Introduction

In March 2002 a fifteen-year-old gave birth unassisted on the bathroom floor of her parents' home in Brampton, Ontario. Shortly thereafter she killed the newborn baby. The adolescent mother hid her pregnancy from family and friends and continued to attend Grade 10 at her Roman Catholic high school. She and her boyfriend had been sexually active since they were fourteen but did not use birth control. The Grade 9 curriculum at their high school had taught them to "protect and promote chastity" without providing any formal access to information about birth control or abortion, although there was evidence to suggest they knew where they could obtain both. She hid her pregnancy from her family and killed the baby at birth to protect herself and her family from the shame of her pregnancy. Family, friends, teachers, and classmates may have suspected the girl's pregnancy but apparently failed to get involved. They tacitly accepted the girl's denial, attributing her weight gain to overeating and teenage development. Just weeks prior to the birth, the girl was seen by a doctor who had no idea that she was in her third trimester. The coroner's autopsy concluded that the baby girl, named Destiny post-mortem, lived for two hours, having apparently died from one of the multiple stab wounds to her neck. At the time, the Brampton teen, whose identity is protected under the Canadian *Young Offenders Act,* was charged with second degree murder and held in a youth detention centre to await a bail hearing. The detective in charge of the case indicated that the police did not feel that "the components of the charge of infanticide were there" but declined to elaborate any further.[1] We are informed by the news reporter that, at the sentencing hearing almost one year later, the court was "torn between horror and mercy in teen mother's stabbing of baby daughter."[2] The adolescent woman pled guilty to infanticide and was sentenced to two years probation, 100 hours of community service, therapy, and sex education counselling.[3] According to the judge, the girl "was operating on a disturbed mind, if not full denial of pregnancy, suffering from psychological and emotional disturbance."[4]

The details of this case are like those of many other killings of newborn babies that have occurred over the past 100 years in Canada. Typically, a sexually active adolescent woman finds herself pregnant and conceals her pregnancy and subsequent delivery. Sometimes the women kill their newly born babies because they have been raped or otherwise coerced into sex by male employers, relatives, co-workers, or boyfriends. The women usually conceal and/or deny their pregnancies, give birth alone, and then dispose of the body of the baby in an outhouse, garbage bin, closet, field, or stream, where it is eventually discovered by the authorities. Once discovered, the coroner conducts an autopsy to determine cause of death and, on the basis of a finding of live-birth, the authorities lay a charge of murder or some lesser charge. For example, in 1926, Vera Fish, aged twenty-two years, was initially indicted on two counts of concealment of birth in Halton County in Ontario, following the discovery of an infant in a river. Fish was single and her pregnancy had been public, so the community suspected her of wanting to kill the illegitimate baby. When confronted, Fish confessed to having given birth to a baby girl but not to the baby boy discovered in the river near her apartment. During the investigation the burnt body of another baby was discovered in the oven at Fish's home. The coroner's autopsy indicated that the body of the infant was "burnt and roasted" but that one lung floated, suggesting that the baby had been "born alive." The authorities were unable to secure an indictment for murder from a grand jury. Fish was then charged with two counts of "concealment of birth" – one count for the baby found in the river and the second for the baby found in her oven. She eventually pled guilty to concealing the birth of the infant girl found dead in her oven.[5] Despite the very different times at which these events occurred, the two cases – one in Brampton and one in Halton County – share certain key similarities; in both cases we see a shameful pregnancy, the mother killing her newborn baby, and the court accepting a conviction lower than murder or manslaughter and offering a lenient disposition.

At the time of Vera Fish's conviction, the charges available in these kinds of cases were murder, manslaughter, concealment of birth (concealing body of child, now s. 243), and neglect to obtain assistance in childbirth (now s. 242), with the last two providing the more lenient options.[6] The provision for a charge of infanticide, the eventual conviction in the 2002 case, and an awkward and much criticized quasi-medico-legal category, was adopted by the Canadian Parliament in 1948. Before the enactment of the infanticide provision, the charges of "concealment" and "neglect" were frequently used in cases of suspected maternal neonaticide.[7] The authorities in the early twentieth century tended to resort to these charges when they failed to secure indictments for murder. Sometimes, when the authorities achieved an indictment for murder the case would eventually be disposed of by way of plea bargain for one of the auxiliary charges in order to ensure

a conviction and to avoid taking the matter to trial, where their chances of success were poor. The difficulties of proving live-birth on medical evidence and of proving wilful intent in many of these cases, along with juror sympathy for adolescent women facing the death penalty, confounded the possibility of homicide convictions at trial, and Crown attorneys resorted to these auxiliary charges as a means of providing some kind of criminal law response. The auxiliary charges were much more likely to result in successful convictions than were the primary charges.

