Introduction

On Wednesday July 5, 1854 the Fredericton, New Brunswick Head Quarters reported on a “serious” criminal case that was heard before the Court of Oyer and Terminer and General Gaol Delivery:

The next cause [sic] was that of the woman who exposed her infant on the river bank in this city. The poor child was drowned, and the mother was indicted for its murder. In the course of the trial several circumstances were elicited which induced a belief that she had not intended to destroy the child, – trusting to the chapter of accidents for its timely rescue, – and the Jury convicted her of Manslaughter only. She was sentenced to four years’ confinement in the Penitentiary.¹

This paper attempts to bring to life the story of the nameless mother in the Head Quarters article: Sophia Fennety (“Sophia”). Sophia was an unwed mother charged with drowning or suffocating her six-week-old illegitimate male infant in Fredericton on the night of June 3, 1854. At trial, the jury found her guilty of manslaughter. The Queen v. Fennety² was the appellate decision of the Supreme Court of New Brunswick in 1855 that ultimately decided the fate of Sophia, a 25-year-old woman originally from the shipping town of Chatham, New Brunswick.³ The Appeal Court pardoned Sophia and its reported decision has kept her story alive for 155 years.

Using The Queen v. Fennety as the backdrop, this paper will illuminate and analyze the social, cultural, and legal context and options available to unwed mothers of illegitimate children⁴ in New Brunswick during the mid-nineteenth century. Disgrace and shame commonly attached to unwed pregnancy in middle- to upper-class Victorian society. Furthermore, few

¹ HEAD QUARTERS (Fredericton, N.B.), July 5, 1854, § Head Quarters. See also THE NEW BRUNSWICK REPORTER (Fredericton, N.B.), June 30, 1854, § New Brunswick Reporter and July 7, 1854, § Communication.
² The Queen v. Fennety, [1855] 8 N.B.R. 132 (Can.) (the case was decided in the Hilary Term, i.e. from January to March, 1855. No exact date of the appeal hearing is available).
³ NBGS-MIRAMICHI BRANCH, ANGLICAN CHURCH BAPTISM REGISTER, 55 (photo. reprint 2004) (1830) (the exact birth date of Sophia is unclear; her Baptismal record states she was baptized on May 9, 1830 but her death certificate states Sophia was born August 11, 1830). See infra note 124.
⁴ For this paper I rely on the definition of “illegitimate child” as per Black’s Law Dictionary: “A child who is not conceived or born in lawful wedlock, nor later legitimated”. See BLACK’S LAW DICTIONARY 255 (8th ed. 2004).
options existed for these women to terminate their pregnancies or otherwise give up their illegitimate child. In this paper, I argue it is probable Sophia abandoned her illegitimate infant son in Fredericton on June 3, 1854 for three reasons: i) in order to escape the shame and disgrace of unwed motherhood during that period, ii) from her lack of alternative options including access to abortion, adoption, or orphan care, and iii) due to the high probability that someone would find her infant in Fredericton upon the wharf and be unable to trace the abandoned child back to her. I further argue Sophia’s treatment by the Trial and Appeal Courts is suggestive of two conditions: i) the Courts’ compassion towards Sophia, and ii) the fact that no specific criminal law existed against the abandonment of children in New Brunswick in 1854 by which to charge and convict her. It is unclear whether the Court favored one of these conditions over the other.

This paper is divided into five sections. The first section provides a background on the extent of illegitimate births, infanticide and abandonment in mid-nineteenth century Eastern Canada. The second section summarizes the trial and appellate decisions of *The Queen v. Fennety*. The third section uses Sophia’s story in *The Queen v. Fennety* to illuminate the social and cultural context of unwed motherhood in New Brunswick at that time. The fourth section describes Sophia’s treatment by the New Brunswick Trial and Appeal Courts. The final section concludes the paper.

I. Illegitimacy and Infanticide/Abandonment in Mid-Nineteenth Century Eastern Canada

This section discusses the percentage of illegitimate births and the relationship between illegitimate births, infanticide and abandonment in mid-nineteenth century Eastern Canada.

---

5 Eastern Canada includes New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, and Quebec.

6 I do not examine access to birth control in this paper because it is unclear the circumstances under which Sophia became pregnant and it is impossible to speculate on whether she was able to prevent her pregnancy in the first place through coitus interruptus, sheaths, pessaries, douches, or sexual abstinence owing to the possibility that she may have been a survivor of sexual violence or unaware of the standard birth control methods of the nineteenth century. See Angus McLaren, *Birth Control and Abortion in Canada, 1870-1920*, 59 CAN. HIST. REV. 319 (1978) 324-7.
**Percentage of Illegitimate Births in Mid-Nineteenth Century Eastern Canada**

Based on available data an estimated two to four percent of live births were illegitimate in parts of Eastern Canada, including New Brunswick, during the mid-nineteenth century.\(^7\) Despite this data it is impossible to determine the precise extent of illegitimate births during this period owing to the absence of reliable demographic methods and instruments, the few surviving parish registers, and the high incidence of women concealing their illegitimate pregnancies.\(^8\)

Researching surviving governmental debates from the eastern provinces of Ontario, Nova Scotia, and New Brunswick from 1866 to 1899,\(^9\) Peter Ward was able to estimate the average ratio of illegitimate to total live births in these provinces. Between 2.1 to 1.0 percent of live births were illegitimate, with the highest percentage in Nova Scotia and the lowest percentage in New Brunswick.\(^10\) Ward argues these numbers are less reliable than surviving parish records from 1800 to 1853 which collected data on a smaller scale and were likely more accurate. But, this data was also limited in scope. Data collected from the St. Andrews, St. Raphael, and Trinity parishes in Ontario, suggest between 1.1 to 2.8 percent of live births were illegitimate.\(^11\)

**Illegitimacy, Infanticide and Abandonment in Mid-Nineteenth Century Eastern Canada**

Victor G. Rosenblum and Michael L. Budde argue one of the most powerful factors contributing to infanticide was a woman’s desire to escape the social stigma associated with an illegitimate birth.\(^12\) Indeed the vast majority of perpetrators of infanticide and abandonment

---


\(^8\) Id. at 37-8.

