
‘A woman like you’: gender, uncertainty and expert opinion evidence in the contemporary criminal trial

Mehera San Roque*

Emma Cunliffe begins her account of the Kathleen Folbigg case, in *Murder, Medicine and Motherhood*,¹ with a quote from Patricia Williams: “That life is complicated is a fact of great analytical importance. Law often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths.”² Williams calls on us to recognise, and challenge, these ways in which Law occludes *necessary* complexity, and how closing down on complexity does damage to justice. Further, she argues, such challenges can reframe, rework—perhaps reclaim—law’s own narratives and rhetorical devices. So in my contribution to this conversation about law, women’s lives and justice, I want to highlight the ways in which Emma’s book takes up Williams’ call; offering a challenge and a reworking, and perhaps also a reclaiming of some of the criminal justice system’s most powerful rhetorical narratives. And at the same time, recognising, as Williams does, that sometimes there is utility in conventional categorisations, as long as one is attentive to the ‘rhetorical event’, and do not mistake such categories as representing an objective truth.

In this review I address three aspects of the *Folbigg* case, as they are analysed in *Murder, Medicine and Motherhood*, aspects that are, inevitably, related, complicated, and so defy neat packaging into sequential order. At the core of Emma’s book is her analysis of the gendered narratives of idealised, normative motherhood that were put to work so successfully both in the Crown case against Folbigg and in the media coverage of her case. So my starting point in this review was to consider the different levels at which these narratives registered—their significance in terms of the overall framing of Folbigg’s guilt, but also the ways in which the Crown’s striking, though not always consistent, appeal to these normative values underpinned the particularly troubling use of the rules of admissibility that allowed the court and the jury to consider in one trial, the multiple deaths of her children.³ In particular, the ways in

* Senior Lecturer, School of Law, University of New South Wales, Australia.

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¹ Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing, 2011) 1.

² Citing Patricia J Williams, “The Brass Ring and the Deep Blue Sea” in *The Alchemy of Race and Rights* (Harvard University Press, 1991). See also Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

³ In New South Wales, the admission of this evidence was governed by the notionally exclusionary ‘tendency’ and ‘coincidence’ rules found in ss 97, 98 and 101 of the *Evidence Act 1995* (NSW). The *Evidence Act 1995* (NSW) forms part of Australia’s Uniform Evidence Law; Uniform Evidence Law jurisdictions in Australia comprise New South Wales, the Commonwealth and ACT, Victoria, NT and Norfolk Island. Sections of the *Evidence Act 1995* (NSW), including s 98 were amended in 2009 by the

which the court accepted that facts that were, primarily, expressions of her role as primary carer were also probative of her guilt. But further, because of the heavy reliance on expert evidence in the case against Folbigg, and as has been made explicit in recent coverage of the case, there are other connections—in particular there are aspects of the emerging crisis in the forensic sciences that can be mapped onto this case.⁴ Presciently, *Murder, Medicine and Motherhood* offers ways for us to think

Evidence Amendment Act 2007 (NSW). At the time of Folbigg's trial, s 98 required that the evidence have "significant probative value" before a fact finder could reason that "because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind." In addition, s 101 prohibits the prosecution from relying on either tendency or coincidence evidence "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant." At the time of Folbigg's trial, s 101 was interpreted, in line with pre-existing common law authority, to require a determination by the trial judge that there be no rational explanation of the evidence consistent with innocence before the evidence could be admitted for the purpose of grounding either coincidence or tendency reasoning (the so called *Pfennig* test). In *Folbigg*, this was held to mean that the court should first assume that the other evidence left the jury with a reasonable doubt, and then consider whether the 'coincidence' evidence would eliminate that doubt, and that it would only be in such circumstances that it could be admitted for that purpose. Arguably, Hodgson J's somewhat idiosyncratic articulation of the operation of the *Pfennig* test, in the string of related cases, *WRC* [2002] NSWCCA 210, *Joiner* [2002] NSWCCA 354 and *Folbigg*, for its circularity alone, does not represent a high point in terms of threshold management. Nonetheless, at least in theory, the evidence in *Folbigg* was subjected to one of the most stringent tests of admissibility both at the stage of deciding whether all of the cases could be heard together and in the trial itself. The 2009 reforms, in combination with more recent jurisprudence have, arguably, lowered the thresholds embodied in ss 98 and 101, but not made the test(s) any easier to understand or apply; the case law in this area remains highly unstable. Historically, tendency and coincidence evidence has been referred to as propensity and/or similar fact evidence. The first significant New South Wales case in this area was *Makin v Attorney General of New South Wales* [1894] AC 57, a 'baby farming' case. The Makins were convicted of the murder of an infant that had been committed to their care. At issue was the admissibility and significance of the evidence that multiple bodies of infants had been found buried in the backyards of a number of houses that had been occupied by the Makins. See Anne Cossins, *The Baby-Farmers* (Allen & Unwin, 2013).

⁴ Recent reports of the National Academy of Sciences in the US, as well the UK, have drawn attention to significant methodological and epistemological deficiencies inherent in the majority of comparative forensic 'sciences' that are routinely relied on in courts. These include, but are not limited to, little or no independent information about the validity or reliability of the majority of techniques and no testing of the accuracy of conclusions and opinions proffered by forensic 'experts', particularly in the comparison fields. See *Strengthening Forensic Science in the United States: A Path Forward* (National Research Council, National Academy of Sciences, 2009); *Report of the Expert Working Group on Human Factors in Latent Print Analysis: Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (National Institute of Standards and Technology, National Institute of Justice (USA), February 2012); *The Fingerprint Inquiry Report 'Lord Campbell's Report'* (The Fingerprint Inquiry (Scotland), 14 December 2011, <http://www.thefingerprintinquiryScotland.org.uk/inquiry/3127-2.html>, accessed 13 March 2013) and the report of the Goudge Inquiry: *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Queens Printer, 2008). For discussion, see, for example: Paul C. Giannelli, "The 2009 NAS Forensic Science Report: A Literature Review" (2012) 48 *Criminal Law Bulletin* 378; Gary Edmond, "Is Reliability Sufficient? The Law Commission and Expert Evidence in International and Interdisciplinary Perspective" (2012) 16 *International Journal of Evidence & Proof* 30; Gary Edmond and Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61 *University of Toronto Law Journal* 343; and Simon Cole, "Who Speaks for Science? A Response to the National Academy of Sciences' Report on Forensic Science" (2010) 9(1) *Law, Probability and Risk* 25. A striking feature of recent Australian cases, even those that have rejected the admissibility of the comparison evidence proffered by the Crown such *Morgan v The Queen* [2011] NSWCCA 257, or the cases discussed below that have overturned convictions based on

thorough the particular medico-legal complex that has arisen around unexplained infant death, and in doing so offers principles that could be usefully applied in other contexts. And so this review engages also with the responsibilities of courts when faced with uncertain or conflicting expert testimony of the kind that was presented in Folbigg's case, and more broadly the failure or inadequacy of current admissibility standards and conventional trial safeguards when it comes to adequately managing the expert evidence in this and other recent cases.⁵

Murder, Medicine and Motherhood provides a detailed and nuanced analysis of the ways in which the Crown and the defence cases were respectively enabled and constrained by normative ideals of motherhood. Ideals that the Folbigg case showed to be extraordinarily, even unexpectedly, persistent and powerful. In particular the difficulties faced by the defence in trying to counter the prejudicial effects that flowed from the complex expectations attached to (good) mothering, refracted through the figure of Folbigg as the failed mother. *Murder, Medicine and Motherhood* makes the case that the deployment of these narratives, in combination with the expert evidence, was critical to the success of the Crown's case, and the failure of each appeal. And as other cases in comparable jurisdictions have been revisited and convictions overturned, the lingering effects of the Crown's account of Folbigg's suspect, failed mothering, continues to set her case apart.⁶

flawed expert testimony, is the *lack* of reference to contemporary research and reports. Compare the US experience where the report was at least cited within three months of its publication: see Giannelli, above. See also Stuart Washington, "Tainted evidence in the dock", *The Sydney Morning Herald News Review* (online), 17 December 2011 (<http://www.smh.com.au/nsw/tainted-evidence-science-in-the-dock-20111216-1oyn7.html>, accessed 23 March 2013) and Stuart Washington, "Appeals spark concern over use of scientific evidence", *The Sydney Morning Herald* (online), 17 December 2011 (<http://www.smh.com.au/technology/sci-tech/appeals-spark-concern-over-use-of-scientific-evidence-20111216-1oyjb.html>, accessed 23 March 2013).

⁵ While these recent cases, particularly in New South Wales, have thrown into sharp relief problems with the forensic sciences more broadly, the most high profile Australian miscarriage of justice that sits ever present in the background is the *Chamberlain* case, a conviction based on, among other things, suspect and flawed expert evidence and accompanied by media/popular narratives that judged Chamberlain's behaviour to be inconsistent with innocence. Notable in this case was the failure of subsequent appellate review, with the High Court confirming Chamberlain's conviction, *despite* being aware of the shortcomings in the expert evidence. On *Chamberlain*, see, Deborah Staines, Michelle Arrow and Katherine Biber (eds), *The Chamberlain Case: Nation, Law, Memory* (Australian Scholarly Publishing, 2009).

