

# Challenging Infanticide: Why Section 233 of Canada's *Criminal Code* is Unconstitutional

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S C O T T M A I R \*

## ABSTRACT

In the early twentieth century, Canadian juries were reluctant to convict mothers who had murdered their newly born children (children who are under one year of age) and would acquit them despite their obvious guilt. In 1948, Parliament tried to remedy this by adding s. 233 to the *Canadian Criminal Code*, creating the offence of infanticide. With a maximum penalty of five years imprisonment, juries would be more willing to convict these mothers. As of this writing, s. 233 is still in force.

In this article, I will argue that s. 233 is unconstitutional because it violates the equality rights of newly born children under the *Canadian Charter of Rights and Freedoms*. Specifically, I argue that the punishments a society gives for murder reflects the value it places on human life. Section 233's mandatory lesser punishment for mothers who kill (or even premeditatedly murder) their newly born children communicates that they are less worthy as members of Canadian society than those who are at least one year of age. Furthermore, with its low maximum penalty and a broad definition of disturbed mind, s. 233 trivializes the killing of the newly born children. I then argue that these infringements cannot be justified. Lastly, I will outline how to constitutionally challenge the law. In the section about why s. 233 cannot be justified, I will also discuss a possible replacement for s. 233: a defence of diminished responsibility that applies regardless of the gender of the perpetrator or age of the victim. This would allow flexibility

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\* Scott Mair is a Licensed Paralegal with the Law Society of Ontario and has a minor in law from Carleton University. The views expressed in this article are his own and not those of the Law Society of Ontario.

in the sentencing of mentally ill but legally sane defendants without discriminating against a newly born child because of his or her age.

**Keywords:** criminal law; infanticide; disturbed mind; jury nullification; *Criminal Code*; *Charter of Rights and Freedoms*; discrimination; equality; diminished responsibility

## I. INTRODUCTION

Section 233 (s. 233) of the *Canadian Criminal Code* details the offence (and the partial defence) of infanticide.<sup>1</sup> It applies to mothers who kill their newly born children while suffering from a “disturbed mind”.<sup>2</sup> If convicted, the mother faces a maximum of five years imprisonment.<sup>3</sup> Some believe that it should be abolished.<sup>4</sup> Others believe that legislators in other countries should use it as a template when adopting similar legislation.<sup>5</sup> Some suggest changing the definition of “disturbed mind”<sup>6</sup> or expanding the provision’s scope to include adoptive parents and fathers.<sup>7</sup> Judges have also discussed the legislation’s constitutionality when determining if it is the Crown or the defence who has the burden of proving the state of the woman’s mind during the killing.<sup>8</sup> There are no articles, however, which specifically detail the impact s. 233 has on the rights of newly born children. Nor has any article discussed s. 233’s constitutionality in this context.

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<sup>1</sup> *Criminal Code*, RSC 1985, c C46, s 233. Section 233 will also be referenced as “the infanticide provision” or “Canada’s infanticide provision” or “the provision” unless otherwise noted throughout this article. I will use the term “newly born child” to describe a child who is less than one year of age.

<sup>2</sup> *Ibid.* See also Eric Vallillee, “Deconstructing Infanticide” (2015) 5:4 *Western J Leg Studies* 1 at 1.

<sup>3</sup> *Criminal Code*, *supra* note 1.

<sup>4</sup> Vallillee, *supra* note 2 at 9.

<sup>5</sup> Margaret Ryzner, “A Crime of Its Own? A Proposal for Achieving Greater Consistency in Neonaticide and Infanticide Cases” (2013) 47:3 *USF L Rev* 459 at 478.

<sup>6</sup> Vallillee, *supra* note 2 at 8.

<sup>7</sup> Sanjeev Anand, “Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code’s Child Homicide Offence” (2010) 47:3 *Alta L Rev* 704 at 728.

<sup>8</sup> *R v LB*, 2011 ONCA 153 at paras 85–88, 270 CCC (3d) 208 [LB].

In this article, I will rectify this. I will argue that s. 233 is unconstitutional because it violates a newly born child's right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms*<sup>9</sup> and cannot be demonstrably justified in a free and democratic society. Specifically, I will argue that by mandating a lesser punishment for the killing of a newly born child, s. 233 demeans his or her dignity by communicating (intentionally or not) that its life is of lesser value than those older than them. Also, this infringement cannot be justified under s. 1 of the Charter.

This article has five parts. Part two looks at s. 233's history and how it has been interpreted by Canadian courts. Part three details how the provision violates a newly born child's right to equality under s.15 of the *Charter*. Part four details why this violation cannot be upheld under s. 1 of the *Charter*. Part five details how to constitutionally challenge s. 233.

## II. THE HISTORY AND JURISPRUDENCE OF SECTION 233

### A. The Provision's Text and History

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.<sup>10</sup>

Parliament added s. 233 to the *Criminal Code* in 1948. Traditionally, many mothers who killed their newly born children were poor and unable to raise them.<sup>11</sup> They were often raped or seduced by their employers or their employer's relatives and fired once their pregnancy became known.<sup>12</sup> Juries were reluctant to convict these mothers of murder as that meant an

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<sup>9</sup> *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, s 15 [*Charter*]. I recognize that challenges under Section 15 of the *Charter* rarely succeed, but I believe the evidence I present will show that section 233 is unconstitutional on this basis.

<sup>10</sup> *Criminal Code*, *supra* note 2, s 233.

<sup>11</sup> Constance B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34:4 UTLJ 447 at 457-458.

<sup>12</sup> *Ibid.*

automatic death sentence. Thus, juries would nullify and acquit these women even if they were clearly guilty.<sup>13</sup>

Sympathy was not the only reason for acquittals, however. Many infanticides were actually maternal neonaticides: the killing of a newly born child “immediately following, or within a few months, of its birth by [its] biological mother”.<sup>14</sup> To convict these mothers, the Crown had to prove the infant had been “born-alive.” A child was deemed born-alive when it had taken its first breath.<sup>15</sup> This was hard to prove and led to many proper acquittals and jury nullifications.<sup>16</sup>

In 1948, Parliament tried to remedy this via enacting s. 233, which allowed juries convict these mothers of the lesser offence of infanticide. Parliament hoped that the lenient maximum penalty of three years (later raised to five years)<sup>17</sup> imprisonment would prevent jury nullification.<sup>18</sup>

## B. Jurisprudence

*R v Marchello*<sup>19</sup> is the first case to outline infanticide’s elements. To be guilty of infanticide:

- (a) the accused must be a woman; (b) she must have caused the death of a child; (c) the child must have been newly born;<sup>20</sup> (d) the child must have been a child of the accused; (e) the death must have been caused by a wilful act or omission of the accused; (f) at the time of the wilful act or omission the accused must not have fully recovered from the effects of giving birth to the child; and (g) by reason of giving birth to the child the balance of her mind was then disturbed.<sup>21</sup>

<sup>13</sup> *House of Commons Debates*, 20th Parl, 4th Sess, Vol V (June 14, 1948) at 5187 (Hon John Deifenbaker) [House of Commons Debates].

<sup>14</sup> Kristen Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: UBC Press, 2005) at 197, n 7.

<sup>15</sup> *Ibid* at 32.

<sup>16</sup> Anand, *supra* note 7 at 708, n 8.

<sup>17</sup> *Ibid* at 715, n 41.

<sup>18</sup> *House of Commons Debates*, *supra* note 13 at 5184 (Hon James Lorimer Isley, Minister of Justice).

<sup>19</sup> *R v Marchello*, [1951] 4 DLR 751, 1951 CarswellOnt 8 at para 14 [Marchello].

<sup>20</sup> A newly born child is defined as a child less than one year of age. See *R v Smith* (1976), 24 Nfld & PEIR 161 at para 11, 32 CCC (2d) 224 [Smith].

<sup>21</sup> *Marchello*, *supra* note 19 at para 14.

To establish the *actus reus* of infanticide, the Crown must prove that a woman caused the death of her child through a wilful act or omission. The woman must also have a disturbed mind due to not fully recovering from the effects of childbirth or lactation.<sup>22</sup> The act or omission need not be the result of the woman's disturbance. The woman's mind only has to be disturbed because of the effects of giving birth or lactation when she causes the death of her biological child.<sup>23</sup>

Initially, the *mens rea* for infanticide was the same as the *mens rea* for murder. The Crown had to establish that the woman intended to kill her child.<sup>24</sup> For example in *Smith*<sup>25</sup> a mother was charged with infanticide after smothering her infant son. The judge acquitted her because he had reasonable doubt about whether she intended to kill her son.<sup>26</sup>

This changed in 2011 when the Ontario Court of Appeal held the *mens rea* for infanticide is the same as the *mens rea* for manslaughter.<sup>27</sup> To have the *mens rea* for manslaughter, the accused must intend to commit an unlawful act and there must be "objective foreseeability of the risk of bodily harm that is neither trivial nor transitory in the context of a dangerous act."<sup>28</sup> That is, a reasonable person should have known that by committing the act they were exposing others to the risk of bodily harm. Also, the accused's unlawful act must be a significant contributing cause to the victim's death.<sup>29</sup> The *mens rea* for murder (including premeditated murder) also suffices.<sup>30</sup> A mother may be convicted of infanticide if she harms her infant intending to cause its death.<sup>31</sup>

Originally, the Crown also had to prove that a woman was suffering from a disturbed mind when she killed her child. If the defense could show the woman's mind was not disturbed or create reasonable doubt about this,

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<sup>22</sup> *R v Borowiec*, 2016 SCC 11 at para 13, [2016] 1 SCR 80 [*Borowiec*].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Smith*, *supra* note 20 at para 29.

<sup>26</sup> *Ibid* at para 35.

<sup>27</sup> *LB*, *supra* note 8 at para 114.

<sup>28</sup> *R v Creighton*, [1993] 3 SCR 3 at 44-45, 105 DLR (4th) 632.

<sup>29</sup> *R v Maybin*, 2012 SCC 24 at para 1, [2012] 2 SCR 30.

<sup>30</sup> *LB*, *supra* note 8 at para 36.

