that their deaths would have been covered under the law governing homicide. Likewise, no fetal deaths were identified. As discussed, an infant had to be fully born of the mother to constitute a life-in-being.

190. Compare Higginbotham, "Sin of the Age," 321; Malcolmson, "Infanticide," 192; and Monholland, "Infanticide," 64–67. That remains true today. See, for example, Maria W. Piers, *Infanticide* (New York: W.W. Norton & Company, 1978) 514–15.

191. Compare Cliche, "L'infanticide," 40; and Higginbotham,. "Sin of the Age," 326. For accounts of women who died during childbirth rather than disclose their condition to family, see Galley, "I Did It To Hide My Shame," 32–33.

192. See, generally, Cliche, "L'infanticide," 39–41 (parental reproach as a factor leading to infanticide); Higginbotham, "Sin of the Age," 321–22; and Sauer, "Infanticide and Abortion," 84.

193. See Gilje, "Infant Abandonment," 583 (noting the traditional view was that those mothers were trying to save their reputations, but arguing that poverty was probably a more likely trigger). See also Sauer, "Infanticide and Abortion," 85.

It was certain that "if care had not been taken of the prisoner she must have died. . . ."[194] When poverty, desperation, and ignorance converged, an infant's death was nearly inevitable.[195]

Domestic servants were one subcategory of women who fit the paradigm common to this crime. Young and unmarried, socially and economically vulnerable, their sexual exploitation by employers and members of their masters' households are well documented.[196] The corollary is that domestic servants have been identified by scholars in many jurisdictions as figuring prominently, perhaps even predominantly, in the annals of infanticide.[197] The frequency with which they appear in infanticide cases has led some scholars to conclude that domestics were more likely than other women to resort to that crime, although it must be noted that they were also less able to conceal their crime.[198] It should also be emphasized that domestics constituted the largest women's occupational group of the period.[199]

Regardless, domestics did not figure as conspicuously in Montreal court records as they have in other jurisdictions. The occupations of many of the

194. *The Montreal Transcript* (August 7, 1847). For discussion of Sally Ann Armstrong's case, see footnotes 212–14 below and accompanying text.

195. Sauer has noted that "[i]llegitimacy occurred predominantly in lower social groups where sanitary standards were low and mothers were least aware of proper techniques of child care." Sauer, "Infanticide and Abortion," 87. For the (I believe unconvincing) view of these women as "revolutionaries" and "rebels" who were driven to protest a lack of birth control or assert control over their sexuality, see Backhouse, "Desperate Women," 477; and Jones, *Women Who Kill*, 49.

196. See, generally, John R. Gillis, "Servants, Sexual Relations and the Risks of Illegitimacy in London, 1801–1900," in *Sex and Class in Women's History*, ed. Judith L. Newton et al. (London: Routledge and Kegan Paul, 1983), 115; and Claudette Lacelle, *Urban Domestic Servants in Nineteenth Century Canada* (Ottawa: Environment Canada, 1987), 59. For discussion of the legal response to seduction of domestics in Upper Canada, see, generally, Bailey, "Servant Girls," 159.

197. Lachance, "Women and Crime," 160–162, discusses four cases of women charged with this crime in eighteenth-century Canada, two of whom were maids. For similar experiences, see, for example, Backhouse, "Desperate Women," 457; Cliche, "L'infanticide," 38; Donovan, "Infanticide," 169; Krueger, "Literary Defenses," 285; Langer, "Infanticide," 357; Malcolmson, "Infanticide," 192; Monholland, "Infanticide," 85; and Rose, *Massacre of the Innocents*, 18.

198. See, generally, Wheeler, "Infanticide," 412.

199. See Rose, *Massacre of the Innocents*," 19. Most domestics in Montreal during this period were young, unmarried Irish Catholics. Cross, *Neglected Majority*, 68–73 (general discussion of Montreal domestics). One scholar has intriguingly suggested that women of respectable backgrounds may have identified themselves as domestics as a means of camouflage. See ibid., 18.

women are unknown; however, only a handful of them were classified as domestics, although nearly all were members of the working poor. The case of Zoé Laurin (or Lorrain), for example, is particularly resonant. As graphic and disturbing as is the dispassionate affidavit of her master, even more startling is her reckless lack of attempt at concealment, having left her child in a chamber pot after giving birth unaided in the middle of the night.[200] From that account, the evidence of whether the child had been stillborn was inconclusive, although her master indicated he had not heard the child cry. The grand jury, for its part, were "unanimously of opinion that the death of the said child was from negligence or want of knowledge (simplicité)" and declined to indict.[201] Had she been prosecuted the following year, the grand jury could have substituted a charge of concealment, but that was technically not an option in 1840. We are therefore precluded from knowing how a judge and jury would have reacted to the plight of that young servant, but the grand jury's response is instructive.[202] Cases such as these illustrate that a component of the gendered compromise included *not* assuming that a woman had to be knowledgeable about pregnancy and childbirth by virtue of her gender.