\(^9\) ONTARIO ARCHIVES, ONTARIO SESSIONAL PAPERS: ANNUAL REPORT OF THE REGISTRAR OF BIRTHS, MARRIAGES, AND DEATHS, 1872-1899 (I was only able to access the Ontario records).

\(^10\) Ward, supra note 7, at 37.

\(^11\) The numbers from the St. Andrews and St. Raphael parishes were verified by my own research at the Ontario Archives: Ontario Archives, St. Andrews Presbyterian Church, Williamstown, Parish Registrars and St. Raphael’s Roman Catholic Church, Charlottenburg Township, Parish Registers. See also Ward, supra note 7, at 36.

were unmarried. In addition these women were often in their early twenties and poor, having been seduced or sexually assaulted and abandoned by their child’s father. Frequently these women were domestic servants who would attempt to conceal their pregnancies; giving birth to an illegitimate child would have likely resulted in termination of employment and diminished employment opportunities. The shame and disgrace of unwed motherhood also severely limited marriage prospects for these women and their siblings, and alternatives to infanticide or abandonment were limited. Combining these features with the fact an estimated two to four percent of live births were illegitimate, it is no surprise that Constance Backhouse argues infanticide and abandonment were common practices in mid-nineteenth century Eastern Canada. Indeed Mary Ellen Wright argues the proportion of infanticides to total illegitimate births in Halifax, Nova Scotia from 1850 to 1875 was an “appalling” 32.6 percent.

Using data from mid-nineteenth century Toronto, Ontario, Backhouse argues the number of trials for infanticide were small compared to the actual number of infants’ bodies discovered in such places as ditches, trash heaps, under floorboards, at the bottom of wells, in privies, under railway station platforms, and in fields and lots. As an illustration, 27 infanticide trials were conducted between 1840 and 1900 in Toronto. Yet between 1877 and 1894, 53 bodies of

infanticide). See also KIRSTEN JOHNSON KRAMAR, UNWILLING MOTHERS, UNWANTED BABIES: INFANTICIDE IN CANADA (U.B.C. Press 2005) (for a contemporary discussion on infanticide in Canada).

13 Ward, supra note 7, at 52.


16 See infra Part III for a more detailed discussion.

17 Constance B. Backhouse, Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada, 34 U. TORONTO L.J. 447 (1984) 447 (of course other factors were also important including post-partum depression, but this is beyond the purview of this paper).

18 Wright, supra note 15, at 21.

19 Backhouse, supra note 17, at 456.

20 Backhouse, supra note 17, at 463-4.
infants were discovered in Toronto and investigated for known or suspected infanticide.\(^{21}\) The difference between the number of infanticide trials and the number of found infant bodies points to the fact infanticide was a common practice; there may have even been additional bodies that were never found. At the same time infanticide was a difficult crime to detect and prove in a period of limited medical knowledge and high infant mortality thereby lessening the number of charges and subsequent trials that could be brought forward from insufficient evidence.\(^{22}\)

Infanticide was not the only means by which unwed mothers liberated themselves from their illegitimate children. Live infants were abandoned in public spaces in the hopes that someone would find and take responsibility of them. Popular locations of abandonment included church doorsteps, hospital premises, at or near the homes of prominent citizens, and in places frequented by the public.\(^{23}\) Although not as common as infanticide, Ward reports that from 1878 to 1884 in Kingston, Ontario eleven infants were found abandoned in public spaces.\(^{24}\)

Similar to infanticide, Peter Gossage argues personal and economic desperation compelled mothers to abandon their children in nineteenth-century cities such as Montreal, Quebec.\(^{25}\) If the abandoned infant was recovered quickly and cared for, its chances of survival were high. However abandonment could also be regarded as an adjunct to infanticide in instances where the infant perished from exposure or other related factors. Wright makes the interesting observation that abandonment may have allowed mothers to rationalize they were not directly responsible for the death of their infant because the infant could have been rescued.\(^{26}\)


\(^{22}\) Ward, *supra* note 7, at 43.

\(^{23}\) Backhouse, *supra* note 17, at 471.

\(^{24}\) Ward, *supra* note 7, at 45.


\(^{26}\) Wright, *supra* note 15, at 18.
While a mother may have been able to rationalize whether or not she caused the death of her infant, the abandonment of an infant in certain circumstances would almost guarantee its demise and may as well have amounted to infanticide. The *The Queen v. Fennety* offers an example of such an abandonment case.

**II. Sophia’s Case: The Queen v. Fennety (1855), 8 N.B.R. 132 (S.C.)**

This section summarizes the trial and appellate decisions of *The Queen v. Fennety*.

**Facts of the Case**

At dusk on June 3, 1854 Sophia arrived into Fredericton by steamboat with her six-week-old illegitimate infant son. Two hours after arriving in the city, she turned up alone and without her child at a lodging house where she remained for the night. The following morning, she went to reside at an acquaintance’s house. It was Sophia’s intention to depart for another part of Canada after a few days. On June 6, 1854 the body of a male infant was found under the wharf, close to where Sophia’s steamboat had landed and several feet above the margin of the River Saint John. The infant was found wrapped in a quilt with his face uncovered.

An indictment charged Sophia with three counts of causing the death of her infant by drowning or suffocation. The first and second counts of the indictment charged Sophia with murdering her infant by having thrown him into the River Saint John. The third count of the indictment stated Sophia had disregarded her duty to protect, shelter, and cherish her infant by having placed him upon the shore of the River Saint John, near the water, in an open and exposed situation where he was likely to roll or fall into the river. The third count charged

---

27 Facts taken from *The Queen v. Fennety*, [1855] 8 N.B.R. 132 (Can.) 132-3 (I was only able to uncover the trial minutes from the Provincial Archives of New Brunswick; all other records related to the case were unable to be located or had been destroyed).