<sup>31</sup> *Criminal Code*, *supra* note 1, s 229(a).

the accused would be acquitted. Once acquitted, the principle of double jeopardy prevented these women from being convicted of murder or manslaughter.<sup>32</sup> For example, in *R v Jacobs*<sup>33</sup> a woman was acquitted of infanticide because she had no disturbance of the mind after giving birth.<sup>34</sup> Ironically, a law meant to make convicting defendants easier almost guaranteed their acquittal.

Parliament remedied this in 1955 by passing s. 662 of the *Criminal Code*. This allows for a conviction if the Crown proves every element of infanticide except the existence of a disturbed mind, unless the actions causing the infant's death were not wilful.<sup>35</sup> From then on, defendants could be convicted of infanticide, even if there was reasonable doubt about whether their minds were disturbed. A disturbed mind was no longer an essential element of the offence. In fact, it soon became an element that the Crown had to disprove to convict a woman of murder.

Indeed, in addition to being a criminal offence, a mother can raise infanticide as a partial defence to murder or manslaughter if the victim is her newly born biological child.<sup>36</sup> The burden of proof remains with the Crown. Once each element of the defence is found to have an air of reality to it, the Crown must disprove one of the elements beyond a reasonable doubt. If they cannot, the accused will be acquitted of murder (or manslaughter) but convicted of infanticide.<sup>37</sup> This process was affirmed by Canada's Supreme Court in *R. v Borowiec*.<sup>38</sup>

## C. The Definition of “Disturbed Mind”

All infanticide-related jurisprudence has held that the definition of a “disturbed mind” under s. 233 is distinct from the mental state required for

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<sup>32</sup> Kramar, *supra* note 14 at 74–75.

<sup>33</sup> *R v Jacobs* (1952), 105 CCC 291, [1952] OJ No 542 (QL) [*Jacobs* cited to OJ No].

<sup>34</sup> *Ibid* at para 3.

<sup>35</sup> *Criminal Code*, *supra* note 2, s 663.

<sup>36</sup> *Borowiec*, *supra* note 22 at para 17.

<sup>37</sup> *LB*, *supra* note 8 at paras 139–140.

<sup>38</sup> *Borowiec*, *supra* note 22 at para 17.

insanity.<sup>39</sup> The threshold is much lower than what is required to find a defendant not criminally responsible by reason of mental disorder.<sup>40</sup>

The Supreme Court of Canada has held that under s. 233, a disturbed mind is a mind that is “mentally agitated,” “mentally unstable,” or is undergoing “mental discomposure.”<sup>41</sup> A woman’s disturbance “need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder...or amount to a significant impairment of [her] reasoning faculties.”<sup>42</sup> The disturbance must “be present at the time of the act or omission causing the...child’s death.”<sup>43</sup> It must also be because “the accused [has] not fully recovered from the effects of giving birth or...lactation consequent on the birth of the child.”<sup>44</sup>

In every case after s. 662 came into force and where infanticide could be raised as a defence, the accused was found to have a disturbed mind or alternatively, pled guilty to infanticide.<sup>45</sup>

The definition of disturbed mind is quite broad. A “disturbed mind” can be a psychiatric illness that amounts to insanity. For example in *R v. Szola*,<sup>46</sup> a woman with postpartum psychosis accidentally killed her newly born son after dropping him on the floor to quiet him. While she pled guilty to infanticide, the Ontario Court of Appeal ruled the woman was legally insane when she killed her child.<sup>47</sup> While the court could not find her insane due to her guilty plea, they reduced the sentence to a conditional discharge and compulsory psychiatric treatment.<sup>48</sup> Another case, *R c*

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<sup>39</sup> *Borowiec*, *supra* note 22 at para 28.

<sup>40</sup> *Ibid* at para 34.

<sup>41</sup> *Ibid* at para 35.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> For guilty pleas see *R v Kang*, 2008 BCPC 511 (a severely depressed woman who drowned her child was given a conditional sentence of two years less one day and three years’ probation); *R v APP*, [1992] OJ No 1626 (QL) (a woman in a dissociative state who killed her newborn son by throwing him out a window was given three years’ probation). For a disturbing case, see *R v Wood*, [1999] OJ No 5042 (QL) (a woman who was in good mental health and killed her child by leaving him to die of exposure was given two years’ probation and required to perform 200 hours of community service).

<sup>46</sup> *R v Szola* (1976), 33 CCC (2d) 572, [1976] OJ No 1229 (QL) [*Szola* cited to OJ No].

<sup>47</sup> *Ibid* at para 2.

<sup>48</sup> *Ibid* at para 6.

*Valiquette*,<sup>49</sup> concerned a woman who suffered from a similar mental illness and killed her newly born child. Her sentence of ten years imprisonment for manslaughter, was reduced to three years' probation and compulsory psychiatric treatment on appeal.<sup>50</sup>

In other cases, however, the “disturbed mind” was due to anxiety over the disapproval the woman would incur from her family if the birth were discovered. In *R v Gorill*<sup>51</sup> a woman who killed her newly born child immediately after birth was found to have a disturbed mind, because she was worried she could not keep the birth a secret from her family.<sup>52</sup> In *R v Leung*<sup>53</sup> a woman was convicted of the killings of two of her newly born children. One of the children was killed on April 2, 2009, shortly after his birth.<sup>54</sup> The second child was intentionally suffocated to death on March 7, 2010.<sup>55</sup> The second killing occurred while police were investigating the accused for killing the first.<sup>56</sup> The defendant killed her children because they were born out of wedlock and she feared the scorn of her family if they were to discover them.<sup>57</sup>

Most troubling of all, sometimes the ordinary difficulties of motherhood are enough to constitute a disturbed mind. In *R v Del Rio*,<sup>58</sup> a woman was found guilty of infanticide after killing her newly born daughter. The accused said the victim was a pain and she “didn’t want it after it was born.”<sup>59</sup> Several witnesses testified that whenever the child cried or needed food, the accused “would slap her [in] the mouth and tell her to go to sleep.”<sup>60</sup> She would also forcefully drop the child into her crib, slap her, and

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<sup>49</sup> *R c Valiquette* (1990), 60 CCC (3d) 325 at para 2, 1990 CarswellQue 27 (QCCA).

<sup>50</sup> *Ibid* at paras 27–28.

<sup>51</sup> *R v Gorill* (1995), 139 NSR (2d) 191, 26 WCB (2d) 476 (CA).

<sup>52</sup> *Ibid* at para 49.

<sup>53</sup> *R v Leung*, 2014 BCSC 1894, 116 WCB (2d) 548 [*Leung*].

<sup>54</sup> *Ibid* at paras 1, 23.

<sup>55</sup> *Ibid* at paras 1, 37.

<sup>56</sup> *Ibid* at para 26.

<sup>57</sup> *Ibid* at para 41.

<sup>58</sup> *R v Del Rio*, [1979] OJ No 16 (QL) (SC) [*Del Rio*].

<sup>59</sup> *Ibid* at para 15.

<sup>60</sup> *Ibid*.



repeatedly told her daughter that if she “didn’t shut up” she would kill her.<sup>61</sup> On the night of her daughter’s death, she was having trouble feeding the child.<sup>62</sup> When the child had trouble swallowing the mother said “You’re not going to live long if you keep this up. Do you want to die?”<sup>63</sup> The next day the daughter was found dead. The cause of death was a beating by her mother. The mother was not mentally ill, only stressed about her daughter’s crying.<sup>64</sup> Yet she still had a disturbed mind under s. 233 and was found guilty of infanticide.<sup>65</sup>

The only time when a woman has been unsuccessful in arguing infanticide is when the victim is older than one year of age. In *R v Fujii*<sup>66</sup> a woman with severe postpartum depression accidentally allowed her children to die of dehydration and starvation. One was newly born while another was older than one year of age. The judge said the infanticide defence was available for the newly born child only.<sup>67</sup> She was sentenced to eight years in jail. After deducting time already served she was given a prison sentence of five and half years.<sup>68</sup>

While it may seem strange that women who were not mentally ill could have a disturbed mind, it makes sense when one examines the social consensus when s. 233 was passed. In 1948, the struggles associated with giving birth and lactation that was said to constitute a disturbed mind often involved socioeconomic conditions rather than psychiatric ones. The “disturbances” that led mothers to kill their infants, were often poverty, the shame of giving birth to an illegitimate child, and the difficulty of raising such a child.<sup>69</sup> When asked why they killed their newly born child women discussed their difficult socioeconomic status. As Constance Backhouse writes:

One told of her terror at contemplating the shame that would come to herself and her family from an illegitimate birth. Another recounted the impossibility of

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<sup>61</sup> *Ibid* at paras 15, 30.

<sup>62</sup> *Ibid* at para 36.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* at para 55.

<sup>66</sup> *R v Fujii*, 2002 ABQB 805, 323 AR 261 [*Fujii*].

<sup>67</sup> *Ibid* at para 46.

<sup>68</sup> *Ibid* at para 55.

<sup>69</sup> Backhouse, *supra* note 11 at 448, 477.

surviving as a single woman attempting to raise a child. Still another referred to her stark poverty...they resorted to infanticide as a final, desperate measure.<sup>70</sup>

Canadian society was very sympathetic to these mothers. They were portrayed as desperate women driven to kill their infants by poverty or a noble desire to conform to social expectations.<sup>71</sup> While some of these mothers were mentally ill or insane, most were in difficult economic circumstances.<sup>72</sup> As sociologists Kristen J. Kramar and William D. Watson write:

Medical experts were as likely as jurors to account for infanticide in socioeconomic terms although...they had a somewhat different population in mind from the “traditional” young, unwed defendants who were so hard to convict. The interpretation of responsibility underlying the English Infanticide Act 1922, an interpretation adopted in the Canadian legislation of 1948, was thus at variance with the categories of contemporary medical knowledge. “Lactational insanity” and “exhaustion psychosis,” as understood by medical specialists, offered a challenge to fundamental legal doctrines in association with infanticide since the impetus to commit infanticide was explained mainly by socioeconomic factors external to the individual perpetrator-mother, extending responsibility to “society” and the experience of “working-class motherhood.”<sup>73</sup>

Other studies also support the finding that the disturbances contemplated by supporters of s. 233 were socioeconomic, not psychiatric.<sup>74</sup> These socioeconomic circumstances were simply given a psychiatric veneer. Psychiatry was used to help fit the law into the current societal consensus.