⁶ This is taking into account that the most *obvious* element of the case against Folbigg, relied on both to ground her conviction, and to distinguish her conviction from other comparable cases, was the dependence on her diaries, containing passages that were interpreted as incriminating admissions. This allowed the courts to side-step questions about the medical evidence as well as the full implications of the decisions in other jurisdictions quashing the convictions of mothers who had been initially convicted of the murder of their children, the most significant being *R v Cannings* [2004] EWCA Crim 1 and *R v Clarke* [2003] EWCA Crim1020. This is clear in all of the decisions relating to her case, including the 2005 appellate decision that upheld her conviction, and in the hearing in the High Court when her application for Special Leave was refused. Briefing advice in 2004 (from the Criminal Law Review Division, presumably for the NSW Attorney General) also emphasised the significance of the diaries when offering a reassurance that the emerging scandal concerning the wrongful convictions of Sally Clarke and Angela Cannings would not affect the case against Folbigg. While superficially the diaries appeared as independent evidence of guilt, as Emma's account makes clear, this incriminating

In discussing why Emma's analysis of the case is so compelling, I want to also draw some connections between the narratives that were allowed to run in Folbigg and some other recent Australian cases. The most direct comparisons can be drawn between Folbigg's trial and the trial of Keli Lane, who was convicted, in 2010, of the murder of her newborn baby Tegan, born in 1995.⁷ Lane bears closer analysis in relation to Folbigg, not only because she too was convicted of killing her child, but also because, like Folbigg, she was prosecuted by perhaps New South Wales' most successful Crown Prosecutor, Mark Tedeschi. In comparing the two cases, there are some striking similarities in the narratives deployed against Folbigg and those deployed against Lane. But there are two other significant cases that can be drawn in for comparison. The first is the long running case of Gordon Wood, who was convicted in 2008, of the murder of his girlfriend Caroline Byrne who died in 1995, only to be acquitted in 2012.⁸ The second is the equally long running case of Jeffrey Gilham, who was convicted in 2009 of the 1993 murder of his parents, and also acquitted in 2012.⁹ These two cases speak to the related, but also broader question of how courts manage (or fail to manage) incriminating expert evidence, and, like *Folbigg*, speak to the failures of the adversarial trial and safeguards to adequately manage the expert evidence in the case, and in particular the failure of the 'safeguard' that is prosecutorial restraint—prosecutorial obligations of fairness that are a

reading of the diaries does not sit in isolation from the gendered narratives and norms brought to bear on Folbigg, and in many respects is dependent on them. Further, it is not clear when the content of the diaries may also have been available to the experts who ultimately concluded that the Folbigg children could not have died of natural causes, though clearly by the time the case came to trial they would have been aware of the more adverse and damaging passages.

⁷ *R v Keli Lane* [2011] NSWSC 289. Lane lodged her appeal in April 2011. It was heard by the New South Wales Court of Criminal Appeal on 23 July 2013. Lane's application for bail was refused by Justice Hoeben on 28 February 2013: *Keli Lane v R* [2013] NSWSC 146. .

⁸ *Wood v R* [2012] NSWCCA 21. Byrne's death was initially assumed to be suicide—her body was found at the base of cliffs at The Gap, a coastal area in Sydney that is an infamous suicide spot. See, for example, Katrina Clifford and Glenn Mitchell, "'The Killer Point': Contemporary Reconfigurations of The Gap as Crime Scene" (2009) 13 *Law Text Culture* 80. Sustained pressure from Byrne's family, combined with the emergence of apparently independent expert evidence that indicated that the location of her body precluded a suicide jump, and instead indicated that she had been thrown from the cliff, led to Wood being extradited from the United Kingdom to face trial. Wood's first trial was aborted after it was discovered that members of the jury had independently visited The Gap.

⁹ *Gilham v R* [2012] NSWCCA 131. The facts in Gilham are equally extraordinary. Jeffrey Gilham's account was that his parents had been stabbed by his older brother, Christopher, and that he, Jeffrey, had come upon Christopher in the act of attempting to light a fire over the body of his mother. Jeffrey's account was that he had picked up the same knife and pursued and killed his brother, before raising the alarm. Gilham pleaded guilty to the manslaughter of his brother, arguing provocation, and this plea was accepted. Much later, following a sustained campaign by Gilham's uncle, Jeffrey Gilham was charged with the murder of his parents—the Crown case being that he had in fact killed all three members of his family. The necessary corollary of this case theory was that Gilham had deliberately set fire to the family home in order to conceal the murders, and further that he had concocted evidence that Christopher was unstable, and resentful of both his parents and his brother, as part of an elaborate, premeditated cover up. For an overview of the legal issues in these two cases see Gary Edmond, David Hamer, and Andrew Ligertwood, "Expert Evidence after *Morgan*, *Wood* and *Gilham*" (2012) 112 *Precedent* 28.

prominent feature of the rhetoric underpinning the conduct of criminal trials in Australia.¹⁰

These other recent appellate decisions are worth noting in part also because of the involvement of Mark Tedeschi in the prosecutions. Gordon Wood, like Folbigg, was prosecuted by Tedeschi. The issues that gave rise to the successful appeal were numerous and complex; critically they included the reliance on inadequate and erroneous expert evidence to support the Crown case.¹¹ But arguably, at the heart of the appeal was the conduct of the prosecution, the unsupported and speculative (and sometimes conflicting) narratives spun out of the circumstantial case against Wood. As McClellan CJ wrote in the appeal, “[t]he difficulties which the prosecutor’s conduct created are so significant that I am satisfied it caused the trial to miscarry occasioning a miscarriage of justice.”¹²

Gilham’s case similarly raised questions about prosecutorial conduct, in combination with a reliance on equivocal expert evidence. Tedeschi prosecuted Gilham’s first trial, which ended in a hung jury, and it is certainly arguable that the Crown case, as run in the second trial by Margaret Cunneen, was built on the foundations laid by Tedeschi.¹³ One of the striking aspects of this case, that maps back to *Folbigg*, was the manner in which the Crown Prosecutor was able to draw inferences from the expert evidence far beyond those which it was capable of bearing, but presented these

¹⁰ See, for example, Gary Edmond and Mehera San Roque, “The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial” (2012) 24(1) *Current Issues in Criminal Justice* 51. The recent AHRC inquiry into the use of discredited techniques for age determination is also worth noting here: *An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say they are Children* (Australian Human Rights Commission, 2012). See also the reopening of the case against David Eastman, convicted in 1995 of the murder of a senior police officer, in part because of fresh concerns relating to the expert evidence proffered at the trial. See Louis Andrews, “Eastman gets his new day in court”, *The Canberra Times*, 11 August 2012, 1, 4 and B1.

¹¹ The appellate court was highly critical of the expert evidence presented by Associate Professor Rod Cross that underpinned the Crown case that Byrne had been thrown from the cliff. In particular, what emerged on appeal was not only the weaknesses in the evidence itself, but also the fact that Cross had inserted himself into the investigation, and prosecution, of the case in a way that overstepped the boundaries of expert impartiality and by implication breached the Expert Code of Conduct: see *Wood*, above n 8, [715] ff. Despite this, the appeal court appears to have accepted that neither the breach nor the apparent weaknesses rendered his evidence inadmissible. A video that includes an interview with Cross and footage of one of the experiments—male police officers throwing (compliant) female officers into a swimming pool—can be viewed at <http://www.smh.com.au/nsw/trial-expert-stands-firm-as-judge-questions-impartiality-20120225-1tv48.html> (accessed 29 March 2013). In *Gilham*, the Crown likewise relied on speculative experiments conducted by a fire examiner, presented to the jury by way of a DVD of a ‘reconstruction’ that bore little resemblance to the actual conditions of the fire that had been lit on the night of the Gilhams’ deaths. In this instance the appellate court held that the expert’s evidence and the DVD of the ‘reconstruction’ ought to have been excluded (under s 137 of the Uniform Evidence Law)—the probative value of the experiments being so slight as to be misleading and thus unfairly prejudicial to the accused: *Gilham*, above n 9, [179].

¹² *Wood*, above n 8, [604].

