

**‘Don’t read the comments!’****Reflections on writing and publishing feminist socio-legal research as a young scholar****Emma Cunliffe\***

I have found it difficult to know where to begin a response to two reviews that succeed in being both enormously generous and fully engaged with the work that forms the basis of *Murder, Medicine and Motherhood*. It is a standard academic joke that we should count our blessings if our research is read by long-suffering family members and one or two of those in our field. With Eve Darian-Smith and Mehera San Roque as my allotted readers, I am blessed indeed.<sup>1</sup> The two reviews published in *feminists@law* are particularly exciting for me as they are written by women whose research accomplishments offer aspirational models for my own work. In a world in which the work of writing reviews tends to be under-valued, it is a particularly feminist act not just to review a book, but to write the review as richly and carefully as these two pieces have been written. I will try to do justice to Darian-Smith and San Roque’s engagement in my response. As well as responding to Darian-Smith and San Roque’s insights, I have also taken this invitation as an opportunity to reflect a little on the experience of writing *Murder, Medicine and Motherhood*, and on its reception.

In the next section, I trace the choices and unanticipated challenges that structured my research for *Murder, Medicine and Motherhood*. Both Darian-Smith and San Roque have commented on this methodology, and I have noticed that after publication, the scope and content of the finished product of a research project can seem inevitable. In this section I try to unpack that appearance, because I think that there can be value in trying to remember why certain choices were made at certain times, and in pondering the accidents that prompt turns within one’s work.<sup>2</sup> The following section considers the transition that takes place when a published work enters the field and in fact changes the topic of research in certain ways. Given the media attention that my conclusions have attracted

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<sup>1</sup> These reviews arose from an author-meets-reader session at the 2012 Law & Society Association conference. The session was organized by my dear friend Pooja Parmar. I am also tremendously grateful to Pooja for organizing the panel and to Rosemary Hunter for suggesting that we turn the session into a set of articles for *feminists@law*.

<sup>2</sup> Simon Halliday and Patrick Schmidt’s excellent work *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge: Cambridge University Press, 2009) provides a model for such reflection.

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and the possibility that Kathleen Folbigg's case may now be reviewed, *Murder, Medicine and Motherhood* has to some extent had this effect. In the course of my work becoming a more public product, my conclusions and my sense of myself as an academic have also been challenged at times. The rewards and perils of media engagement form a topic that is occasionally discussed in the literature,<sup>3</sup> but rarely with regard to explicitly feminist work. Given that academics are increasingly exhorted by our employers and research funding agencies to demonstrate the public relevance of our work, and to engage with mass media, it seems important to consider the possibilities and the pitfalls of such engagement from a feminist perspective.

### **Methodology: A mixture of choice and chance**

I am occasionally asked how I chose to focus on the *Folbigg* trial. The project that became *Murder, Medicine and Motherhood* did not begin as a study of a single case. In 2004, as I proposed the doctoral research on which the book was ultimately based, the English courts, Home Office, Royal College of Paediatrics and Child Health, and Royal College of Pathologists were responding to the realization that justice had failed Sally Clark and Angela Cannings. Trupti Patel had been acquitted. Donna Anthony's exoneration soon followed, as did a number of reports that sought to understand the variety of errors that had contributed to these wrongful convictions and to prevent their recurrence.<sup>4</sup> However, with the notable exception of Fiona Raitt and Suzanne Zeedyck's insightful article on Munchausen Syndrome by Proxy, very little of the commentary on these cases explored why *mothers* had been the subject of these errors.<sup>5</sup>

Meanwhile in Canada, one had to look more closely, but there were glimpses that all was not well with child homicide prosecutions in Ontario. Judgments had been issued either acquitting parents and caregivers charged with killing children (and criticizing expert witnesses along the way),<sup>6</sup> or staying prosecutions.<sup>7</sup> In other cases, prosecutions had

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<sup>3</sup> Two of the best examples are Michael McCann and William Haltom, *Distorting the Law: Politics, Media and the Litigation Crisis* (Chicago: University of Chicago Press, 2004) and Austin Sarat and Susan Silbey, "The Pull of the Policy Audience" (1988) 10 *Law & Policy* 97.