We are left with the question of why a young woman who had managed to keep her pregnancy a secret under such difficult circumstances did not act more circumspectly with respect to disposing of her child's body. Laurin's master had confronted her with his suspicions only the night before, and even had that not been the case, leaving her infant in a waste bucket was hardly a successful strategy for avoiding detection. Was the non-concealment a sign she was subconsciously seeking discovery and punishment, indicative of a lack of premeditation, or did it reflect a helplessness borne out of depression and despair?[203] Is it possible that

200. BAnQ-M, KB(F), *Queen v. Zoe Laurin/Lorrain* (May 31, 1840) (affidavit of Louis Pontus dit Claremont (*sic*)). The deponent described hearing her use the chamber pot in the middle of the night and finding a "new born female infant with the afterbirth attached" at 4:30 a.m. the following morning. He had earlier accused her of being pregnant, which she had denied. He went on to state that "[t]he deponent and his wife reproached her for having concealed and brought to such a termination the infant," in response to which she "looked in the bucket but did not speak." On Monday afternoon he carried the infant "to Thomson Clements the Beadle in a coffin of wallnut (sic) wood" and asserted that Laurin "is now in bed and appeared unwell." Similar observations about recklessness were made by Higginbotham, "Sin of the Age," 326.

201. BAnQ-M, KB(F), *Queen v. Zoe Laurin* (August 29, 1840); KB(R), 29, *Queen v. Zoe Lorrain* (August 29, 1840).

202. Compare note 181 at 43 above and accompanying text (case of Bridget Cloone) and footnotes 223–24 below and accompanying text (case of Catherine Whelan).

203. See, for example, Higginbotham, "Sin of the Age," 326; and Monholland, "Infanticide," 125–26.

Laurin believed that she had not really given birth? The latter scenario seems improbable from a presentistic perspective; however, contemporary sources indicate clearly that this was a common occurrence, or at least was viewed as such.[204] Whether it was fear, exhaustion, or some other explanation, remains unknown.

Laurin's story came to light largely because of her own imprudence. Whereas the difficulties attendant in keeping secret an illicit pregnancy under such circumstances were daunting, she might well have feared discovery even if her circumstances had been different. Evidence suggests that prying neighbors did not hesitate to interpose themselves if they felt an unmarried woman was with child. Some felt they were driven by a moral imperative to probe suspicious activities, whereas others simply sought to assist a mother in distress or to provide support for a fragile infant life. The newspaper account of Sally Ann Armstrong's trial, for example, reported that it was her mother's neighbor who was responsible for disclosing Sally Ann's situation:

> [T]he neighbour of the prisoner's mother. . .suspecting the prisoner to be on the eve of confinement. . .went to her on the morning of the day mentioned in the indictment. She saw the prisoner's mother, who told her that nothing was wrong except a little head-ache which her daughter had. Witness then returned to her house; but as she was quite convinced that her suspicions were correct, her husband advised her to return again, and render all the assistance in her power. She did so return, and was then told that a child had been born; and upon searching, the body of a dead infant was found at the foot of the bed; a stain was also found. . .which seemed to show that the child had lain there. It was folded up in a cloth which was stained with blood.[205]

This account vividly illustrates some of the gendering which surrounded infanticide—female neighbors would have been uniquely well-equipped to spot expectant mothers, as was the case here; however, it was the husband who prevailed upon his wife to return and give assistance.

204. The theme of a woman mistaking labor pains for a bowel movement or cramps was a commonly accepted defense, probably reflecting a general lack of knowledge of pregnancy among many unmarried women. See, generally, Krueger, "Literary Defenses," 285–86 (also noting that accidental death by drowning was a common defense); Rose, *Massacre of the Innocents*, 73; Wright, "Unnatural Mothers," 13. For a reference in Victorian medical jurisprudence, see Boys, *Treatise*, 54 (the "pains of labour may be mistaken for other sensations, and the child in consequence be born under circumstances which would inevitably cause its loss without any blame attaching to the mother.").

205. *The Montreal Transcript*, August 7, 1847. For the view that townsfolk played a prominent part in ferreting out murders of illegitimate newborns, see Wheeler, "Infanticide," 408.

Women, of course, bore the infants as well as the risk, but men possessed the agency and discretion to dictate the law's response.