This societal consensus, including the way society views children, the challenges of single motherhood, and the role a parent is supposed to play in a child’s life, have changed a great deal since 1948. This is especially true of the role the law is to play in protecting and denouncing violence against children. Canadian law has changed as well. All laws must conform to the *Charter* and all individuals, including newborns, are guaranteed to equal treatment under the law. I will now turn to why s. 233 violates this guarantee and must be struck from the *Criminal Code*.

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<sup>70</sup> *Ibid* at 458.

<sup>71</sup> Kramar, *supra* note 14 at 7.

<sup>72</sup> *Ibid* at 93.

<sup>73</sup> Kristen J Kramar & William D Watson, “Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate” (2008) 33:2 *Can J Sociology* 237 at 249 [emphasis added].

<sup>74</sup> Backhouse, *supra* note 11 at 462-463; Anand, *supra* note 7 at 715; Kramar, *supra* note 14 at 74-75.

### III. SECTION 233 VIOLATES A NEWLY BORN CHILD'S RIGHTS UNDER SECTION 15 OF THE *CHARTER*

#### A. The Test for an Infringement of S. 15(1)

Section 233 violates a newly born child's equality rights under s. 15(1) of the *Charter*. Section 15(1) reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...based on race, national or ethnic origin, colour, religion, sex, age or physical or mental disability.<sup>75</sup>

To prove a violation of s. 15(1), a claimant must show the law at issue subjects them to differential treatment by withholding a benefit or imposing a burden and that the differential treatment is based on an enumerated or analogous ground listed in s. 15(1).<sup>76</sup> They must then prove that such treatment is discriminatory. They must show the challenged law reflects or promotes the notion they are less worthy of recognition or value as human beings or as members of Canadian society.<sup>77</sup> To be discriminatory, a law must demean the claimant's dignity.<sup>78</sup> Section 233 meets all of these criteria.

#### 1. *Differential Treatment*

Under, s. 233 mothers who kill their infants must be sentenced to no more than five years in prison.<sup>79</sup> If a mother kills her child and the child is at least one-year old, she may (and often must) be punished with life imprisonment. Section 233 mandates that the killings of newly born children by their mothers be punished differently than those older than them. Thus s. 233 subjects newly born children to differential treatment.

While one could argue that s. 233 treats the perpetrator of the crime differently after the victim has been murdered, this does not mean that such legislation does not also subject the victim to differential treatment. For example, consider *McClesky v Kemp*<sup>80</sup> a case decided by the United States

<sup>75</sup> *Charter*, *supra* note 9 at s 15(1) [emphasis added].

<sup>76</sup> *Law v Canada*, [1999] 1 SCR 497 at para 30, 170 DLR (4th) 1.

<sup>77</sup> *Ibid* at para 51.

<sup>78</sup> *Ibid* at para 75.

<sup>79</sup> *Criminal Code*, *supra* note 1, s 237.

<sup>80</sup> *McClesky v Kemp*, 481 US 279 (USSC 1987) [*McClesky*].

Supreme Court. Warren McClesky, a black man sentenced to death for the murder of a white police officer, claimed that Georgia's death penalty statute was unconstitutional.<sup>81</sup> He claimed the statute violated the equal protection guarantee under the Fourteenth Amendment of the United States Constitution.<sup>82</sup> This claim was based on a study which showed that, in Georgia, people who kill white victims are more likely to be sentenced to death than those who kill black victims, sending the message black lives were less valuable than white lives.<sup>83</sup>

A majority of the United States Supreme Court rejected McClesky's challenge as he could not show that he (or blacks as a whole) was deliberately discriminated against by the law.<sup>84</sup> Most importantly, however, the challenge failed because every death penalty case had to involve a statutorily listed aggravating factor and even when such a factor was found, juries could still sentence the defendant to life imprisonment.<sup>85</sup> As every trial (and every capital murder) is different, juries could impose a sentence that was tailored to the circumstances of the defendant.<sup>86</sup>

While the claim may have centred on the differential treatment of a murderer after his or her victim has been killed, it also dealt with how the lives of victims were treated by the justice system. By allegedly treating the murder of a white person as a graver crime than the murder of a black person, the lives of black people were being devalued.<sup>87</sup>

Indeed, McClesky's lawyer compared Georgia's death penalty statute to the "black codes" of antebellum Georgia.<sup>88</sup> Under these laws, free blacks were second-class citizens and black slaves were deemed to be their masters' property. These laws explicitly discriminated against them in many ways, including punishment. Courts had to give lower penalties if victims were

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<sup>81</sup> *Ibid* at 282–283.

<sup>82</sup> See *ibid* at 286.

<sup>83</sup> *Ibid* at 291–292. For more information about this claim see Frank Baumgartner, Amanda J Gregg & Alisa Maestro, "#BlackLivesDon'tMatter: Race of Victim Effects in US Executions, 1976–2013" (2015) 3:2 *Politics, Groups, and Identities* 209 at 211.

<sup>84</sup> *McClesky*, *supra* note 80 at 292–293.

<sup>85</sup> *Ibid* at 302–303.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* at 336 (Brennan J, dissenting).

<sup>88</sup> Transcript of oral argument at 1 US 279 (1987) (no 84-6811). Many of these codes were also in force in other southern states.

black (and higher penalties if they were white).<sup>89</sup> For example free blacks who assaulted whites could be whipped, banished, or executed.<sup>90</sup> Whites who assaulted free blacks, however, could only be imprisoned for up to ten years.<sup>91</sup> Whites who killed slaves often went unpunished.<sup>92</sup> This two-tier system of punishment reflected the belief in the inferiority of black slaves and black lives.<sup>93</sup>

After the passage of the fourteenth amendment of the United States Constitution, such statutes were voided as they violated the right to equal protection under the law.<sup>94</sup> These statutes subjected blacks to differential treatment and the mandatory lesser punishment was part of this treatment. One can constitutionally challenge such laws whether it is the perpetrator or the victim who is treated differently.

While the ground being discussed is race rather than age, and the infringement comes from the maximum punishment being too low, the same can be argued about of s. 233. While it may treat a perpetrator differently after a newly born child has been murdered, it also treats the newly born child's killing differently. If an unknown woman with a disturbed mind as a result of giving birth enters the mother's home and intentionally kills the newly born child, the killing is considered murder and the perpetrator is liable to life imprisonment. If the child's biological mother does so, the justice system treats the infant's killing as a less serious infanticide punishable by no more than five years in jail. While s. 233 treats the perpetrator differently, newly born children are also treated differently under Canada's legal system.

This claim is stronger than Warren McClesky's. Under Georgia's death penalty law, the judge or jury may also decide to sentence a defendant to life imprisonment instead. While the study at issue showed that people were more likely to be sentenced to death for killing whites, judges and juries

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<sup>89</sup> Ursula Bentele, "Race and Capital Punishment in the United States and South Africa" (1993) 19:2 *Brook J Intl L* 235 at 267.

<sup>90</sup> A Leon Higgenbottom Jr & Anne F Jacobs, "The 'Law Only as an Enemy'; The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia" (1992) 70:4 *NCL Rev* 969 at 1055.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 1044.

<sup>93</sup> Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1998) at 30.

<sup>94</sup> Bentele, *supra* note 89 at 255.

were not forced to impose a death sentence based on the victim's race. They had to impose a sentence based on the facts of each case. Section 233, by contrast, mandates a lesser punishment for mothers who kill their newly born children. Newly born children will automatically be treated differently when their mother kills them. Canada's Supreme Court recognized that a different punishment for the murder of specific Canadians amounts to treating those Canadians differently. Consider *Miller et al v the Queen*.<sup>95</sup> In this case a mandatory death sentence for murdering a police officer or prison guard while they were performing their duties was challenged under the *Canadian Bill of Rights*. The court upheld the sentence. One reason for this was because the need to protect the lives of police officers and prison guards. Since they worked in jobs that put them at a greater risk of murder than other Canadians, they were treated differently when they were murdered while performing their duties. As Chief Justice Bora Laskin wrote:

I do not think, however, that it can be said that Parliament, in limiting the mandatory death penalty to the murder of policemen and prison guards, had only vengeance in view. There was the consideration that persons in such special positions would have a sense of protection by reason of the grave penalty that would follow their murder and, further, that the mandatory penalty would be, to some extent at least, a deterrent as, for example, to a prison inmate already serving a life sentence but tempted to escape even if this meant committing murder.<sup>96</sup>

Under the law, the lives of police officers and prison guards were given additional protection (and thus subject to differential treatment) by a law that mandated a harsher punishment for someone who murdered them. Newly born children are also subjected to differential treatment by s. 223 which mandates a lesser punishment when their mother kills them. They are subjected to differential treatment for the purposes of s. 15(1).<sup>97</sup>

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<sup>95</sup> *Miller et al v the Queen*, [1977] 2 SCR 680, 321 DLR (4th) 577 [Miller].

<sup>96</sup> *Ibid* at 696 [emphasis added]. While the death penalty had been abolished for all civilian crimes before the decision was released, the matter was not moot because the statute was constitutional. Appellants would have to serve at least 25 years in prison before being eligible for parole. See *ibid* at 712–713.

<sup>97</sup> While I argue that section 233 discriminates against newly born children by mandating a lesser punishment for their intentional killing, I do not argue that all statutorily required lesser punishments will always be discriminatory. My argument is that mandatory lesser punishments that demean a person's dignity on a ground enumerated in section 15(1) are unconstitutional. As occupation is not an enumerated ground, laws that impose additional penalties for the murder of police officers and prison guards are

## 2. *Based on an Enumerated Ground*

Moreover, the differential treatment is imposed on the basis of age. A mother can only be convicted of infanticide rather than murder or manslaughter if she kills her child and her child is less than one year of age. Therefore, the differential treatment is based on an enumerated ground.