<sup>4</sup> See for example Helene Kennedy, *Sudden Unexpected Death in Infancy: A Multi-Agency Protocol for Care and Investigation* (London: Royal College of Pathologists and Royal College of Paediatrics and Child Health, 2004); Royal Statistical Society, Peter Green, *Letter from the President to the Lord Chancellor regarding the use of statistical evidence in criminal cases* (Royal Statistical Society 2002) available online at <http://www.rss.org.uk/uploadedfiles/userfiles/files/Letter-RSS-President-Lord-Chancellor-Sally-Clark-case.pdf>.

<sup>5</sup> Fiona Raitt and Suzanne Zeedyck, "Mothers on Trial: Discourses of Cot Death and Munchausen's Syndrome by Proxy" (2004) 12 *Feminist Legal Studies* 257.

<sup>6</sup> *R v SM* 1991 CarswellOnt 3660.

been withdrawn by the Crown, in some instances after trials had begun.<sup>8</sup> In Australia, coincidence evidence against Tracey Phillips had been excluded by a NSW Supreme Court Judge, resulting in a withdrawal of charges,<sup>9</sup> and charges had been laid against Carol Matthey for killing four children.<sup>10</sup> Kathleen Folbigg had, of course, been convicted and sentenced for killing her four children.

It was apparent that serious battles were taking place in courtrooms around infant death, and mothers seemed the most vulnerable participants in these cases (though fathers and other caregivers were also affected, especially in Canada). It was less clear why these cases were emerging in several jurisdictions at about the same time. The initial goal of this project was to understand where this particular trend had come from, to explore how it might be linked to changing expectations of both motherhood and medical science, and to think about the connections between these cases and the broader literature on criminalization.<sup>11</sup>

The motherhood aspect of the cases seemed crucial to me, from at least two points of view. First, taking seriously Carol Smart's suggestion that legal discourse helps to *produce* gendered subject identities, I worried about the effects of a turn towards the punitive in criminal law's approach to motherhood – and I saw troubling connections between criminal law and other fields such as family law and welfare law in this regard.<sup>12</sup> What disciplining effects might these cases have on other mothers? Secondly, I was also struck by Shelley Gavigan's rejoinder to Smart – her suggestion that seeing women within law as purely a discursive construction overlooked the importance of lived experience, leaving women with 'neither agency nor experience' beyond the discursive construction of their lives.<sup>13</sup> I was interested in both how law produces authoritative

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<sup>7</sup> *R v Kporwodu & Veno* (2003), 176 C.C.C. (3d) 97 (Ont. S.C.J.), aff'd (2005), 195 C.C.C. (3d) 501 (Ont. C.A.).

<sup>8</sup> These cases had been reported in Canadian media by 2004, but are conveniently described together in Stephen T Goudge, *Report of the Inquiry into Pediatric Forensic Pathology Services in Ontario* (Toronto: Queen's Printer, 2008) volume 2, chapter 2.

<sup>9</sup> *R v Phillips* [1999] NSWSC 1175 (17 December 1999) Bell J.

<sup>10</sup> "Authorities were Told of Child Deaths" *The Age* (29 August 2003) 1.

<sup>11</sup> For example, David Garland, *The Culture of Control: Crime and Social Order* (Oxford: Oxford University Press, 2001); Jonathon Simon, *Governing through Crime Metaphors* (2002) 67 *Brooklyn Law Review* 1035. I was also cognizant of the criticisms that had been made by feminists of the inattention to gender within the criminalization literature. For example Lorraine Gelsthorpe, "Female Offending: A Theoretical Overview" in G. McIvor (ed.) *Women Who Offend* (London: Jessica Kingsley, 2004) at 76.

<sup>12</sup> Carol Smart, "The Woman of Legal Discourse" (1992) 1 *Social & Legal Studies* 1 at 29.