Although the preponderance of cases followed those archetypes, there were notable exceptions. As stated previously, married women were virtually invisible in the annals of infanticide prosecutions. Many reasons can be adduced for that fact, most fundamentally that they did not face the despondency associated with unmarried motherhood. Furthermore, an infant who died within a traditional marriage tended to elicit sympathy rather than suspicion. Although "overlaying"—the smothering of an infant while sleeping in bed with its mother—may well have masked many cases of infanticide, it was viewed as accidental rather than something potentially more sinister.[206]

The case of Susan Pengelly was the rare instance in which a married woman was tried for infanticide. In 1839 she ventured into a forest and slashed the throat of her 11-month-old daughter before attempting to kill herself. Married to a prosperous farmer in the Township of Grenville, Pengelly was faced neither with social ostracism nor with the prospect of destitution. She had raised several children, the eldest of which was a 13-year-old boy, and was considered a doting mother.[207] Her infant was also nearly a year old, well past the age when most infanticides were likely to occur, and Pengelly was further anomalous in attempting suicide.[208]

At her trial, Pengelly's counsel mounted a spirited defense alleging mental infirmity, although she was apparently fully recovered by this time. Her son and neighbors testified that she had begun acting deranged the previous winter, as she "used occasionally to get up during the night, dress herself and dance about the house. . .say[ing] that the fairies were coming to carry her off."[209] The jury seized upon this evidence of her being non compos

206. See, generally, Sauer, "Infanticide and Abortion," 81; see also, generally, Elizabeth de G.R. Hansen, "Overlaying in Nineteenth-Century England: Infant Mortality or Infanticide?" *Human Ecology* 7 (1979): 333–43. For a reference to this practice, see *The Pilot*, September 1, 1846 and *The Montreal Weekly Pilot*, September 1, 1846: "DEATH OF AN INFANT FROM SUFFOCATION—On Thursday, an inquest was held upon the body of an infant, ten months old. . ..It appears that the infant, while sleeping with its mother slipped between the bed and wall, which produced suffocation. A verdict was accordingly returned." Other common forms of natal care, such as administering narcotic-based soporifics, could also be dangerous. See *The Pilot*, March 11, 1845 (cautioning parents against that practice).

207. *The Montreal Gazette*, March 21, 1840. For a similar case in Ontario, see Backhouse, "Desperate Women," 464–65, n. 51.

208. This fact pattern more closely mirrors a number of high-profile modern child murders; see, generally, Rapaport, "Mad Women."

209. Ibid. As Monholland noted, children were commonly accepted as witnesses in mid-nineteenth century England and elsewhere. Monholland, "Infanticide," 179–81. For

mentis and promptly found her not guilty by reason of insanity. The attorney general balked at the defense's request that she be immediately discharged as she was "now in a perfect state of sanity" but the Court nonetheless granted the request.[210]

Unlike Pengelly, single mothers often had no choice but to give birth unattended. On those rare occasions when a defendant had assistance, she was most likely to turn to family members who might have been bound by a sense of loyalty or been inclined to assist in removing such an embarrassing burden.[211] Two cases involved defendants who had secured assistance during their delivery, including that of Sally Anne Armstrong who was aided by her mother. After spending nearly 2 weeks convalescing, Sally Anne was moved to the local jail where she awaited trial for 6 long months on the charge of "wilful murder of her male infant child. . .by suffocating and stifling the child between two beds."[212] At her trial, a neighbor testified to having suspected Sally Anne was pregnant and "eventually discovered the child rolled up in a quilt, with every appearance of having been smothered as soon as born." The child had evidently been born alive, as upon her first visit the neighbor heard the child crying, and "afterwards the voice of the prisoner saying 'pussy pussy' as if to disguise the cause of the cry." A physician testified that the infant showed no marks of violence and that he concluded the child had died of negligence.[213] Sally Anne was acquitted of murder but convicted of concealment, and sentenced to 6 months' hard labor.[214] Her mother's involvement was not

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the period under examination, evidence of that practice in Montreal sources is mixed. In the case of Susan Pengelly, the testimony of her family clearly helped her case. Compare Monholland, 169, noting that "in virtually every case wherein a defendant's family member testified, those comments about a defendant were derogatory, negative, and hurtful to that case."

210. BAnQ-M, KB(R), 79–80, *Queen v. Susannah Pengelly* (March 7, 1840).

211. See, generally, Wheeler, "Infanticide," 413. Hoffer likewise made the observation that the most frequent abettor in those rare cases involving accessories was the defendant's mother. Hoffer and Hull, *Murdering Mothers*, 103.

212. *The Montreal Gazette*, August 14, 1847.

213. Or, as the physician put it, from "want of care." *The Montreal Transcript*, August 7, 1847. This claim corroborates the view that infanticide was not infrequently a passive act.