In response, one might argue that the lower penalty is because of a woman's disturbed mind and not the age of the victim. They are incorrect because for the partial defence of infanticide to succeed, the victim must be less than one year of age. Consider a mother who has two children. One is two years old and the other is eight months old. She is experiencing a disturbed mind after giving birth to her eight-month old child. She intentionally kills both children. She can only use infanticide as a partial defence for the killing of the eight-month old. The killing of the two-year old must be classified as either murder or manslaughter and can be punished with life imprisonment.<sup>98</sup> Indeed, this is akin to what happened in *Fujii*.<sup>99</sup> Furthermore just because the woman must have a disturbed mind to be convicted of infanticide does not mean s. 233 does not make a distinction based on age. Consider s. 43 of the *Criminal Code*. It allows parents, teachers, and guardians to use reasonable force to discipline children in their care.<sup>100</sup> When the law was challenged under s. 15 of the *Charter*, the Attorney General argued that the differential treatment was due to the relationship between the parties.<sup>101</sup> While s. 43 only applies to defendants who have a particular relationship with a child, the court still

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constitutional. If a lesser punishment is not administered in a discriminatory manner (for example, it applies to every crime victim, not just those of a certain race) it will not offend section 15(1). This stipulation ensures that the invalidation of section 233 will not lead to an "opening of the floodgates" where every mandatory lesser punishment is struck down via section 15(1). For example, laws that mandate lesser sentences for "crimes of passion" regardless of the victims' characteristics do not necessarily violate section 15(1) based on the arguments in this article regarding section 233.

<sup>98</sup> NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) at 117–118

<sup>99</sup> *Fujii*, *supra* note 66 at para 46. Fortunately for the defendant, however, the judge did not sentence her to life in prison but to eight years in prison. After receiving credit for time already spent in custody, the judge reduced her sentence to five years, six months. See para 55.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].

found that the differential treatment was based on age.<sup>102</sup> Only those with a chronological age less than 18 years were covered. Those over 18 could not be assaulted by their caretaker or teacher as a punishment, even if they had the mental age of someone much younger.<sup>103</sup> The court ruled requirement of a particular relationship did not change the fact that s. 43 treated children differently based on age.<sup>104</sup> The same is true of s. 233's differential treatment of newly born children. The relationship between the perpetrator and victim does not change the fact that, as a group, newly born children are treated differently when they are killed by their mothers.

## B. Section 233 and Section 15(2) of the *Charter*

Before determining if s. 233 is discriminatory, one must answer another question: can s. 233 be shielded from the scrutiny of s. 15(1) by s. 15(2) of the *Charter*?<sup>105</sup> Section 15(2) reads:

Subsection [15](1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or ...disability.<sup>106</sup>

At least one woman's rights group has argued that s. 233 responds "to the social context of women's inequality."<sup>107</sup> Namely, only women can give birth or lactate and experience the difficulties associated with those activities. By passing s. 233 Parliament chose to respond to the "unique stressors accompanying the reproductive and caregiving roles ascribed to women."<sup>108</sup> As it stated in its intervener's factum in *R v Borowiec*:

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<sup>102</sup> *Ibid* at paras 1, 222, 232.

<sup>103</sup> *Ogg-Moss v R*, [1984] 2 SCR 173 at 186, 11 DLR (4th) 549.

<sup>104</sup> *Canadian Foundation*, *supra* note 101 at para 222 (Deschamps J dissenting but not on this point).

<sup>105</sup> I am determining if section 233 is an ameliorative program before explaining why it is discriminatory. This is in line with the Supreme Court of Canada's ruling in *R v Kapp*, 2008 SCC 41 at para 56, [2008] 2 SCR 483 [*Kapp*].

<sup>106</sup> *Charter*, *supra* note 9, s 15(2).

<sup>107</sup> *R v Borowiec*, 2016 SCC 11, [2016] 1 SCR 80 (Factum of Women's Legal Education Action Fund Inc at para 10), online: <[www.scc-csc.ca/WebDocuments-Documents-Web/36585/FM040\\_Intervener\\_Womens-Legal-Education-Action-Fund.PDF](http://www.scc-csc.ca/WebDocuments-Documents-Web/36585/FM040_Intervener_Womens-Legal-Education-Action-Fund.PDF)> (accessed 21 August 2017) [*Borowiec* LEAF factum].

<sup>108</sup> *Ibid* at para 8.



Parliament's reasons for enacting the infanticide provision remain pressing social concerns. The motivating concerns that underpinned the enactment of s. 233 – based as they were upon a compassionate understanding of the unique inequalities experienced by women during pregnancy, childbirth and child-rearing – are not anachronisms...Women continue to disproportionately experience the negative effects of continuing inequality in relation to childbirth and child-rearing [and s. 233 is meant to remedy this].<sup>109</sup>

According to this group, Parliament recognized that women often killed their newly born children due to their disadvantaged position in regard to giving birth or raising children. Section 233 was meant to mitigate the consequences for mothers who killed their children under these circumstances. Thus, s. 233 honours the principle of substantive equality which requires that laws do not worsen “a group’s historical disadvantage or vulnerability.”<sup>110</sup> According to this view, it cannot be struck down as a violation of s. 15(1).

### C. The Definition of Affirmative Action Program

After examining relevant jurisprudence and history, however, it is evident that s. 233 is not an affirmative action program. To be considered an affirmative action program, the stated purpose of the “law, program, or activity” must be to ameliorate the conditions of a disadvantaged group.<sup>111</sup> Also, the means used to achieve amelioration must be rationally connected to its stated purpose.<sup>112</sup> While s. 233 benefits a historically disadvantaged group - women in general and poor women in particular - its purpose is not to ameliorate their condition. It is to make it easier to convict women who kill their newly born children.

Transcripts of the House of Commons debate over s. 233 prove this. John Diefenbaker, then the Member of Parliament for Lake Centre Saskatchewan, stated s. 233’s purpose when he said:

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. I presume that the reason for this amendment

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<sup>109</sup> *Ibid* at para 9.

<sup>110</sup> *Ibid* at para 1.

<sup>111</sup> *Kapp, supra* note 105 at paras 41–42.

<sup>112</sup> *Ibid* at para 48.

is to make it easier to get a conviction for the offence of homicide short of murder or manslaughter.<sup>113</sup>

Minister of Justice, James Lorimer Isley agreed. Parliament had to pass the law because:

[T]here 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.<sup>114</sup>

E. Davie Fulton, then the Member of Parliament for Kamloops, also felt its purpose was not to help women but to make it easier for judges and juries to convict those women of killing their newly born children. As Fulton said:

[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 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?<sup>115</sup>

In 2016, the Supreme Court of Canada held s. 233 was enacted to prevent jury nullification in cases where mothers killed their newly born children.<sup>116</sup> Neither, can one argue that s. 233 has a renewed legislative objective. Canada's Supreme Court rejected that a shifting purpose can be manifested in unbridled fashion by courts in *R v Zundel*.<sup>117</sup> As Madam Justice Beverley McLachlin (as she then was) wrote:

In determining the objective of a legislative measure...the [Supreme] Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision. Although the application and interpretation of objectives may vary over time, new and altogether different purposes should not be devised.<sup>118</sup>

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<sup>113</sup> House of Commons Debates, *supra* note 13 at 5184 (Hon John Diefenbaker) [emphasis added].

<sup>114</sup> *Ibid* at 5185 (Hon James Lorimer Isley, Minister of Justice) [emphasis added].

<sup>115</sup> *Ibid* at 5186–5187 (Hon E Davie Fulton) [emphasis added].

<sup>116</sup> *Borowiec*, *supra* note 22 at para 27.

<sup>117</sup> *R v Zundel*, [1992] 2 SCR731 at 761, 95 DLR (4th) 202.

<sup>118</sup> *Ibid* [citations omitted].

Some scholars, however, see s. 233 in a different way. One scholar suggests that one of s. 233's purposes was to create a new offence that would exempt desperate women who killed their newly born children from a mandatory death sentence.<sup>119</sup> It was meant to account for the social context that surrounded these killings. There are also many well-written works about infanticide in Canada that view the issue from a feminist perspective (many are cited in this article).<sup>120</sup> Section 233 is seen as a women's rights issue and the lesser punishment reflects the demeaned position of lower-class women who commit infanticide.<sup>121</sup> Thus, s. 233 has an ameliorative purpose and is entitled to s. 15(2) protection from s. 15(1) scrutiny.

These are interesting ways to view s. 233. When debating s. 233, legislator John Diefenbaker expressed sympathy for a woman who finds herself "alone in the world and fearful of the consequences of going out into a society with a stigma [from single motherhood] upon her."<sup>122</sup> These sentiments, however, do not indicate that sparing poor woman the death penalty for killing their newly born children was the legislation's stated purpose. It simply notes the sentiments that juries had about mothers on trial for killing their newly born children and that these sentiments would lead to acquittals no matter how strong the evidence of that mother's guilt was.<sup>123</sup> Indeed, when answering a criticism of s. 233 from Member of Parliament Fulton, Diefenbaker says the legislation will either make the killing of newly born children by their mothers "punishable with some penalty, or almost every person committing the crime will escape. That I believe is what impelled the [Minister of Justice] to introduce this amendment."<sup>124</sup>

The Minister of Justice himself said s. 233 was first proposed by provincial attorneys general because juries would not convict women for killing their newly born children.<sup>125</sup> Isley stated:

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<sup>119</sup> I thank an anonymous reviewer for suggesting this argument.

<sup>120</sup> See Kramar, *supra* note 14; Backhouse, *supra* note 11; *Borowiec* LEAF Factum, *supra* note 107.

<sup>121</sup> I would again like to thank Professor Richard Jochelson for providing me with this insight.

<sup>122</sup> House of Commons Debates, *supra* note 13 at 5187 (Hon John Deifenbaker).

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* [emphasis added].

<sup>125</sup> *Ibid* (Hon James Lorimer Isley, Minister of Justice).

They [the attorneys general] do not like to have to prefer a charge that does not charge a crime, and that is what they have to do [in these cases]...Otherwise nothing happens. They make charges once in a while of manslaughter, but generally of a charge of what is [known as] concealment of birth because that is a charge on which they can get a conviction. It is a most undesirable situation that our law should be such that nobody will apply it properly. [By passing s. 233] we are meeting not only public opinion as shown by the indisposition of juries to convict, but also the wishes of experienced prosecuting departments who want a law that is susceptible of application.<sup>126</sup>

In other words, Parliament passed s. 233 because it was almost impossible to convict women of killing their newly born children because of jury nullification. Prosecutors then had to bring a charge that did not acknowledge that the victim had died at the hands of their mother. In their view this made a mockery of justice. Section 233's purpose had nothing to do with sparing women the death penalty and everything to do with preventing jury nullification and ensuring that mothers who were guilty of killing their infants were convicted of something. While the bleak socioeconomic circumstances of a women on trial for killing their newly born children may have caused juries to nullify, s. 233's objective was not to ameliorate these conditions. While s.233 may have had such an effect, this was not its purpose, and it is the purpose of the legislation that must be ameliorative (not its effect) for it to be covered under s. 15(2).<sup>127</sup>

Furthermore, even if one could demonstrate that Parliament's intention in drafting s. 233 was to ameliorate the condition of women, this would not save the legislation from scrutiny via s. 15(2). This is because Canada's Supreme Court has ruled that laws that are designed to punish or restrict behaviour are not considered to have an ameliorative purpose.<sup>128</sup> While the maximum punishment enumerated in s. 233 is much less than that of other homicide offences, s.233 is still a criminal law statute meant to punish women who kill their newly born children.