<sup>13</sup> Shelley Gavigan, "Mothers, Other Mothers and Others: The Legal Contradictions and Challenges of Lesbian Parenting" in Dorothy Chunn and Dany Lacombe (eds) *Law as a Gendering Practice* (Oxford: Oxford University Press, 2000) 100 at 105.

subject identities for women and in how these authorized identities might depart markedly from the lives of the women they purport to categorize and thereby render susceptible to judgment.<sup>14</sup>

I knew I wanted to look at trial transcripts and court records, because I had a sense that they offered the material from which one might be able to challenge the fluency of law's authorized narratives regarding facts and culpability, and I suspected I would need to mount that challenge at times. The legal archive seemed an obvious starting point for understanding more about cases than one can learn by reading judgments. However, very little was written about how one should approach the task of analyzing transcripts and court records. Accordingly much of my first eighteen months was spent developing a workable process by analogy with qualitative research methods borrowed mostly from sociology and history – and influenced especially by the feminist institutional ethnographies of Dorothy E. Smith.<sup>15</sup>

A further challenge was presented by difficulties of access. Access problems, which seem anecdotally to be widespread, but are too rarely described in published work, excluded the English cases from close analysis, and plagued my attempts to investigate *Matthey*.<sup>16</sup> The NSW Court Registry was, by contrast, willing to allow me access to its records in *Folbigg* and *Phillips* and able (for a fee) to make copies of those documents I wished to retain.

In Ontario, strong principles of open justice offered a more stable route to accessing court records. However, concerns about child homicide cases progressed during 2005 to the point where the Office of the Chief Coroner for Ontario announced that he would

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<sup>14</sup> I have written more about these concerns in Emma Cunliffe, "(This is not a) Story: Using Court Records to Explore Judicial Narratives in *R. v. Kathleen Folbigg*" (2007) 27 *Australian Feminist Law Journal* 71 and with Angela Cameron in "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 *Canadian Journal of Women and the Law* 1.

<sup>15</sup> Dorothy Smith, *Institutional Ethnography: A Sociology for People* (Lanham MD: AltaMira Press, 2005); Dorothy Smith (ed.) *Institutional Ethnography as Practice* (Lanham MD: Rowman and Littlefield, 2006). An article by Stephen Robertson also proved invaluable. Stephen Robertson, "What's Law Got to Do with It? Legal Records and Sexual Histories" (1995) 14 *Journal of the History of Sexuality* 161.

<sup>16</sup> The English Court of Appeal denied my request for access to the *Clark* and *Cannings* files on the basis that it considered a PhD to be a personal project, and presumably therefore exempt from the principles of open justice. Challenging this decision was beyond my resources. Later in the study, the Victorian Supreme Court returned all exhibits used in *R v Matthey* to the parties immediately after Coldrey J issued his judgment criticizing the prosecution evidence and the expert testimony offered in *R v Matthey* (see [2007] VSC 398). These exhibits had been used in open court and would otherwise have been available for inspection as part of the court record. I had access to the transcripts of argument in the Supreme Court, and the transcripts of the committal hearing. However, without the exhibits, it would be difficult to perform a complete analysis of the case. These experiences eventually prompted me to write an article about the concept and importance of open justice: Emma Cunliffe, "Open Justice: Concepts and Judicial Approaches" (2012) 40(3) *Federal Law Review* 385.

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commission a review of all criminally suspicious cases in which pathologist Charles Smith had been involved.<sup>17</sup> This review concluded that there were serious errors in 20 of 45 cases, and the Goudge Inquiry was announced while the Ontario Court of Appeal and Supreme Court of Canada began to review individual appeals. This was welcome news for the parents and caregivers who believed that they had been wrongly convicted or unfairly accused of killing children, and those who supported their cause. It also made researching these cases much more of a moving target.