¹³ See *Gilham*, above n 9, [107] and Paul Bibby, “Scientific evidence flaws highlighted”, *The Sydney Morning Herald* (online), 27 June 2012 (www.smh.com.au/nsw/scientific-evidence-flaws-highlighted-20120626-210my.html, accessed 11 March 2013).

to the jury as legitimate, available, almost inevitable conclusions. In particular, in *Gilham*, the Prosecutor was allowed to make repeated reference to the conclusions that could be drawn from the pattern of stab wounds present in all three bodies; in characterising the matter as one of common sense, the Crown invited the jury to conclude that it defied belief that more than one person was responsible, such was the similarity of the pattern and number of stab wounds.¹⁴ This was despite the fact that a number of the expert witnesses in the trial had disavowed such conclusions and had been explicitly prevented from giving evidence along these lines.¹⁵ This was compounded by the Crown's failure to call, as part of its case, Professor Cordner who of all the experts was the most unequivocal in emphasising that it was not possible to draw meaningful conclusions from the pattern and number of wounds.¹⁶ Further weaknesses in the expert evidence relied on in *Gilham*'s prosecution emerged after the trial, with one of the witnesses, whose evidence had been crucial in establishing the sequence of events, and in particular the sequence of death(s), admitting in the appeal hearing in 2011 that they had exceeded their expertise when they had given this incriminating evidence in the trial.¹⁷ In all of these cases attempts by the trial judge, and defence, to maintain control of the presentation of the evidence were ineffective, or, worse, *generated* misunderstandings.¹⁸

¹⁴ *Gilham*, above n 9, [348].

¹⁵ The appeal court characterised the Crown's conduct, in this respect, as an egregious departure from the limits set by the trial judge and in fact that the evidence was inadmissible for that purpose. A notable aspect of the trial was that at no point did the court engage with the coincidence (or tendency) rules that, given the conclusions that the jury was being invited to draw, *ought* to have operated to manage the admissibility of the evidence: *Gilham*, above n 9, [288], [327] ff, [348]-[350]. The appeal court also noted that the defence failed to object (or identify) that the Crown's case relied on coincidence reasoning: *Gilham*, above n 9, [325].

¹⁶ *Gilham*, above n 9, [383] ff. This had the curious effect of limiting the manner in which the defence could respond; the limits placed on the prosecution experts produced the *appearance* of a conservative or cautious approach, but in operation hampered the defence attempts to proffer rebuttal evidence disputing the (apparent) significance of the injuries found on all three members of the *Gilham* family. On a related point, see Simon Cole, "Splitting Hairs? Evaluating 'Split Testimony' as an Approach to the Problem of Forensic Expert Evidence" (2011) 33(3) *Sydney Law Review* 459 and Gary Edmond et al., "Atkins v The Emperor: The 'Cautious' Use of Unreliable 'Expert' Opinion" (2010) 14(2) *International Journal of Evidence and Proof* 146.

¹⁷ *Gilham*, above n 9, [621]. The emergence of this concession during the appeal hearing, apparently unanticipated by both the prosecution and the defence, marked a turning point in the appeal. *Gilham*, unlike Wood, was present at the hearing, and was released on bail immediately, at the conclusion of the appeal hearing, with the court indicating that he was entitled, at the very least, to a retrial: see, for example, Paul Bibby, "Gilham's champagne moment: Free to celebrate after murder conviction quashed", *The Sydney Morning Herald* (online), 2 December 2011 (<http://www.smh.com.au/nsw/gilhams-champagne-moment-free-to-celebrate-after-murder-conviction-quashed-20111202-1o9wb.html>, accessed 11 March 2013).

¹⁸ In appearing to accept that there was no empirical basis that would allow an expert to conclude that the wounds were inflicted by the same person, and thus preventing the experts from testifying as to whether, or not, the patterns and number of wounds could be seen as significant in this way, the trial judge none the less emphasised that it was open to the jury to determine whether the apparent similarity was significant: *Gilham*, above n 9, [298]. The conceptual confusion is perhaps a striking example of the lack of clarity as to the role, relevance and function of expert opinion. It also bears a family resemblance to the conceptual confusion attending the admission of the expert opinions in cases such as *Folbigg*, and the trials of Clarke and Canning, where the opinions of the experts were founded on a form of concealed or occluded coincidence reasoning (see discussion below n 32).

So, all of these more recent cases bear some comparison to *Folbigg*, if one is thinking about the problems raised by the expert evidence. But turning back to Lane, the case that bears the closest relationship in terms of the narratives of ideal(ised) or normative motherhood, I wanted to start with an image. In this double page spread from the popular weekly magazine, *Woman's Day*, we have the headline “Baby Killer Mums”.¹⁹ In contrast to Emma’s careful, systematic and illuminating analysis of the media coverage of Folbigg’s case—that manages to combine a discourse analysis of the representation of Folbigg herself, with an account of the imbalance of the reporting of the prosecution and defence narratives—I am relying on this one image to set the tone. I am using it here not to point to the simplistic popular media coverage endemic to these cases, but because it sets Folbigg alongside three other recent Australian cases where women have been convicted of the murder of their child, one of whom is Keli Lane.

This prison houses our worst

BABY KILLER MUMS

KATHLEEN FOLBIGG

KELI LANE

RACHEL PITZNER

Australia's most notorious babykillers are all living under the same roof, where conflict is rife, writes MATTHEW BENNS

When the two women who made the headlines in jail, it was always going to be a high-profile case. The mother (the accused) who returned to death row after her daughter "Bobby" was killed in an infant bed.

"They both were in prison for the worst case within the jail," says a source inside the women's correctional centre, about 20 km west of Sydney's CBD.

There are the families who have committed the most heinous crimes, the most notorious of crimes in a national facility - the killing of their own children.

Angry families have been involved in a string of lawsuits, often involving the police, the coroner, hospital and school. Despite being a high-profile target for every other inmate.

Women who kill their babies are the lowest of the low - the equivalent of paedophiles in a male prison," says the source.

Sydney's most notorious baby killer is Keli Lane, a 36-year-old mother of three. The longest serving inmate in the prison is Kathleen Folbigg. She was jailed in 2003 for 40 years for the murder of three of her four children in an infant bed and a cot.

They were all sentenced to life in prison. Lane's sentence was reduced to 30 years with a non-parole period of 15 years on appeal.

"She is a usually transformed woman, you wouldn't recognise her on the inside and well, and it is a bit of a surprise when she is appearing in the," explains the source.

Folbigg, like the other two child killers, is a category 1 inmate in the women's prison and is being protected, usually with other high-risk, high-profile inmates likely to be targeted if they fall prey to her. She has accepted her fate and is quiet and polite in her cell, where she has a television and a small kitchen.

It is a far cry from the life she led as a mother of three children in a middle-class suburb of Sydney.

The husband had a weight and alcohol problem and was violent and violent. She was a completely different person and a completely different person.

majority of inmates inside the women's prison. The daughter of a politician, she grew up in a loving home on Sydney's north coast. She was a high-achieving student and a high-achieving professional.

She was the girl who had it all - and then it all went wrong. She was charged with the murder of her baby in her bed. Lane was charged with the murder of her baby in her bed. Lane was charged with the murder of her baby in her bed.

born in a suburban hospital in 1996. Hours after her birth, she was taken to a hospital, where she died. Lane was charged with the murder of her baby in her bed.

bin reports, separating him in his 20s and changing his name in 2007. He had spent the previous 10 years in prison. He was charged with the murder of his baby in her bed.

have in 2007. He was charged with the murder of his baby in her bed. He was charged with the murder of his baby in her bed.

The case against Lane was entirely speculative and circumstantial. She had fallen pregnant in 1996, giving birth to Tegan on 12 September 1996. Lane had successfully concealed the pregnancy from family and friends, including, according to the evidence, her then partner.²⁰ Lane had previously carried a child to term in 1995, a girl who had been adopted out, and two previous pregnancies had ended in

¹⁹ This article by Matthew Benns, “This prison houses our worst Baby Killer Mums”, appeared in the *Woman's Day* in the first half of 2012 (image provided 5 June 2012).
²⁰ The Crown case is summarised in *R v Lane* [2011] NSWCCA 157, [43].

terminations.²¹ In 1999, Lane had a third child, a boy, who was also adopted out. With the exception of the first pregnancy and termination, which was known (only) to her then boyfriend, all of these other pregnancies had, apparently, been successfully concealed from family and friends.²² In the case of baby Tegan, the defence case was that Lane had handed the baby over to the (initially unnamed) natural father. There was no body, no admission, and no direct evidence. The circumstantial evidence supporting the case was primarily negative, including the inferences to be drawn from the failure to locate the surviving child or man that Lane had claimed was the father of Tegan. Which is to say that, in addition to the reliance on hegemonic gendered narratives, the Crown case was strongly dependent on what was argued to be the sheer implausibility of her account. This appeal to (im)plausibility was implicated in the decision to allow the jury to draw some limited inferences from Keli Lane's conduct, in particular, what were said to be lies.²³ Perhaps even more than *Folbigg* or *Wood*, this was the case of Tedeschi's career, considered to be the impossible conviction. And it was a case that clearly troubled the trial judge. In the sentencing judgment, Justice Whealy of the New South Wales Supreme Court, said, "whatever views I may have had about the strength of the Crown case must take second place to the jury verdict."²⁴ More recently, on his retirement, and in what has been widely regarded as a surprising and controversial move, Justice Whealy has spoken publicly about his unease at the outcome of the case.²⁵

The four women discussed in this article also present, and represent, a range of different scenarios of failed or feckless motherhood. Folbigg, concealing her murders behind the screen of multiple cot deaths, is perhaps the most reviled, whereas Lane's conduct places her into a different category, and most closely resembles the traditional picture of an infanticide. In contrast to both of these we have Rachel Pfitzner and the unnamed mother of Ebony—both parents whose children had come to the attention of the overstretched child welfare apparatus (including the Department

²¹ Tedeschi argued that Lane murdered Tegan because she was unwilling to go through either the distress (or inconvenience) of an adoption, or the trauma of a termination: see *R v Keli Lane*, above n 7, [81].