To be considered a criminal law, the legislation must have a valid criminal law purpose backed by a prohibition and a penalty.<sup>129</sup> Section 233 has a criminal law purpose: to provide a unique framework to prevent jury nullification and punish the killings of newly born children at the hands of

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<sup>126</sup> *Ibid.*

<sup>127</sup> *Kapp, supra* note 105 at para 47 [emphasis added].

<sup>128</sup> *Ibid* at para 54.

<sup>129</sup> *R v Malmo-Levine*, 2003 SCC 74 at para 74, [2003] 3 SCR 571.

their mothers. It also prohibits the killings of infants and imposes a penalty of five years imprisonment on those who violate it. Section 233 is a statute that is meant to punish behavior; even if one feels that the maximum punishment is inadequate. By definition, s. 233 does not fall within s. 15(2) mandate and thus, is not protected by it.

Lastly the argument that s. 233 is an affirmative action program to help infants also fails. This is because s. 233 imposes a disadvantage. It denies infants equal status under the criminal law. Such statutes cannot have an ameliorative purpose and are not immune from s. 15(1).<sup>130</sup>

#### D. Section 233 and the Demeaning of a Newly Born Child's Dignity

As s. 233 has no ameliorative purpose, one must determine if it is discriminatory and thus a violation of s. 15 of the *Charter*. In doing so, one must adopt the view of a reasonable person acting in a newly born child's best interest.<sup>131</sup> He or she would find that, intentionally or not, s. 233 promotes the idea that newly born children are less worthy than those who are older than them.

A law and the differential treatment it imposes, may not have a discriminatory purpose, but can still be deemed discriminatory if the effects demean a person's dignity.<sup>132</sup> For example, Canada's Supreme Court ruled that excluding sexual orientation from Alberta's *Individual Rights Protection Act (AIRPA)*, which prohibited discrimination in employment, housing and other areas, discriminated against the s. 15 rights of homosexuals. Since the objective of the *AIRPA* was to protect the dignity and inalienable rights of Albertans through the elimination of discriminatory practices, excluding homosexuals from this protection was discriminatory even if the legislature did not intend such discrimination.<sup>133</sup> The same is true of s. 233. In passing s. 233 Parliament did not intend to discriminate against newly born children, but s.233's effects are discriminatory.

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<sup>130</sup> *Kapp, supra* note 105 at para 53, citing *R v Music Explosion Ltd* (1990), 68 Man R (2d) 203, 59 CCC (3d) 571 (CA). How section 233 denies the newly born equal status will be explained in the section discussing if it is discriminatory.

<sup>131</sup> *Canadian Foundation, supra* note 101 at para 53.

<sup>132</sup> *Vriend v Alberta*, [1998] 1 SCR 493 at para 93, 156 DLR (4th) 385.

<sup>133</sup> *Ibid* at paras 95-99.

One may question how a potential lesser punishment for perpetrators implicates a homicide victim's dignity and denies them equal status under the law.<sup>134</sup> The answer is that s. 233 does not allow for a lesser punishment for a specific group of homicide victims, it mandates it. A judge could not sentence a woman who has committed infanticide to more than five years imprisonment, even if the circumstances of the crime demanded it.

This discriminatory nature of such a mandate becomes clear when one examines the role criminal sentencing plays in denouncing crime. For example, the mandatory minimum sentence for murder is meant to reflect the seriousness of intentionally and unlawfully taking a person's life.<sup>135</sup> The higher parole ineligibility period for first-degree murder is meant to show that it is more serious than second-degree murder.<sup>136</sup> By contrast, manslaughters are punished more leniently because they often involve unintentional killings while murders involve deliberate killings.<sup>137</sup> Punishment plays a major role in reflecting the seriousness of a crime. As Dennis Prager writes:

The punishment for a crime is the most convincing way society teaches its members how serious the crime is. This is easily demonstrated. Imagine a society that meted out the same punishment to murderers as to those who had parked their car in a no-parking zone. That society would obviously be communicating that it regards murder as no more serious a crime than it does illegal parking.<sup>138</sup>

The harsh sentences available for punishing those who unlawfully take innocent life is, at least in part, meant to communicate how much society values human life. This is a common moral argument of those who wish to retain the death penalty for murder. Human life is so precious that at least some people who unlawfully take it should forfeit the right to their own lives.<sup>139</sup> Even in Canada, which does not have the death penalty, a similar reasoning is used to justify life sentences with mandatory parole ineligibility

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<sup>134</sup> I would like to again thank an anonymous reviewer for this assertion.

<sup>135</sup> *R v Latimer*, 2001 SCC 1 at para 86, [2001] 1 SCR 3 [*Latimer*].

<sup>136</sup> *R v Luxton*, [1990] 2 SCR 711 at 720-721, 58 CCC (3d) 449.

<sup>137</sup> Kent Roach, "The Problematic Revival of Murder Under Section 229(c) of the *Criminal Code*" (2010) 47:3 *Alta L Rev* 675 at 700.

<sup>138</sup> Dennis Prager, *Still the Best Hope: Why the World Needs American Values to Triumph* (New York: Broadside Books, 2012) at 360.

<sup>139</sup> *Ibid.* See also Edward Feser & Joseph M Bessette, *By Man Shall his Blood Be Shed: A Catholic Defense of Capital Punishment* (San Francisco: Ignatius Press, 2017) at 63-65.

periods for murder.<sup>140</sup> This is meant to reflect that human life is so valuable and that the culpable taking of an innocent human life is so grave. One who does this may be subject to a long term of imprisonment and the possibility of losing their liberty for the rest of their life.<sup>141</sup> This punishment is, at least in part, supposed to send a message about how valuable human life is. Indeed, “one of society’s most basic tasks is that of protecting the lives of its citizens, and one of the most basic ways in which it achieves the task is through criminal laws against murder.”<sup>142</sup> Lower punishments for similar *actus reas* could convey that the victim’s life was of a lower value.

Consider examples from history. The “black codes” in the antebellum United States mentioned earlier in the article is a good example of how a required lower punishment demeans the dignity of a homicide victim.

Another example is found in the Ottoman Empire (and Islamic Spain). In these places, non-Muslims (called dhimmis) were considered inferior to Muslims.<sup>143</sup> To enforce this inferior status, (and humiliate them) dhimmis were subject to discriminatory laws and taxes.<sup>144</sup> This discrimination extended to the justice system. The value of a male dhimmi’s life was considered to be half that of a Muslim’s (a female dhimmi’s life was valued at one-quarter of a Muslim man’s and half that of a man’s in general).<sup>145</sup> To enforce the dhimmi’s lesser value, the law declared that a person who murders a Muslim can (and sometimes must) be executed. If a Muslim murders a non-Muslim, the state cannot execute the Muslim because the law considers the value of a Muslim’s life to be of greater value than the victim’s.<sup>146</sup> Also, any compensation or fine that the Muslim had to pay for their crime was limited to half of what a dhimmi would have to pay for killing a Muslim.<sup>147</sup> The lesser punishment for Muslim killers of non-

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<sup>140</sup> *Latimer, supra* note 135 at paras 80–82.

<sup>141</sup> *Ibid* at paras 5, 80–84, 86.

<sup>142</sup> *Gregg v Georgia*, 428 US 153 at 226 (USSC 1976) (White J concurring).

<sup>143</sup> Efraim Karsh, *Islamic Imperialism: A History* (Connecticut: Yale University Press, 2007) at 25–26.

<sup>144</sup> *Ibid* at 26.

<sup>145</sup> Bat Ye’or, *Eurabia: The Euro-Arab Axis* (New Jersey: Fairleigh Dickinson University Press, 2005) at 192.

<sup>146</sup> Dario Fernandez-Morera, *The Myth of Andalusian Paradise: Muslim, Christians and Jews Under Islamic Rule in Medieval Spain* (Delaware: ISI Books, 2016) at 210–211.

<sup>147</sup> *Ibid* at 211.

Muslims was designed to reflect that their victims were less worthy of recognition than they were.

Similar laws were in place in feudal Tibet where people divided people into distinct social classes. Buddhist monks and nobles were at the top of this hierarchy while serfs were at the bottom.<sup>148</sup> If a member of one of the higher classes was murdered, the perpetrator had to pay the victim's family gold equivalent to the victim's weight. If a serf was murdered, however, the perpetrator only had to provide the victim's family with a "hayband," a rope that Tibetans used to bury their dead.<sup>149</sup> The inferior value of the serf's life compared to that of a noble was enforced by the mandated lesser punishment given to a serf's murderer.<sup>150</sup>

Similarly, Canada's infanticide law, intentionally or not, holds that a newly born child's life is less valuable than the life of an older child. The penalty for a mother who kills her newly born child cannot exceed five years imprisonment. Once he or she reaches one year of age, however, a mother can (and sometimes must) be sentenced to life imprisonment, even if she has a disturbed mind (as long as the disturbed mind does not amount to insanity). While not intended to humiliate, s. 233 communicates the message that a newly born child's life is considered less worthy of recognition by the Canadian justice system than the lives of older children or adults.<sup>151</sup> This demeans a newly born child's dignity and violates his or her rights under s. 15(1) of the *Charter*.