Sophia with having the intent that her deserted and abandoned infant should perish from drowning or suffocation as a result of his exposure.\textsuperscript{29}

\textit{Evidence and Judgment at Trial}

Sophia’s criminal trial was held on July 3, 1854 in Fredericton before the Court of Oyer and Terminer and General Gaol Delivery. At trial, Sophia was represented by defense counsel who produced six witnesses. The Prosecution similarly produced six of its own witnesses.\textsuperscript{30} The evidence proved Sophia was the mother of the found infant. To that end, Sophia’s defense counsel argued that Sophia had left her child upon the wharf with the intention that he should be found by a passerby, and that this was not an unlawful act.\textsuperscript{31} On cross-examination, a witness for the defense similarly stated Sophia had declared she had left her infant on the wharf in the hope that someone would find him.\textsuperscript{32} A witness for the prosecution testified that he had seen what he thought was the infant in the water.\textsuperscript{33} The Coroner’s Inquest was unable to prove whether the infant had perished from exposure or had drowned in the River Saint John.\textsuperscript{34}

The jury found Sophia guilty of the third count in her indictment and she was convicted of manslaughter.\textsuperscript{35} Justice Wilmot, who presided over the trial, sentenced Sophia to a four-year imprisonment term in the provincial penitentiary.\textsuperscript{36} However, defense counsel then brought a successful motion before the Court arguing there was no evidence that the death of the infant had been caused by drowning, and if there was, the question should have been left to the jury.

\textsuperscript{29} It was unclear from the decision how Sophia’s role in the death of the infant was first discovered by the authorities. The third count in the indictment did state however that Sophia was the “reputed” mother of the found infant. The fact that she was the mother of the found infant was only proved at trial although the name of the infant – if one existed – was never revealed in Court: \textit{The Queen v. Fennety}, [1855] 8 N.B.R. 132 (Can.) 132-133.

\textsuperscript{30} N.B. ARCHIVES, Queen v. Fennety, 1854 (trial minutes dated July 3, 1854).

\textsuperscript{31} \textit{The Queen v. Fennety}, [1855] 8 N.B.R. 132 (Can.) 133.

\textsuperscript{32} \textit{Id.} at 133.

\textsuperscript{33} \textit{Id.} at 133.

\textsuperscript{34} \textit{Id.} at 133.

\textsuperscript{35} N.B. ARCHIVES, supra note 30.

\textsuperscript{36} N.B. ARCHIVES, supra note 30.
Justice Wilmot thereby restrained the judgment of the Court in order to have the Appeal Court consider whether there was sufficient evidence that the infant’s death was caused by drowning.  

_Judgment on Appeal_

The appeal was heard in October 1854. On appeal, the question before the Court was whether there had been sufficient evidence to warrant the jury in finding that the death of Sophia’s infant had been caused by drowning or suffocation. Chief Justice Carter, writing for the Court, found that this exact question had not been posed to the jury for deliberation. As such, the Court was unable to determine the jury’s conclusion on this issue. The Court reviewed the evidence and stated it was more probable that the infant did not perish from drowning, implicitly concluding the infant likely perished from being abandoned on the wharf. In the end, the Court ordered that Sophia be pardoned.

_III. Sophia’s Social and Cultural Context: Unwed Mothers with Illegitimate Children in Mid-Nineteenth Century Eastern Canada_

Sophia’s story can be used to illuminate the social and cultural context and options available to unwed mothers with illegitimate children in mid-nineteenth century Eastern Canada. It is probable Sophia abandoned her illegitimate infant son for three reasons: i) in order to escape the shame and disgrace of unwed motherhood during that period, ii) from her lack of alternative options including access to abortion, adoption, or orphanages, and iii) due to the high probability that someone would find her infant in Fredericton upon the wharf and be unable to trace it to her.

_Shame and Disgrace of Unwed Motherhood in Mid-Nineteenth Century New Brunswick_

Unwed motherhood was unacceptable in nineteenth century Canadian society. Motherhood without matrimony breached the prevailing codes of respectable female sexual
conduct and propriety that existed during that period. As a result women who found themselves pregnant and unmarried brought intense embarrassment and disfavor upon themselves and their families. However, Karen Bridget Murray argues that despite harsh public and self-imposed opinions, some unwed mothers found a degree of acceptance and support from their families and were tolerated by their neighbors. This was evidenced by the fact unwed pregnant women and mothers were willing to make public declarations of their circumstances through affidavits in order to seek child support or otherwise name the putative fathers. At the same time there was no denying the marriage prospects of these women and their siblings would have diminished considerably by such public pronouncements or by the appearance of pregnancy alone, unavoidable in the smaller communities of nineteenth-century Eastern Canada.

Despite the acceptance and support of some families, other families did not provide a refuge for unwed mothers. These women either lacked families or had families unable to offer assistance due to poverty or disapproval. Many of these women were immigrants or workhouse children who arrived from England without family or friends and were employed as domestic servants. These women were easily exploited by their employers and the employers’ sons. A domestic servant who became pregnant found herself in a perilous position: if her pregnancy was discovered, she often lost her employment and shelter and was ostracized from society. Many of these women therefore made attempts to conceal their pregnancy and delivery, but if discovered were often forced to leave their employment and communities.

39 Ward, supra note 7, at 45.
41 Ward, supra note 7, at 47- 8.
42 Ward, supra note 7, at 48.
43 Ward, supra note 7, at 48.
44 Backhouse, supra note 17, at 458. See also Ward, supra note 7 at 45-6.
The difficulties facing unwed mothers trying to support themselves and their children were often insurmountable because women’s wages were meager. Furthermore these women faced challenges seeking employment and shelter because others did not want to be regarded as offering their assistance and therefore approving of the moral and religious digressions of unwed motherhood. Facing the pressing need to support themselves and their newborn, a traditional source of income for poor and isolated unwed mothers was to provide wet-nursing services. Some women were also forced into prostitution. However, these types of employment were barely able to sustain these women and their children. Coupled with the shame and dishonor of unwed motherhood, many women chose to commit infanticide or abandon their children.

The embarrassment of unwed pregnancy and motherhood was especially intense for women in the middle- and upper-classes. One major consequence of unwed motherhood was the limitation it placed on marriage prospects for these women and their siblings. A revealing illustration is provided in the medical journal *The Canada Lancet* where in 1875 a physician wrote an article recounting a young woman’s plea to have the doctor abort her fetus lest she disgrace her recently-married sister and kill her mother:

> When we consider the terrible penalties inflicted by society on the female sex for incontinence, we need not wonder at the desperate efforts young girls make to escape them…Marriage was impossible; I must not tell you why. The poor child (for she was scarcely more than a child) protested that if not relieved, rather than disgrace her recently-married sister, and kill her mother, she would conceal her fault and avert exposure by suicide.