In the end, after much worry, and many consultations with my PhD committee, we decided that I would focus on a close analysis of the Australian cases and draw the English and Canadian cases in for context rather than direct study. I obtained copies of large portions of the *Folbigg* and *Phillips* files, and set to work persuading the Victorian courts to give me, at least, the transcripts in *Matthey*. By mid-2007, I had all of these materials. I also had the sense from time spent with the documents in the court registry that *Folbigg* was different from the other cases – the Crown evidence was more troubling, more complicated, perhaps more evenly weighted. I decided to write a chapter for the imagined dissertation explaining the *Folbigg* case. After it had been drafted, I met again with my committee and much to my relief my supervisor suggested that I focus solely on *Folbigg* going forward. Six years later, the ‘progression’ of my PhD dissertation from nine cases in three jurisdictions, to three cases in one jurisdiction, to focusing on a single trial is a subject of amusement among my committee – but at the time, it felt like an enormous gamble to write about ‘only one case’.

Another thing I hadn’t anticipated when I began the project was that it might take me deep into the published medical literature. However it became apparent from early reviews of the expert testimony that it would be helpful to read the cited material. This led me to wonder how that material fitted with a broader field of medical research and ultimately I read everything I could find about the relationship between SIDS and homicide. Reviewing this literature, seeking to understand individual conclusions, the limits of those conclusions and the intellectual genealogy of a body of work as a whole, took months and required me to develop a somewhat different set of skills from those I had so far used to analyze the court record. I was fortunate to find Sheila Jasanoff’s work<sup>18</sup> and that of Gary Edmond<sup>19</sup> early in my research, as their (slightly different) conceptualizations of the relationships between legal and expert knowledges became the theoretical scaffolding that structured my approach to both the medical literature and the

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<sup>17</sup> Goudge, above note 8, volume 2 at 30-1.

<sup>18</sup> Particularly Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Cambridge MA: Harvard University Press, 1995).

<sup>19</sup> See the works cited below, note 20.

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expert witnesses' work in *Folbigg*. Edmond's early work on expert testimony offered a model for careful analysis of the claims and discursive contests within experts' work in court.<sup>20</sup> Linking that literature to Smith's idea that institutional knowledge circulates through texts and is activated by the work of people<sup>21</sup> gave me a sense that it might prove fruitful to trace the connections and interruptions between published medical research, expert reports and testimony.

This combination of methodological choice and theoretical approach informed my conclusions in *Murder, Medicine and Motherhood* and ultimately led particularly to the recommendations I have made for managing expert evidence. I am heartened that San Roque finds these suggestions pragmatic and capable of ready implementation even as I am conscious that, requiring courts to re-conceptualize expert knowledge, they are unlikely to be fully embraced in the near future. Nonetheless, I think the concept of double counting – the idea that courts should be attentive to the possibility that expert opinions are informed by the very adverse behavioural evidence and implicit prejudice that is often relied upon by triers of fact to 'validate' those opinions – is an important one, and I will explore it further in future work.

I make a point of relating the 'backstory' to my doctoral work each year to the graduate students I teach in my methodologies class, because I think it illustrates the ways in which research projects are shaped by accidents and opportunities. I make a point of telling the story here because Darian-Smith has praised my methodological approach for its range and for the way in which it is integrated with my theoretical lens. The methodological challenges presented by this project seemed immense at times, and if I have succeeded in meeting those challenges, it is at least partly because I had a supervisory committee – Susan B. Boyd, Wesley Pue, Christine Boyle and Dorothy Chunn – who encouraged me to be flexible and creative in my approach, and to persevere with empirical work in the face of unexpected difficulties. I am very grateful to them for the trust they placed in me as I found a way through it all.

### **Transitions: From academic work to media engagement**

As I was preparing the book for final publication, I faced two decisions that I found difficult. First, how bluntly would I state my conclusion that Kathleen Folbigg had been wrongly convicted? Secondly, what steps could and should I take to draw attention to my

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<sup>20</sup> Gary Edmond, "Azaria's Accessories: The Social (Legal-Scientific) Construction of the Chamberlains' Guilt and Innocence" (1998) 22 *Melbourne University Law Review* 396; Gary Edmond, "Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High-Profile Criminal Appeals" (2002) 22 *Oxford Journal of Legal Studies* 53.

