Infanticide Provisions in a Contemporary Context: Should They Stay, or Should They Go?

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ABSTRACT

The enactment of Sections 233 and 237 of the Criminal Code by Parliament aimed to address the historical prevalence of jury nullification in infanticide cases by offering leniency to offenders, particularly women, in dire circumstances due to societal norms, economic constraints, and a lack of support systems. These legislative measures aimed to find a balance between holding individuals accountable for their actions and recognizing the underlying complexities that led to such tragic outcomes. Nevertheless, a critical examination of the evolving societal attitudes towards women, children's rights, and family structures prompts a re-evaluation of the current legal framework surrounding infanticide. This reassessment delves into the intricate interplay of socio-economic factors that historically influenced juries and justified the leniency provided by Sections 233 and 237.

This paper argues that the existing infanticide provisions in Canada, particularly Sections 233 and 237, no longer align with modern understandings of moral blameworthiness in cases of infanticide. These sections should be replaced by a statutory defence of diminished responsibility. This proposed shift towards a more flexible and morally informed approach to addressing infanticide within the legal system emphasizes the importance of adapting legal mechanisms to meet evolving standards of justice and ethics in society. This call for reform is rooted in a deep understanding of the historical context that shaped existing laws and

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a forward-looking vision that prioritizes fairness, accountability, and the protection of vulnerable individuals within the criminal justice system.

KEYWORDS: *Infanticide; diminished responsibility; homicide; sentencing; section 233; postpartum disorders*

I. INTRODUCTION

This paper examines the extrinsic circumstances surrounding the enactment of Section 233 (formerly Section 262(2)) of the *Criminal Code* and recommends that Parliament replace it with a statutory defence of diminished responsibility.[1] This topic is important because it strikes at the core of societal views of both women and infants. In a contemporary context, Canadian society recognizes that women are rational, independent, and self-reliant. Also, infants are some of the most vulnerable members of Canadian society. They do not have the ability to speak for themselves, they cannot defend themselves, and in infanticide cases, they are the victims who die at the hands of the people they rely upon the most. The law ought to recognize these things and yet, Section 233 does not. This paper demonstrates the importance of the intersection of law and changing societal norms.

This paper has four sections. The first section canvasses the evidentiary rules for infanticide in Canada and presents the definition of a disturbed mind. Broadly speaking, the definition of a disturbed mind is quite broad, and the evidentiary burden placed upon the accused to establish the partial defence is low. However, the evidentiary burden placed upon the Crown when Section 233 operates as an offence is low. This suggests that Section 233 was designed to protect an accused from the consequences of a murder conviction and ensure that Crowns can obtain a criminal conviction when mothers kill their infants.

The second section explains the historical context which informed Parliament when it enacted Section 233(formerly Section 262(2)). The drafting of Canada's infanticide provisions can be explained by historical

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1 See *R v LB*, 2011 ONCA 153 at paras 64-104 and Appendix B [*LB*]. What is now s 233 of the Criminal Code was initially s 262(2) of the Criminal Code. In 1954, it became s 204 of the *Criminal Code*, and in 1985 it became s 233. See also JC Martin, *Martin's Criminal Code* (Toronto: Cartwright, 1955) at10-11. The only significant change that the amendments in 1954 imposed was including the reference to lactation.

considerations that can be traced back to as early as medieval Europe. In short, the penalty for murder in Canada used to be severe. Historically, mothers who killed their infants did so out of desperation, which prompted judges and juries to show mercy. Thus, the picture painted here is one that shows what happens when the community's sense of fairness and the law are out of alignment. Parliament enacted Section 233 to resolve this issue.

The third section recommends that Parliament repeal Canada's infanticide provisions. Three reasons are offered in support of this recommendation. First, Canada's infanticide provisions rely on misogynistic assumptions about female agency. Issues stemming directly from women's socio-economic oppression were inappropriately attributed to their biology. Secondly, women in a contemporary context face socio-economic conditions distinct from those experienced by their historical counterparts. For example, societal views of marriage have significantly changed, and women today have far more economic opportunities. Lastly, infants and children are now held in higher esteem. Gone are the days when illegitimate children were stigmatized, and the inherent dignity and value of infants are now more widely recognized.

Overall, the current state of the law is unjust because it promotes inappropriate leniency. The reasons that once made such an approach to infanticide sensible are significantly less relevant. This is not to say that there are never cases where leniency is warranted. However, Section 233 makes it nearly impossible for the Crown to disprove the disturbed mind element of the defence. Section 237 also rigidly mandates a mild punishment. Something must be done.

The fourth section suggests that Parliament replace infanticide provisions with a statutory defence of diminished responsibility and explains the evidentiary rules that would apply. Implementing a defence of diminished responsibility is desirable because it would promote flexible sentencing and include accused mothers who are unable to use a Section 16 defence.