46 Backhouse, supra note 17, at 448.
47 Ward, supra note 7, at 49.
48 Ward, supra note 7, at 51-2.
Sophia did not come from a poor family nor was she an immigrant or domestic servant. Rather, the archival evidence suggests Sophia’s family was part of the urban middle-class. Sophia’s father, James Fenety, was a merchant. A merchant was a type of businessman, and businessmen were arguably the most numerous, prominent and representative members of middle-class nineteenth century. Lori Chambers argues this prominence extended to the homes of middle-class families, who were expected to symbolize the status associated with their station in society. The wives and children therefore adhered to specific behaviors that met gendered expectations of propriety and cultivation. Because Sophia came from a middle-class family, she was likely desperate to rid the illegitimate infant before her life and the lives of her siblings were disastrously stigmatized. Not only was Sophia herself of marriageable age at the time of her delivery, but she had five younger siblings who were or would be approaching marriageable age themselves: Mary was 21 years, William was 20 years, James was 16 years, Susan was 13 years, and Jane was nine years of age.

The shame and disgrace associated with her unwed motherhood can be evidenced from the fact Sophia was unwilling to make any statements that publicly or officially acknowledged the birth of her illegitimate child. In fact the lack of any baptismal or birth record or announcement of Sophia’s illegitimate infant in the local newspaper suggests she may have even concealed her pregnancy from the community. The Fenety family was Anglican and belonged to the Church of England. Baptismal records indicate Sophia was born in New Brunswick and baptized on May 9, 1830 in Chatham. In addition, baptismal records existed for all of Sophia’s

53 Id. at 231.
54 NBGS-MIRAMICHI BRANCH, ANGLICAN CHURCH BAPTISM REGISTER, 64, (photo. reprint 2004) (1831) (Mary Rebecca Fenety born June 21, 1831)
five younger siblings – all also born in New Brunswick.\textsuperscript{55} A review of the baptismal records reveal no male infant belonging to a “Sophia Fenety” or “Fenety” baptized in 1854.\textsuperscript{56} Furthermore no birth registration of such an infant could be located. Based on the past actions of the Fenetys a child whom the family did not want to conceal would have been baptized or had its birth registered. Furthermore, the Chatham newspaper the \textit{Gleaner & Northumberland Schediasma} consistently announced all births in the community including illegitimate births. A review of the archives revealed no such announcement for the birth of Sophia’s illegitimate son. Last despite reports in both Fredericton newspapers,\textsuperscript{57} the \textit{Gleaner & Northumberland Schediasma} never reported that Sophia’s infant had been found upon the wharf nor did it report on her trial or appeal. This suggests the community did not suspect Sophia had given birth to an illegitimate child. Conversely, news of the death of the infant may never have reached Chatham.

A review of the census records also provides some suggestion that Sophia’s family experienced some embarrassment from her unwed motherhood. Sophia’s family name was “Fenity”, but her last name was changed to “Fennety” at trial and in the reported appellate decision. Even if we assume this was an inadvertent typographical error, there is clear evidence


\textsuperscript{56}The infant was born and died in between the two censuses of 1851 and 1861 so he was not included in either of them. I had the Provincial Archives of New Brunswick check the birth, death, and baptismal records for the registration of the infant, but none could be located. Furthermore the name of the infant was not included in the appellate decision. I made an inference that the child was born in mid- to late April or early May 1854 based on the fact the child was six weeks old at the time he was abandoned on June 3, 1854.

\textsuperscript{57}The two newspapers published during that period were the HEAD QUARTERS and THE NEW BRUNSWICK REPORTER.
that Sophia’s brother – William Fenety – changed his surname to “Fenity” following the trial.\textsuperscript{58} His new surname appeared beginning in the 1861 census and was sustained in subsequent census records.\textsuperscript{59} This demonstrates at least one family member was ashamed and desired to distance himself from any association with Sophia’s illegitimate birth.

Sophia’s travel plans and the associated events in Fredericton further support the notion she feared her illegitimate birth would bring disaster upon her family. The fact that she abandoned her infant in Fredericton rather than in her home town of Chatham suggests pre-planning on her part; it seems highly unlikely that an unwed mother of an illegitimate infant would travel frequently or away from the comforts of an urban middle-class family especially following so closely after her delivery unless she was driven by extreme circumstances. Indeed, census records from 1851 show Sophia resided in Chatham with her two parents and five younger siblings and had no occupation at that time\textsuperscript{60} and the same is true of census records from 1861\textsuperscript{61} so it is unclear how she would have supported a newborn baby on her own.

Chatham was the second largest shipping port in New Brunswick in the nineteenth century\textsuperscript{62} and it had regular steamboats departing daily to other areas including Fredericton.\textsuperscript{63}

As made evident during her trial, Sophia arrived in Fredericton by steamboat. This would have


\textsuperscript{59} Id.

\textsuperscript{60} PUBLIC ARCHIVES OF CANADA, 1851 CENSUS OF CANADA EAST, CANADA WEST, NEW BRUNSWICK, AND NOVA SCOTIA (1851), available at http://search.ancestrylibrary.com/cgi-bin/sse.dll?indiv=1&rank=0&gsfn=sophia&gsln=&sx=&f35=New+Brunswick&f37=&f41=&f20__ftp=&rg_81004011__date=0&f14=&f0003AC1=0&f18=&f12=&gskw=&prox=1&db=1851canada&ti=5542&ti.si=0&gss=angs-d&pcat=35&fh=94&h=547677&recoff=1&fsk=CIAABCUBA3Zs&bsk=&pgoff=1


\textsuperscript{62} CHARLES H. LUGRIN, NEW BRUNSWICK: ITS RESOURCES, PROGRESS AND ADVANTAGES (1886) 98.

\textsuperscript{63} Id. at 99. See also HEAD QUARTERS (Fredericton, N.B.), July 5, 1854, § Advertisements.
required purchasing a ticket. Evidence elicited at trial uncovered that upon arrival Sophia resided at a lodging house and then with an acquaintance, and had intended to depart for another part of the country.\textsuperscript{64} This also would have required making preceding travel arrangements.