<sup>21</sup> Smith, *A Sociology for People*, above note 15, chapter 8.

conclusions? As I have already identified, Folbigg's trial seemed in certain respects better managed than many of the trials that were approximately contemporaneous with it. The trial judge did not permit expert medical witnesses to testify directly to the dogma that the presence of multiple deaths in a given family suggested murder, reasoning that this opinion was based on common sense rather than expertise.<sup>22</sup> Nonetheless, I found that this logic entered the trial in invidious ways, some of which made this reasoning more difficult for the defence to contest than might have been the case if the opinion had simply been directly attested to.<sup>23</sup> There were, additionally, strong hints that some of the experts were influenced by Kathleen Folbigg's diaries and perhaps by other inculpatory evidence when they testified about cause of death in individual children. Craig Folbigg, Kathleen's estranged husband, likewise changed his testimony in a way that was considerably more damning than his previous statements to police and Crown. The diaries were used by the Crown prosecutor in a manner that could well have left the jury uncertain about what Kathleen Folbigg wrote, and how Tedeschi (the prosecutor) interpreted those entries. All of these strategies were troubling, and each proved difficult for the defence to counter at trial.

While recognizing that this was a difficult case to defend, I was also somewhat critical of some of the choices that had been made by Folbigg's defence team at trial. Most particularly, when the Crown suggested that the jury could use Folbigg's interest in physical fitness, or her evenings out with friends, or her occasional desire to work outside the home, or her frustration at Craig's refusal to help with household chores to discern a possible motive for her to kill her children, the defence responded by suggesting that these hadn't been Folbigg's true desires at all. As a feminist (frankly, as an adult woman living in an OECD country), it seemed astonishing to me that the defence had not also challenged the Crown's reasoning.

The notion that a reason to murder one's children can be discerned from a desire to be fit, a concern about whether her husband would find her attractive when she felt overweight, a wish to share household work more equally or a desire to have her own money and to help secure the financial stability of her family seems absurd when decontextualized from its application to a woman who was already suspect by virtue of having lost four children and being charged with their murder. The apparent salience of these (contested) facts demonstrates the importance of framing – they mattered *because* Folbigg had lost her children and *because* she was charged with murder. The possibility that this reasoning might put the cart before the horse was never adequately addressed at trial. Rather, in the context of the trial, the bizarreness of the Crown's logic went largely unchallenged and

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<sup>22</sup> *R v Kathleen Folbigg*, unpublished decision of Barr J, 7 May 2003.

<sup>23</sup> The discursive and strategic moves that permitted this re-emergence are traced in *Murder, Medicine and Motherhood* at 73-79.

the logic was at times actively supported by the defence strategy of accepting the category, but denying that Folbigg fitted within it.

The defence was undoubtedly surprised by Craig Folbigg and Lea Bown's<sup>24</sup> testimony that Kathleen had occasionally been rough with Laura. This testimony was at odds with prior statements, and was cross-examined on that basis. Again, however, the defence didn't squarely challenge the proposition that murderous tendencies can be discerned from, for example, holding down a child's hands in frustration when she resists eating her breakfast – preferring instead to deny that such incidents had occurred. Like San Roque, I am perturbed by the apparent ease with which the NSW Department of Public Prosecutions has leveraged a particularly punitive – at times misogynistic – vision of contemporary womanhood in the service of convicting women for crimes that may never have occurred, and by the implications that these strategies may have for every woman who struggles at times with the frustrations and loneliness of mothering. It also troubles me that these moves were not targeted, and countered, by the defence at trial. Yet these moves are not unique to *Folbigg*, nor even – as *Clark* and *Cannings* demonstrate – to NSW. I suspect that they are rarely countered in criminal courts as strongly as they should be.