214. For her concealment conviction, see BAnQ-M, KB(R) (August 1846–August 1847), 151–52, *Queen v. Sally Anne Armstrong* (August 3, 1847); *La Minerve*, August 5, 1847. For her sentence, see BAnQ-M, MG (Armstrong committed February 9, 1847, convicted August 14 and sentenced to 6 months' imprisonment; discharged on February 14, 1848); BAnQ-M, KB(R) (August 1846–August 1847), 195, *Queen v. Sally Anne Armstrong* (August 14, 1847); see also *The Montreal Transcript*, August 17, 1847; *La Minerve*, August 16, 1847. More than a year had elapsed from the time of her incarceration to her discharge.

without its attendant risks, as she was arrested 3 days after her daughter, although not indicted.

Unlike the norm of a single mother acting alone, three prosecutions implicated co-defendants who were the parents of the victims.[215] In two of these cases, the victims were twins. In fall of 1843 a respectable young woman named Eleanor Chance and her partner were charged with murder and concealment. A shopkeeper who boarded in the same house alleged that Chance had been delivered of a child in December but that "the only knowledge he had of this affair is that he found a package of woolen articles covered in blood, in his courtyard close to the house." He also attested to seeing a mysterious trench that had been recently dug in the cellar.[216] The shopkeeper's wife claimed that on the night of December 2 she had heard the cries of a newborn emanating from Chance's room. Chance refused all assistance, but the following day when confronted, stated that the infant had died shortly after birth and that it was in a box under the bed, awaiting a cellar burial. Later that evening, the shopkeeper's wife saw Chance's partner enter the cellar with a shovel. Upon examination of the site with her husband, she saw that the earth had been disturbed and she had no doubt that the child had been buried there.[217]

During her voluntary examination, Chance acknowledged that she had delivered a male infant but adamantly denied having caused his death, claiming the child had died shortly after birth. As she subsequently lost consciousness, she asserted, she was not aware of the cause. She further denied having conspired with her partner to bury their child in the cellar, nor did she admit to having any knowledge of the infant found in a thicket in Ste. Thérèse; this latter statement perhaps in response to the authorities' belief the couple removed the body from the cellar for fear of discovery, as there was no mention of a successful exhumation in the court records.[218] Her partner's assertions were largely identical, curiously adding that the child had been buried in consecrated ground, the only such claim found

215. Hoffer and Hull have pointed out that fathers were sometimes charged in concealment prosecutions but rarely convicted. Co-defendants tended to be related. See Hoffer and Hull, *Murdering Mothers*, 103.

216. BAnQ-M, KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (March 1, 1843) (affidavit of Dominique Joanette) (author's translation).

217. BAnQ-M, KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (March 1, 1843) (affidavit of Félicité Monette).

218. BAnQ-M, KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (March 5, 1843) (voluntary examination of Eleanor Chance).

within the judicial annals for this period.[219] Commenting on the case, one newspaper reported that Chance "had borne an unimpeachable character previous to her seduction, and the case excited much interest" but went on to say (as was all too typical for the period) that "[i]t is to be regretted that the circumstances are not better fitted for publication, as they might convey a useful lesson to the public, and possibly prevent much of the immorality which prevails. . .." Chance was acquitted at trial while a grand jury refused to indict her partner.[220] Six years later, another couple was implicated in infanticide in a strikingly unusual case insofar as the putative parents were also involved in an incestuous relationship between uncle and niece.[221] The bodies of their infants were never found, and the grand jury declined to indict them for murder, manslaughter, or even concealment.[222]

The other case involving co-defendants, the Whelan and Brennan trial of 1848, was among the more high-profile prosecutions of the first half of the century, eliciting extensive coverage, which allows for an unusually comprehensive reclamation of the proceedings. The linchpin of the Crown's case was provided by the coroner and the defendant's neighbor. The

219. BAnQ-M, KB(F), *Queen v. Eleanor Chance & Stanislas Forgette* (March 3, 1843) (voluntary examination of Stanislas Forgette). One might wonder why the couple did not show authorities the burial site, unless the body would have been incriminating. It is also interesting that this is the only instance in which burial in consecrated ground was alleged.

220. *The Times and Commercial Advertiser*, September 9, 1843. See also *The Montreal Transcript*, September 8, 1843.