All of these facts point to the likelihood that Sophia planned to leave Chatham when she was sufficiently strong following her delivery and upon arrival in Fredericton, intended to abandon her six-week-old infant with the goal of departing for another part of Canada to probably seek employment and a new life.\textsuperscript{65} By means of departing for another part of Canada without her infant, Sophia was essentially creating a new identity for herself that enabled her to escape the public scorn of unwed motherhood that would have accompanied her everywhere she went with her illegitimate infant in tow.\textsuperscript{66} Furthermore, by leaving her family behind and moving to another part of the country Sophia was simultaneously removing the humiliation her unwed motherhood had likely brought – or could have brought – upon her family in Chatham.

It is unclear if any of her family members knew of Sophia’s plans to travel to Fredericton to abandon her infant. However her family seemed to support her when she was brought to trial despite the fact the trial in 1854 publicly announced Sophia had given birth to an illegitimate child and then abandoned it.\textsuperscript{67} At trial Sophia was represented by defense counsel. Although accused persons were granted the right to defense counsel in 1836, prisoners who lacked the funds to pay for a barrister would find themselves unrepresented.\textsuperscript{68} Judges would only appoint counsel to represent a poverty-stricken prisoner if they were on trial for a capital offense. In this

\textsuperscript{64} The Queen v. Fennety, [1855] 8 N.B.R. 132 (Can.) 133.
\textsuperscript{65} \textit{Id.} at 133.
\textsuperscript{66} Murray, \textit{supra} note 40, at 265.
\textsuperscript{67} At the same time how public the announcement of the found infant and the hearings is questionable and whether it reached Chatham because Sophia was never named in the Fredericton newspaper articles and the reports on the child being found and her hearings only received scant attention in the press. Furthermore there was no report on the found infant or Sophia’s trial or appeal in the Chatham newspaper the GLEANER & NORTHUMBERLAND SCHEDIASMA. This could also point to evidence that she had concealed her pregnancy from the town of Chatham.
\textsuperscript{68} BACKHOUSE, \textit{supra} note 14, at 10.
case, Sophia was on trial for manslaughter only and would not have qualified for judicially-appointed counsel. Because Sophia did not have an occupation during this time period, it is likely her family provided the funds for counsel to defend her at both the trial and appellate levels.  

In the end, despite some family support, the evidence suggests the Fenetys did suffer some humiliation from the pregnancy and birth of Sophia’s illegitimate child and that Sophia abandoned her illegitimate infant son upon the wharf in Fredericton in order to escape the shame and disgrace her unwed motherhood brought to herself and her family.

**Lack of Alternative Options including Access to Abortion, Adoption, or Orphan Care**

An unmarried pregnant woman or unwed mother had limited options to escape motherhood in mid-nineteenth century Eastern Canada. For instance Wright notes while pregnant unmarried women in nineteenth century Halifax relied on abortion to a limited extent, one of the more widely used choices was concealing the pregnancy, bearing the child in secret, and then disposing of it soon after.  

Ann Jones makes the argument infanticide may have been a kind of birth control for women finding themselves in desperate circumstances. Through infanticide, these women not only committed murder, but were confronting patriarchy by asserting some measure of control over their bodies.  

Backhouse agrees these women may have been challenging patriarchy, but counters they were also relatively powerless with few available alternatives.  

Such alternatives included abortion, adoption, or sending an illegitimate child to an orphanage. However, as we will see, these alternatives were limited in accessibility and availability in mid-nineteenth century New Brunswick. As a result many unwed mothers likely

---

69 Public Archives of Canada, supra note 58.  
70 Wright, supra note 15, at 17.  
72 Backhouse, supra note 17, at 477.
used infanticide or abandonment as a necessary or last resort when child-rearing created impossible financial demands and was detrimental to the reputation and livelihood of the mother.  

Canadian law began to prohibit abortions in the nineteenth century. New Brunswick in 1810 was the first province that made abortion a felony punishable by death after the fetus had “quickened”. In 1842 the legislation was amended to set a maximum penalty of life imprisonment in all abortion cases regardless of quickening. The legislation was further amended the following year by reducing the maximum penalty to fourteen years’ imprisonment. It was not until 1849 that New Brunswick also made it a crime for a woman to procure her own abortion with a maximum punishment of fourteen years of imprisonment. Such criminal sanctions created obstacles for women seeking abortions because almost half of all abortion charges resulted in guilty verdicts and the legislation targeted the abortionist and not the pregnant woman. As a result very few individuals would procure or seek an abortion at the risk of being charged under the criminal law and women often resorted to self-induced

---

73 Murray, supra note 40, at 264.  
74 Backhouse, supra note 17, at 447-8.  
75 An Act for making further provisions to prevent the destroying and murdering of Bastard Children, and for the further prevention of the malicious using of means to procure the miscarriage of women, 1810, 50 Geo. III, c. 2 (N.B.) (A distinction had been made between procuring an abortion prior to “quickening” - before there were recognizable movements of the fetus in the womb - and after “quickening” could be felt).  
76 An Act further to amend the Law relating to offences against the person, 1842, 5 Vict., c. 33, s. 2 (N.B.).  
77 An Act to amend “An Act further to amend the Law relating to offences against the person”, 1843, 6. Vict., c. 29, ss. 1, 2 (N.B.).  
78 An Act to consolidate and amend the several Acts of Assembly relating to the Criminal Law of this province, so far as relates to the definition of certain indictable offences, and the punishment thereof, 1849, 12 Vict., c. 29, art. 7 (N.B.).  
79 Part of the obstacles in accessing abortion was the fact women had no role in the passage of legislation that criminalized abortion since they could not vote nor sit as members of the legislature. See LINDA GORDON, WOMEN’S BODY, WOMEN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (Grossman Publishers 1976) 108.  
80 Backhouse, supra note 50, at 71.
abortions. When women did have access to abortions there was a great chance the procedure would place their health and life at risk.