There were also some positive indicia of factual innocence in Kathleen Folbigg's case. In *Cannings*, the English Court of Appeal made much of the fact that none of Cannings' children had any signs of smothering on autopsy:

It is of course possible to smother a baby without leaving any physical signs discernible on medical examination or at post mortem. Nevertheless, given that all four children were said by the Crown to have been subjected to violence sufficient to cause death, the absence of any physical signs of injury was somewhat surprising. There was no fresh copious bleeding in the lungs of the dead children, and no petechial haemorrhage. There were no pressure marks to show as reddening in the area of the mouth and nose, nor blood or bloodstained fluid in the nose. No bruises were discovered on the outer skin surface, or indeed subcutaneously. The fraenum, in each case, was undamaged.<sup>25</sup>

The four Folbigg children were likewise free from all signs of foul play. This was important in aggregate, and perhaps most striking in relation to Laura, who was well above the age at which it is normally considered possible to smother an infant without detection, and whose autopsy was conducted by a pathologist who strongly suspected homicide based on the family history. Each of the children was autopsied, and in two cases (Patrick and Laura) investigating doctors identified a plausible natural cause of death at the time of autopsy. In relation to both of these children, doctors testified at trial

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<sup>24</sup> Lea Bown is Kathleen Folbigg's foster sister.

<sup>25</sup> *R v Cannings* [2004] EWCA 1 at para 160.

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in a manner that was inconsistent with earlier conclusions, but without explaining the reasons for their change of opinion. In fact, the jury would have had to work hard to realize that the medical opinions had changed at all.

Likewise, Folbigg had none of the risk factors identified in the literature as predisposing a mother to smothering her children. This remains true even when one includes studies that have been criticized as being unduly suspicious of women.<sup>26</sup> Craig Folbigg did not suspect Kathleen of having killed their children until he spoke to police and subsequently read Kathleen's diaries after she had left him, and them, in the marital home. When Craig told Kathleen that he had suggested to police that Kathleen may have killed their children, Kathleen told Craig to go back to the police station and 'tell them the truth'.<sup>27</sup>

The Crown case at trial was that Folbigg killed her children and then immediately raised the alarm. The Crown made much of some evidence that the two children who died at night were found by Folbigg as she went to the toilet – San Roque has quoted Tedeschi's sarcastic comment about Folbigg's bodily functions. There was conflicting evidence about whether the children's bodies were cool to the touch when they were found – but this was not drawn to the court's attention. It is clear from the 2007 appeal that this factor mattered to some jurors (and to the NSW Court of Criminal Appeal).<sup>28</sup>

Collectively, the lack of physical signs of foul play after careful assessment; the presence of positive indicia of natural causes; the lack of risk factors; the possibility that the bodies of the children who were found at night were cool to the touch when attended by ambulance personnel; the lack of suspicion of Folbigg by her closest family and friends; and her immediate response to the revelation that she was now suspect, suggest that there may be good reasons to believe that Folbigg did not kill her children.

When I was writing the manuscript that became *Murder, Medicine and Motherhood*, I was not particularly looking for evidence of factual innocence, or even for evidence of an error that could found a claim of wrongful conviction. I was, as I have already noted, interested in what prompted the trend towards charging mothers who suffered multiple infant death, keen to understand the implication of changing concepts of motherhood and medical science in this trend, and I hoped to investigate the links between these matters and the criminalization literature. I am grateful to Darian-Smith and San Roque for

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<sup>26</sup> This research is discussed at length in chapter five of *Murder, Medicine and Motherhood*. Perhaps, Kathleen Folbigg's early childhood could be interpreted as constituting a difficult upbringing. Barr J construed her history in this way when sentencing Folbigg (*R v Folbigg* [2003] NSWSC 895). However, by most accounts she was a relatively settled child and teenager and one should be careful before generalizing from an infant history to adult findings of criminal guilt when there is an intervening period of unexceptionable behaviour and a capacity to form personal relationships.

<sup>27</sup> Craig testified at trial that he interpreted this direction as a coded injunction to lie to police.

<sup>28</sup> *R v Folbigg* [2007] NSWCCA 371 at para 8 and 56-9.