As of 1948, authorities could also rely on the law of infanticide. Section 233 of the *Criminal Code of Canada,* the infanticide provision, reads: "233. Infanticide – 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 the effect of lactation consequent on the birth of the child her mind is then disturbed."[8]

The pre-existing charges available to be brought in cases of suspected maternal neonaticide being retained, the infanticide provision became, then, merely *one* of a range of potential options, intended specifically to address cases where women were suspected of killing their babies at birth. The infanticide provision was explicitly intended to provide the opportunity in these cases for a homicide conviction, which is less serious than a murder or manslaughter conviction; it stands with "concealment" and "neglect" as a less serious conviction but with murder and manslaughter as a culpable homicide.[9] Like "neglect," the infanticide charge is both formally gender-specific and restricted to cases where the relationship between perpetrator and victim is the biological relationship of mother and child. In practice, "concealment" almost always operates in the same way. The range of available charges is integrated through a scheme of "lesser included" offences; triers of fact can substitute findings of manslaughter or infanticide in cases where the Crown fails to prove murder (s. 662(3)) and concealment of birth where charges of murder or infanticide are not proven (s. 662(4)).[10] The integration of infanticide and concealment in this scheme maximizes the possibility of a jury returning a conviction for a *Criminal Code* offence in cases of women suspected of killing their newly born babies.[11]

Feminist scholarship, in older and contemporary versions, has often placed infanticide as well as the offences of "concealment" and "neglect," within the context of a range of laws that regulate (hetero)sexuality and reproduction rather than infant homicide. Consistently criticized in these analyses is the medicalization of infant killing integral to contemporary infanticide law. Much of the late twentieth-century critical scholarship on the law governing the killing of newly born babies by their biological mothers treats infanticide law as an expression of repressive state power, grounded in the intrinsically exploitative reproductive and productive relations governing

women. According to Carol Smart's earlier critiques (1989, 1992), English infanticide laws from the seventeenth to the twentieth centuries regulated both illegitimacy and single motherhood – these being special challenges to the capitalist-patriarchal consolidation of the heterosexual monogamous family form. Her analysis of the state's regulation of women's sexuality locates infanticide law within the broader legal framework of nineteenth-century acts governing reproduction and sexual relations (e.g., infanticide, abortion, birth control, baby farming, illegitimacy, sodomy, prostitution, age of consent, and marriage). These laws were aimed at regulating so-called sexual deviance and trumpeted the prevention of immorality among the "dangerous classes" and the preservation of racial purity (Valverde 1991).[12] According to Smart (1992, 17), the seventeenth-century English infanticide law and its harsh punishment framework (typically, death by hanging) functioned to regulate, through detection, prosecution, and punishment, "the sexual and reproductive behaviour of a woman who had no man to support her."[13] By the end of the nineteenth century in England jurors' tacit understanding of the economics of infanticide eased the punishment framework for infanticide, which, by then, was rarely dealt with by way of hanging (17). Poverty, the result of capitalist industrialization, was both the mitigation for, and explanatory model of, infanticide.[14] Smart argues further that the established economic rationale for infanticide gave way to a modern medical rationale that linked infanticide to insanity and to the womb. Thus, infanticide law offers one of the most explicit examples of the medicalization of deviance in criminal law.[15]

Smart's analysis exemplifies the use of the text of the contemporary infanticide law as an illustration for the broader feminist critique of the medicalization of women's deviance. This broader critique problematizes the merging of law and medicine, viewing its development as part and parcel of the capitalist patriarchal structure within which juridical categories like infanticide can be used to control women (Smart 1992; Showalter 1985; Edwards 1984). This was achieved by a patriarchal medical profession through oppressive bio-psychological ideas expressed in legal categories like infanticide, which define women's deviance in relation to bodily difference or defect. According to this feminist critique of the medicalization of deviance, infanticide law has negative effects because it accounts for the causes of women's deviance in bio-psychological terms (pregnancy, childbirth, and lactation) rather than locating the causes of women's deviance in an oppressive patriarchal social structure (O'Donovan 1984; Osborne 1987; Smart 1989, 1995).[16]

I am able to show that this analysis does not fit well with the development of the Canadian infanticide provision, which was a pragmatic, even artful, solution to the problem of securing convictions faced by the prosecut-

ing authorities. The *Hansard* record demonstrates that, from the perspective of government, the problem was that the then existing legal framework was being applied in an entirely ad hoc manner. This was *legally* problematic since it allowed far too much discretion on the part of individual agents of the state, with disparate outcomes for individual women charged with the various offences. Ironically, the legislators' apparent concern was "fairness" and "justice" through the even application of law, although they did not express the problem in quite this manner.[17] The parliamentary debates among legislators, all of whom were trained as lawyers, illustrate that "concealment" was understood to be an entirely unsatisfactory response to the crime of infanticide. The concern articulated in the House of Commons was with the crime of maternal neonaticide and its prosecution. It was described as impossible to prosecute as "murder" since juries were unable or unwilling to sentence women to death. The various ways in which the crime was being dealt with interfered with the proper application of legal doctrine.

The immediate, practical purpose of the Canadian infanticide law was not to police the boundaries of gender relations but, rather, to provide a favourable legal solution to the problem of convicting women for the murder of their newborns in a manner consistent with lay and scientific knowledge. The issue was not whether these women should be punished for failing to conform to ideological standards governing femininity and motherhood; the issue was framed in terms of providing a measured appropriate response to the killing of babies in a manner that recognized women's unique experiences of pregnancy, childbirth, and lactation. Although this is not obvious from a purely textual reading of the infanticide provision itself, both the mothers and the killed babies were understood in and by lay and scientific thinking, and in English law in the form of the infanticide provision, to be the victims of social injustice.[18] The coercive sexual relations between single women and their male "seducers" – men who failed to meet their social obligations dictated by prevailing rules of propriety – was the substance of the humanitarian sentiment operationalized by infanticide law. In this sense, the new "medicalized" infanticide provision was more an attempt to gently redirect juror sympathy toward significant conviction than to reorganize the discourse around infant killing. As a consequence of the failure of fathers to meet their socially ascribed obligations to both mother and child, the issue of holding women legally responsible under the *Criminal Code* framework for culpable homicide was, from the perspective of legal practitioners, uniquely vexatious. When the women sometimes confessed to murder, they were invariably sentenced to death, but the public's adamant opposition to the punishment eventually resulted in their release from prison on a ticket of leave (although not before they spent a considerable number of years in federal prison).