II. INFANTICIDE – WHAT EXACTLY IS IT?

Canada's primary infanticide provisions are Sections 233, 237 and 663 of the *Criminal Code*.[2] From the outset, it is essential to understand that

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2 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

Section 233 can be a separate offence or a partial defence to a murder charge. This is noteworthy because the evidentiary rules differ depending on how Section 233 is used. Section 233 of the *Criminal Code* reads:

A female person commits infanticide when by a wilful 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 on the birth of the child her mind is then disturbed.[3]

Under the prevailing interpretation of Section 233, infanticide acts as a partial defence to murder when the accused can establish that there is an "air of reality" to the premise that they suffered from a disturbed mind when she killed her newly-born child.[4] The mother must have suffered from a mental disturbance while she was still recovering from the side effects of lactation or giving birth.[5] However, the accused does not need to show that there was a causal link between the disturbance of the mother's mind and the act or omission that caused the infant's death.[6] The infanticide defence must be put before a jury when it has an air of reality.[7] Then, the Crown must prove the mother caused the infant's death and disprove the disturbed mind element beyond a reasonable doubt.[8] In short, the mother's mind being "disturbed" while she is recovering from the side effects of childbirth or lactation is an essential element of the defence. There is no definition of the term "disturbed mind" in the *Criminal Code*. However, the Supreme Court of Canada has indicated that "there is a very" low or "fairly low" threshold for a finding of a mental disturbance.[9] An accused need not establish that they had a mental disorder to prove the disturbed mind element.[10] Also, the term disturbed mind "is not a legal or medical term of art but should be applied in its grammatical and ordinary sense."[11] Thus, in

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3 *Ibid* at s 233 [emphasis added].

4 *R v Borowiec*, 2016 11, [2016] SCJ No 11 at para 15 [*Borowiec*]; S 2 of the *Criminal Code* defines a newly born infant as an infant under one year old.

5 *Borowiec, supra* note 4 at para 14.

6 *Ibid* at paras 14 and 35.

7 *LB, supra* note 1 at para 139.

8 *Ibid* at para 139.

9 *Borowiec, supra* note 4 at para 34.

10 *Ibid* at para 34.

11 *Ibid* at para 35.

infanticide cases, the Crown is tasked with disproving an element of the defence that the accused can establish with ease.

When infanticide operates as an independent offence, the evidentiary rules are different. The accused must be a mother who has killed her newly-born child. Infanticide has the same *mens rea* as manslaughter. "Thus, to prove infanticide, the Crown must establish the *mens rea* associated with the unlawful act that caused the child's death and [the] objective foreseeability of the risk of bodily harm to the child from that assault."[12] Interestingly, the disturbed mind element is part of "the *actus reus* of the offence and not the *mens rea*."[13] However, Section 663 of the *Criminal Code* eases the Crown's evidentiary burden by removing the disturbed mind element. When the evidence establishes that a mother killed her newborn, the accused is only entitled to an acquittal if she can prove that her actions were not willful.[14] Overall, the critical distinction between the evidentiary rules that govern infanticide as an independent offence versus when it operates as a partial defence is the evidentiary rules regarding the disturbed mind element of the offence and the different onuses of proof. Section 237 of the *Criminal Code* stipulates that the maximum punishment for infanticide is five years of imprisonment.[15] The maximum sentence for infanticide remains the same regardless of whether it is being used as a partial defence or as an independent offence.

Why is the evidentiary threshold for the disturbed mind element so low? Why is the punishment so mild compared to other forms of homicide? The Ontario Court of Appeal's judgement *R v B(L)* partially addressed these questions.[16] Doherty JA held that Parliament made the punishment for infanticide mild "in an attempt to bring the law into line with the community's sense of fairness and justice as expressed through the verdicts of numerous juries."[17] Parliament prevented jury nullification by making it easy for the accused to establish the disturbed mind element of the defence and difficult for the Crown to disprove it. Parliament mandated a mild punishment for the same reason. However, a more fulsome examination of

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12 *Ibid* at para 16.

13 *Ibid* at para 14.

14 *LB, supra* note 1 at para 86; *Criminal Code, supra* note 2, s 663.

15 *Criminal Code, supra* note 2, s 237.

16 *LB, supra* note 1.

17 *Ibid* at para 71.

the extrinsic circumstances and historical context is required to understand this issue better.

III. HISTORICAL CONTEXT

The relevant history starts in medieval Europe. At common law, the judiciary treated infanticide trials the same as any other form of murder – the penalty was death.[18] However, it was exceedingly difficult to prove a charge of murder in infanticide cases because, at that time, many infants perished from natural causes or improper medical treatment.[19] Also, many women successfully concealed their pregnancies, gave birth in secret, and then hid the infant's body to escape detection.[20] If someone discovered an accused had done this, then the accused claimed the infant was stillborn. This was often enough to create a reasonable doubt and prevented the Crown from establishing all the elements of murder beyond a reasonable doubt. Discontent with these outcomes, the legislature in England passed the *Bastard Neonaticide Act* (the *Neonatacide Act*) in 1624.[21] The *Neonaticide Act* changed the evidentiary rules by creating a presumption of guilt when unmarried women concealed their pregnancy and the child subsequently died.[22] When the remains of a child were found, concealment of its birth was considered evidence that the mother had murdered them.[23] To rebut this presumption of guilt, the accused had to produce a witness who could testify that the infant was born stillborn.[24] Unsurprisingly, most women

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18 Eric Vallillee, "Deconstructing Infanticide" (2015) 5:4 UWO L Rev at 2 [Vallillee]. See also Constance Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34:4 UTLJ 447 at 448 [Backhouse].

19 Backhouse, *supra* note 18 at 449.

20 *Ibid.*

21 BM McLachlin, "Crime and Women–Feminine Equality and the Criminal Law" (1991) 25:1 UBC L Rev 1 at 2 [McLachlin].

22 *Ibid* at 3. Similar statutes were also enacted in the Colonies. For example, see a statute passed in the year 1792 in PEI: *An Act relating to Treasons and Felonies*, SPEI 1792, c 1 s, 5 [*Treasons and Felonies*].

23 RW Malcolmson, "Infanticide in the Eighteenth century", in JS Cockburn ed, *Crime in England, 1550-1800* (Princeton, NJ: Princeton University Press, 1977) at 197 [Malcolmson].