²² Perhaps most extraordinarily, Lane had played in a competitive water polo match the day before giving birth to her first daughter, Tahlia Rose, on 19 March 1995: *R v Keli Lane*, above n 7, [5].

²³ In particular the jury was allowed to draw the inference that the lies were told because of a 'consciousness of guilt' and were thus directly probative of guilt, overruling the trial judge on this point. The NSWCCA pointed to fact that the defence case did not name the father and that the evidence that the jury could use to ground its conclusion that Lane's account of handing the baby to a man called Andrew Norris/Morris (the putative natural father), was not 'entirely co-extensive with the circumstantial case relied on to prove the murder'. See *R v Lane*, above n 20, per Simpson J, [62]. It seems as if, like the fact of the rarity of multiple infant deaths, this negative evidence that was the failure to find Morris/Norris (and therefore Tegan), becomes 'double counted'. See discussion in n 32 below.

²⁴ These remarks were reportedly made at the sentencing hearing: Kim Arlington, "Tearful Lane faces sentencing hearing", *The Sydney Morning Herald* (online) 11 March 2011 (<http://www.smh.com.au/nsw/tearful-keli-lane-faces-sentencing-hearing-20110311-1bq17.html>, accessed 24 March 2013). In his written sentencing reasons (above n 7) Justice Whealy is perhaps more circumspect, but reading between the lines it is evident that he is uneasy about elements of the Crown case.

²⁵ Deborah Snow, "Judge reveals his doubts over Keli Lane conviction", *The Sydney Morning Herald* (online), 24 November 2012 (<http://www.smh.com.au/national/judge-reveals-his-doubts-over-keli-lane-conviction-20121123-29yut.html>, accessed 24 March 2013).

of Community Services),²⁶ Pfitzner's case raising also the added complexities of race, involving as it did the death of an Aboriginal boy caused by his white mother. It is perhaps worth noticing that with *Folbigg*, the experts (and ultimately the courts) were dealing with what they saw as an exceptional case; it was the very rarity of the four deaths in one family that, in a sense and in the end, raised the alarm.²⁷ But alongside, running as a counterpoint to cases such as *Folbigg*, there is that routine, heavily bureaucratised space of child protection, risk assessments, welfare interventions, family placements and child removals—the folk devils and moral panics of child welfare discourse that in Australia provoked the Northern Territory Intervention with its targeting of Aboriginal parents and families²⁸—that operates as an echo chamber for the apparently disruptive, exceptional, spectacular criminal case of maternal filicide.

And so, Emma's book speaks of Folbigg's case as providing us with what Fitzpatrick calls a 'telling instance'. That is to say we can read off the case, it allows us to see further, to see broader patterns—and in these telling moments, the case itself can function both as evidence and as authority, it is both reflective and generative. It is a case that can tell us about social expectations and constructions of motherhood (and indeed fatherhood) even as it reconstructs and reinforces them, and exposes particular vulnerabilities in the criminal justice system, compounding what might otherwise be an ordinary failure to manage the expert forensic evidence. Related to this and more familiar to me is Robert Hariman's conception of a 'popular trial' and also Nancy Fraser's analysis of moments of what she terms 'hyperpublicity'. For Hariman a popular trial is a particular class of 'persuasive event', a social performance of the law that functions to create social knowledge, perhaps even, though not entirely in the

²⁶ Seven year old Ebony died as a result of long term deprivation and neglect. Ebony's parents were both tried, with her mother convicted of murder and her father of manslaughter: *R v BW & SW (No 3)* [2009] NSWSC 1043 (2 October 2009). Rachel Pfitzner pleaded guilty to the murder of her two year old son, Dean Shillingsworth: *R v Pfitzner* [2009] NSWSC 1267. In both cases it was conceded that the Department of Community Services had failed to adequately respond to reports about risks facing the children (and the families) involved. See *The Death of Ebony: The Need for an Effective Interagency Response to Children at Risk* (New South Wales Ombudsman, Special Report to Parliament under section 31 of the *Ombudsman Act 1974*, October 2009) and *The Death of Dean Shillingsworth: Critical Challenges in the Context of Reforms to the Child Protection System* (New South Wales Ombudsman, Special Report to Parliament under section 31 of the *Ombudsman Act 1974*, December 2009). Both cases were catalysts for the establishment of a Special Commission of Inquiry into Child Protection Services in NSW, headed by Justice James Wood AO QC.

²⁷ It was the death of Folbigg's fourth child, Laura, which prompted a revisiting of the conclusions with respect to the prior children, whose deaths had initially been attributed to SIDS.

²⁸ An investigation into child abuse within Indigenous communities culminated in the *Little Children are Sacred* report that identified endemic and entrenched problems within Indigenous communities and made a number of recommendations. The extent to which the recommendations have been implemented is contested, but the report was used as the trigger, by the then conservative government, for rapid deployment of inconsistent and punitive health, welfare and legal regimes across communities in the Northern Territory Emergency Response. See, more generally, John Chesterman and Heather Douglas, "Law on Australia's Northern Frontier: The Fall and Rise of Race" (2009) 24(1) *Canadian Journal of Law and Society* 69.

old fashioned sense, ideologically.²⁹ For Fraser, these moments are events that break our routine, provoke widespread attention, and consequently have, as she puts it, “great diagnostic value,” making visible the “structures of inequality and practices of power that deform public opinion making in ordinary times, less obtrusively but more systematically.”³⁰

So *Folbigg* can tell us much about the faith in and the failures of the adversarial criminal trial and forensic sciences, the structures and practices that function to impede public accountability mechanisms such as the criminal trial. And in this respect it is like other recent cases, such as *Wood* and *Gilham*. But taking Fitzpatrick, Hariman and Fraser’s framing a little further, the *Folbigg* case can be both aligned with, but also distinguished from, say *Wood* and *Gilham*. Because while, like *Folbigg*, these two cases can tell us much about the systematic failures of the criminal trial, about what can go wrong in even well resourced cases, or about the under-considered relationship between prosecutorial obligations and the use of incriminating expert evidence, and they are certainly *sensational* cases, they are not ‘telling’ in quite the same way. Emma’s book is special, I think, because she manages to show how *Folbigg*’s case is telling in the Fitzpatrick sense, popular on Hariman’s terms, and diagnostic in the Fraser sense. Most clearly in these terms, Emma charts what this case can tell us about ideologies of motherhood—as well as historical and current discourses of women, criminality and violence—as it also hints at the relevance of ‘postfeminism’ as a complicating cross-narrative. And, as I discuss further below, it manages to combine this with a careful, pragmatic account of how courts could do better when faced, as they will inevitably be, with conflicting or uncertain forensic evidence, particularly in situations where such evidence is especially vulnerable to an insidious form of coproduction.³¹

²⁹ Robert Hariman, “Performing the Laws: Popular Trials and Social Knowledge” in Robert Hariman (ed), *Popular Trials: Rhetoric, Mass Media, and the Law* (University of Alabama Press, 1990). See also Barry Brummet, “Mediating the Laws: Popular Trials and the Mass Media” in the same volume.

³⁰ Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition* (Routledge, 1997) 99.

³¹ *Murder, Medicine and Motherhood* draws on work by Sheila Jasanoff in characterising the relationships between the courts and science/expertise as one of coproduction: see *Science at the Bar: Law, Science and Technology in America* (Harvard University Press, 1995). See also Bruno Latour, *Science in Action* (Harvard University Press, 1987). Coproduction provides a useful framework for understanding that when it comes to the generation of expert knowledge within and for a legal dispute, a reciprocal relationship of influence, like the dimension of interpretation, is likely to be inevitable, and is not necessarily suspect. However, in a case such as *Folbigg*, dealing as it does with a diagnosis, and medical literature, that is complex, contested and inflected by normative ideologies, these dynamics operate in ways that are not only hegemonic, but also particularly difficult for the defence to expose adequately. Even in a case such as *Wood* where the ‘coproduction’, and indeed the deficiencies of the expert evidence, appear in retrospect to be so transparent as to be almost (blackly) comic, none the less a well resourced and experienced defence was unable to counter effectively the inherent weaknesses in Cross’s evidence, nor to adequately reveal his involvement in the investigation. As discussed further below (see n 61 and surrounding discussion), developing what Emma terms a *robust* account of the reciprocal relationships between science and law is a necessary part of developing an adequate response to the management of expertise and expert knowledge within the trial. See also, in a related

But turning first to what Emma's account tells us about how the trial and indeed the appeals, constructed and flattened out Folbigg's experience of mothering, in such a way as to provide, in the absence of definitive, reliable evidence that could point to how her children died, and in the face of significant known *challenges* in overseas jurisdictions to the use of 'coincidence', evidence that relied on the pattern of four unexplained deaths as an indicia of murder, proof of guilt.³² In this respect the use of Folbigg's diaries was critical, but more than this, the narrative constructed by Tedeschi, elements of which were repeated in the case against Keli Lane, managed to create a situation where every action by Folbigg was able to be constructed as suspicious, leaving her, and her defence, very little room to move when it came to countering what became an apparently overwhelming case.