221. See *L'Aurore*, September 8, 1848 and *La Minerve*, September 7, 1848 (author's translation): "INFANTICIDE—The named Louis Legault and Elmire Legault his niece. . .were arrested Tuesday and brought to the police station on accusation of having maintained an illicit relationship together and having hidden the births of two children who were buried in the cellar. Information having been given to Mr. Coursol the Coroner by the brother of the girl. . .the cellar was excavated but without result. It appears that he has since avowed that the bodies were exhumed from the cellar and interred in a field, but after a new search conducted by the Coroner, it was impossible to find them. As a result of the testimony and several confessions made by the prisoners they were both sent to prison." For a similar account, see *The Pilot*, September 7, 1848 (citing *The Montreal Herald*). Note the reference to the defendant having confessed, and the role of the woman's brother in providing evidence. Incest per se was not a legally cognizable offense during this period. See generally Ian C. Pilarczyk, "'To Shudder at the Bare Recital of Those Acts': Child Abuse, Family, and Montreal Courts in the Early-Nineteenth-Century," publication forthcoming in *Essays in the History of Canadian Law: Old Quebec and the Canadas*, ed. G. Blaine Baker and Donald Fyson (University of Toronto Press, for the Osgoode Society for Canadian Legal History, Toronto, 2013).

222. BAnQ-M, KB(R), 321, *Queen v. Louis Legault otherwise called Desloriers* (*sic*) *& Elmire Legault otherwise called Desloriers* (*sic*) (February 6, 1849) (no bill for murder); KB (R), 322, ibid. (February 6, 1849) (no bill for manslaughter); KB(R), 323, ibid. (February 9, 1849) (no bill for concealment).

neighbor testified that the couple had cohabited for approximately 4 years and that it had become apparent by May of the previous year that Whelan was pregnant. After Whelan had delivered, the neighbor visited her at home, and saw her sitting on the bed, looking dejected. When asked what was troubling her, Whelan replied, "whisht: with the help of God I will soon be well." The neighbor observed a newly delivered infant on the bed and inquired whether it had died, to which Whelan ominously replied "not yet." Hearing there was a dead twin the neighbor returned a short time later. Pulling back the bed sheets she uncovered the macabre sight of the twin, badly bruised and with a crushed head. Visibly shaken by what she had seen, she testified that in response Whelan offered the explanation that her partner's adolescent son had beaten the infant the night before.

The coroner, a surgeon with the inspiring name of Dr. Verity, followed the neighbor's testimony by describing in vivid detail the injuries sustained by the twin. He was "struck by the extraordinary appearance of the head," he testified, as it had "lost its rotundity, and was flattened." The autopsy revealed graphic evidence of head trauma, with the infant's brain reduced to a "pulpy mass, shewing (sic) fearful violence to have been used," with finger marks clearly visible on the child's scalp. He also found the lungs to be uninflated and the child fully developed, leading him to conclude that the child had not breathed but would have otherwise survived were it not for the injuries he had sustained. On cross-examination, Dr. Verity could not be shaken from his belief that the injuries were deliberately inflicted and were the cause of death.

Whelan and Brennan's defense counsel, rather than offering alternative explanations for the facts in evidence, opted to challenge the Crown's case on legal grounds. It was a long-standing common law precept, counsel argued, that in order for the defendants to be charged with murder it had to be proven both that the child had been "entirely born" as well as that the child had respired. The Crown having failed to prove the elements requisite to a murder charge, counsel moved that the murder charges be dismissed. The chief justice, with great reluctance, agreed that the charges could not be sustained and dismissed them. Noting sternly that the defendants had shown "great moral criminality," he felt bound to add that although Whelan could conceivably be charged with concealment, the evidence did not support such a charge, and the Court summarily dismissed the concealment charge also.[223]

223. *The Montreal Gazette*, February 7, 1848 (case of Catherine Whelan and Peter Brennan). See also BAnQ-M, KB(R) (August 1846–August 1849), 219–20, *Queen v. Catherine Whelan & Peter Brennan* (trial for murder); KB(R), 220–21, ibid. (trial for

Faced with a case that was rapidly collapsing, the Crown prosecutor refocused his case on the death of the first twin who unassailably had been fully born and had died under his parent's care. Whelan and Brennan were summarily indicted for manslaughter but quickly acquitted by the jury.[224] Faced with two dead infants—one of which had sustained a crushed skull and severe bruising—the Crown was therefore unable to secure a conviction for murder, manslaughter, or even concealment against either parent, for either infant death. The Whelan and Brennan case is the most vivid example during this period of the role of judicial filtering and also reflects the legal culture of the time: a combination of informal, almost ad hoc proceedings, coupled with a strongly formulaic and rigid common law. Cases in which acquittals occurred in the face of strong evidence illustrate how the legal system could exhibit extraordinary leniency, either intentionally, or through the complexities of the criminal law, even in instances in which the defendants' culpability seemed incontrovertible.[225]

Although infanticide, concealment, and attempted murder constituted the main spectrum of legal charges related to these crimes, two variant charges—abandonment and assisting to conceal and murder—were also identified. A complaint in 1834 alleged that a woman named Pollard "did wickedly and maliciously leave her two infant children within the portico of the Deponent's front door saying that she left them there so that the Deponent should take care of them[,] then departed and made her Escape." Had he not placed them with the Ladies Benevolent Institution as a temporary measure they would have perished, the complainant alleged, and accordingly he "prayeth for relief and further that the said Pollard may be arrested and dealt with according to law."[226] There were no legal provisions governing abandonment during this period, however, and therefore no cognizable crime was committed and no formal disposition of this complaint was found.[227] The other example, "assisting to conceal and murder a

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manslaughter). The phrase "moral criminality" is another example of the commonly perceived intersection between crime and morality.