The Canadian medical lobby was especially vocal in denouncing abortion in the mid-nineteenth century. Two different articles in The Canada Lancet describe abortion as a crime “worse than Typhus or Small-pox” in 1875, and as a widespread evil that deserved “nothing short of the most stringent enactment, prohibiting the sale of all drugs calculated to produce abortion – under a severe penalty” in 1871. Interestingly physicians did not express similar upset over infanticide committed by women despite the fact it was likely more prevalent than abortion. Backhouse argues this may have been because women who committed infanticide or abandonment often did not employ any medical assistance during their deliveries and were for the majority lower class, unmarried, and socially-undesirable women and children in the eyes of physicians. Furthermore there was no risk the physicians would be prosecuted for performing the procedure if they did not perform it in the first place.

It is likely abortion services would have been available to some degree in New Brunswick during the mid-nineteenth century; however, it is unclear whether they were available in a smaller town like Chatham. A review of Chatham’s Gleaner & Northumberland Schediasma and even Fredericton’s Head Quarters and The New Brunswick Reporter during the

---

82 Backhouse, supra note 50 at 87.  
83 This was in response to the declining birth rate amongst the “respectable” middle and upper classes of married women as compared to the immigrant lower classes, that reproduction was the purpose of womanhood, and that abortion was a religious and moral sin. See Wendy Mitchinson, Historical Attitudes Toward Women and Childbirth, 4 ATLANTIS 13 (1979) 23.  
84 Andrews, supra note 51, at 291.  
85 Anonymous, Criminal Abortion, IV CAN. LANCET: MONTHLY J. MED. & SURGICAL SCI. 185 (1871) 186.  
86 Mitchinson, supra note 21, at 143.  
87 Backhouse, supra note 50, at 79.  
88 Mitchinson, supra note 21, at 134.
initial months of Sophia’s pregnancy showed no obvious or implicit advertisements for abortion services, but there were implicit advertisements for abortifacients. Indeed regardless of the availability of abortion services Angus McLaren argues that pregnant women would often self-induce abortions through folk remedies or patent medicines. For example, several types of “pills” that corrected a wide variety of illnesses including women’s menstrual periods were sold. While overtly these pills were not advertised as such, it was understood that they were for procuring abortions. Indeed, “missed periods” were not regarded as an early sign of pregnancy, but related to general ill-health that required medication to resume menstrual regulation. However, with a limited understanding of the reproductive process, some women may not have realized they were pregnant until it was too late to induce an abortion safely and easily with these pills. Sophia’s decision to abandon her infant therefore may have reflected her lack of knowledge of her pregnancy, the limited access to abortion, or the safety of the procedure in 1853. She may also have attempted to use available abortifacients, but with no success.

Another alternative to abandonment was giving an illegitimate child up for adoption, a rare act in nineteenth century Eastern Canada. Unwed mothers who found themselves higher up in socio-economic status were often able to conceal their pregnancies from the public by being sent away to relatives. Upon delivery their families would attempt to secure private

---

89 Sophia’s infant was six-weeks-old when she abandoned it on June 3, 1854. With no birth or baptismal records, I estimated the infant was born in mid- to late April and Sophia became pregnant in mid- to late July 1853. I surveyed advertisements for abortion services and abortifacients from mid-July 1853 to the end of September 1853. This would have been Sophia’s first trimester and when abortion services and abortifacients would have been utilized.

90 For instance, The New Brunswick Reporter on July 15, 1853 advertised “George’s Hondura’s Sarsaparilla Extract” for “female irregularities” and on August 19, 1853 advertised “Holloway’s Pills” also for “female irregularities”. The Gleaner & Northumberland Schediasma on July 30, 1853 advertised the “The Cramp and Pain Killer” for stomach pain and “Mrs. Winslow’s Soothing Syrup” for women and children suffering from dysentery.


92 Wright, supra note 15, at 14-15. Such types of abortifacients would have become less available in New Brunswick in 1864 with the passage of legislation that prohibited anyone from supplying poisons, noxious things, or instruments used for abortion: An Act further to amend the Law relating to offences against the person, 1864, 27 Vict., c. 4, ss. 4, 5 (N.B.).

93 Murray, supra note 40, at 265.
adoptions facilitated through a lawyer or a doctor.\textsuperscript{94} Elsewhere, the illegitimate child would continue to live in the household, but as a “sibling” to his or her actual mother.\textsuperscript{95} However, poor unwed mothers, often cast aside by their families and communities, were unable to exercise this privilege. Because charitable work with unwed mothers was only in its infancy at that time, poor mothers were left with few avenues if they chose to surrender their illegitimate children.\textsuperscript{96}

A final alternative to abandonment was dropping off an illegitimate child at an orphanage. A small number of orphanages existed in mid-nineteenth century Eastern Canada.\textsuperscript{97} For instance Saint John, New Brunswick and Halifax, Nova Scotia established orphanages through religious organizations such as the Saint John Protestant Orphan’s Home Asylum established in 1855,\textsuperscript{98} the Sisters of Charity of Saint John established in 1854\textsuperscript{99}, and the St. Joseph’s Orphanage in Halifax established in 1849.\textsuperscript{100} Although orphanages were becoming more common at the time of the birth of Sophia’s infant son in 1854, there was no guarantee that even if she was able to travel to, and approach, an orphanage that they would take in her illegitimate son on account of his English-Anglican faith and age. Indeed the Sisters of Charity of Saint John although established in 1854 only cared for older Irish-Catholic children orphaned by the cholera epidemics in that area.\textsuperscript{101} There is no evidence that any orphanages existed in

\begin{footnotes}
\item[95] Murray, \textit{supra} note 40, at 256.
\item[96] Murray, \textit{supra} note 40, at 256.
\item[97] Ward, \textit{supra} note 7, at 5. \textit{See also} Backhouse, \textit{supra} note 17, at 466, 472-3.
\item[101] McGahan, \textit{supra} note 99, at 101-102
\end{footnotes}
Chatham or Fredericton in 1854.\textsuperscript{102} Baby-farming was also an option, but there is no evidence that such institutions existed in New Brunswick in the 1850s.