24 Judith A Osborne, "The Crime of Infanticide: Throwing Out the Baby with the Bathwater at 49 [Osborne].

charged under the *Neonaticide Act* were unable to produce a witness who could help them because women who concealed their pregnancy usually gave birth in secret.[25]

Women in this position found themselves in a terrible situation. The social and economic implications of keeping an illegitimate child were overwhelmingly negative, and the law's response to the killing of the infant was extremely severe. For instance, "If a girl was a servant – and a high proportion of young women were – knowledge of her pregnancy would result in immediate dismissal; she would probably receive no character reference, and there would be little chance of her being taken into service again. In all probability, she would be stigmatized for life."[26] Unless women in these circumstances could find a charitable organization willing to help them, prostitution or thievery were their only means of survival.[27] Also, the stigma associated with single motherhood was so intense that their friends would shun them, and their families would disown them.[28] The presence of an infant that needed to be fed and cared for did nothing but intensify these harsh realities.[29] Many of these pregnancies occurred via sexual assault, often in the woman's place of employment.[30] Thus, these women faced a future of abject poverty, social ostracism, and the grim task of raising an unwanted child alone. . Their options were also minimal, as contraceptives, abortion, and adoption were rarely, if ever, viable alternatives.[31] These harsh realities reveal that many women committed infanticide because it was necessary for their survival. However, the law reinforced their oppression because if they killed their infant, the law mandated the death penalty.

Even though the law's response to infanticide was severe, juries and judges responded to these unjust circumstances by completely disregarding the *Neonaticide Act*. They were very reluctant to sentence these mothers to

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25 Backhouse, *supra* note 18 at 449-450.

26 Malcolmson, *supra* note 23 at 192-193.

27 Backhouse, *supra* note 18 at 448.

28 *Ibid.*

29 Peter C Hoffler & NEH Hull, *Murdering Mother: Infanticide in England and New England 1558-1803* (New York: New York University Press, 1981) at 93.

30 McLachlin, *supra* note 21 at 3; Backhouse, s*upra* note 18 at 457.

31 McLachlin, *supra* note 21 at 5. See also Veronica Strong-Boag, *Fostering Nation?: Canada Confronts its History of Childhood Disadvantage* (Waterloo, ON: Wilfred Laurier University Press, 2011) at 43.

death.[32] In some cases, judges circumvented the statute by shifting the onus onto the Crown. Instead of the mother having to prove that the infant was born stillborn, the Crown had to verify that the baby was born alive.[33] Various defences were created, some plausible, others less so. Some examples include the "benefit of linen defence"[34] and the assertion that the baby had died accidentally because the mother had no assistance while she gave birth.[35] Even in cases where judges sentenced the mother to death, there was a significant public outcry. Consequently, "Parliamentarians viewed the law as being so severe as to be ineffectual, as thereby encouraging women to resort to the practice of killing their children."[36] Contemporary case law shows similar conditions in Canada.[37]

Eventually, the British Parliament decided to repeal the *Neonaticide Act* and created a new concealment offence that restored the conventional common law rules and carried a maximum punishment of two years.[38]

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32 Malcolmson, *supra* note 23 at 202: Between 1730 and 1774, there were sixty-one infanticide trials at the Old Bailey and the statue was only mentioned in one of them.

33 McLachlin, *supra* note 21 at 4.

34 *Ibid.* This defence allowed an accused to argue that making baby clothes before the infant's birth showed that the baby was wanted and not murdered by the mother.

35 *Ibid* at 4-5.

36 Osborne, *supra* note 24 at 51.

37 Backhouse, *supra* note 18 at 450-453. Consider the case of Angelique Pilotte, which took place in Upper Canada in 1817. She was charged under legislation that had imported English criminal law into the colonies. After being found guilty, many prominent community members came to her defence and recommended mercy. This included 11 justices of the peace, many magistrates, an associate judge and the officers stationed at Fort George. Eventually, a royal pardon was extended, reducing her punishment from death to one year of imprisonment. While Angelique Pilotte's Indigenous status and the absurdity of applying an imperial statue to an Indigenous individual played a significant role, the overwhelming response of the community is still noteworthy. See also Robert Lochiel Fraser III "PILOTTE, ANGELIC" (1983, University of Toronto/Université Laval), Dictionary of Canadian Biography, vol. 5 online: <http://www.biographi.ca/en/bio/pilotte_angelique_5E.html> [perma.cc/2GCJ-CLLX]; Also consider the case of Mary Thompson, which took place in Upper Canada during the year 1823; and Robert Lochiel Fraser "THOMPSON, MARY" (1987, University of Toronto/Université Laval), Dictionary of Canadian Biography, vol. 6 online: <http://www.biographi.ca/en/bio/thompson_mary_6E.html.> [perma.cc/AFN6-82MC].

38 McLachlin, *supra* note 21 at 5; Vallillee, *supra* note 18 at 3.

However, cases where the evidence established that a mother had killed her infant still put juries and judges in an uncomfortable position because, at law, the mother was guilty of murder, and the penalty was death.[39] Juries continued to acquit women in these circumstances even though the facts did not support a verdict of not guilty.[40] In response, England passed the *Infanticide Act* in 1922 and subsequently amended it to its current form in 1938.[41] In 1948, Canada also adopted infanticide as an offence.[42] The Canadian Parliament drafted the Canadian version nearly identically to the English version drafted in 1922. Transcripts of the House of Commons debate over Section 233 reveal that Parliament drafted it to confront the same issues that had plagued England for centuries. For instance, John Diefenbaker indicated that:

Experience has shown, of course, the necessity for a clause such as this; for in a great number of cases in which a woman finds herself in the position of having on her hands a newborn child, loses her power of control, and the child dies in consequence of some act on her part, over and over again juries have refused to convict, regardless of the evidence.[43]

In response, the Minister of Justice, James Lorimer Isley stated:

[Tlhere are cases where a mother kills her newborn child, and...it is useless to lay a charge of murder against the woman, because invariably juries will not bring in a verdict of guilty. They have sympathy with the mother because of the situation in which she has found herself. To a minor extent this brings the law into disrepute, because the offence is murder; that is unless the woman is insane.[44]

Also, Davie Fulton, then the member of Parliament for Kamloops, commented that:

[W]hat is actually being done [through this legislation] is to change the law in order to permit convictions being made. From what the minister [of Justice] said I take it the feeling is that the present penalty is such that the

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39 Osborne, *supra* note 24 at 51.