224. It was reported that the jury "did not consider the evidence conclusive." Ibid. For a discussion of the inappropriateness of manslaughter charges, see Backhouse, "Desperate Women," 466–467.

225. In the context of eighteenth century England, Hay observed that the law's "very inefficiency, its absurd formalism, was part of its strength as ideology." Hay, *Property*, 33.

226. BAnQ-M, QS(F), *Dominus Rex v. Mary Pollard* (26 December 1834) (charge of misdemeanor). The charge made on the document also was described as "abandonment" as well as "misdemeanor."

227. Abandonment was not a statutory offense in British North America until 1864, when the New Brunswick legislature was the first to promulgate such legislation; it became a federal offense in 1869. Backhouse, "Desperate Women," 472. It became law in England in 1861 with 24 & 25 Vict. C. 100, s. 27 (1861) (providing a maximum sentence of three

child," was levied against the mother of a defendant who was acquitted of infanticide but convicted of concealment; she spent several days in prison before it was likewise determined this was not an indictable offense.[228] These alleged crimes, more descriptive than legally valid, were reflective of the discretionary and informal nature of the everyday administration of criminal justice, and the irregular legal training of many justices of the peace and other officers, and also demonstrated either an assumption that the law considered these acts to be crimes, or an attempt by these legal officers to criminalize acts that were deemed immoral.

Those cases provide a wealth of information on the dynamics and circumstances surrounding infanticide in Montreal during this period, demonstrating that juries were reluctant to convict defendants for any acts related to that crime. Evidence, even if facially compelling, was often found insufficient to sustain conviction or even indictment. The few cases in which conviction resulted—one charge for murder and three of concealment—generally resulted in penalties far from the allowable maximum.[229] It is not possible to offer conclusive reasons why those women were convicted when so many others were not, but the trials offer tantalizing clues. Betsey Williams, unique for being the only defendant convicted of infanticide during these years, presented a clear case of infanticide but she was

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years' imprisonment upon conviction of concealment). The majority of cases would have been inimical to prosecution given the difficulty of identifying a putative defendant. Abandonment as a "crime," however, was tracked even though not prosecutable. See for example, *The Pilot*, January 10, 1849 (listing crime figures for 1848 which included two cases of child abandonment; the ages of the children were not identified).

228. BAnQ-M, KB(F), *Domina Regina v. Ann Armstrong* (2 February 1847); BAnQ-M, MG (Ann Armstrong committed on 27 January 1847; discharged 3 February 1847); KB(R), 83, *Queen v. Sally Anne Armstrong & Anne Armstrong* (3 February 1847). Nineteenth century Canadian indictments and charges were often fluid, and did not always correlate neatly to common law or statutory offenses. See generally Pilarczyk, "Justice" (indictments for offenses related to family violence were often more descriptive than legally accurate); Ian C. Pilarczyk, "'Too Well Used by His Master': Judicial Enforcement of Servants' Rights in Montreal, 1830–1845, 46 *McGill Law Journal* (2001): 491–529 and "The Law of Servants and the Servants of Law: Enforcing Masters' Rights in Montreal, 1830–1845," 46 *McGill Law Journal* (2001): 779–836 (illustrating the descriptive and flexible nature of charges related to labor infractions during this period); Poutanen, 'The Homeless" (fluidity in charges related to vagrancy); Fyson, *Magistrates*, 211–212 (describing range of offenses and difficulties in categorization by scholars). In some instances, cases were filed under various charges. See e.g., *Dominus Rex v. Mary Pollard*, above at footnote 226 and accompanying text. The provinces of New Brunswick and Nova Scotia amended their statutes to allow for charging persons other than the mother in 1849 and 1851, respectively, while England did so in 1861 and Canada in 1869. Backhouse, "Desperate Women," 455.