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focusing on these dimensions of the book in their comments. They remain, for me, the core of the academic project and the factors that will continue to animate my work. However, in light of the evidence that militated against Folbigg's guilt, I decided to state clearly that I believed Folbigg had been wrongly convicted. NSW does not have any corresponding institution to the Criminal Cases Review Commission, and so the question of what might happen next was far from clear.

I did not correspond with Folbigg until the proofs were finalised. When the contract with Hart was signed, however, I reached the conclusion that it was important to alert Folbigg to my conclusions and offer to send a copy of the book to her.<sup>29</sup> The letter I received in response put the essential conundrum I now faced into devastating clarity. Rather than protesting her ill treatment within the justice system, Folbigg wrote: 'If this is purely for publication ... then I would appreciate being informed of this. As hope can destroy as much as enliven ones soul.' Receiving this letter, I was aware of both my relative lack of capacity to offer practical help – as an academic lawyer working in another country, with no practising certificate – and of the enormous privilege I enjoy by virtue of my education and institutional position. I resolved to do what I could to find Folbigg a lawyer who could act on her behalf, and that I would also try to draw the media's attention to my conclusions.

*Murder, Medicine and Motherhood* is deeply critical of the press coverage of Folbigg's trial. Based on my quantitative and qualitative analysis of that coverage, I concluded that the press systematically ignored the challenges made by various witnesses to the Crown narrative of the case, and thereby presented an imbalanced account of the evidence in Folbigg's trial. My decision to try to enlist the media's help to reverse the conviction felt ironic, at best. Dorothy Chunn, who has taught me so much about media and media analysis, assured me however that the press would care less about consistency in its own reporting than it would about the newsworthiness of a credible claim that Folbigg may have been wrongly convicted. Her prediction proved right, and my efforts resulted in several favourable stories, particularly in the *Sydney Morning Herald*. The *60 Minutes* and *Alan Jones Show* followed in mid-2013. I hope, though I don't yet know, that these stories will help Folbigg to persuade the court of public opinion that there may be more to her case than was first reported.

As feminist scholars might anticipate, the journalists I have spoken to have been much more interested in the failures of institutional processes that formed part of the investigation and trial than they have been in my analysis of the ways in which Folbigg's

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<sup>29</sup> Debra Parkes and I had a number of conversations about whether to approach Folbigg, and if so by what means. Her wisdom and her greater experience with women in prison were instrumental to the strategy we formulated, and I appreciate Debra's generosity in helping me to find a suitable way to alert Folbigg of the book's existence while ensuring that she had adequate support and that her privacy was respected.

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mothering was punitively enlisted against her. This focus is consistent with the coverage afforded to Sally Clark, Angela Cannings, and the Canadian exonerees. To the extent that a story of miscarriage of justice has gained traction in the media, it has largely excluded the concerns about the targeting and disciplining of women that San Roque articulates in her piece in this issue, and that I sought to raise in *Murder, Medicine and Motherhood*. A feminist narrative has thereby been stripped out of a more conventional liberal account of the rational expectations of criminal justice and medical institutions.

My experience of engaging with the media in Folbigg's case resonates with the conclusions drawn by Dorothy Chunn, Susan Boyd and Hester Lessard in their study of feminism, law and social change. Speaking about law reform, these authors observe that:

While they never controlled the agenda-setting process, feminists have been active and influential to varying degrees in proposing and shaping socio-legal reform ... However, the broader social and economic forces represented by neo-conservatism and neo-liberalism have an important mediating influence on the impact that feminism can achieve.<sup>30</sup>

Chunn, Boyd and Lessard conclude that feminist successes have been strongest when feminists have found common cause, or strategic alliance, with strands of neo-conservatism or neo-liberalism. This conclusion has important ramifications for feminist academics, who are increasingly finding their performance judged against criteria such as 'impact' – including the extent to which one's work is embraced within political, judicial or public discourse. The assumption that merit is the only criterion by which academic work will be judged within these spheres is unsettled by studies such as Chunn, Boyd and Lessard's.