40 *Ibid.*

41 *Infanticide Act*, (UK), 1938, [*Infanticide Act*].

42 McLachlin, *supra* note 21 at 5.

43 *House of Commons Debates*, 20th Parliament, 4th session, Vol V (June 14,1948), online: <https://parl.canadiana.ca/view/oop.debates_HOC2004_05> [perma.cc/4ZMU-C8ZX] at 5184 (Hon John Diefenbaker).

44 *Ibid* at 5185 (Hon James Lorimer Isley, Minister of Justice).

juries do not convict and that, therefore, that the crime is being made subject to a little less severe penalty in the hope that juries will convict. I wonder if perhaps that is not the wrong principle to follow in amending the criminal code?[45]

Parliament intended to make it possible for the Crown to obtain criminal convictions where mothers in unbearable circumstances committed actions that, at law, warranted the death penalty.

Before moving on to why Parliament should repeal Section 233 of the *Criminal Code*, other relevant historical considerations should be taken into account. The overwhelming circumstances faced by women who gave birth out of wedlock were not the only causes of jury nullification. Societies' perception of children also played a role. Traditionally, children were considered their parents property and not as individuals with rights.[46] Corporal punishment was common and severe.[47] Also, as has already been explained, most of the infants killed by their mothers were considered illegitimate. Society did not view illegitimate children favourably and often viewed them as nothing more than the byproduct of sexually deviant behaviour.[48] There was a generally held fear that treating illegitimate children the same as legitimate children would "inhibit the marriage imperative."[49]

Consequently, illegitimate children were unable to inherit property, restricted from holding any office of the church and had no right to support from their parents.[50] Also, people at that time were much less concerned about the murder of infants. Many thought that mothers who killed their children inflicted little harm because an infant's mind was not developed

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45 *Ibid* at 5186-5187 (Hon E Davie Fulton).

46 McLachlin, *supra* note 21 at 5; Backhouse, *supra* note 18 at 463.

47 For example, a statute passed in Prince Edward Island in 1792 allowed parents to do the following acts while chastising their children: murder, cutting out or disabling the tongue, putting out an eye, slitting the nose or lip, cutting off or disabling the limb or member, stabbing or thrusting with a weapon These actions could be done without any legal ramifications. See *Treasons and Felonies, supra* note 22 s 2-4.

48 Veronica Strong-Boag, *Fostering nation? Canada Confronts its History of Childhood Disadvantage* (Waterloo, ON: Wilfred Laurier University Press, 2011) at 43 [Strong-Boag].

49 Susan B Boyd & Jennifer Flood, *Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History* (Rochester, NY: 2015) at 3 [Boyd & Flood].

50 *Ibid*, at 25.

enough to allow it to contemplate its impending death.[51] Many believed that the murder of an infant did not harm society because infants lack substantial social connections, and no one counts on them for support.[52]

The analysis above sets the stage for the next part of this paper. I have explained that Parliament created Section 233 to prevent jury nullification. At the time, the penalty for murder was the death penalty. Women who committed infanticide were usually victims of the overwhelming socio-economic consequences that followed childbirth outside of wedlock . This made juries sympathetic. Also, the murder of infants – especially illegitimate infants, was thought to be less blameworthy than the murder of an adult. Overall, society did not perceive children and infants as beings with rights. For these reasons, juries and judges refused to apply the law. This historical narrative explains why Parliament created the evidentiary rules in the *Criminal Code* today. When infanticide is an offence, Sections 233 and 663 of the *Criminal Code* cumulatively impose a low burden of proof on the Crown. Parliament wanted to prevent an accused from generating a reasonable doubt about the disturbed mind element of the defence. The purpose of Section 233, and to a certain extent, Section 663, was to ensure that the Crown could obtain at least *some* kind of criminal conviction in infanticide cases.[53] This also explains why the onus is on the accused to show their actions were not wilful.

Moreover, the circumstances women faced, society's views of children and the severity of the punishment for murder explain why the evidentiary threshold for the disturbed mind element of the defence is so low. Parliament intended to make it easy for mothers caught in these circumstances to avoid the death penalty. Furthermore, all these factors motivated the mild punishment. The killing of an infant, especially in the circumstances discussed, was thought to carry less criminal culpability. The next part of this paper explains that "many of the factors which contributed

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51 Jeremy Bentham, Etienne Dumont & Richard Hildreth, *Theory of legislation* (London : Trübner, 1894) at 264-265.

52 *Ibid* at 265; Backhouse, *supra* note 18 at 463.