Subsequent to the socialist-feminist critiques, the less functionalist analyses have understood infanticide law as an essential component of a disciplinary society in which "woman" is constituted as a legal subject. These analyses rely on Foucauldian insights to argue that the law influences the formation of the category "bad mother," which interpolates ideological notions of proper motherhood. Now we see infanticide law, along with the other laws regulating (hetero)sex and reproduction, constituting specific action categories rather than expressing and/or consolidating capitalist and patriarchal power relations. In this critique, the economism drops away and infanticide law operates to help reproduce expert knowledge governing femininity and motherhood, which includes the constitution of deviant women in legal discourse as diseased, dangerous, and hysterical. With this Foucauldian turn, ideas about respectable femininity and motherhood articulated in and through legal text and trial get inside the minds and bodies of women, directing/motivating action in a particular manner. Here, regulation is more complex than in the economistic feminist approach. It is achieved through the inculcation of individual self-governance, accomplished partly through the infanticide law, which delineates a boundary between "bad" and "good" mother – with the bad mother being self-evidently deserving of punishment.

In her later work, Smart (1995) adopts this style. She abandons seeing infanticide law as inextricably linked to the furtherance of capitalism and patriarchy, and highlights the broader symbolic effects of contemporary infanticide law, which is still seen as regulating single women and constructing an exploitative medico-legal category. The infanticide law continues to be depicted as problematical insofar as it expresses a medicalized model of women's deviance. At both the practical and the symbolic levels, infanticide law is still conceived of as a reaction by the authorities to women's refusal to conform to a particular set of established patriarchal discourses that govern reproduction and mothering. This reaction by the authorities is linked to women's failure to conform to the dominant standards of femininity insofar as a woman who kills her newly born baby rejects her immediate responsibility to that infant. However, for Smart, the infanticide law is less about the act of killing babies and the prosecutions of women suspected in the deaths of babies, and more about the regulation and control of women's sexuality. The bio-psychological causation model built into the text of infanticide law is, thus, seemingly a paradigmatic example of the easy alliance between two dominant discourses: infanticide law illustrates how patriarchal law and medicine are deployed to secure conformity and to promote moral self-governance among women. Consequently, the trials of the single women accused of infanticide are an important means of communicating hegemonic ideals and regulatory aims (Smart 1992). In this model the regulation of women through medical knowledge, expressed as

diminished responsibility on the basis of pregnancy, childbirth, and lactation, works by delimiting and describing single motherhood in negative terms. It is the discourse itself, rather than the economic system, that determines how single women are understood and how they will behave as a consequence of these negative ideas about women's deviance. Legal regulation works at both the practical and symbolic levels to control women.

Along with the problems inherent in the continuing adherence to the anti-medicalization line, which I have already identified, this Anglo-Foucauldian feminist critique of infanticide offers an analysis of the text of the infanticide law without interrogating the discursive basis of the text as articulated by the medical experts. In fact, the psychiatric theory upon which the apparently reductionist bio-psychiatric mitigation of infanticide is based turns out to be surprisingly "sociological." The experts believed that the straightened social and economic circumstances of many young and not-so-young mothers, combined with the physical stresses identified in the statute, produce mild mental disturbance.

The treatment of the reproductive morality implicit in the medicalized infanticide provision, especially when considered in relation to pre-existing juror sympathies, is also problematic. The Anglo-Foucauldian model suggests that, from the perspective of government, infanticide was an example of unrestrained sexual immorality. However, the immorality of infanticide was ambiguous. Single women who killed illegitimate babies to conceal their illicit sexual activity were acting out of the very sense of morality that the purity campaigns sought to inculcate. That the illegitimate babies did not survive to complicate paternal responsibility may also have explained juror reluctance to punish women harshly. Therefore, these killings were arguably *consistent* with the broader aims of the sexual purity movements because killed illegitimate babies could not disrupt lines of inheritance. More broadly, the women who killed their newly born illegitimate babies were understood to be *conforming* to ideological notions governing motherhood and femininity since they killed their babies to hide the shame of their extra-nuptial sexual activity and to protect the infant from living a life stigmatized by illegitimacy. In Canada the killing of these babies was sometimes openly backed by the women's lovers, families, and friends, who wanted to avoid stigma for themselves and the babies. In this very important sense, the women were seen in contradictory terms, at once virtuous and misguided in their actions.