Sophia’s middle-class status would have raised the possibility that she could have been sent away to deliver her illegitimate child. Sophia’s parents emigrated from Nova Scotia\textsuperscript{103} and it appears they were the first of their family to settle in New Brunswick.\textsuperscript{104} If Sophia had been sent away to relatives, she would have likely been sent away to Nova Scotia, assuming relatives were there and willing to take her in. And even if she were sent away, her family was clearly unable or unwilling to arrange for a private adoption through a doctor or a lawyer. Her actions suggest Sophia was also unwilling or unable to place her newborn in an orphanage or baby-farm. \textit{High Probability that Sophia’s Infant would be Found upon the Wharf and Not Traced to Her}

The Appeal Court believed Sophia travelled to Fredericton with her illegitimate infant with the intention that someone would find him after he was abandoned. Fredericton, the capital of New Brunswick, had an estimated permanent population of 7,000 – almost double that of Chatham.\textsuperscript{105} It possessed the largest shipping port in the province and was the center for trade and manufacturing.\textsuperscript{106} The wharf – where Sophia abandoned her infant – was a public place and would have been full of activity. Sophia likely abandoned her infant upon the wharf because it

\begin{flushleft}
\textsuperscript{102} Another possible option would have been for Sophia to leave her infant son at an almshouse. Such poorhouses were designed as work houses for society’s poor, and were notorious for their horrible living conditions. However, Sophia would likely have had to reside in the almshouse to care for her infant and this was unlikely owing to her middle-class background and likely support she received from her family. Furthermore, although almshouses were established in Saint John in 1801 and in Fredericton in 1823, the Chatham almshouse was only established in 1869, over ten years after the birth of her infant: James M. Whalen, \textit{Social Welfare in New Brunswick, 1784-1900}, Provincial Archives of New Brunswick, Saint John New Brunswick History, http://archives.gnb.ca/Irish/Databases/Almshouse/text/en-CA/WelfareNB.pdf (last visited Nov. 20, 2010 at 3:47 PM).
\textsuperscript{103} PUBLIC ARCHIVES OF CANADA, \textit{supra} note 61.
\textsuperscript{104} PUBLIC ARCHIVES OF CANADA, \textit{supra} note 58.
\textsuperscript{105} LUGRIN, \textit{supra} note 62, at 74, 98-99.
\textsuperscript{106} LUGRIN, \textit{supra} note 62, at 74.
\end{flushleft}
was close to where she disembarked and she would not have had to carry it by much distance and arouse the suspicions of others. It was also unlikely the child would be traced back to her.

With limited options for infant care, the likelihood her abandoned child would not be traced back to her, and the desire that someone find her infant, Sophia’s journey to Fredericton to abandon her illegitimate child upon the wharf seems quite reasonable. In fact if the child had not fallen into the River Saint John it is highly probable that someone would have found the abandoned infant before perishing from exposure. Alternatively, Sophia could have been placed the infant upon the wharf with the intention that it fall into the water and perish. Unfortunately the evidence elicited at the trial of The Queen v. Fennety did not reveal whether Sophia intended the child fall into the River Saint John, such as where and how the child had been placed and why she did not simply throw the child into the water. The jury believed Sophia intended the child to perish. Conversely, the Appeal Court believed Sophia’s intention was that someone find and rescue her abandoned infant. In the end, it seems more probable the infant was abandoned.

**IV. Sophia’s Legal Options: The Compassion of the Court and Abandonment as a Crime**

Sophia’s treatment by the Trial and Appeal Courts is suggestive of two conditions: i) the Courts’ compassion towards Sophia, and ii) the fact that no specific criminal law existed against the abandonment of children in New Brunswick in 1854 by which to charge her.

*The Compassion of the Trial and Appeal Courts in The Queen v. Fennety*

Backhouse argues the leniency in the verdicts and sentencing toward women charged with infanticide in nineteenth century Eastern Canada is indicative of a sense of tolerance and compassion of the legal system.107 Most of the women charged with infanticide that appeared

---

before the courts were very young, unmarried, and still living at home or in a boarding house with another family.\textsuperscript{108} For many of them the pregnancy was their first.\textsuperscript{109} As an example, in her examination of the 27 infanticide trials in Ontario from 1840 to 1900 Backhouse notes that two-thirds of the women charged with infanticide were acquitted, in six cases a lesser verdict was substituted, in one case the verdict was unknown, and in only two cases did the Court return a guilty verdict.\textsuperscript{110} Backhouse provides several explanations for these outcomes including the innocence or perceived innocence of these women, the fact counsel, juries and judges were sensitive to the moral and social realities which drove unwed mothers to commit infanticide, that the murder of an infant was not perceived to be as serious as the murder of an adult because children were viewed as property, and the high rates of infant mortality during that period.\textsuperscript{111}

The legal authors of the *Upper Canada Law Journal* in Ontario published an article in 1862 that is illustrative of the legal system’s compassion towards unwed mothers:

Marriage is the state in society to which all women look forward. To attain this state, character is necessary: the loss of character is the loss of earthly prospects. No compensation can be awarded adequate to the loss of virtue under such circumstances. The injury is at least two-fold – pain which the woman suffers from shame – and the loss of reputation. The sense of shame must be strong indeed when we know it frequently causes the woman to destroy her offspring – to murder her own flesh and blood. The loss which she sustains by the ruin of her reputation defies computation. The consequence at times is a life of prostitution, loathsome disease – in a word, a living death.\textsuperscript{112}

On its face Backhouse’s explanations do not necessarily apply to Sophia’s case where the jury found her guilty of manslaughter and the trial judge sentenced her to four years of imprisonment. Yet upon closer reading, at the time of sentencing the trial judge simultaneously

\begin{footnotes}
\item[109] Backhouse, supra note 17, at 457. See also Backhouse, supra note 107, at 126.
\item[110] Backhouse, supra note 17, at 462.
\item[111] Backhouse, supra note 17, at 461-4. See also supra note 107, at 136-7.
\end{footnotes}
granted a motion to have the case heard before the Appeal Court and suspended Sophia’s sentence. The question on appeal focused on whether a specific issue had been properly posed to the jury for deliberation. Even if the prosecution or defense counsel never instructed the jury on that issue it begs the question why the trial judge did not intervene and properly instruct the jury himself. Furthermore, did the trial judge sentence Sophia in form only with the full knowledge that he would grant the motion and suspend her sentence anyway? These questions will never be answered but do suggest some compassion, or at least tolerance, by the trial judge towards Sophia’s actions.