53 *LB supra,* note 1 at paras 84-85. S663 was passed by Parliament in 1954. It attracted no parliamentary debate, but in *LB*,the court remarked that s 663 (formerly s 570) was meant to prevent acquittals that were reached because the burden of proof placed upon the Crown could allow defence counsel to raise a reasonable doubt about the disturbed mind element of the offence. In cases where this happened, the principle of double jeopardy allowed the mother to escape a criminal conviction entirely.

to the tolerance of infanticide in the 18th and 19th centuries no longer exist."[54] Contextual considerations now weigh against the leniency promoted by the evidentiary rules and mild punishment. In a more contemporary context, the blameworthiness of murdering an infant has increased. Also, Section 233 depicts women in a manner that is offensive to modern views about female agency.

IV. THE CONTEMPORARY CONTEXT

A. How Section 233 Depicts Women

Several commentators have noted that infanticide provisions blamed female biology for an issue caused by socio-economic factors. The wording of the provision linked the concept of a disturbed mind with biology, more specifically, the effects of childbirth and lactation.[55] This allowed Parliament to address the issue of jury nullification without acknowledging the underlying socio-economic problems that were the driving forces behind jury nullification. For instance, Judith Osborne writes, "The medical rationale [underpinning the infanticide provision] was never in vogue or scientifically established. It was simply more conventional, conservative and less contentious than the reasons for the court's lenient treatment of murdering mothers."[56] Referring to the social and economic challenges faced by mothers raising illegitimate children as the basis for mitigating an accused's criminal culpability would have been controversial and corrosive to basic legal tenants of personal responsibility.[57] An explicit socio-economic rationale would have made it difficult to prevent the reduction of the penalty for other socially disadvantaged offenders who committed homicide.[58] Linking mothers' disturbed minds to their biology, rather than

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54 McLachlin, *supra* note 21 at 6.

55 *Criminal Code*, *supra* note 2, s 233.

56 Osborne, *supra* note 24 at 54, 58.; See also Sanjeev Anand, "Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence Special Issue: Rethinking Canadian Homicide Law" (2009) 47:3 Alta L Rev 70 at 714 [Anand]; Kirsten Johnson Kramar, "Unwilling mothers and Unwanted Babies, The Vicissitudes of Infanticide Law in Canada" in Brigitte H. Bechtold & Donna Cooper Graves, ed, *Killing Infants: Studies in the World Practice of Infanticide* (Lewiston, NY: Edwin Mellen Press, 2006) at 5 [Kramar].

57 Kramar, *supra* note 56 at 56.

58 Anand, *supra* note 56 at 714.

the circumstances oppressing them, allowed Parliament to address jury nullification without resorting to such drastic measures. However, exclusively placing the blame on female biology in such a broad way is problematic because it implies that women's sex-specific reproductive functions make them more unstable and less rational than men.[59] Such a premise lacks merit and offends a contemporary view of women's agency. While postpartum depression is undoubtedly a real phenomenon, modern science has shown that a variety of factors, including environmental factors, genetics, and lifestyle choices, cause postpartum disorders.[60] Some specific examples include nutrition, lack of sleep, stress levels and lack of social support.[61] To a degree, scientists were aware of this even in 1922, when the U.K. created their infanticide provision.[62] It is worth noting that men can experience prenatal and postpartum depression as well.[63] This strengthens the position that the primary factors that drive postpartum disorders are external rather than internal. Even adoptive and foster parents can experience postpartum disorders.[64]

B. Changed Socio-economic Conditions for Women

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59 James Mason, "The Myth of Madness: Murderous Mothers and Maternal Infanticide" (2021) 85:6 J Crim L 441 at 445.

60 Bernadette McSherry, "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15:3 Sydney L Rev 292 at 293-295 [McSherry).

61 *Ibid* at 295. Saba Mughal, Yusra Azhar & Waqyar Siddiqui, "Postpartum Depression" (2022) National Institute of Health StatPearls online at <https://www.ncbi.nlm.nih.gov/books/NBK519070/> [perma.cc/X7NM-KQ4Y] [Mughal, Azhar & Siddiqui].

62 Kramar, *supra* note 56 at 154.

63 It is currently estimated that up to 10% of new fathers experience postpartum depression. See also James F Paulson & Sharnail D Bazemore, "Prenatal and Postpartum Depression in Fathers and its Association with Maternal Depression: a Meta-analysis" (2010) 303:19 JAMA 1961–1969; Kara L Smythe, Irene Petersen & Patricia Schartau, "Prevalence of Perinatal Depression and Anxiety in Both Parents: A Systematic Review and Meta-analysis" (2022) 5:6 JAMA Network Open online: <https://doi.org/10.1001/jamanetworkopen.2022.18969> [perma.cc/293U-LB3F] [Smythe, Petersen & Schartau]. Both parents can experience postpartum depression at the same time, although that does not seem to be nearly as common.

64 Canadian Mental Health Association Ontario, "Postpartum Depression", online: <https://ontario.cmha.ca/documents/postpartum-depression/> [perma.cc/JBS9-MQGY].

Also, many of the societal changes that have taken place since Parliament incorporated infanticide into the *Criminal Code* undermine the concerns which led to its enactment. For instance, society does not ostracize women for having children outside of wedlock to the same degree.[65] It has become common for children to be born to parents who are not married.[66] Canadians now view common-law unions as an acceptable alternative to marriage.[67] Also, the proportion of lone-parent families in Canada has drastically increased.[68] The lack of stigma attached to single motherhood significantly reduces the pressure faced by women who have children outside of wedlock.

Also, women today have far more employment opportunities and financial independence.[69] Consequently, "in less than a lifetime, the dual-earner family has gone from the exception to the norm, and a growing number of women are primary income earners within their families."[70] Women are far more independent now. Also, every province, except

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65 McLachlin, *supra* note 21 at 2-4; Strong-Boag, *supra* note 48 at 81.