Given that the trial is presumably an important means of communicating the ideas that Anglo-Foucauldian feminists identify in the statute, it is surprising that little attention is paid to the processes by which cases of women who kill their newly born babies come to trial. In practice, many cases of maternal neonaticide had very little impact in terms of communicating ideological notions about motherhood and medicalized notions of

deviance. To begin with, in Canada, it was discovered very shortly after the adoption of the infanticide provision that the Crown could not meet its evidentiary burden with respect to the mental element. Following an amendment to the infanticide law in 1955, the only element required to be proven "beyond a reasonable doubt" is that the act or omission was wilful.[19] Section 663 of the *Criminal Code* prevents an acquittal on a charge of infanticide if the Crown *fails to meet its burden of proof* with respect to the psychological evidence of disturbance of mind:

> 663. No acquittal unless act or omission not wilful – Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,
>
> (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and
> (b) the balance of her mind was, at the time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,
>
> She may be convicted unless the evidence establishes that the act or omission was not wilful.[20]

Thus, in the absence of proven psychological disturbance, a conviction for infanticide may still be secured as long as the Crown meets its burden and establishes that the act was wilful. The authorities are not required to establish the mental disturbance element; it is merely "read-in" from the killing of the infant and the charge of infanticide itself.[21] So here we see an extraordinary situation where a woman's ability to think and act rationally at the time of the killing – notwithstanding her mind being supposedly weakened by gestation, parturition, and lactation – allows her to be found guilty of the crime of infanticide. The infanticide law and its qualifying clause *is* a unique quasi-medico-legal category for which a controversial psychological rationale has been effectively abandoned as a formal legal requirement, yet its odd reliance on the supporting psychological knowledge has the effect of *preventing* vengeance toward "unmarried mothers" on the basis of gender and motherhood. This is because the law is based on the English version, where infanticide diminishes the punishment for manslaughter. In the Canadian version, the law is written as a diminished capacity provision but stands alone as a separate charge.

The idea that infanticide trials communicated negative ideas about single women fails to account for the many married and widowed women who killed their babies and were tried for infanticide, and it makes no mention of the means of communication of these ideas to delimit the broader effects

on the social body. Overall, the relevant details of these cases have often been kept tightly within the legal arena. This "silencing" of the cases predates the medicalized concept and continues after its adoption. Grand jury deliberations were conducted in secret and typically concluded without issuing a "true bill." In Ontario, during the early part of the twentieth century, most cases were disposed of by way of concealment or neglect indictments, with only some resulting in convictions. In these situations the issue at bar was usually about either women's *intent* to conceal the birth or neglect to obtain medical assistance rather than women's diminished mental state consequent upon pregnancy, childbirth, or lactation. Discussions at bar sometimes addressed the question of marital status but, typically, for the purposes of mitigation rather than retribution. For the vast majority of cases of mothers who killed their babies there were no trials. However, of the many women who were tried for killing their newly born babies, some confessed to killing while others pled not guilty. In situations where the women pled not guilty, the issues at bar dealt with the very difficult forensic question of live-birth. Even today, the scientific evidence adduced at trials cannot establish "beyond a reasonable doubt" that an infant, born outside of a hospital without medical assistance, is live-born. Therefore, the question of the communication of a medicalized notion of deviance through infanticide law is doubly diluted since, apart from the elimination of the need for psychological evidence, these cases rarely went to trial in Canada.

Once the infanticide law was adopted in 1948 it became an additional charge rather than a replacement for murder or the lesser auxiliary charges. Again, the communication of the now supposedly medicalized notions of deviance are limited because very few cases where infanticide was the actual charge went to trial. In any case, the organization of legal facts and various lay and expert knowledge produced a discourse around the killing of newly born babies by their mothers that perceived the women's actions as the product of the stress on the body and mind caused by socioeconomic hardship. Toward the end of the twentieth century, postpartum depression and/or postpartum psychosis developed into a dominant justification for women who kill their newly born babies. However, these situations are typically associated with the deaths of older children (over six months). It has been established that onset of postpartum depression occurs around the sixth month postpartum, when the hormone levels associated with pregnancy drop significantly. Typically, women who kill their babies during this phase suffer from psychotic delusions about the baby (often believing her/him to be the devil or going to hell) and suffer from hallucinations.[22]

It is, then, in many ways misleading to apply the broad notion that this particular "patriarchal" law is a sound example of the socially effective medicalization of women's crime. The approach laid out here moves beyond

both the socialist-feminist and the Anglo-Foucauldian critiques, both of which firmly connect the medical aspects of the text of the infanticide law to the oppression/regulation of women. Infanticide law should be understood within a *legal* context as something quite different from the medicalization of women's deviance or the constitution and regulation of "bad" mothers *through this category*. The history of the passage of the law and its prosecution reveals that legislators had little concern for the medical knowledge underwriting the law. The discursive base of the law, as articulated by the English experts in mental medicine, understood infanticide as a product of exhaustion and stress on working-class women, and categories like "lactational insanity" and "exhaustion psychosis" were developed to provide both medical diagnoses and plain socioeconomic explanations for infant murders. Experts in mental medicine made no attempts to bind medicine to law or to control, regulate, or punish the women in their institutions. The women were in their care for very brief recovery periods and were then discharged. These were the very women who, in socialist-feminist and Foucauldian terms, failed to conform to ideological standards governing femininity or motherhood. Laymen empanelled on juries refused to indict women for murder when they killed their newly born babies because the death penalty was too harsh a punishment for a crime firmly connected to an unjust *legal* system in which women themselves were held wholly (individually) accountable for the product of illicit sexual activity, be it coerced or consensual. Then, when the "infanticidal" mitigation framework gets taken up in law, and thereby becomes highly individualized and focused on rationality and intentionality, its practical effect was to make convictions difficult to secure – until its biomedical teeth were pulled in the 1955 amendment.