229. See footnotes 134–46 above and accompanying text (case of Betsey Williams) footnotes 175–85 above and accompanying text (concealment prosecutions).

hardly alone in that regard. Procedurally, the fact that she incriminated herself by making a full allocution to the justice of the peace (despite judges' reluctance to countenance confessions) and offered no defense at trial were certainly important, and perhaps dispositive, factors. Faced with unambiguous facts and no alternative narrative, the jury might have felt compelled to convict, the likelihood of clemency assuaging whatever qualms they felt about convicting on a capital charge.[230] Williams' race and socially marginal status may also have made her an obvious candidate for exemplary punishment.[231]

Sally Ann Armstrong, despite enduring circumstances of extreme privation, was sentenced to 6 months' imprisonment for concealment.[232] Her negligence in providing for the child likely prompted the jury to conclude she had intentionally let her child perish. Reluctant to convict for infanticide under any circumstances, the jury may have felt her actions warranted punishment and accordingly convicted her of concealment as a form of compromise. Her conviction also may have been a form of benevolent justice: conditions in Montreal jails were bleak, but the food and shelter she received could well have meant the difference between life and death during the harsh winter months.[233] Not enough is known about the circumstances of the other two women who were convicted to allow for meaningful extrapolation.[234]

These cases show that the juridical response to infanticide was typified by compromise and a balancing of competing imperatives, with custom often trumping the law. Despite public calls for the punishment of the perpetrators of infanticide, there was strong sympathy for those mothers

230. That was a common occurrence in successful prosecutions for infanticide. Compare Osborne, "Crime of Infanticide," 51; Phillips, "Pardon," 438.

231. One may well ask if her background influenced the manner in which she understood or reacted to the proceedings against her. Compare Backhouse, "Desperate Women," 112–124 (discussing a First Nations defendant convicted of infanticide in Upper Canada in 1817); Wright, "Unnatural Mothers," 25 (1862 Nova Scotia case in which race may have been a factor leading to conviction); but see Beattie, "Attitudes," 57 (citing period article claiming that "Indians and Negroes" were treated more leniently than whites in criminal proceedings).

232. See pp. 620–21, 623, and 625 above.

233. For imprisonment as a survival strategy, see for example, Mary Anne Poutanen, "Reflections of Montreal Prostitution in the Records of the Lower Courts, 1810–1842," in Class, *Gender and the Law: Papers of the Montreal History Group*, 218; Poutanen, "The Homeless," 41–43 (imprisonment of female vagrants); generally Jim Phillips, 'Poverty, Unemployment, and the Administration of the Criminal Law: Vagrancy Laws in Halifax, 1864–1890" in Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law*, vol. 3 (Toronto: University of Toronto Press, 1990) 134. For a description of Montreal prison conditions, see Poutanen, "Images du danger," 402 n.86.

234. See footnotes 178–80 above and accompanying text (cases of Anastasie Lepine *dit* Chevaudier and Jane Hughes).

who found themselves in such untenable situations. Mothers were rarely identified, seldom brought to trial, and even more infrequently convicted. Convictions, when they were had, were more likely for the offence of concealment than infanticide; that these sentences also tended to be less than the maximum is further evidence of judicial clemency.

Jurists could well afford to extend chivalric notions of mercy to these defendants. The accused often had few other options and had given birth under inauspicious circumstances without assistance. Given the fragility of infant life it required no leap of imagination to assume death was the result of a "visitation of God" or that these deaths were unworthy of notice, as high infant mortality rates also served to inure people to the phenomenon of infant death.[235] Even when the facts clearly condemned a defendant, the desire to exercise forbearance and leniency remained. Period medical literature was deeply gendered, written by men who depicted mothers as uterine driven with mental states that were fragile and easily addled. Indeed, it was a commonly espoused belief that a form of temporary insanity, a "puerpural mania," often overtook women because of the pain of labor, providing a ready justification for some mothers' murderous impulses when other explanations might not have been forthcoming.[236]

Jurors and jurists alike were also cognizant of the fact that the father, a party who shared moral if not legal culpability, rarely received censure.[237] In the case of Marie Carmel, a newspaper editor unusually concluded his account by noting:

> It is a terrible thing, a dishonor to society, that it rebuffs. . .a poor unhappy creature who had the weakness to yield to seduction, perhaps to the promises of marriage of a lover, or rather of an atrocious enemy, and he who is the first

235. See generally Backhouse, "Desperate Women," 447; Osborne, "Crime of Infanticide," 52; Rose, "Massacre of the Innocents," 5.

236. Compare Donovan, "Infanticide," 169; Galley, "I Did It to Hide My Shame," 81–85; Knelman, Twisting in the Wind, 151; Sauer, "Infanticide and Abortion," 83. That view was to survive well past the nineteenth century. For example, the 1922 English infanticide law declared all women potentially insane for the first few months after childbirth. See generally Higginbotham, "Sin of the Age," 337. Similarly, the present Criminal Code provision concerning infanticide reads: "A female person commits infanticide when by a willful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent upon the birth of the child her mind is then disturbed." R.S.C. 1985, C-46, s. 233. Contemporary commentators have noted that today we retain a dichotomous view of these women as either "mad or bad." See generally Rapaport, *Mad Women*; Ania Wilczynski, "Images of Women Who Kill Their Infants: The Mad and the Bad," 2 *Women and Criminal Justice* (1991): 71–88.