66 Mary Mossman et al, *Families and the Law: Cases and Commentary,* 3rd ed (Concord, ON: Captus Press, 2019) at 2, 16. [Mossman] In 2007, 26% of the infants born had mothers who had never been married. It is essential to be aware that the numbers across Canada are not uniform. For example, in Nunavut, over three-quarters of the infants born in 2007 had unmarried mothers; in Quebec, 60% of the infants born had an unmarried mother; in Ontario, only 12% had an unmarried mother.

67 *Ibid* at 13. In 2016 and 2021, cohabiting couples represented over one-fifth of all couples. See also . Statistics Canada, "State of the union: Canada leads the G7 with nearly one-quarter of couples living common law, driven by Quebec" (13 July 2022) online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220713/dq220713b-eng.htm> [perma.cc/A7CY-LRT7].

68 Mossman, *supra* note 66 at 17. The proportion of lone-parent families doubled between 1961 and 2011 (8.4%-16.3%). In 2016, the proportion increased to 19.2%, with over 80% of them being single mothers.

69 Mossman, *supra* note 66 at 19. Based on the Labour Force Survey (LFS), 82.0% of women in the core working ages of 25 to 54 years (6 million) participated in the labour market in 2015. Only 21.6% (563,000) of women in 1950 and 65.2% (3.3 million) in 1983 were in the workforce. This shows that economic opportunities for women have steadily improved. Melissa Moyser, *Women in Canada: A Gender-Based Statistical Report – Women and Paid Work* (Ottawa: Statistics Canada, March 2017) online: <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.pdf> [perma.cc/7NC3-GRGJ] at 3.

70 See Vanier Institute of the Family, *Families Count: profiling Canada's Families* (Ottawa: Vanier Institute of the Familiy, 2010) at xii.

Alberta, has incorporated child support guidelines into provincial law.[71] There has also been a significant focus on increasing the enforcement measures regarding child support.[72] Thus, even if a woman must raise an infant independently, the father must pay child support. These positive developments show that the socio-economic consequences of having a child out of wedlock are now much less severe.

Furthermore, with the significantly increased availability of contraception, abortions and adoption, women who do find themselves in difficult circumstances have many less drastic measures available to them. In a contemporary context, "infanticide is rare because it is socially inappropriate, for its functions have been superseded by other practices, most notably abortion."[73] In other words, the variety of alternatives available to women today makes infanticide unacceptable. Lastly, Canada has abolished the death penalty.[74] If Parliament repealed Section 233, the law would never mandate an accused's execution. Thus, few, if any, women today find themselves in circumstances comparable to the women who lived before and during the time Section 233(formerly Section 262(2)) was enacted.

C. Infants and Children Held in Higher Esteem

Perceptions about infants and children have also significantly shifted. Illegitimacy as a legal concept has been abolished in every province except Nova Scotia.[75] Infants born to unwed mothers are no longer viewed as individuals with inherited immorality and are afforded the same legal rights as infants born to married mothers. The infant mortality rate has also

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71 See Government of Canada, Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines, Volume 2*, (29 March 2002) online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/rp/pdf/v2.pdf> [perma.cc/P9AG-3HGQ] .

72 Mossman, *supra* note 66 at 947.

73 Malcolmson, *supra* note 23.

74 *Criminal Code*, *supra* note 2, s 231(1) & 745.The minimum sentence for first-degree murder in Canada is lifetime imprisonment with no chance of parole for 25 years. See also Scott Mair, "Challenging Infanticide: Why Section 233 of Canada's Criminal Code Is Unconstitutional" Youth and Beyond: Controversies of Accountability" (2018) 41:3 Man LJ 241 at 278.

75 Boyd & Flood, *supra* note 49 at 51.

significantly decreased, which means infant death has become less common, and therefore less acceptable .[76]

Canadian law now recognizes that children are individuals with rights. Society no longer views children as the property of their parents and sees corporal punishment in an entirely different light. The law demands restraint, whereas before, it did not.[77] Canada has also ratified the *United Nations Convention on the Rights of the Child*.[78] Article 3 of the Convention states that actions taken by Legislative bodies ought to make the child's best interests "a primary consideration."[79] Article 6 also recognizes that all infants have the inherent right to life and that "state parties shall ensure to the maximum extent possible the survival and development of the child."[80] Thus, Canada has recognized that due to the elevated vulnerability of infants and children, they deserve more legal protection than adults – not less.

This position is supported even further by the sentencing provisions in the *Criminal Code*. Section 718.01 stipulates that denunciation and deterrence must be the primary considerations when an offence involves the abuse of a person under 18 years old.[81] Subsection 718.2(ii.1) lists the abuse of a victim under 18 years old and the abuse of a position of trust or authority in relation to the victim as aggravating factors in sentencing.[82] Thus, Canadian society holds infants and children in higher esteem than it once did. The notion that the murder of an infant is a less severe crime than the murder of an adult is unacceptable in a contemporary context. The

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76 McLachlin, *supra* note 21 at 5.

77 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76 at para 37. This landmark case on corporal punishment imposed significant restrictions on the practice.

78 Government of Canada, "Rights of Children,", (23 October 2017) online: <https://www.canada.ca/en/canadian-heritage/services/rights-children.html> [perma.cc/A6VN-7GNY].

79 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3. United Nations, "Convention on the Rights of the Child" (20 November 1989) art 3, online: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> [perma.cc/VFT2-TSZU] .

80 *Ibid* art 6 [emphasis added].

81 *Criminal Code*, *supra* note 2 s 718.01.