While the killing of newly born babies can be modelled as a kind of political resistance to enforced motherhood as a result of a range of straightened circumstances, including rape, lack of fertility control, illegitimacy, and poverty, it is also a potential homicide of a live-born human being. In Western culture the killing of a live-born human being demands a formal legal response. Infanticide law is thus distinct from other laws, such as those prohibiting sodomy, prostitution, abortion, birth control, and obscenity, that have historically been used to govern sexuality and reproduction. Lumping infanticide law together with these other laws is conceptually problematic since infanticide is not an event we can now imagine failing to receive a criminal law response in Canada. Certainly, the killing of newborn babies by their mothers has not been universally constructed as a moral, legal, or quasi-legal violation, a fact that is well documented by anthropological literature, which casts a very telling light on the narrow Western conceptualization of the killing of newborn babies as a crime requiring a retributive response, even if only for the purposes of general deterrence.

Within differing cultural and historical contexts, the deaths of babies (of certain kinds) has been tolerated, understood in relation to the social conditions under which women mother. In part, this tolerance of infant death, both by the mothers themselves and the authorities, is connected to disparate valuations of infants and their differing relations in and to global economies. This literature is best exemplified by the ethnographic research of Scheper-Hughes (1985, 1987, 1992); and Scheper-Hughes and Sargent (1998). It illustrates that when acts and omissions, which would be viewed in the West as maternal apathy and neglect resulting in death, occur within the context of "environment[s] hostile to the survival and well-being of mothers and infants" (1987, 3), they are rarely constructed as requiring moral censure or punishment. In Western culture, where the standard of living is generally quite high, the killing of newly born babies by their mothers is ideologically taboo. Infanticide law is part of a much wider cultural formation that disallows the killing of live-born babies. To assert that infanticide law constructs the categories of "bad" and "good" mother around the notion that killing babies is wrong cedes far too much power to an ill-conceived and poorly operating law. This idea already exists as a formidable component of the broader culture. And that the formal legal response has typically been especially forgiving is perhaps perplexing from both the socialist-feminist and Anglo-Foucauldian feminist perspectives. After all, for both, criminal law is conceptualized, albeit somewhat differently, as a negative expression of power. That the law *diminishes* responsibility for the killing of babies by their biological mothers in relation to all other kinds of murder committed by both men and women demands an examination of the broader disciplinary effects of the rationale of diminishing women's responsibility for murder within the context described by Smart.[23]

In the English context, infanticide law has more recently been understood as creating a special category of mother-murderer whose responsibility is diminished by an understanding of women's troubles – an understanding rooted in liberal humanitarian sensibilities about the feminine class experience. These notions are taken up in and by law and are reconstructed to "fit" the legal ideology of the abstract rational individual who is the subject of law. And, as Ward (1999, 174) has argued, again in the English context, infanticide law *reconstructs* medical knowledge to fit the individualistic needs of law. More specifically, infanticide law provides an illustration of the tension between the abstract individualism of criminal law and the recognition of social and emotional pressures on human subjectivity and agency in lay and medical discourse. According to this critique, the English act, 1938 (a version of which was adopted in Canadian law), provides a working example of how "criminal law doctrine addresses itself to an autonomous juridical subject, the lay and medical narratives ... often depict a very different, much less autonomous subject" (Ward 2002,

269). It is argued here, along with Ward and others, that the mitigation for baby killing achieved by infanticide law is linked to gender in that the criminal justice system is not inclined to treat violent women as rational autonomous agents. According to Allen (1987, 93), women are more often treated as the "victims of circumstances, social or economic pressures, of violent men or violent emotions; she may indeed be much like other women, and have similarly pressing responsibilities in such feminine domains as motherhood and the family; she may indeed be a generally harmless creature who poses little threat outside the immediate – and perhaps exceptional – circumstances of a single crime. Furthermore, the recognition of these factors may quite genuinely enlighten many aspects of the case, and their acknowledgement is by no means necessarily oppressive or illegitimate."

In terms of the dominant mitigating discursive frameworks, it has been argued that women defendants have been viewed by the courts as "sad," "mad," and "bad" (Ward 1999, 2002; Wilczynski 1991, 1997a, 1997b). But this debate about how the courts have variously constructed women defendants misses the broader point that these three interconnected discourses are an integral feature of the criminal trial process. The acknowledgment of extenuating circumstances is a feature of *most* criminal trials. During the sentencing phase, evidence of social or psychological constraint on human subjectivity is usually introduced by defence counsel to reduce the punishment, while evidence of enhanced culpability is emphasized by the Crown to secure a conviction and appropriate punishment. The courts quite properly take into account a broad range of social and psychological variables when sentencing both men and women, and it is within this context that the mitigation framework offered by the infanticide law speaks directly to women's difficulties with pregnancy, childbirth, lactation, and mothering. In other words, the immediate (and perhaps disciplinary) effects of the infanticide law are positive insofar as that law abandons formal legal equality and abstract individualism in favour of a contextually located legal defence to murder. This provides a counterpoint to the argument that law is distinct and separate from the external reality of crime and that its categories are independently constructed. The law does not exist in a separate universe parallel to the one outside of the courtroom doors: it very immediately and easily takes up the medically authorized humanitarian mitigation model and moulds it into the language and form required in law.