This noted, some people may still argue that a deceased victim cannot be discriminated against by a mandatory lesser punishment upon conviction because in Canada, crimes are considered to be wrongs against the state, not the victim.<sup>152</sup> While the assertion that crimes are considered wrongs against the public rather than the victim may be true, it is ultimately irrelevant when determining s. 233's constitutionality. Even when viewed in this light, s. 233 demeans a child's dignity. Under this view, crimes "are a breach and violation of the public rights and duties, due to the whole community,

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<sup>148</sup> Li Sha, "Contribution of 'Abolishment of Serf System' in Tibet to Human Rights Campaign—In Memory of the Fiftieth Anniversary of Democratic Reform in Tibet" (2009) 1:2 *Asian Culture and History* 45 at 46–47.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> Backhouse, *supra* note 11 at 463.

<sup>152</sup> I thank an anonymous reviewer for this insight.



considered as community, in its social aggregate capacity.”<sup>153</sup> In other words crimes are punished because they injure the community as a whole. Murder is punished ‘not just because of what happened to the victim’ but also because of the community’s loss of one of its members and the murderer’s disparagement of the community’s teaching that murder is immoral”<sup>154</sup> Punishments are in part a reflection of society’s values and punishments for murder reflects society’s value for the lives of its members.

When it was passed, s.233 was reflective of Canadian society’s belief that the lives of newly born children were inferior to those of adults.<sup>155</sup> At the time:

[T]he killing of a child did not create the same feeling of alarm as other forms of murder, at least in the perceptions of the adults who applied the criminal law...The lenience may also have been related, in part, to the quasi-property status that children still held in the eyes of the law. Parents were almost never prosecuted for disciplining their children, even when this resulted in severe physical injury...[C]hildren were often viewed as the property of their parents, rather than as individuals in their own right.<sup>156</sup>

Similar views of children as inferior were one of the reasons for Britain’s infanticide legislation, upon which s. 233 was based. In calling for such legislation:

There was a general feeling emphasized in the evidence [presented to the legislature] that child murder is not so heinous as other forms of murder because of the nature of the victim. A child could not be regarded in the same light as a grown-up person; the loss to the child itself could not be estimated; “it were as if the child never came into the world than that, having come into it, it was murdered.”<sup>157</sup>

Also, Canada’s Supreme Court has ruled that criminal penalties available are, in part, a communication of society’s values. As Chief Justice Antonio Lamer (as he then was) wrote:

[A] sentence should also communicate society’s condemnation of that particular offender’s conduct. In short, a sentence with a denunciatory element represents a

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<sup>153</sup> William Blackstone, *The Oxford Edition of Blackstone’s Commentaries on the Laws of England: Book IV: of Public Wrongs* (Oxford: Oxford University Press, 2016) at 27.

<sup>154</sup> Adam J MacLeod, “All for One: A Review of Victim-Centric Justifications for Criminal Punishment” (2008) 13:2 Berkeley J Criminal L 31 at 34.

<sup>155</sup> Backhouse, *supra* note 11 at 463.

<sup>156</sup> *Ibid* [emphasis added].

<sup>157</sup> D Seaborne Davies, “Child-Killing in English Law” (1937) 1:3 Mod L Rev 203 at 221.

symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law...Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated...judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.<sup>158</sup>

Moreover, in addition to communicating societal values, sentences also play a role in shaping the values of the community. In a 2016 study, researchers found that the punishment of a crime against a victim correlated with the social standing the victim had within the community. In all cases where the guilty perpetrator was punished the victim's social standing was increased. When a guilty perpetrator went unpunished, however, the social standing of the victim decreased.<sup>159</sup> Another study by researchers from the University of Chicago found the same thing. In most samples, whether a guilty perpetrator was punished correlated with whether people viewed the action as harmful. The researchers also speculated that this could lead to a lower opinion of the victim in the eyes of the public.<sup>160</sup> Even when wrongs are seen as wrongs against the community, a mandatory lesser punishment for crimes against newly born children demeans their dignity. It signals that the community values these lives less.

## E. Does the Charter Guarantee the Right to Equal Punishment?

One might object that s. 233 does not violate the *Charter* because there is no *Charter* right to equal punishment for victims of serious crimes. Parliament has the right to create different penalties for different crimes because of social context.<sup>161</sup> They are partly correct. Victims do not have freestanding right to a specific punishment for wrongdoing under the *Charter*.<sup>162</sup> The state is able to determine criminal sanctions and it is

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<sup>158</sup> *R v M(CA)*, [1996] 1 SCR 500 at para 81, 105 CCC (3d) 327 [emphasis added].

<sup>159</sup> Kenworthy Bilz, "Testing the Expressive Theory of Punishment" (2016) 13:2 J Empirical Leg Stud 358 at 371-375.

<sup>160</sup> Jessica Bregant, Eugene M Caruso & Alex Shaw, "Expressing What? Evaluating the Expressive Value of Punishment" (2016) SSRN Paper at 35, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2816543](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816543)>.

<sup>161</sup> This insight was also provided to me by Professor Jochelson.

<sup>162</sup> *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 116-118, 157-167, [2014]

permissible for them to limit the redress victims receive. Civil redress is restricted via limitation periods<sup>163</sup> and criminal punishments are restricted via maximum penalties.

This does not, however, mean s. 233 is not discriminatory. In setting criminal penalties, Parliament must respect the *Charter* right to equality. It cannot, for example legislate that murders be punished more harshly when committed by men.<sup>164</sup> While Parliament can assign lesser penalties for killings where a perpetrator's conduct is considered less morally blameworthy, it cannot pass laws that have the effect of deeming conduct to be less blameworthy because of the victim's age. Parliament may legislate that provocation by a victim makes a crime against them less blameworthy. They cannot pass laws that, in effect, deem particular conduct to be provocative because of discriminatory beliefs about women.<sup>165</sup> The same prohibition applies to sentencing. A judge cannot give a male perpetrator a more lenient sentence simply because his female victim was provocatively dressed.<sup>166</sup> This would violate the s.15 (1) equality guarantee.<sup>167</sup>

Section 233 violates a newly born child's equality rights in a similar way. It mandates that the killings of newly born children be punished much less harshly than those of older children. This is in accordance with the ageist stereotype that the unlawful killings of newly born children are not as serious as the unlawful killings of others. It holds that their lives are less valuable and less worthy of recognition as members of Canadian society than the lives of those older than them. It is just as unconstitutional to have legislation that has the effect of making a killing less morally blameworthy due to the victim's age as it would be to have legislation that has the effect of holding that a murder less morally blameworthy because of the victim's gender.

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3 SCR 176.

<sup>163</sup> *Ibid* at para 160.

<sup>164</sup> *R v Hess and Nyugen*, [1990] 2 SCR 906 at 928, 119 NR 353.

<sup>165</sup> *R v Humaid* (2006), 81 OR (3d) 456, [2006] OJ No 1507 (QL) at para 93 provides an example about how cultural beliefs about the inferiority of women were used to advance a provocation defence. This submission was rejected as these beliefs were in conflict with both constitutional and Canadian values.

<sup>166</sup> *R v Sandercock*, 1985 ABCA 218 at para 29, 62 AR 382.

<sup>167</sup> *R v Ewanchuk*, [1999] 1 SCR 330 at para 97, 169 DLR (4th) 193 (L'Heureux-Dube J concurring).

While the *Charter* does not guarantee the right to specific punishments, it forbids setting or administering them in a discriminatory manner. Section 233 breaches this prohibition and is thus unconstitutional.

## F. Does Section 233 Correspond to a Newly Born Child's Circumstances?

One may also object that age is unlike gender and can be a factor when determining punishments.<sup>168</sup> Courts routinely consider a perpetrator's age when determining the length of a sentence. Perpetrators who are under eighteen years of age are assumed to be less culpable than adults. Rather than being discriminatory, this distinction is a principle of fundamental justice.<sup>169</sup> Laws will not be deemed discriminatory under the *Charter* if they corresponds to the capacities and circumstances of Canadians.<sup>170</sup> For example laws that mandate a harsher punishment for the murder of an on-duty police officer or prison guard are not discriminatory because they correspond to those victims' circumstances.<sup>171</sup> On-duty Police officers or prison guards are at a greater risk of being murdered by criminals or inmates and thus laws that mandate a harsher punishment for such murders are meant to correspond to this. Some argue that since newly born children cannot contemplate approaching suffering or death, society does not suffer as great of a loss than when someone older is killed.<sup>172</sup> Therefore s. 233 corresponds to the circumstances of newly born children and is not discriminatory.

While age can be a factor in criminal sentencing, this alone does not prove that s. 233 corresponds to a newly born child's circumstances. While minors are entitled to a presumption of diminished culpability, that presumption is rebuttable. A young person can receive an adult sentence if the government can rebut the presumption and establish that a youth sentence would be incapable of holding them accountable for their

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<sup>168</sup> Pnina Alon-Shenker, "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" (2012) 25:2 Can JL & Jur 243 at 243. See also *Gosselin v Quebec*, 2002 SCC 84 at paras 31-32, [2002] 4 SCR 429.

<sup>169</sup> *R v DB*, 2008 SCC 25 at paras 46-69, [2008] 2 SCR 3.

<sup>170</sup> *Canadian Foundation*, *supra* note 101 at para 57.

<sup>171</sup> Miller, *supra* note **Error! Bookmark not defined.** at 696.

<sup>172</sup> Backhouse, *supra* note 11 at 463. See also Peter Singer, *Practical Ethics*, 3rd ed (Cambridge: Cambridge University Press, 2011) at 151-152.

actions.<sup>173</sup> Youths can receive life sentences for murder.<sup>174</sup> Under s. 233, the harshest penalty a mother can get for killing her newly born child is five years imprisonment, no matter how culpable she is or how heinous the killing. The sentencing regime for young offenders corresponds to a youth's capacity and circumstances because there is a range of proportionate sanctions available. This same is not true of s. 233.

The argument s. 233 responds to the circumstances of the victim also fails. Society does not automatically reduce the sentences of those who kill people unable to contemplate approaching death. Canadian law does not require a lower penalty for murder of comatose or brain damaged victims. On the contrary, the victims' vulnerability will be an aggravating factor in sentencing.<sup>175</sup>

Also, the realities of infancy show that s. 233 does not correspond to a newly born child's capacities, and circumstances. These children are incredibly vulnerable and must rely on others to survive. They cannot resist the mildest of assaults. In England, which has a law like s. 233, newly born children are three to four times more likely to be killed than any other age group.<sup>176</sup> The threshold for a disturbed mind, however, is absurdly low. In *R v Coombs*,<sup>177</sup> anger from childbirth was held to suffice.<sup>178</sup> Other courts have set similar thresholds.<sup>179</sup> As Heather Leigh Stangle writes:

In Canada, a woman does not need to prove that her actions *resulted* from mental defect; she need only prove that she suffered from some type of general mental disturbance...As is the case in England, a Canadian mother's burden of proof is very low; her word is all that the law requires. The government, on the other hand, must prove beyond a reasonable doubt that a woman had fully recovered from childbirth at the time of the killing...As this burden is nearly impossible to meet, the Canadian Act effectively excuses all acts of [murderous] maternal aggression during the first year following childbirth.<sup>180</sup>

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<sup>173</sup> *Youth Criminal Justice Act*, SC 2002, c 1, ss 72(1)(a)-(b).