82 *Ibid*, s 718.2(ii.1).

punishment and evidentiary rules governing infanticide ought to reflect this shift in Canadian society, but they do not.

Overall, due to the better position women find themselves in today, the fact that society's perception of infants has shifted, and that Section 233 relies upon misogynistic pseudoscience, Parliament must repeal it.[83] The evidentiary rules governing Section 233 and the punishment it mandates through Section 237 do not adequately reflect the blameworthiness of killing an infant in a contemporary context. However, there are still cases where there is room for some leniency.

V. THE NEED FOR A NEW DEFENCE

It is important to remember that the above arguments have only addressed whether Parliament should repeal Section 233. If Parliament repealed Section 233 and did not replace it with something else, then infanticide cases would be tried as ordinary first-degree murder trials. There are cases where that would be appropriate.[84] However, even in a contemporary context, there are cases where the mandatory life sentence for first-degree murder is too severe. Failure to consider this could result in jury nullification.

In many cases, Section 16 of the *Criminal Code* would not be useful for an accused. The evidentiary threshold for a defence of mental disorder is too demanding. To mount a defence of mental disorder, the accused would have to prove on a balance of probabilities that they have a disease of the

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83 In 1984, the Law Reform Commission made the same recommendation, albeit for different reasons. Although they did mention the invalidity of section 233's medical rationale was one of the reasons they offered. See Law Reform Commission of Canada, *Working Paper #33, Homicide* (Ottawa: Supply and Services Canada, 1984) at 76-78.

84 Consider *R v Del Rio* [1979] OJ No16 [*Del Rio*]. In that case the accused had been heard by several witnesses calling her infant "a pain" (para 15). Whenever the baby cried or had difficulty eating, she would slap the baby in the face and scream profanity at it. She was heard saying things like "Shut up. You little bitch. You're a bitch all right" (para 30). She would also drop the baby into its crib from a height of three and a half feet and scream that if the baby continued to cry she would kill her (para 15). On the last night the baby was alive, a witness heard the accused say "You're not going to live long if you keep this up. Do you want to die?" (para 36). The next day the infant was found dead. Her mother had beaten her so badly that there were severe bone fractures in the infant's skull. One ran from one ear to another (paras 21-22). The mother in this case did not suffer from a mental disorder. She only received a five-year sentence, which is the maximum for infanticide (paras 54-55).

mind so intense that it rendered them incapable of "appreciating the nature and quality of the act or omission" or of "knowing it was wrong."[85] Moreover, this disease of the mind must be caused by an internal defect within the accused's mind.[86] Mental disturbances caused by external factors "do not fall within this concept."[87] It is doubtful that any of the three possible postpartum disorders would fit under this definition.

Baby blues, the mildest postpartum would not fit under the definition of a disturbed mind because the symptoms caused by baby blues are not severe enough. The symptoms are brief crying spells, irritability, unstable mood, insomnia, anxiety, loss of appetite and poor concentration.[88] Baby blues does not "affect daily functioning or the ability to take care of the baby" and lasts no more than two weeks.[89] Postpartum depression would not qualify for the same reasons, although postpartum depression is recognized as far more debilitating. The symptoms that can be caused by postpartum depression are insomnia, a feeling of worthlessness or guilt, fatigue, impaired concentration, suicidal thoughts or agitation.[90] These symptoms can last for up to a year.[91] Postpartum psychosis is the most severe type of postpartum disorder. The symptoms it causes are hallucinations, lack of sleep for several nights, agitation, delusions and unusual behaviour.[92] Despite the severity of the symptoms, postpartum psychosis would not fall under the definition of a disease of the mind either. Recall that earlier, I explained that a variety of factors, most of which are external, cause postpartum disorders.[93] Postpartum psychosis, like all other postpartum disorders, is caused by a variety of factors, most of which are external.[94] The

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85 *Criminal Code, supra* note 2 at s 16(1) & 16(2)

86 SeeRegina v Rabey*, [1977] OJ No 2356 at para 61 [*Rabbey*];, Edward Greenspan et al, *Martin's Annual Criminal Code, 2023 Edition,* (Toronto, ON: Thomson Reuters 2022) at 61.

87 *Ibid.*

88 Valentina Tosto et al, "Maternity Blues: A Narrative Review" (2023) 13:1 J Pers Med 154.

89 Smythe, Petersen & Schartau, *supra* note 63.

90 *Ibid.*

91 McSherry, *supra* note 60 at 294.

92 Mughal, Azhar & Siddiqui, *supra* note 61.

93 McSherry, *supra* note 60 at 294.

94 *Ibid* at 293-295. See also Cleveland Clinic, "Postpartum Psychosis: What It Is, Symptoms & Treatment" (13 September 2022), online:

definition of a disease of the mind only accounts for mental disturbances caused by internal factors.[95]

Thus, the evidentiary burden for establishing a defence of mental disorder is too onerous to be of any use in cases where an accused kills her infant unless the accused has a severe mental disorder that is not a postpartum disorder. Thus, a defence with an evidentiary burden higher than Section 233 but lower than Section 16 is required. Moreover, even if Section 16 were available to an accused, it would be undesirable because it would not offer flexible sentencing. A judge would only be able to give an accused a lifetime imprisonment sentence or a verdict of not criminally responsible. No other options would be available. A statutory defence of diminished responsibility would be able to address these issues.