In practice, the question of whether or not the infanticide category is used to control women turns out to be much more complicated than is suggested by the contemporary Anglo-Foucauldian feminist critique. This is not to say that there is nothing to the broad Anglo-Foucauldian and feminist claim that this bio-psychological category is used to control women. However, the question we might consider is this: how much controlling of women as a group does it do? The most consistent observable fact of this

research is that the Crown wants to maximize its legal control over deviant women and that it pushes for a quasi-medical notion when it thinks it can accomplish this. It is important to note that its aims are pragmatic – it believes that the infanticide law would achieve the simple goal of gaining convictions for homicide. The state very readily picked up on the medical vocabulary written into English law, indeed adopting it in a rather cavalier manner, but when we get to present-day prosecutions, we see that it is able to drop the medical vocabulary because it believes it can get a harsher response another way. Therefore, we should not think of the criminal law here only as the moral governance of women as a group because these cases are very obviously about the arrest, prosecution, and conviction of individual women. The law does not just govern diffusely, it also governs immediately and directly. It is important to make a clear distinction between the law governing individuals directly and the diffuse effects of that law on society as a whole because, theoretically, we might not have the same prescription at these two very different levels of analysis. The development and application of contemporary infanticide law is probably a much better example of the latter than of the former. I argue that it is quite far fetched to see infanticide law as a coherent component of a system of governance with significant effects being articulated into the social body. Ironically, I believe that the socio-legal feminist critique of medicalization has done much more to articulate a medicalized notion of infanticide into the social body than has the infanticide law. After all, if we *are* being governed through this medico-legal category, then we must also include in our critical analyses of these processes the broader effects of the feminist critics who advanced the idea that infanticide law oppresses women because it is based on regressive ideas about women's mental capacity wrought by reproduction (and the feminist critique has become a much more generally broadcast discourse than has the infanticide doctrine itself). Instead, we must understand that infanticide law was an end run around the death penalty and that it diminishes responsibility for a crime very firmly located within a sociological or cultural understanding of these women's experiences of broader patriarchal oppression. That it governs immediately and directly an especially vulnerable group of adolescent women should not escape our notice.

In the prevailing punitive climate, the legitimacy of diminished responsibility is disappearing and, with it, the use of the infanticide law as a legal response. This can be linked to a broad range of law reforms affecting the formal legal status of women and, particularly, of women's reproductive freedom (especially the greatly increased availability of contraception and abortion and the destigmatization of illegitimacy). In the early part of the twentieth century, before the enactment of the infanticide provision, both the Canadian authorities and the public had a more complex understanding of the vagaries of life for single working-class mothers than they appear

to have today. In the early twentieth century, people sympathized with the everyday hardships faced by single women with illegitimate babies, and they understood that there were extreme economic and emotional hardships connected to raising babies for single working-class mothers. The view that the women were victims of social circumstance was, of course, realistic given the social, political, and legal climate of early twentieth-century Canada. The gradual achievement of formal legal equality and new reproductive freedoms has not led to the disappearance of maternal neonaticide – only to a wholly different construction of "unwilling mothers" and "unwanted babies." Rather than locating the explanation for the killing of newly born babies by their biological mothers within a social welfare or mental health model, the authorities are attempting to amplify the available criminal justice punishment for crimes related to infanticide. While this book was being written, the federal government entertained the idea of removing "infanticide" from the *Criminal Code* and replacing it with "death by child abuse/neglect." It was suggested that this provision not require the specific intent to kill and that the minimum term of imprisonment without eligibility for parole be classed as second degree murder (life imprisonment). This suggestion came from the Office of the Chief Coroner for Ontario following several high-profile child abuse inquests.[24] The new offence, dubbed "child abuse homicide," amounted to a strict liability provision governing motherhood in criminal law. In a related move, the government is set to amend the current punishment framework for "abandonment," increasing it from two to five years imprisonment. The government is increasing the penalty, despite the fact that at least forty US states, France, Germany, and Italy have all decriminalized the crime of "abandonment" and established public spaces for women to leave their unwanted babies without fear of public censure or criminal prosecution in order to *prevent* infanticide. Today in Canada, the prosecutorial aim of punishing women who kill their infants is apparently no different than it was fifty years ago when Parliament passed the infanticide provision itself. But now, feminist discourses have been appropriated by law and order advocates to support the enhanced prosecution of women suspected of infant murder. In other words, the feminist discourse on women's reproductive responsibility, advanced in order to secure freedom of choice and to decriminalize abortion, has been appropriated by law and order advocates and incorporated into legal discourse in order to further retributive aims directed at the women on behalf of the baby. The baby, in turn, has acquired new quasi-legal status somewhat in line with the anti-abortion movement's attempt to assert foetal rights claims in law. In a climate where foetal rights are immanent, the newly born baby has become the wholly deserving victim around which calls for retribution are now organized; we see the emergence of the rights-bearing victim in the body of the baby, damaged or dead, while the mother, no longer a legitimate

victim herself, continues to be the target of prosecution and, now, enhanced punishment.