To begin, and in the context of the admissibility rules that governed the (joint) trial, there are significant cross-overs between thinking about the rules of evidence and thinking about the gendered narratives running through the case, perhaps most significant being the way in which the Crown managed to use the coincidence rules not only as the conceptual framework for thinking about the (damning) significance of the four unexplained deaths, but also, and equally as damaging, as the means of rendering the largely inevitable consequences of the gendered division of labour

vein, Gary Edmond, "Supersizing *Daubert Science for Litigation* and its Implications for Legal Practice and Scientific Research" (2007) 52 *Villanova Law Review* 857.

³² Most prominent here was the realisation that the 'statistical' evidence—that the chances of three natural infant deaths in one family was 1 in 73 million—presented by Sir Roy Meadows in the prosecutions of Angela Cannings and Sally Clark was simply wrong. The so called 'Meadows' Law'—variously expressed, but most commonly rendered along the lines of 'one is tragedy, two is suspicious, three is murder'—was equally spurious: see discussion of *Cannings* and *Clark* in *Murder, Medicine and Motherhood*, 8-11 and in Chapters 4 and 5. Folbigg's committal hearing occurred prior to these cases, and similar spurious statistics were proffered at that hearing: Lee Glendinning, "Four dead by their mother's hand", *The Sydney Morning Herald* (online), 22 May 2003 (<http://www.smh.com.au/articles/2003/05/21/1053196642652.html>, accessed 23 March 2013). However, by the time it came to trial, the discrediting of Meadows meant that the evidence was confined to more generalised statements as to the 'rarity' of such multiple deaths. However, just as problematically, their *experience* as to rarity of four natural (or unexplained) deaths in one family was still canvassed in the questioning of the expert witnesses, at the same time that the fact of the rarity was being characterised by the trial judge as a matter of common sense and within the province and knowledge of the jury (see discussion, above n 18). The conceptual confusion made it much harder to decouple the fact of rarity from the uncertainty as to the cause of death. By contrast, in *Matthey*, the trial judge was far clearer as to the need to separate out, conceptually, the question of the rarity of multiple deaths from the expert opinion as to cause of death. And thus the lack of agreement in the medical evidence was able to come to the fore, and in many respects this compelled the conclusion that *Matthey's* case could not be safely sent to a jury: see *Matthey* [2007] VSC 398, per Coldrey J, [188]-[192], [199]. A similar point is made in *R v Phillips* [1999] NSWSC 1175: see *Murder, Medicine and Motherhood*, 6, 195. See also Gaudron J's dissent in *Velevski* which supports the view that a jury faced with a fundamental conflict in the expert evidence on a critical point—and in the absence of sufficiently compelling alternative evidence upon which to base a verdict—must have a reasonable doubt: *Velevski v The Queen* [2002] HCA 4, [86], [112]. Further, given that it was acknowledged that the jury had accessed additional information about Folbigg, there is at least a strong possibility that they also came across the media reports of the committal hearing, including the reporting of the (spurious) numbers: see n 43 below.

within the Folbigg household as suspicious. As Emma tracks in detail, the list of similarities relied on to show that the evidence had “significant probative value” such that it could be used to determine whether Folbigg had killed the children included:

(iii) *each death occurred in the child's own cot or bed;*

(iv) *each death or ALTE occurred during a sleep period;*

(v) *each child was last seen alive by the accused;*

(vi) *each child was found not breathing by the accused, and in relation to those who died in the night, she claimed to have observed from a distance, and in the dark, that they had stopped breathing;*

(vii) *only the accused was awake or present at the time when each child was found dead or not breathing;*

(viii) *there was, in each case, a short interval between the time when the child was last claimed to have been seen alive by the accused, and the time when he or she was found lifeless or not breathing properly;*

(ix) *in relation to the children who died in their cots or had an ALTE in the night, the accused had got up to go to the toilet, and in some cases had returned to bed, before getting up again and sounding the alarm;*

(x) *the accused had failed to pick up or attempt to resuscitate any of the children after the discovery of his or her death or cessation of breathing (subject to her claim to have done so in relation to Laura); ...*³³

Of particular note here is the attempt to read something significant in terms of the probative value into the fact that it was Folbigg who was getting up at night, and who thus was the parent who raised the alarm. Tedeschi’s success in framing care as suspect is apparent when you consider the extraordinary language he uses in describing Folbigg finding her children dead after checking on them while getting up

³³ *R v Folbigg* [2003] NSWCCA 12, [11]. See the discussion in *Murder, Medicine and Motherhood*, Chapter 6, especially 107 ff. The Crown closing address rendered these similarities slightly differently and as Emma points out, the list of similarities itself mutated as the case worked its way through the system—what was initially presented when the Crown was arguing that the cases could, and should, be tried together was reframed at trial. And as the list of similarities shifted, and the Crown was precluded from relying on reasoning of the type offered in the trials of Clarke and Canning, the presence of the diaries became more and more critical to shoring up the appropriateness of the conviction. Note also that in the 2005 appeal, Justice Sully performed what seems to be a rather extraordinary move when he relied on the interlocutory judgment in *Canning* to support the conclusion that the probative value of the evidence was not outweighed by the danger of (unfair) prejudice and thus neither s 101, nor s 137 should operate in *Folbigg* to exclude the evidence. And this is notwithstanding that his Honour had, in the same judgment, previously cited the Court of Appeal’s warning, in *overturning* Canning’s convictions, to be cautious about falling into the trap of “taking the wrong starting point” when dealing with the inferences that can be drawn from rarity. See *R v Folbigg* [2005] NSWCCA 23, per Sully J, [156], [12].

to go to the toilet. As Emma recounts, he first expresses disbelief that a sleep deprived mother would (need to) get up to go to the toilet during the night, and then goes on to say, in his closing address, “her going to the toilet was very dangerous for these children. ... Gosh you’d be telling her not to check on them.” And as Emma emphasises, what should have been much clearer, to the trial judge and indeed the appellate courts—and this is putting aside the descriptive circular similarities that are necessarily present in a case where the deaths of four children from the same family are being heard together—the fact that Folbigg was the primary caregiver explains most of the ‘striking similarities’ that underpinned the joint trial and the admissibility of the evidence as evidence that can be used to negate coincidence.³⁴ Counter-intuitively the Crown was able to convert Folbigg’s ‘good mothering’, her active parenting and role as primary caregiver, into evidence that substantiated her guilt. And while this was a point that the defence made some attempt to articulate, in the end it was unable to make this point strongly or clearly enough, faced as it was with the difficulty of simultaneously trying to frame Folbigg as a caring, ideal, *unambiguously* good mother, who dressed her children neatly and was consistently attentive to their needs.³⁵

So, faced with a mother who in many respects conformed to the ideal—she gave up work, she devoted herself to her children, she to all outside appearances put the interests of her children ahead of herself, and she had, nonetheless tragically, lost those children—the Crown case as run by Tedeschi does a number of things, many of them familiar and predicably manoeuvres. It is perhaps this that makes them in many ways so striking—because what Emma’s book points to is the resilience of normative constructions of motherhood, in the face of sustained critique from feminist commentators, and despite the circulation of what appears to be a more forgiving social and popular discourse about the challenges of parenting (mothering) in contemporary times.

³⁴ And noting, also, that admission of this evidence was thought at the time to require that there be “no rational explanation consistent with innocence”. See above n 3. Which ought to have given the court pause when considering a list of ‘similarities’ that not only relied on Folbigg’s role as primary caregiver, but also sought to draw significance from the fact that, in common with most small children, the Folbigg children spent time at home in their cots, asleep. In contrast, Justice Coldrey in *Matthey* points out that the fact that the children died alone while in the company of their primary carer has minimal, if any, probative value: *R v Matthey* [2007] VSC 398, [193]. While it is important to acknowledge that by the time the appeal in relation to Folbigg’s conviction was heard the admissibility terrain had shifted somewhat, the courts also seem to envisage that even more problematically, the evidence describing the circumstances surrounding the deaths can be used to ground a conclusion as to a probative tendency of the accused (to lose her temper with her children?) as a step in the reasoning process towards guilt, which tends to occlude the risks and slippages involved in relying on evidence of tendency. This approach is consistent with trends in more recent cases in New South Wales involving the use of tendency evidence as an intermediary step, representing what is arguably a problematic lowering of the admissibility threshold: see for example *Regina v PWD* [2010] NSWCCA 209.