A. The Defence of Diminished Responsibility

Thankfully, there is no need for Parliament to be entirely original. The defence of diminished responsibility already exists in other common law jurisdictions, including the UK[96] Canada can draw from the experience of the UK to craft a defence of diminished responsibility specifically designed to deal with infanticide cases where leniency is still warranted. In the Canadian context, a defence of diminished responsibility could apply if an accused could establish on a balance of probabilities that they suffered from a recognized postpartum disorder that "substantially impaired" the accused's ability to form a rational judgement or to exercise self-control.[97] Lastly, the accused would need to establish a temporal link between the substantial impairment to their mental faculties and the killing of the infant.

The term "substantially impaired" would differ from the disturbed mind element in Section 233 because it is more onerous to establish. UK courts have held that the term "substantially impaired" should be interpreted in its ordinary meaning.[98] If juries struggle with the concept, trial judges in the UK must explain that for an impairment to be substantial,

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<https://my.clevelandclinic.org/health/diseases/24152-postpartum-psychosis> [perma.cc/BKS4-WZKX].

95 *Rabbey, supra* note 86 at para 32.

96 See *Coroner's Justice Act* (UK), 2009 c 25, s 52 [*Coroner's Act*]; See also Alexia Bystrzycki, "A Call for Diminished Responsibility in Canada" (2022) 45:5 Man LJ 255 at 267.

97 *Coroner's Act*, supra note 96 s 52(1A)(c).

98 *R v Golds*, [2016] UKSC 61 (BAILII) [*Golds*] at para 43.

it must be more than trivial, but not all non-trivial impairments meet this threshold.[99] Also, requiring an accused to establish a temporal link between the substantial impairment and the death of the infant is important. Section 233 currently does not demand a causal link between the accused's disturbed mind and the killing, which is one of the reasons it is such an easy defence to use. Thus, this requirement makes this defence more demanding, but not unbearably so. If an accused can successfully mount the defence of diminished responsibility, it would reduce a murder charge to voluntary manslaughter, which has no mandatory minimum, and a lifetime sentence is the maximum punishment.[100]

A defence of diminished responsibility articulated in this manner has the benefit of ensuring that leniency is the exception rather than the rule. The elements of the defence would allow courts to treat all cases of postpartum psychosis and extreme cases of postpartum depression leniently. This standard would properly exclude an accused who suffered from baby blues. The symptoms are too mild and experienced by far too many women after childbirth to be considered more than trivial impairments. Also, clinical research has shown that baby blues does not impair daily functioning or a mother's ability to care for an infant.[101] Another benefit of this defence is that it allows judges to deliver more flexible sentencing. This rightfully acknowledges that an accused who suffered from postpartum psychosis is less blameworthy than an accused who suffered from postpartum depression.

Practically speaking, the requirement that the accused prove that they were suffering from a postpartum disorder makes input from experts mandatory. Some may wonder whether this is desirable. What if an accused cannot afford to hire an expert to offer evidence on their behalf? This question is worth addressing, albeit briefly. Section 672.11 of the *Criminal Code* allows for the court to order an assessment of the accused's mental condition if it has reasonable grounds to think that the evidence is necessary to determine whether the balance of the accused's mind was disturbed while she killed her newly-born child.[102] Parliament only needs to amend the wording of this provision to account for the new defence suggested above.

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99 *Ibid.*

100 *Criminal Code*, *supra* note 2 s 236.

101 Mughal, Azhar & Siddiqui, *supra* note 61.

102 *Criminal Code*, *supra* note 2 s 672.11(c).

Doing so would ensure that an accused would always have access to expert evidence that they need to have a fair trial.

VI. CONCLUSION

Parliament should remove Sections 233 and 237 from the *Criminal Code* because the reasoning which supported their enactment is no longer legitimate. Historically, jury nullification was an issue in infanticide cases. This was so because the punishment for murder was death, and mothers who killed their infants were seen as less blameworthy than other offenders. This was because unwed mothers killed their infants out of desperation. The socio-economic consequences of having a child outside of wedlock were devastating. Mothers killed their infants out of necessity. Also, infants were not seen as individuals with inherent rights. The killing of an infant was viewed as less blameworthy than the killing of an adult. Consequently, judges and juries consistently refused to apply the law out of sympathy for the accused. In response, Parliament made the evidentiary burden on the accused low and the sentencing range lenient to prevent jury nullification.

However, in a contemporary context, things have changed. Single motherhood is not stigmatized nearly as much as it once was; women have far more economic opportunities now, and women who experience unwanted pregnancies have other options. Also, it is no longer appropriate to assume that women are less criminally responsible for their actions because of their biology. Moreover, society holds children and infants in higher esteem. Due to the elevated vulnerability of infants and children, society gives them more legal protections than adults, not less. This is reflected through sentencing provisions in the *Criminal Code*, society's views of corporal punishment, and Canada's ratification of the *Convention on the Rights of the Child*.

These changes indicate that Canada's infanticide provisions no longer reflect the blameworthiness associated with murdering a newborn infant. In a twist of irony, a law which was meant to align the law with the societal views of its time is now out of alignment with justice in a contemporary context. Once again, Parliament must act and harmonize the law with the societal views that have changed over time.

Consequently, Parliament should repeal Canada's infanticide provisions and replace them with a defence of diminished responsibility. Doing so would introduce a defence that promotes leniency when it is still

warranted, flexible sentencing, and a more appropriate evidentiary burden upon the accused.

It is worth bearing in mind that this paper has not touched upon whether this new defence of diminished responsibility should also include male accused who suffer from postpartum disorders. This paper has also not addressed concerns about resources. Due to backlogs in the courts and shortages of family doctors, getting a diagnosis of a postpartum disorder may be challenging at times. This paper has focused exclusively on doctrinal considerations. Finding creative ways to implement a defence of diminished responsibility and determining if it should be made available to both sexes are puzzles to be solved another day.