<sup>174</sup> *R v Ellacott*, 2017 ONCA 681 at paras 7-8, 141 WCB (2d) 552.

<sup>175</sup> *Latimer*, *supra* note 135 at para 85.

<sup>176</sup> Heather Leigh Stangle, "Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide" (2008) 50:2 *Wm & Mary L Rev* 699 at 723, n 150.

<sup>177</sup> *R v Coombs*, 2003 ABQB 818, 343 AR 212.

<sup>178</sup> *Ibid* at para 85.

<sup>179</sup> *R v Effert*, 2011 ABCA 134 at para 24, 502 AR 276 [*Effert*].

<sup>180</sup> Stangle, *supra* note 176 at 718.

This means that nearly any mother who kills her newly born child will benefit from infanticide's lesser penalty. This makes infants particularly vulnerable to murder by their mothers. With a maximum penalty of five years, there is much less disincentive for a mother to kill her newly born child if she finds childrearing too difficult. One legislator acknowledged this problem when s. 233 was first being debated. Member of Parliament Fulton pointed out that:

What you [the legislators] are actually doing [by passing this legislation] is making a crime, which is most shocking if committed, subject to a less heavy penalty...[W]hy make it [killing a newly born child] a lesser penalty and thus run the risk of encouraging persons to commit the crime? So long as they might be convicted of murder, they would be less inclined to commit the crime, but if they knew they could get a maximum of only three years, those who might be tempted might yield to the temptation to commit the crime?<sup>181</sup>

Laws that mandate harsher punishments for the murder of on-duty police officers and prison guards are meant to correspond to their vulnerability when they are performing their duties.<sup>182</sup> Newly born children are even more vulnerable to murder and s. 233 increases their vulnerability. Therefore, it does not correspond to their needs, capacities, and circumstances.

## G. Is a Constitutional Challenge to Section 233 too Novel?

Lastly, one might claim that this analysis of s. 233 is too novel and has no legal precedent under Canadian law.<sup>183</sup> There are many cases where a criminal statute has been deemed unconstitutional because its penalty was too harsh. There is no case law where a statutory offence or sentencing regime has been found unconstitutional because its penalty is too lenient. An argument's newness, however, does not necessarily undermine its validity. Canada's Supreme Court takes novel approaches in certain circumstances. Also, many arguments about *Charter* rights were once novel. Just because an argument is novel does not mean it is meritless.

Another version of this claim comes in the form of a question: if s.233 is unconstitutional why was there no constitutional challenge to the

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<sup>181</sup> House of Commons Debates, *supra* note 13 at 5187.

<sup>182</sup> Miller, *supra* note **Error! Bookmark not defined.** at 696.

<sup>183</sup> I thank Professor Richard Jochelson of the University of Manitoba for this observation.

legislation in *Borowiec*?<sup>184</sup> The answer is that there was no constitutional challenge because no party critical of s. 233 could constitutionally challenge the legislation. While the Crown can suggest interpreting legislation in accordance with *Charter* values,<sup>185</sup> it cannot constitutionally challenge legislation that is before the courts.<sup>186</sup> The Crown's inability to mount a constitutional challenge to legislation because of the role it plays in a criminal trial does not mean that the legislation at issue is constitutional.

#### IV. IS SECTION 233 A “REASONABLE LIMIT” ON AN INFANT’S RIGHTS?

All this noted, a law that infringes upon a constitutional right will still be upheld if it can be justified under s. 1 of the *Charter* which states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>187</sup>

To justify an infringement upon a constitutional right, the government must meet the criteria detailed in *R v Oakes*.<sup>188</sup> The infringing legislation must have a pressing and substantial objective that justifies limiting the right in question.<sup>189</sup> The infringement upon the right must also be rationally connected to the legislation's objective and impair the right as little as reasonably possible to achieve its objective.<sup>190</sup> Lastly, the legislation's harms cannot outweigh its benefits.<sup>191</sup> The infanticide provision is not a reasonable limit. While the objective of preventing jury nullification is pressing and substantial, the legislation does not satisfy the rest of the criteria.

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<sup>184</sup> I would like to thank an anonymous reviewer for providing this insight.

<sup>185</sup> *R v JA*, 2011 SCC 28, [2011] 2 SCR 440 (Factum of the Appellant) at para 8, online: Supreme Court of Canada <[https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33684/FM010\\_Appellant\\_Her-Majesty-the-Queen.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33684/FM010_Appellant_Her-Majesty-the-Queen.pdf)>.

<sup>186</sup> *Borowiec* LEAF Factum, *supra* note 107 at para 16.

<sup>187</sup> *Charter*, *supra* note 9, s 1.

<sup>188</sup> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

<sup>189</sup> *Ibid* at 138–139.

<sup>190</sup> *Ibid* at 139.

<sup>191</sup> *Ibid* at 139–140.

## A. Pressing and Substantial Objective

In *R v Morgentaler*,<sup>192</sup> Chief Justice Brian Dickson summed up the dangers of jury nullification well when he wrote:

[T]hat a jury may...ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of [jury nullification].<sup>193</sup>

Preventing such occurrences and ensuring guilty mothers are punished for killing their newly born children instead of being acquitted via nullification is a pressing and substantial objective.

## B. Rational Connection

Section 233, however, is no longer as necessary to achieve the objective of jury nullification avoidance. Juries will no longer nullify on the basis of a potential death penalty since Canada abolished the death penalty in 1976.<sup>194</sup> To found a rational connection, in this case, would mean that an infant's rights would be limited "where there is no countervailing right [or interest] and hence no reason to limit them."<sup>195</sup> Is the stigma of being labelled a murderer or manslaughterer enough to sustain a rational connection? This seems unlikely. Today's social landscape is much different from the one in 1948. The circumstances that earned a jury's sympathy are

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<sup>192</sup> *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

<sup>193</sup> *Ibid* at 77.

<sup>194</sup> *United States v Burns*, 2001 SCC 7 at para 33, [2001] 1 SCR 283.

<sup>195</sup> *R v NS*, 2012 SCC 72 at para 51, [2012] 3 SCR 726. Some may argue that section 233 is still necessary because Canada has mandatory minimum sentences for first-degree murder and second-degree murder (life without parole for at least 25 years for the former and life without parole for at least ten years for the latter). See *R v Tran*, 2010 SCC 58 at para 22, [2010] 3 SCR 350 where similar reasoning is applied in the context of the provocation defence. I will respond to this point when I discuss whether section 233 minimally impairs a newly born child's rights.



much less common. When s. 233 was passed, women who killed their newly born children were often too poor to raise them or coerced into sex by their employers or their employer's relatives.<sup>196</sup> Presently, single motherhood is morally acceptable. Canada's welfare system has made giving a child up for adoption viable for those who cannot raise children.<sup>197</sup> As Sanjeev Anand writes "[t]he conditions that created a sympathetic response to young women facing unwanted children...no longer exist, at least to the same extent."<sup>198</sup>

Evidence also suggests s. 233's infringements undermine its goal. Presently, s. 233 may also lead to a different type of jury nullification. Juries may think five years imprisonment is too lenient a punishment. Thus, a jury may find such women guilty of murder even though all the elements of infanticide are present and she is legally entitled to "a verdict of not guilty of murder but guilty of infanticide."<sup>199</sup> This is called reverse jury nullification. It is where a jury convicts a defendant even though the law entitles him or her to an acquittal or a conviction on a lesser charge.<sup>200</sup> Some jurors may feel the crime a defendant has been charged with is so heinous that a guilty verdict is necessary to vindicate the victim even if there is reasonable doubt about the defendant's guilt.<sup>201</sup> For example, one study found that sample juries aware of their power to nullify would always convict a defendant accused of impaired driving causing death (called reckless vehicular homicide in the study) even if the prosecution had not proven the defendant's guilt beyond a reasonable doubt.<sup>202</sup> They did this because they want to morally condemn impaired drivers who cause death through their negligence (even if the defendant was not one of those drivers).<sup>203</sup>

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<sup>196</sup> Backhouse, *supra* note 11 at 457.

<sup>197</sup> Anand, *supra* note 7 at 718.

<sup>198</sup> *Ibid.*

<sup>199</sup> Borowiec, *supra* note 22 at para 17.

<sup>200</sup> Saul M Kassan & Lawrence S Wrightman, *The American Jury on Trial: Psychological Perspectives* (New York: Taylor & Francis, 1988) at 161.

<sup>201</sup> Travis Hreno, "Jury Nullifications and the Bad Faith Juror" (2013) 1:1 L Ethics & Philosophy 53 at 60.

<sup>202</sup> *Ibid* at 62-63.

<sup>203</sup> *Ibid.*

Section 233 encourages such jury nullification. Since any disturbance from the effects of giving childbirth, however slight, meets the requirement of a disturbed mind for infanticide, almost no mother who kills her newly born biological child can be convicted of murder.<sup>204</sup> This would be true even if she fully appreciated what she was doing, or planned the killing far in advance.<sup>205</sup> A woman who the jury believes is factually (and morally) guilty of murder (and would be guilty of murder as a matter of law but for s. 233) must be found guilty of infanticide and sentenced accordingly. Presently, Canadian juries are mindful of society's interest to protect children from violence by their caretakers (and to morally condemn such violence).<sup>206</sup> Like the sample juries in the above study, a jury may engage in reverse nullification and convict a mother who kills her newly born child of murder even if she is legally entitled to an acquittal on that charge.