237. See generally Backhouse, "Desperate Women," 462; Donovan, "Infanticide," 169 & 173; Langer, "Infanticide," 360; Rose, "Massacre of the Innocents," 74.

> cause of all the evil, remains unpunished, and does not lose anything except the consideration which one has for him. In the current case, what is the main cause of this horrible crime that was committed, and which one cannot explain away by delirium, insanity, or a dizzy spell which prevented the call of nature from being heard? A mother barbaric enough to give the fruit of her body such a terrible death is certainly a monster; but what reduced her to this state? If impunity was not ensured to seducers, he would commit less crimes of this kind.[238]

The penalties provided for those acts may well have seemed too draconian, particularly for the capital crime.[239] Criminal trials were, after all, the culmination of an investigative process that was highly discretionary; inquests and grand juries, prosecutors, judges, and jurors were all links in a chain in which agency could be exercised to suspend prosecution and punishment.[240] This gender-driven leniency was often triggered by the gendered realities these defendants faced.[241]

Although deeply entrenched societal mores were implicated in the commission of infanticide, those values had relatively little to do with the sanctity of infant life. The notion of a newborn being dispatched by its mother was shocking to period sensibilities, inimical to sentimentalist notions of the purity of motherhood, and violative of Christian precepts. That, however, was counterbalanced by the fact that those were traditional, middle-class constructs: the women most apt to commit infanticide may not have been seen as fitting that paradigm. Children were also viewed more as chattel than as individual rights holders.[242] Infanticides were always a small number relative to the number of child abandonment cases, which in turn were outnumbered by illegitimate births, and which were but a fraction—albeit a significant fraction—of the overall birth rate. Concern with infanticide had more to do with "moral panic" in response to a social phenomenon than it did to enforcing the law, and its prosecution had less to do with children than with regulating sexuality, reproductive

238. *L'Aurore* (June 10, 1846) (author's translation). The language used is clearly not sympathetic to Carmel, making it even more striking that the editor acknowledges the central role played by men in these crimes.

239. See, for example, Osborne, "Crime of Infanticide," 53; Beattie, "Attitudes," 9 (detailing Upper Canadian experience of victims refusing to prosecute and juries refusing to convict).

240. Galley, "I Did It To Hide My Shame," 13.

241. Compare Donovan, "Infanticide," 169. Donovan also suggests that violent crimes committed by women were generally not deemed as compelling as those committed by men. Ibid. at 170.

242. Compare Gillis, "Servants," 463; Osborne, "Crime of Infanticide," 52. Cliche, "L'infanticide," 48, points out that these were seen as less dangerous than other violent crimes and that the mothers were more to be pitied than condemned.

power, and gender roles. The sanctity of infant life was at best an afterthought, with regulation of motherhood and the protection of social morality as the primary focus.[243] An infant who did not receive protection from a loving mother was unlikely to receive it elsewhere.

One is also forced to conclude that from the viewpoint common in that era, infant deaths within the lower classes posed no tangible threat to the social fabric. Their deaths caused no bereavement, threatened no laws of primogeniture or inheritance, and deprived no one of sustenance.[244] There were few adoptive families to provide for unwanted children, and no concerted public campaigns on their behalf. One can even go further and suggest, as has been argued in the context of nineteenth-century France, that these crimes against unwanted infants were viewed through the prism of social cleansing as it was thought they were most likely destined to become miscreants and criminals.[245] Infant murder could therefore be seen as a less-nefarious crime than other forms of murder, which also had the incidental but beneficial result of avoiding scandal.[246] Ultimately, Montreal society of the period may have been best served by treating infanticide with ambiguity and compromise. The law and its servants could well afford to exhibit mercy, for whereas the individual acts might be characterized as "so foul a deed," the lives cut short by those acts were perceived as largely insignificant.

243. See Beattie, "Attitudes," 2 (discussing the perceived correlation between crime and morality in the nineteenth century). This was even more heightened when the offenses implicated the complex issues of sexuality that surrounded infanticide.

244. Hoffer & Hull, *Murdering Mothers*, 79, have pointed out that the mercy shown defendants in eighteenth century English infanticide trials "perhaps reflected a sense of the diminished threat of crimes like infanticide to the social order." For the view that infant deaths did not threaten bloodlines or inheritances, see generally Backhouse, "Desperate Women," 477–478.

245. Compare Donovan, "Infanticide," 163.

246. See generally Backhouse, "Desperate Women," 463; Sauer, "Infanticide and Abortion," 82–83.