In keeping with the media interest in 'how it feels' to experience reported events,<sup>31</sup> *60 Minutes* and the *Sydney Morning Herald* have also featured interviews with Kathleen Folbigg's friends and foster sister. While Folbigg's foster sister remains convinced that Folbigg killed her children, her friends quietly supported her throughout her trial and imprisonment. In this most recent phase, the media attention has been reconfigured and Folbigg's friends have assumed a prominence that they did not have during the trial and appeals. The implicit message being promoted appears to be that Folbigg's friends are ordinary, loving women who are also mothers – and who cannot conceive that their friend committed the crimes of which she was convicted. This aspect of the reportage

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<sup>30</sup> Dorothy E. Chunn, Susan B. Boyd and Hester Lessard, "Feminism, Law & Social Change: An Overview" in Dorothy E. Chunn, Susan B. Boyd and Hester Lessard (eds), *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) at 4.

<sup>31</sup> See *Murder, Medicine and Motherhood* at 168 – 70; Richard Ericson, Patricia Baranek and Janet Chan, *Representing Order: Crime, Law and Justice in the News Media* (Toronto: University of Toronto Press, 1991) at 35.

has exhumed Folbigg's humanity in place of the 'monster' who was previously depicted in the media.<sup>32</sup> It appeals to the emotional dimensions of the case – inviting readers to consider for the first time the awful possibility that Folbigg may first have lost four children, and then been wrongly convicted of killing them. However, this reportage also sidesteps the question of how and why Folbigg was portrayed so differently by the prosecution and in the media in the initial phases of the case. In particular, while the diaries have occasionally been reproduced and discussed in this media coverage, there has been relatively little sustained consideration of the role they might have played in Folbigg's mothering and her grief about her children's deaths. The observations that I made in *Murder, Medicine and Motherhood* about the implications of the privatization and gendering of responsibility for early childhood, and the ways in which this responsibility has been harnessed by Crown prosecutors to the task of rendering some mothers suspect,<sup>33</sup> have (predictably) been wholly ignored within the media coverage. San Roque's piece in this issue demonstrates the extent to which such prosecution strategies are, in fact, reinforced by the media coverage of cases in which women are prosecuted for homicide.

### **Works in progress**

As I prepare this response, the final chapter of Folbigg's case remains incomplete. The moderate success of efforts made by several people to draw attention to concerns about the evidence given at Folbigg's trial provides some reason to hope that the convictions may be reviewed. However, the mechanism by which this may happen remains unclear. Having exhausted normal avenues of appeal, Folbigg's quandary illuminates the inadequacy of NSW's mechanisms for criminal review. As San Roque and Gary Edmond have argued, Folbigg's case and others also demonstrate that the ethical obligations imposed on prosecutors and experts do not substitute for vigilant judicial oversight of the evidence introduced against criminal defendants.<sup>34</sup> I will continue to do what I can to draw my conclusions to the attention of those who may be in a position to review Folbigg's convictions. Despite the positive reception my work has enjoyed, Folbigg remains in prison, locked in a protective ward in a maximum security women's facility that is housed inside a men's prison on the outskirts of Sydney.

While I work to correct the injustice that has been done in Folbigg's case, however, I am grateful to Darian Smith and San Roque for focusing on the systemic implications of my

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<sup>32</sup> *Murder, Medicine and Motherhood*, chapter eight.

<sup>33</sup> *Murder, Medicine and Motherhood*, chapter six, particularly 104-16.

<sup>34</sup> San Roque, this issue. See also Gary Edmond and Mehera San Roque, "The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial" (2012) 24 *Current Issues in Criminal Justice* 51.

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research. These implications extend to the relationships between punitive visions of motherhood, medical opinions that are deeply imbricated with social stereotypes, and legal processes in which existing checks and balances have failed to prevent errors from occurring. Taking a broader view of the failures that led to wrongful convictions in England, Canada and Australia permits the Folbigg case to be seen not as an aberration, but as a telling instance of the failures of contemporary conceptions of the relationships between gender, crime and truth-seeking. While such discussions may find their greatest resonance within academic circles, I remain convinced that they offer the most fruitful path towards a more egalitarian model of fact determination in difficult criminal trials.