Indeed, such reverse jury nullification may have already occurred. Consider the Katrina Effert case. In 2005, Effert gave birth to a son. A few hours later, she strangled him to death with her underwear.<sup>207</sup> She was charged with second-degree murder.<sup>208</sup> Though all of the elements of infanticide were present, the jury convicted her of second-degree murder.<sup>209</sup> Eventually, the Alberta Court of Appeal set aside her murder conviction and substituted a conviction for infanticide.<sup>210</sup> She received a three-year suspended sentence.<sup>211</sup> The Alberta Court of Appeal said "it is impossible to say that there was not at least a reasonable doubt [that infanticide had been disproven] present on this record."<sup>212</sup> They held that the jury must not have been acting judicially when they convicted Effert because they were

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<sup>204</sup> *R v Borowiec*, 2016 SCC 11 at para 13, [2016] 1 SCR 80 (Factum of the Appellant) at para 3, online: <[https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36585/FM010\\_Appellant\\_Her-Majesty-the-Queen.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36585/FM010_Appellant_Her-Majesty-the-Queen.pdf)> [*Borowiec* Appellant's Factum].

<sup>205</sup> *LB*, *supra* note 8 at paras 35–36.

<sup>206</sup> *Borowiec* Appellant's Factum, *supra* note 205 at para 70.

<sup>207</sup> *Effert*, *supra* note **Error! Bookmark not defined.** at para 2.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid* at para 7.

<sup>210</sup> *Ibid* at para 31.

<sup>211</sup> *Leung*, *supra* note 53 at para 62.

<sup>212</sup> *Effert*, *supra* note **Error! Bookmark not defined.** at para 29.

“distracted by the tragic circumstances of the death of a newborn infant.”<sup>213</sup> Section 233 lead to reverse jury nullification in this case.

One of Chief Justice Dickson’s concerns about jury nullification is that juries would convict a defendant they disliked even if the law required an acquittal. Section 233’s goal was to prevent jury nullification, now it is likely to cause it. This shows that there is no longer a “rational connection” between its objective and the infringement of a newly born child’s rights.

### C. Minimal Impairment

Neither is s. 233 a minimal impairment of an infant’s rights. One could prevent jury nullification without such a low standard for a disturbed mind or such a low maximum punishment. Consider the proposal of Eric Vallillee who writes that s. 233’s goals could be achieved by:

[A] modernized partial defence of infanticide should require the following: (1) that the mother be clinically diagnosed with a post-childbirth psychological disorder, and (2)...the disorder substantially reduced her ability to make a reasonable decision about the care of her newborn child. What constitutes “substantially” should be a question of fact left to the jury. This is similar to the defence of mental disorder, but it requires a lower threshold.<sup>214</sup>

The maximum penalty for infanticide could be the same as the one for manslaughter. This would prevent nullification by allowing juries to show mercy if warranted. The threshold for a disturbed mind would not be so low as to “disrespect the [infant’s] memory.”<sup>215</sup>

Another way to accomplish this goal is to enact a statutory defence of diminished responsibility that would reduce murder to manslaughter. The defence would be distinct from other partial defences like provocation and intoxication. It would be available in cases where a defendant’s reasoning skills or ability to appreciate their actions is impaired, but not absent. This could be due to a medical condition that falls short of insanity or a significant stress that goes beyond the ordinary tribulations of life.<sup>216</sup> Its

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<sup>213</sup> *Ibid* at para 30.

<sup>214</sup> Vallillee, *supra* note 2 at 11.

<sup>215</sup> *Borowiec*, *supra* note 22 at para 34.

<sup>216</sup> Mark Gannage, “The Defence of Diminished Responsibility in Canadian Criminal Law” (1981) 19:2 *Osgoode Hall LJ* at 303. This solution would also allow mothers who kill their newly born children while they are affected by a serious mental illness but are not legally insane to be shown mercy without discriminating against newly born children on the basis of age.

availability would not depend on the victim's age. The accused would have to prove diminished responsibility on a balance of probabilities.<sup>217</sup> A manslaughter conviction does not usually require a minimum sentence.<sup>218</sup> The maximum penalty for manslaughter, however, is life imprisonment.<sup>219</sup> Mothers who kill their infants might, but would not have to be, sentenced to at least ten or twenty-five years in prison. With the main reason for jury nullification resolved, s. 233 becomes unnecessary. Jury nullification can be avoided without legislation that demeans an infant's dignity. Section 233 does not minimally impair an infant's rights.

#### D. Costs and Benefits of Section 233

Lastly, s. 233's harms outweigh its benefits. The benefit of preventing jury nullification is dwarfed by the damage s. 233 does to a newly born child's dignity. It leaves him or her vulnerable to murder by its mother and cheapens its life. The infanticide provision cannot be justified under the *Charter*.

### V. CHALLENGING CANADA'S INFANTICIDE LEGISLATION

A person or organization could challenge s. 233 by filing a statement of claim with a local superior court. For the court to agree to hear the claim the claimants must have standing. People automatically have private standing when their private rights are at stake or they are impacted by a decision's outcome to a greater extent than the general public.<sup>220</sup> This is to ensure that judicial resources are used properly, avoid frivolous litigation, and maintain the judiciary's proper role in government.<sup>221</sup> It is unlikely someone with private standing will challenge s. 233.

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<sup>217</sup> Anand, *supra* note 7 at 727.

<sup>218</sup> There is a mandatory minimum sentence of four years imprisonment for those who commit manslaughter with a firearm. See *Criminal Code*, *supra* note 1, s 236. Parliament could legislate that this mandatory sentence would be waived when diminished responsibility has been proven.

<sup>219</sup> *Criminal Code*, *supra* note 1, s 236(b).

<sup>220</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 1, [2012] 2 SCR 524 [*Downtown Eastside*].

<sup>221</sup> *Ibid.*

There are, however, parties who could be granted public interest standing to challenge it. Public interest standing arises from the principle of legality.<sup>222</sup> This principle requires state action to conform to the *Charter* and that there must be a viable way to challenge state action.<sup>223</sup> To be granted this standing, a claimant must have a genuine interest in the litigation at hand, their claim must raise a serious constitutional issue, and there must be no other reasonable or effective way to bring the matter before a court.<sup>224</sup> Claimants can also satisfy the third criterion by showing a constitutional challenge is a reasonable or effective way of bringing the issue before a court.<sup>225</sup> There are individuals and organizations that have a genuine interest in s. 233's constitutionality. Pro-life groups could challenge the law as they often see infanticide as an "after-birth abortion."<sup>226</sup> Child welfare charities also have an interest in s. 233. One of their mandates is to protect children from physical abuse, neglect, and death at the hands of their parents.<sup>227</sup> It is suggested that s. 233 makes such deaths more likely, and thus, these organizations have an interest in challenging its constitutionality.

A legal challenge to s. 233 also raises a serious constitutional issue: whether the infanticide violates the equality rights of newly born children.<sup>228</sup> The third requirement is met regardless of the standard applied. A constitutional challenge from the above parties is both a reasonable and effective way of bringing the matter before the courts and the *only* reasonable and effective way to do so. Newly born children cannot sue on their own behalf. Action from litigation guardians is also unlikely, as mothers who benefit from such legislation have no reason to challenge it. Challenges

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<sup>222</sup> *Ibid* at para 31.

<sup>223</sup> *Ibid*.

<sup>224</sup> *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 575 at 597–598, 130 DLR (3d) 588 [*Borowski*].

<sup>225</sup> *Downtown Eastside*, *supra* note 220 at para 2.

<sup>226</sup> Alberto Guiblini & Francesca Minerva, "After Birth Abortion: Why Should the Baby Live?" (2013) 39:5 J Medical Ethics 261 at 261. See also Steve Weatherbe, "After-Birth Abortion? Judge Lets Woman Walk After Drowning Her Newborn," *Lifesite News* (2 December 2016), online: <<https://www.lifesiteneews.com/news/after-birth-abortion-judge-lets-woman-walk-after-drowning-her-newborn>>.

<sup>227</sup> Jonathan Herring, *Family Law: A Very Short Introduction* (Oxford: Oxford University Press, 2014) at 84–85. See also *Canadian Foundation*, *supra* note 101 at para 69.

<sup>228</sup> *Borowski*, *supra* note 224 at 581, 597.

from other members of the newly born child's family are also ineffective as they will not know if a mother is likely to commit infanticide. Any constitutional challenge will need to come from another party.<sup>229</sup>

## VI. CONCLUSION

Section 233 has been in the *Criminal Code* for almost 70 years. When it was first passed, all those convicted of murder were sentenced to death. Women who killed their infants were often poor, coerced into sex by employers, and wanted to conform to social norms. There were very few social services and putting a child up for adoption was not a viable alternative.<sup>230</sup> This made juries extremely reluctant to convict these mothers, even if they were clearly guilty. Section 233 created the lesser offence of infanticide to prevent this jury nullification.

Things are different today. Canada has no death penalty, the social stigma arising from the antiquated conception of illegitimacy has abated, and there is a social system that makes adoption of children much easier.<sup>231</sup> Canada also has a constitution that guarantees everyone, including infants, equality before the law. Section 233 violates this guarantee by mandating that all mothers who kill their biological infants be given no more than five years of imprisonment. This is true even if the murder was premeditated<sup>232</sup> or committed after the mother has been abusing the child for months.<sup>233</sup> Yet if she kills her child and that child is more than one year of age, she faces a possible life sentence. This sends the message that the killing of an infant is less heinous than the murder of someone who is at least one-year-old. This is destructive of an infant's dignity. Preventing jury nullification is admirable, but this objective could be achieved by creating a partial defence of diminished responsibility that can be put forward regardless of a victim's age.

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<sup>229</sup> When section 233's challengers file their claim, they must also file and serve a Notice of Constitutional Question to Canada's Attorney General at least fifteen days before the case is heard. If they do not, their case may be dismissed regardless of its merits. *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at para 5, 142 DLR (4th) 385. See also *Courts of Justice Act*, RSO 1990, c C.43, ss 109(1), 109(2.2).

<sup>230</sup> Anand, *supra* note 7 at 718.

<sup>231</sup> *Ibid.*

<sup>232</sup> *LB*, *supra* note 8 at para 26.

<sup>233</sup> Kramar, *supra* note 14 at 121-122. See also *Del Rio*, *supra* note 58.

What may have been constitutional in 1948 may be unconstitutional in 2018. This is the case with Canada's infanticide provision. It must be challenged and struck down.