³⁵ The attention drawn to the appearance of the Folbigg children, by witnesses called by the defence, is itself striking. Tedeschi’s strategy of discounting the evidence of these supporting witnesses as the ‘gym girls’ plays, successfully perhaps, into this focus on appearances, emphasising that these observers are missing the true picture. See *Murder, Medicine and Motherhood*, 121.

First, as one strand of his case, Tedeschi constructs a narrative of resentment and thwarted ambition: that, notwithstanding her apparent willingness to care for her children, in reality Folbigg resented being made to conform, and that she wished to return to her 'former', self absorbed life. As the Crown case unfolds, it becomes clear that, notwithstanding the presence of contemporary counter-narratives that purport to be more understanding of the difficulties of fulfilling idealised conceptions of motherhood, Folbigg can nonetheless be judged as an unfit mother, for her unwillingness, her immaturity, and her emotional inability to perform the proper role she has *chosen*. The Crown emphasises that Kathleen and her husband had made 'a deal', and this construction of the division of labour within the Folbiggs' home as a choice is an important strategy; it short-circuits the possibility of sympathy, and operates ideologically, rendering the historical realities and pressures of the gendered division of labour invisible.³⁶ Thus she improperly, and contrary to the strictures of the Folbigg family, sought opportunities to work, to socialise, to go to the gym, she was obsessed with her weight and appearance, she unfairly resented the lack of assistance provided by Craig, notwithstanding that she had 'accepted' the binary deal of breadwinner/caregiver. She wanted to go out dancing.

And in terms of how this narrative persists, it is worth noting that in Keli Lane's case much is made of the fact that on leaving the hospital after the birth of her daughter she too goes dancing. The implication is clear, even if one believes her explanation that she has handed her child over to its father, that this is not the behaviour of a woman who wants to be a mother, who genuinely cares for her child. In the Crown case against Lane, she too is obsessed with her weight and appearance and in her case this is more explicitly coupled to the norms of a reserved feminine sexuality. Tedeschi's submissions to the jury included pointing out she had, "a very active social and sex life. A child was just not part of that picture" and that, "[a] child would put a serious dent in these activities . . . as it would have undoubtedly put a dent in her overriding sporting ambitions [to play waterpolo for Australia]."³⁷ Coupled with her promiscuity, and her unacceptable, self-centred immaturity and ambition, is the expressed disbelief that an intelligent, educated woman, from a good family, could have (so many) accidental pregnancies. Even more extraordinarily, Tedeschi argues before the jury that the fact that Lane accepts a job while pregnant, knowing that it is due to commence shortly after the birth of the child, "show[ed] only too vividly that she had no intention of ever taking Tegan home."³⁸ In Tedeschi's narrative, all of her actions

³⁶ The strategic deployment of 'choice' being a common incident of both 'postfeminist' and 'postsocialist' discourse: see Fraser, above n 30 and also Rosemary Hennessy, *Materialist Feminism and the Politics of Discourse* (Routledge, 1993), especially Chapter 4.

³⁷ Variations of these comments were widely reported throughout the trial. See, for example, Lisa Davies, "Games dream led to murder: Court told of Keli Lane's bizarre Olympic motive" *The Daily Telegraph* (Sydney), 10 August 2010, 1.

³⁸ Kim Arlington, "No time for five babies: Keli Lane accused", *The Sydney Morning Herald*, 10 August 2010, 1. The primary argument in the NSWCCA related to whether an alternative charge of

in response to her pregnancies, the adoptions, the terminations, the (alleged) murder, become morally equivalent and equally suspect, and all are evidence of her “tendency to dispose of her children.”³⁹ It is perhaps too easy to note, also, that according to *Woman’s Day*, Lane remains preoccupied with her weight (though she has lost a lot) and the mother of *Ebony* is likewise obsessed with her hair and make-up. By contrast, Folbigg is “fit and well”, she is adjusted to her new life, “prison routine agrees with her.” She smiles.

But at the same time, as a further means of undermining Folbigg’s care of her family, Tedeschi constructs a narrative of the overbearing, controlling, dominant mother—obsessed with routines, unwilling to allow the father to contribute—who is headed, inevitably, towards a battle of wills in which her children will lose. Just as Tedeschi has pointed us to Folbigg’s obsession with her own appearance, he warns us not to be fooled by appearances. It is perhaps worth noting here how this maps onto conventional understandings of that figure of maternal deception, the MSbP mother whose apparent care for her children is in fact a manifestation of a pathological desire for attention.⁴⁰ And by revealing Kathleen Folbigg’s apparently caring, good, mothering as overbearing and potentially monstrous, Tedeschi is able to make far more of the cracks in appearances, via the evidence of Craig Folbigg, the evidence of expressions of temper and lack of control, that seem to take the defence by surprise and places them in an invidious position.⁴¹

manslaughter should have been left to the jury. Defending the decision to confine the case to one of murder only, the Crown argued that manslaughter (or accidental death) was inconsistent with her past conduct in concealing her past pregnancies and the evidence that she had repeatedly shown that she “did not accept the responsibility of caring for the [a?] child.” There was little or no critical discussion in the appeal of the language used by Tedeschi, or of the narratives deployed in her trial, though the second ground related to the prosecutorial approach and conduct during the trial, in particular the posing of questions to the jury in a manner that might displace the Crown’s onus of proof, with comparisons drawn between Lane’s trial and the trial of Gordon Wood.

³⁹ *R v Lane*, above n 20, per McClellan J. In its submissions on sentencing, the Crown argued that her previous pregnancies could be considered as pointing to the seriousness of her offence: “Mr Chapple SC [acting for Lane] submitted that the offence fell at the lowest end of the spectrum in terms of its objective seriousness. The Crown did not accept this submission. It referred to aggravating features involved, the selfish motives underlying the murder, and the fact that this was not the first time the accused had been involved in giving birth to a baby, indeed, a baby she did not intend to keep.” *R v Keli Lane*, above n 7, [36].

⁴⁰ On the construction of (the contentious and arguably now discredited) Munchausen’s Syndrome by Proxy, see discussion in Fiona E Raitt and M Suzanne Zeedyk, “Mothers on Trial: Discourse of Cot Death and Munchausen’s Syndrome by Proxy” (2004) 12 *Feminist Legal Studies* 257.

⁴¹ The fact that the accused has experienced expressed irritation becomes one of the ‘striking similarities’ in the circumstances leading up to the deaths, notwithstanding that the evidence in relation to events preceding *all* four children is equivocal or incomplete. Rather the diaries are used as evidence that the accused is acknowledging that she had become stressed while caring for the children, particularly the third child, Sarah. It perhaps goes without saying that incidents described are hardly unusual in the day to day life of many parents and children, but in an environment where the defence strategy relied on characterising Kathleen Folbigg as conforming to an ideal type, it perhaps shied away from acknowledging Folbigg’s experience as representative of the imperfect, day to day frustrations and conflict that can be generated in the home.

Finally, building on the revelation that Folbigg's mothering was in fact not a demonstration of care, but rather a manifestation of her (improper) desire for control, Tedeschi uses her diaries as confessionals, as Emma points out, to reveal the 'true' nature of Folbigg's mothering by way of the 'machine' for reading her true state of mind.⁴² Thus the emphasis on the way that the diaries record this battle of wills, as well as Folbigg's day to day preoccupations, which include comments on her sense of her own well being. This point reverberates in the list of 'striking similarities' described above as well, as they simultaneously rely on and occlude the normative ideals of motherhood. Most obviously the expectation that an innocent mother, who is truly focused on her children's needs, would have attempted to resuscitate, *to cradle*, her child is implicit in point (x) above. Thus the Crown case is able to present the most striking sections of the diary as unequivocal admissions, isolating the most striking phrases out of their full context: "[Craig] has a morbid fear about Laura—he well I know theres nothing wrong with her. ... *Because it was me not them*" and "Scared that she'll leave me now. Like Sarah did. I know I was short tempered & cruel sometime to her & she left. *With a little help*", and also is able to point to sections that appear to predict the death of her children.⁴³

And the diaries are accepted as revealing Folbigg's awareness of her own *culpability* by the courts, at each appellate level, as they seek to reassure themselves that Folbigg will not become another Sally Clarke or Angela Canning. Emma's account demonstrates the way that the Crown case successfully flattens out ambiguity, extending beyond reading what could conceivably be Folbigg's expressions of her *sense* of guilt and responsibility into admissions and seeping into the reading of all aspects of the diaries, so that expressions of ambivalence towards her experiences are likewise flattened out—functioning as premonition or as evidence of premeditation—so that they too can be subjected to an interpretation that reads only one thing between the lines.⁴⁴ There is, I suspect, a significant class element at work here. Rather than a reading that might allow for a recognition that (women's) diaries might offer insights into the sensibilities and (hidden) *capabilities* of their author (while also acknowledging that they are not a *transparent* record), in this case the framing of the diaries by the Crown—with their mistakes, mundane details and lack of literary

⁴² See Chapter 7 in *Murder, Medicine and Motherhood*.