These developments are connected to the rise in legal and *medical* status of the infant. Babies, newly born without medical assistance, used to be assumed to have been stillborn (and their mothers innocent). Now they are assumed to have been live-born (and their mothers guilty). Any humanitarian sympathy that existed for the women has been refocused on the baby. These developments are occurring within the context of a dramatic shift in the broader politics of criminal law, where the due-process rights of the accused are pitted against the rights of victims and potential victims to protection (Roach 1999). However, within the troubling emergence of the "due-process-versus-victim's-rights" model of criminal justice, only certain kinds of victims are truly deserving of state-sanctioned protection. The broader experiences of suffering by the women are always trumped by the obvious status of the (dead) baby as immediate victim. Proposals for the reform of the infanticide law must also be understood within the context of recent developments in the identification and management of child abuse, and its variant "shaken baby syndrome," where any kind of harm suffered by infants and children is construed as "child abuse" (witness the proposed "child abuse homicide" charge).[25] Here we see not just a conceptual affinity but also a practical cross-fertilization between feminist discourse (especially its positioning as part of a broader politics of victimhood) and the law and order discourse (with its emphasis on responsibility and the individual rights of the victim). Here, two seemingly disparate discourses merge/converge, bringing into being an impending system of regulation.

The socio-legal feminist critique of medicalization, with its emphasis on the women's rationality and agency, has been appropriated by "law and order" advocates to bolster their own arguments, although they have dropped the concern with the social contexts within which these women acted. And the development of the feminist critique of medicalization as a purely textual analysis of law, with largely symbolic force, seems to have been associated with a lack of direct feminist involvement both in cases where women kill their newly born babies and in current criminal law debates about the possible repeal of infanticide law. In part, this is because feminist activism was largely concerned with reforming law and procedure that reproduced the oppression of women as *victims* of violence.[26] Unlike feminist activism in other areas of criminal law reform (e.g., the amendment of traditional rape law and procedure, the decriminalization of birth control and abortion, the criminalization of woman abuse, and the nouveau-criminalization of obscenity) there have been no equivalent feminist discussions around the prosecution of women who kill their newly born babies. The purely textual forms of the feminist critique, and the obvious lack of organized response to the application of the infanticide law, have had the unintended

effect of conceding conceptual territory to advocates of increased criminal sanction. Law and order advocates believe that the infanticide provision "devalues human life," and they have appropriated the language, rather than the intent, of the socio-legal feminist critique of medicalization in order to legitimize their claim that women be held wholly responsible for "infanticide" transmogrified as "child abuse." This development is especially significant in the present legal and political climate, when the "rights" of the foetus and baby threaten to acquire quasi-legal authority and to justify broader encroachments on and punishments of the pregnant, and recently pregnant, body.[27]

Attempts to locate infanticide within a framework of aggression in which infants are conceptually positioned as innocent victims of evil mothers, and whose right to life trumps all others, tend to dismiss both sociological and psychological explanatory frameworks as the product of ivory tower (and perhaps feminist) madness. Maternal neonaticide has become a problem of women's aggression, irresponsibility, selfishness, and "child homicide," demanding a different kind of criminal law response. The new explanatory framework is, of course, very much at home in the criminal justice arena as the criminal justice system is neither structured nor equipped to redress social injustices and inequalities, and, within the Canadian legal context, explanatory models of intentionalist maternal aggression tend to prevail over explanatory sociological models of social inequality. It also fits comfortably within the framework of contemporary political discourse, with its emphasis on individual responsibility, market economics, and minimal government.

During the twentieth century maternal neonaticide shifted from (1) an act understood in relation to socio-economic disadvantage to (2) an act understood as a psychiatric illness linked to childbirth and lactation to (3) an act for which no justification is legitimate because it is presumed that the infant-victim has a "right-to-life" that the courts must protect by punishing fully responsibilized mothers. My analysis demonstrates that, during a series of distinct phases in the treatment of defendants accused of maternal neonaticide, Crown prosecutors have persistently attempted to secure the most serious convictions and the most severe punishments available, despite the early legislators' attempts to deal with the problem in a manner that recognized working-class adolescent women's experiences of unwanted pregnancy. The pattern of prosecutorial effort, now reflected and potentially achieved in the new law and order discourses about "child abuse homicide" is, perhaps, the only completely consistent element of how the killing of newly born babies by their mothers has been viewed and responded to in Canada throughout the twentieth century. It indicates that any repeal of the infanticide provision is likely to result in adolescent women, whose

offences have traditionally been (are still sometimes) regarded with considerable sympathy and responded to with appropriate leniency, becoming subject to aggressive prosecution and harsher punishment.

Chapter Breakdown

Chapter 1 sets out the prosecutorial conviction problem prior to the passage of the infanticide law in 1948. Concealment of birth and neglect to obtain assistance in childbirth were the charges most likely to secure a conviction for the killing of a newly born baby. Since only a live-born baby can be the victim of a homicide, the establishment of live-birth was crucial to the Crown's success. Yet forensic specialists were explicitly instructed to presume stillbirth rather than live-birth in these cases, thereby thwarting the Crown's efforts to obtain homicide convictions. Chapter 2 investigates the prosecution process prior to the law's passage. It does this by looking at the available indictment case files for the province of Ontario between 1853 and 1977 as well as at the capital case files in which women were sentenced to death for killing newly born babies. This chapter demonstrates that the authorities were prevented from obtaining indictments and convictions largely as a consequence of the inadequate evidence provided by coroners. The provincial cases reveal a strong inclination on the part of the authorities to secure indictments for murder; however, since grand jurors, who were convened under the antiquated system of indictment through a coroner's jury, were unlikely to issue these indictments and were disposed only to permit indictments for the lesser auxiliary charges, legislation in the form of the infanticide provision was adopted in the House of Commons in 1948.[28] The capital case files reveal that the women convicted usually made declarative statements to the authorities amounting to confessions that resulted in their conviction at trial. These convictions provoked considerable public protest. Eventually, the convicted women who were sentenced to death had their sentences commuted to life and were invariably released after serving a shorter period of time. This is the immediate background to the passage of the infanticide law in Canada in 1948.