It is the Appeal Court that seems to most offer compassion to Sophia’s circumstances. First, the Court mentioned in its decision that when the infant was found, it had been wrapped in a quilt with its face uncovered. While not explicit, the Court was making the point Sophia had tried to protect her infant from exposure when she abandoned him. This statement by the Court cast Sophia as a sympathetic mother whose wish was to have her infant discovered alive and rescued by someone. The Court’s treatment of Sophia follows Janet Fink and Katherine Holden’s argument that starting in the 1850s even narratives in literature developed a more sympathetic representation of maternal sacrifice of the unwed mother as compared to depictions of the prostitute or fallen woman in the earlier part of the nineteenth century.113

Second, the Court implicitly accepted Sophia’s argument that she left her infant upon the wharf with the expectation that someone would find him when it stated, “It appeared, however, that this wharf was a very public place, and that the infant, if left upon it, would probably have

---

been either seen or heard by some one [sic].” There was no question Sophia abandoned her infant upon the wharf on June 3, 1854. But rather than admonish Sophia for her actions, the Appeal Court cast doubt on the jury’s factual findings and implied that it did not think Sophia intended to cause the death of her infant.

Last, the appeal before the Court was whether there had been sufficient evidence to warrant the jury in finding that the death of Sophia’s infant had been caused by drowning. Had that specific question been left to the jury, the Court would “probably have felt that their finding would have been conclusive.” The Court then delivered the following judgment:

> In order to support the indictment in this case, it would be clearly necessary that the death of the child should be proved to have been caused by drowning, or by… suffocation ….The probability seems rather the other way. Under these circumstance we do not think that the sentence should be carried into execution…[we] recommend a pardon.

In coming to its decision, the Appeal Court essentially made a finding of fact although couching its reasons in terms of probability. Not only did it overstep its jurisdiction as a review court, but as a consequence of its fact-finding the Court stated it did not think Sophia’s sentence should be executed, recommending a pardon rather than ordering a new trial. The Court then made the disclaimer that it was recommending a pardon because it was uncertain whether it had the power to alter the Trial Court’s judgment in light of the fact the appeal was made on motion. This disclaimer was curious and suggests the Court pardoned Sophia based on what it thought were Sophia’s (blameless) circumstances despite the fact the Court should have sent the case back to be heard again. In the end the actions and statements by the Trial and Appeal Courts are suggestive of its tolerance and compassion of Sophia as an unwed mother taking desperate measures to release herself from the burden of an illegitimate child.

---

114 The Queen v. Fennety, [1855] 8 N.B.R. 132 (Can.) 133.
115 Id. at 134.
116 Id. at 134-5.
**Abandonment was not a Crime in New Brunswick in 1854**

No specific criminal law existed against the abandonment of children in New Brunswick when Sophia abandoned her infant upon the wharf in June of 1854. As a result, Sophia was charged with manslaughter in the drowning or suffocation of her infant. However, as seen above, based on the facts of the case the Appeal Court pardoned her. While there is no direct evidence on this issue, it is likely the New Brunswick legislature was concerned about the outcome in Sophia’s case because it enacted criminal legislation in 1864 that made specific provisions against the abandonment of children:

> Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be imprisoned in the Provincial Penitentiary for any term not exceeding two years, with hard labour.\(^{117}\)

Although child abandonment legislation did pass, it was enacted ten years after Sophia’s abandonment of her infant and the lack of any specific criminal law on abandonment at the time of her trial in 1854 likely contributed to her subsequent pardon at the Appeal Court in 1855.

V. **Conclusion**

Making the choice to keep a child is not straightforward in the best of circumstances and mid-nineteenth century New Brunswick presented a far from ideal context for an unwed mother to raise an illegitimate child. Sophia’s decision to abandon her six-week-old infant son upon the wharf in Fredericton is not only understandable given the potential stigma to herself and her family had she kept the illegitimate child, but also the lack of alternative options available to her. It is interesting to note however that in 1862, eight years after Sophia’s decision to abandon

\(^{117}\) An Act Further to Amend the Law Relating to Offences against the Person, 1864, 27 Vict., c. 4, ss. 4, 5 (N.B.).
her infant, she married\textsuperscript{118} a Scottish fish preserver named Matthew Waddell and that they settled on Prince Edward Island.\textsuperscript{119} Sophia gave birth to two children within her marriage named James and Minnie Waddell. \textsuperscript{120} James eventually became an electrician and lived with his wife Clara in Prince Edward Island, but their records could not be tracked past 1891.\textsuperscript{121} After the passing of her husband,\textsuperscript{122} Sophia lived with her daughter Minnie and Minnie’s husband, Robert Mason. \textsuperscript{123} Sophia eventually died at the age of 95, in Cumberland County, Nova Scotia, in 1925.\textsuperscript{124}

It remains unknown whether Sophia ever told her husband about her illegitimate child or her trial, and the circumstances surrounding her marriage are also uncertain. What is clear is Sophia’s marriage seems to support her decision to abandon her child as the probability of a man marrying a woman with an illegitimate child in New Brunswick in the mid-nineteenth century was very doubtful – a stigma which lingers even in present-day Canadian society.\textsuperscript{125}

\textsuperscript{118} NBGS-MIRAMICHI BRANCH, ANGLICAN CHURCH MARRIAGE REGISTER, 96 (1862) (record of Matthew Waddell and Sophia Fenety married Mar. 13, 1862).
\textsuperscript{119} PUBLIC ARCHIVES OF CANADA, 1881 CENSUS OF CANADA, available at http://data2.collectionscanada.gc.ca/e/e325/e008113112.jpg.
\textsuperscript{120} Id.
\textsuperscript{122} Based on Census data, Matthew Waddell passed away between 1881 and 1891.
\textsuperscript{123} 1901 Census Data shows Sophia as widowed, but living with her daughter Minnie and son-in-law Robert Mason. See PUBLIC ARCHIVES OF CANADA, 1901 CENSUS OF CANADA, available at http://www.automatedgenealogy.com/census/View.jsp?id=59287&desc=1901+Census+of+Canada+Charlottetown+%28City%2FCit%C3%A9%29+QUEEN%27S+West%2FOuest%29+PRINCE+EDWARD+ISLAND.