⁴³ Not mentioned in the judgments as a relevant diary entry, but present in the media accounts, was Folbigg's use of the striking phrase, "Obviously, I am my father's daughter". Folbigg's mother had been murdered by her father, Thomas Britton, because, according to one newspaper report, "Britton was furious over his partner's severe neglect of Kathleen", who was then eighteen months old. See Stephen Cauchi, "Killing them softly", *The Age* (Melbourne), 30 August 2003. It became apparent after the trial that the jury had conducted their own research about the case, and had acquired knowledge of Folbigg's family history: *Folbigg v R* [2007] NSWCCA 37.

⁴⁴ See, for example, in the 2005 appeal, the comment that Folbigg's 'admissions', including that she is trying to control her responses to frustration, or that she has lost her temper, "make chilling reading in the light of the known history of Caleb, Patrick, Sarah and Laura": *R v Folbigg* [2005] NSWCCA 23, per Sully J, [132].

quality—precludes the possibility of a more complex inner life for Folbigg.⁴⁵ And it is worth noting here that, as so meticulously documented by Emma, this flattening of ambiguity is a strategy that is used in relation to the expert evidence as well—the removal of qualification and the eliciting of a hardening of incriminating opinion that is done so skillfully, but also seems to happen almost inevitably, that perhaps even Tedeschi might be surprised by what he has wrought.

The Crown narrative of the overbearing monstrous mother, and use of her diaries to reveal her true nature also, and Emma I think alludes to this, taps into the idea that Folbigg epitomises the deceptive, violent, murderous *woman* who has had us all fooled. In Lane's case, the Crown narrative also emphasised the 'golden girl' with the secret life and hidden tendencies—the ongoing and deep deception that was both evidenced, and revealed, by the multiple (concealed) pregnancies. The point here is complicated, not so much a counter narrative as the supplement to the narrative that sees, or purports to see, murder by a mother of her child as inexplicable, and thus must be in some way pathological.⁴⁶ Rather it is a construction in which deception is inevitably constituted in the (violent, immature, *natural*) female offender and, because of the discursive constructions of gendered difference that are at work here, more fundamentally of Women.⁴⁷

This construction of feminised deviance, and female criminality, and perhaps in particular the construction of the woman who has murdered her child, is never a simple story of departure or aberration from the norm(ative). In fact, as Smart has noted, there is, in the construction of the female criminal, a double strategy at work, one that is premised on the capacity to characterise Woman, and thus the female offender, as “*both kind and killing, active and aggressive, virtuous and evil, charitable and abominable, not either virtuous or evil.*”⁴⁸ And in this respect it is perhaps worth noting a further layer, another echo chamber, one that is hinted at in Emma's account, generated by the cross currents within feminist analysis concerned with agency,

⁴⁵ It is worth noting here also the presentation of Folbigg as a woman of limited intelligence and stunted emotional development, which particularly came to the fore in her sentencing. Emma's account of the ways in which the diaries could be read draws on a far more nuanced account of women's writing. And in this regard it might be worth considering by way of comparison (and contrast) the conventional image of the female novelist, writing in secret, revealing her hidden depth of understanding only her novels. In other work, Emma usefully extends this analytical approach to the reading of other forms of court documents: “(This Is Not a) Story: Using Court Records to Explore Judicial Narratives in *R v Kathleen Folbigg*” (2007) 27 *Australian Feminist Law Journal* 71.

⁴⁶ See, for example, discussion in Raitt and Zeedyk, above n 40. Raitt and Zeedyk open their article with the comment of Justice Hallet, trial judge in *R v Cannings* [2004] 1 EWCA Crim 1: “I have no doubt that for a woman like you to have committed the terrible acts of suffocating on your own babies there must have been something seriously wrong with you. ...” (emphasis added).

⁴⁷ See Carol Smart, “The Woman of Legal Discourse” in *Law Crime and Sexuality* (Sage Publications, 1995).

⁴⁸ Smart, above n 47, 194. Smart's point is that these seemingly contradictory constructions become explicable once we realise that they are implicated in the construction of gendered difference more broadly.

women and violence, but circulating in the public sphere in a form that, inevitably, flattens out historical complexity. For we should also consider how these narratives and (re)constructions of normative motherhood and of concealed criminality play out in a ‘post-feminist’ era and how the figure of the self-absorbed “baby killer mum” can both reveal and replicate a narrative that was a distinctive strand in what we used to call the ‘backlash’—and remains a persistent and pervasive element of contemporary gendered discourse—the ‘popular theory’ of the expressive, violent girl/woman as the inevitable supplement to feminism and equality.⁴⁹

So as Emma points out through her opening epigraph, it *is* complicated, though Emma’s account makes it at least easier to understand the ways in which the medical, legal and popular discourses converged, with such devastating effect, in Folbigg’s case. And to understand why the narrative cannot be that of the rogue Prosecutor, nor is it one of deliberate inattention, or malice, on the part of the court, the experts (though I suspect that Emma is willing to go harder here) or defence counsel. While it is important, as *Murder, Medicine and Motherhood* does, to focus attention on the conduct of the prosecution, and while it is perhaps easy to do as I have done, and make connections with the other cases run by Tedeschi, it is also important to remind ourselves that the obligations of the Prosecutor are but one of the failed trial safeguards—and that (all of) these cases are, indeed telling, diagnostic of systemic failure in the operation of the conventional adversarial trial, and that accusatorial principles require a rethink of the way that courts have conventionally approached the admission and evaluation of expert opinion.⁵⁰ But in the broader sense, that these cases are ‘telling’ instances, popular trials, or moments of hyperpublicity, cases like *Folbigg* and *Lane*, and, notwithstanding the distinction that I drew earlier, also *Wood* and *Gilham*, are, by Fitzpatrick’s definition, a *symptom* of an obsession, that a trial process, conventional or otherwise, is going to be unable to resolve, at the very point when the situation demands, of the process, resolution. So in this environment, how to offer a way forward, while at the same time insisting, as Emma does, on the analytical importance of uncertainty?

Recent coverage of the *Folbigg* case in Australia has focused on the flaws in the expert evidence that was presented at Folbigg’s trial, drawing attention to contemporary understandings of multiple infant death, and including speculation that

⁴⁹ Meaghan Morris uses the term ‘popular theory’ to describe the, often hegemonic, ideas that circulate in and as popular culture: see Mehera San Roque, “Popular Trials/ Criminal Fictions/ Celebrity Feminism and the Bernardo/Homolka Case” (1999) 13 *Australian Feminist Law Journal* 38. See also Carol Smart, “Feminist Approaches to Criminology, or Postmodern Woman meets Atavistic Man” in *Law, Crime and Sexuality*, above n 47; Alison Young, “Criminology and the Question of Feminism” in *Imagining Crime* (Sage Publications, 1996); and discussion in *Murder, Medicine and Motherhood*, 101-103.

⁵⁰ In this respect it is disappointing that in *Wood*, the Court of Criminal Appeal draws attention to the obligations of prosecutions, but does not really get beyond the rogue prosecutor explanation.

were Folbigg to be tried today, the medical evidence could not support a conviction.⁵¹ One of the strengths of *Murder, Medicine and Motherhood* is the careful account of the development and state of the medical literature underpinning the prosecution of Folbigg. The analysis is revealing in a number of ways, demonstrating both the deficiencies of the evidence itself, but perhaps more significantly documenting the way in which the trial process itself contributed to the production of what was arguably a distorted picture of agreement within the field, overstated the strength of the evidence, and further encouraged the prosecution experts to ‘harden’ their opinion. The argument is that not only was Folbigg prosecuted at a moment where the accepted scientific account was itself shifting, but also that her trial occurred at a moment when the punitive narratives of normative motherhood attached to the account of multiple infant death were operating at their full strength. But while it may be true to say that a more tempered view of the expert evidence might mean that a prosecution today, against Folbigg, might not succeed, as I think Lane’s case shows, the normative values that underpinned Tedeschi’s narrative have proved to be extraordinarily persistent—we are not all ‘postfeminists’ now, and it is important not to become complacent about changing times.

But as I have said before, Emma’s book is special because in *Murder, Medicine and Motherhood* she combines her clear eyed gendered analysis with an account of how the case is significant in terms of the operation of the adversarial system *and* she manages to provide concrete (even simple, though not simplistic) principles that can be used both to manage conflicting expert evidence but also to elicit better information so as to enable a trial court to better assess both the strengths and risks attendant on such evidence. Emma argues that when dealing with infant deaths, single or multiple, we need to be attentive, at first instance to our starting point; that is to say that interpretations of behaviour, demeanour, and indeed written records such as diaries, must proceed from, and thus be moderated by, the presumption of innocence. As was made clear in *Canning*, much will depend on your starting point.⁵²

Next, confirming the point made in *Canning*, and applied in *Matthey*, when considering expert (medical) opinion as to cause of death, it is critical to guard against double counting.⁵³ Most obviously expert opinion cannot rely on the now discredited assumptions that the rarity of the multiple deaths is itself indicative of cause. But

⁵¹ See, for example, Eamonn Duff, “New Science would let Folbigg go free”, *The Sun-Herald* (Sydney) 3 February 2013, 4; Mark Whittaker, “Did she do it?”, *Good Weekend* (Sydney), 2 February 2013, 18-20.