Chapter 3 demonstrates that early twentieth-century medical knowledge, upon which rests English infanticide law (est. 1922, amended 1938), of which the Canadian law is a version, placed the killing of newly born babies by their biological mothers within its socio-economic context. The experts in mental medicine saw their "infanticidal" patients as overwhelmed by poverty. They believed that these adverse circumstances placed pressures on the recently pregnant and now lactating mind and body, causing women to kill their babies. This provides a counterpoint to the argument that the biomedical/psychological category "reproductive insanity" regulated single motherhood by individualizing and/or pathologizing deviance. In practical

terms, it accomplished neither. This chapter also demonstrates, through a discussion of the House of Commons debates that occurred when the infanticide law was passed, that legislators intended to implement a more logical process for securing convictions for homicide when a woman was suspected of killing her newly born baby. Their aim was to assimilate the practices into one category – infanticide. The penalty could then be applied consistently in each case.

Chapter 4 provides a critical analysis of the available reported cases dealing with infanticide. Rather than diminish responsibility for manslaughter on the basis of pregnancy, childbirth, and lactation – as is the case with the English statute – Canadian infanticide law constitutes a separate charge. As a result, infanticide has not achieved the objectives as set out by reformers and has proven very difficult to administer. Once passed, the infanticide provision was very quickly amended to remove the Crown's dual burden of proving both intent and reproductive mental disturbance, which had turned out to constitute a new obstacle, rather than an aid, to conviction. The difficulties with using the infanticide law as laid out in *R. v. Marchello* (1951) led to its revision in 1955, when Parliament passed a law removing the Crown's burden to prove the reproductive mental element.[29] The amendment eliminated the need to prove mental disturbance, although the underlying psychological mitigation rationale was retained in the existing statute. Now we see the efforts on the part of the authorities to maximize convictions by tinkering, this time, with *procedural* elements of the criminal law. The identifiable legal barriers to conviction for infanticide, noted by those in law and order circles (particularly Crown prosecutors and judges), were well articulated and partially sorted out by the middle of the twentieth century. Following this, very few cases were reported. Existing case law deals with the perennial legal questions of live-birth and wilful intent. The development of jurisprudence on wilfulness reveals a trend toward enhanced responsibility for the women. Cases on sentencing reveal a growing dissatisfaction with the mitigation framework offered by the provision and a drift toward harsher punishment, especially when the baby is subject to maternal violence.

Chapters 5 and 6 describe the more recent development of new prosecutorial strategies for dealing with cases of maternal neonaticide, which locate it within a framework of child victimization, and attempt to cast it as a wholly willed and wicked act requiring intensive investigation and deserving of severe punishment. This framework is criticized on the ground that cases of maternal neonaticide are very frequently so unlike the abuse and victimization scenarios established in the "child abuse" framework (by its own moral and evidentiary logics) that to assimilate the one to the other is indefensible and can result in punishments that, from any standpoint, are

inappropriately harsh. Chapter 5 discusses the rise of the child abuse detection movement and its links to the Office of the Chief Coroner for Ontario. It lays out a number of cases of child abuse homicide that occurred while the children were in the care of the Conservative government's child protection system. These deaths resulted in a very high-profile coroner's inquest in the mid-1990s. This inquest resulted in sweeping changes to the identification, detection, and management of the homicides of children, including abolishing the infanticide provision because it was seen as allowing women to get away with murder premeditated for nine months. Again, we see the authorities tinkering with both law and procedure in order to maximize the opportunity for a retributive response.

Today, the very idea of "infanticide" as a formal category of mitigation based on diminished capacity has become discredited as a means of partially excusing the killing of newly born babies. This "disappearance of infanticide" can be explained within the context of a consistent ethic of retribution, which is connected to the ongoing activities of the Office of the Chief Coroner for Ontario. Chapter 6 reviews the development of the newly minted category "child abuse homicide," which is deemed appropriate for responding to virtually all cases of infant death. An examination of the coroner's investigation case files and inquests (1980-98) suggests that the disappearance of the mitigating category of infanticide, like the disappearance of the death category "sudden infant death syndrome," occurred because it was seen as an obstacle to the discovery and prosecution of maternal child murder. This development occurs within the context of a much broader concern, beginning in the middle of the twentieth century, with the detection of child abuse and child abuse homicide and the concomitant amplification of criminal investigations.

By providing an interdisciplinary approach, bringing historical, sociological, and legal scholarship techniques to bear on the study of the application of laws governing the killing of newly born babies by their biological mothers, as well as the underlying medical discursive basis of infanticide and the introduction of the infanticide law, I am able to show that the critical textual analysis and account of the medicalization of women's deviance is ahistorical. I hope that, by revealing some of the political dangers inherent in hasty critiques of this law, and by demonstrating the value of a more complete and nuanced view to the development of legal and political interventions, I will be able to show the value of careful historical, sociological, and criminological analysis to critical legal scholarship.