⁵² See discussion in *Murder, Medicine and Motherhood*, 205. Note, again by way of contrast to *Folbigg*, that in *Matthey*, Justice Coldrey takes a far more nuanced approach to the interpretation of cues such as demeanour, including (lack of) expressions of grief, as well as noting that evidence of observations as to the accused’s relationship with her children are likewise of minimal probative value as evidence of the accused’s ‘true’ state of mind: see *R v Matthey* [2007] VSC 389, [283], [290], [292]-[299].

⁵³ *Murder, Medicine and Motherhood*, 71.

equally, if expert opinion in this area will be shaped, almost inevitably, by interpretations of psycho-social factors, then this needs to be clearly articulated and understood within the trial context. Consequent on this is thus an obligation on courts, on judges, when considering the admissibility of incriminating expert evidence, to sharpen up their analysis, and to be far more attentive, in a substantive way, to the basis of the expert opinion.⁵⁴ In this context this is particularly important where the reasoning process may have involved the expert being exposed to (arguably) domain irrelevant information or double counting.⁵⁵

Equally, expert obligations in terms of disclosure of reasoning need to be addressed, by the expert, in substantive rather than formulistic terms and Emma's principles would require the expert to not only describe the investigations that were undertaken, and the reasoning process involved, but also to situate the analysis within the existing literature, and to be explicit about the conditions of uncertainty and doubt affecting the field. Significantly, and in line with cases such as *Canning* (and *Matthey*), Emma points out that some conditions of uncertainty will mandate an acquittal.⁵⁶ And thus running parallel to this is an obligation on judges, lawyers, and in particular prosecutors, to be far more attentive to the significance of uncertainty within a discipline; conventional adversarial safeguards or reforms of procedure, with their focus on form over substance, are not a sufficient proxy. So not only must we be sceptical of the manner in which the asserted compliance with Expert Codes is taken at face value by (trial) courts, but we must also ensure that the prosecutorial obligation to disclose uncertainty to the defence is a real one.⁵⁷ Finally, courts need to be attentive to *shifts* in opinion, and to be particularly cautious where it becomes

⁵⁴ In the civil sphere, but consistent with emerging trends in criminal cases, in cases such as *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, courts in Australia have recently (re)directed attention to the importance of determining the 'basis' of the expert opinion (see also *HG v The Queen* [1999] HCA 2), but have stopped short of imposing a condition of substantive or demonstrative reliability on incriminating evidence proffered by the state. See, for example, discussion in Edmond and San Roque, above n 10; Gary Edmond, "Impartiality, Efficiency or Reliability? A Critical Response to Expert Evidence Law and Procedure in Australia" (2010) 42 *Australian Journal of Forensic Sciences* 83-99; and Gary Edmond and Mehera San Roque, "Just(.) Quick and Cheap: Do We Need More Reliable Expert Evidence in Civil Proceedings?" in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis, 2013). The recent decision in *Dupas v R* [2012] VSCA 328 does, however, offer the possibility of a Victorian-led shift in the jurisprudence in this area. Emma discusses trends in this area more broadly in "Independence, Reliability and Expert Testimony in Criminal Trials" (2013) 45 *Australian Journal of Forensic Sciences* 284.

⁵⁵ A far sharper, contextually sensitive, analysis of the ways in which the tendency and coincidence rules function in this area is also indicated.

⁵⁶ *Murder, Medicine and Motherhood*, 201.

⁵⁷ *Gilham* and *Wood* offer salutary lessons here. In a different, but equally fraught field, see for example the discussion and strong criticism of the conduct of the Commonwealth DPP for its reliance on discredited techniques and inadequately qualified experts in its prosecution of minors for people smuggling offences. The report of the inquiry into these cases drew attention to the fact that the Commonwealth DPP continued to rely on a discredited technique for many years after it was on notice that the evidence they were relying on did not have a proper foundation, and further that there was a failure to disclose the known limitations to the defence: *An Age of Uncertainty*, above n 10, Chapter 3, especially 138 ff.

apparent that an expert has hardened their opinion as the investigation and trial unfolds. More specifically in relation to infant deaths, Emma proposes a set of categories that will help prosecutors, experts and courts to manage the complexity, and help them to identify which cases are most likely to be vulnerable to mistranslation, to double counting, to miscarriage.⁵⁸

Emma's proposed principles are ones that have been developed in response to the particular risks revealed in the Folbigg prosecution, and in this respect her book is located firmly as part of a feminist reform project. This location is particularly clear when we consider the principles she offers as ways to think about Folbigg's diaries that are attentive to the complexities of relying on such documents.⁵⁹ But further, it is this careful attention to the narrative patterns that reflected and instantiated normative ideologies of motherhood in this 'telling' case that enable what might be otherwise seem as a distinct (ungendered) reform project with respect to the management and evaluation of expert evidence more broadly.⁶⁰ Her proscriptions and prescriptions are informed by her attentiveness to and acceptance of the inevitable role of interpretation, mediation and (re)construction when dealing with expertise in the courtroom—and that this process might be able to support the production of more, rather than less, reliable evidence.⁶¹

And these principles that Emma foreshadows in the final chapter of *Murder, Medicine and Motherhood*, and develops further elsewhere, are principles that can be applied by courts now.⁶² They are consistent with fundamental principles of the criminal trial—ensuring fairness for the defendant, the presumption of innocence, proof beyond reasonable doubt, factual rectitude—and with current evidentiary rules and frameworks,⁶³ introducing new safeguards into the trial directed towards managing a

⁵⁸ *Murder, Medicine and Motherhood*, Chapter 4 and 200.

⁵⁹ Again, while these ideas might be most easily related to cases with comparable fact patterns, they are by no means limited to such cases.

⁶⁰ Comparison with work such as Dorothy E Smith's *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (University of Toronto Press, 1990), or Rosemary Hennessy's (above n 36), comes to mind here.

⁶¹ In this regard, Latour insists on what is perhaps a reconfigured image of certainty when he argues that reliability and accuracy should be seen as the *products* of mediation and interpretation: see Bruno Latour, *On the Modern Cult of the Factish Gods* (Duke University Press, 2010).

⁶² See also Emma Cunliffe, "Independence, Reliability and Expert Testimony in Criminal Trials", above n 54.

⁶³ This is notwithstanding the fact that the development of a jurisprudence around the admissibility of expert evidence in Uniform Evidence Law jurisdictions, particularly with respect to incriminating expert evidence, has been slow and uneven, and that courts, particularly in New South Wales, have resisted importing a condition of reliability as a threshold requirement. Even in Uniform Evidence Law jurisdictions there are signs of a (limited) shift in approach in relation to expert evidence, and a recent authoritative decision of the Victorian Court of Appeal has confirmed that the trial judge does have a role in evaluating the reliability of evidence when considering whether to exclude evidence that might be prejudicial, confusing or misleading, to the extent that the risks outweigh the probative value of the evidence (s 137 Uniform Evidence Law): *Dupas v R*, above n 54. Note, however, the NSWCCA's responsive counterpoint to *Dupas*, on the interpretation of s 137, in *R v XY* [2013] NSWCCA 121, handed down in May 2013. In relation to relationships between fundamental fair trial principles and

potentially pathological coproduction.⁶⁴ Her principles are very much in line with reforms that might be developed in response to critiques of forensic sciences informed by the critique, for example, of the National Academy of Sciences,⁶⁵ but they offer something that can be done without a need to wait for a broad, externally generated reform project, or a wholesale revision of the trial process, or the manner and form in which expert evidence is presented to such a forum.

In *Murder, Medicine and Motherhood* (and elsewhere) Emma actively resists and reconstructs the conventional law/science binaries, and consequently she offers something both more realisable *and* more nuanced than the conventional ‘reform’ agendas of concurrent evidence, expert codes, specialised courts, judge only trials, and other standard responses to the expert evidence ‘crisis’ as it is conventionally configured. Such responses, may offer some benefits, and—putting aside the perennial calls for the abolition of the jury—they are not necessarily inconsistent with Emma’s principles. But, as conventionally configured, such responses generally over-estimate the efficacy of procedural reform and they lack reflexivity; they fail to account for the complexity of the dynamics that *Murder, Medicine and Motherhood* uncovers. Thus to insist on uncertainty, as Emma does in her conclusion, is a principled response, but more than this, it is also a *pragmatic* one.

admissibility rules for expert evidence, see, for example, Gary Edmond and Andrew Roberts, “Procedural Fairness, the Criminal Trial and Forensic Science and Medicine” (2011) 33 *Sydney Law Review* 359.

⁶⁴ The characterisation of coproduction as potentially *pathological* is borrowed from Gary Edmond and discussed in Gary Edmond and Mehera San Roque (with others), “Justicia’s Gaze: Surveillance, Evidence and the Criminal Trial” (on file).

⁶⁵ See above n 4.
