

***Murder, Medicine and Motherhood*, Emma Cunliffe, Hart Publishing, Oxford, 2011, 246 pages (ISBN 978-1-849-46157-3)**

Introduction

Murder, Medicine and Motherhood is an arresting book that examines the controversial Australian case of Kathleen Folbigg, who was convicted in New South Wales of killing her four children between 1991 and 1999. The autopsy reports classified two of the deaths as sudden infant death syndrome (SIDS), one was ascribed to ‘complications from epilepsy’, and the final death was ‘undetermined’ (Cunliffe 2011:3). The book is a valuable read for lawyers, academics and others interested in the *Folbigg* case for two main reasons. First, it unpacks medical and social understandings around SIDS, and its evolving conceptualisation in the socio-legal context. Second, it draws together disparate threads relevant in filicide literature, and critically assesses assumptions in law (on criminal guilt) and medicine (scientific certainty), and gendered presumptions in parenthood ideals.

As indicated by the title, the book presents three stark themes — murder, medicine and motherhood. These eye-catching themes structure the current book review. This review examines the critical role and adequacy of the law, as envisioned by Cunliffe, in these distinct fields. First the review outlines the arguments presented in the book. The next section, ‘Murder’, summarises the first two chapters of the book, which provide the facts of the case and outline the legal proceedings that followed. The section on ‘Medicine’ reviews chapters four and five of the book on the SIDS debate. The section on ‘Motherhood’, examines chapters six to eight of the book. These chapters uncover motherhood as ideology, narrative, and criminological discourse, and discuss the pivotal influence of the media in reconstructing these representations. Finally, the conclusion suggests some deeper implications that the book foreshadows.

Overview

By the end of her Introduction, Cunliffe clarifies her position regarding two points; first, what she sees are legal and scientific obfuscations in attempting to explain unexplained infant deaths; and second, the enigmatic, but increasingly suspect, prognoses of SIDS. The SIDS discourse in the literature, according to Cunliffe, was polarised in that medical consensus was divided as to whether or not it was sometimes ‘masking murder’ (Cunliffe 2011:12). The usage of ‘masking’ employed by Cunliffe immediately conveys a sense of theatrical illusion around the certainty of medical science as empirically dependable. She then sets out to prove that the need and desire for criminal punishment in filicide, a particularly morally heinous crime, outweigh sympathetic concerns and the absence of scientific evidence. All of which in the *Folbigg* case were at the expense of the, possibly, innocent Kathleen Folbigg (Cunliffe 2011:2).

Focusing on selective legal representations in the Folbigg trial and its post-facto construction in the media, Cunliffe analyses the case with penetrating insights into the prevailing climate of suspicion around unexplained infant deaths in the case. She argues that such an environment, fuelled by the scientific engagement of medical experts, affected the investigation, prosecution and the manner in which medical evidence was presented at the

trial and, subsequently, by the media (Cunliffe 2011:13). The admixture of these factors was further buttressed by powerful judicial representations on normative and dominant social expectations of motherhood. Cunliffe questions subtly two sensitive issues in this complex area: the mystification of the facts by dualistic narratives inherent in the symbol of the mother; and the perceived need for the hegemonic production of medical knowledge to fill the theoretical shortcomings on the pathology of infant deaths. Cunliffe's in-depth interrogation of the case explores the depths of two inextricable spheres of knowledge, social construction theory of law and the empirical rationalist tradition of science. Her fascinating probe into the overlap of these two spheres illuminates the extent to which interdisciplinary boundaries of law and medicine merge, and mirror each other, within the highly emotive and legally charged phenomenon of filicide.

At the end of the book, it is open to suggestion that these meaning-making processes in law and medicine are geared towards producing acceptable explanations for otherwise unacceptable and violent acts of killing. Rather than highlighting the need to move away from stereotyped symbols and conceptualisations of the filicidal parent, the book suggests that the reinforcing of dominant symbols added another layer of mystification to the already complex phenomenon. Following the unpeeling of existing layers of legal, symbolic and social mystifications, the book makes obvious to the reader that legal meaning and myth-making can do much more to aid critical developments in social, medical and even interactional understandings surrounding unexplainable infant deaths.

Cunliffe articulates this succinctly when she makes the point that, 'law valorises and translates some extra-legal knowledges while de-contextualising and disapproving others' (Cunliffe 2011:206). The selective nature of judicial and legal representation necessarily means that it is futile to search for absolute representation of truth in trial proceedings, as shown by Cunliffe utilising the *Folbigg* case as an example.

More importantly, this book demonstrates that the weight and execution of morality in this particular example, and filicide cases in general, fall on particular bearers of authority. These authority figures are also the gatekeepers representing, and determining, normative expectations of acceptable and unacceptable parenting behaviours.

Murder

The idea of a mother killing her children is abhorrent and seems the worst crime that could be committed. (Jackson quoted in Cunliffe 2011:12)

Cunliffe argues that the legal standard of proof of 'beyond a reasonable doubt' was not met in the *Folbigg* case. This leads her to the inevitable conclusion that Kathleen Folbigg had been wrongly convicted of killing her children. Chapter two is devoted to setting out the legal narratives, as reported, which include the interlocutory judgments; sentencing judgment; and appeals from conviction and sentence. This framework allows Cunliffe, in her later chapters, to consider the implications arising from each of these significant stages in the processes of judicial decision-making and fact-finding.

The discussion of the trial judge's sentencing judgment is perhaps the most thought provoking section in this chapter. Cunliffe points to the controversial, and perhaps even contentious, use of circumstantial evidence — Folbigg's diary entries — that the court relied on to suggest the reason for the killing of the children. The diary entries allegedly revealed Folbigg's existing mental state at the time, which alluded to 'a profound disturbance of personality development' (Cunliffe 2011:20). This, and the pre-sentencing psychiatric

reports, constructed a representation of Kathleen Folbigg as a mother who was unable to cope with motherhood (Cunliffe 2011:21). The process of judicial fact-finding and judgment here is fascinating because it reveals the nature of legal representation as based on selected pieces of evidence, which somehow transforms mere representation into a discoverable objective reality (Twinning 1990:76).

More interesting is the appellate court's judgment on the diagnosis of SIDS in the case. From the appellate court's articulation, Cunliffe highlights various possible meanings of the certainty of this diagnosis. She argues that there was an over-reliance on behavioural and medical evidence to independently validate both the cause of death and the lack of medical reassurance on the certainty of SIDS. This meant that the prosecution's argument for unnatural cause of death was extensively propagated to the exclusion of natural causes of death. For Cunliffe, this co-mixing of evidence coupled with the prosecutions efforts, over-simplified and obscured the possibility of, and necessary conditions for, a diagnosis of SIDS. This concealed from the jury the extent of medical uncertainty on SIDS (Cunliffe 2011:22).

Further, the two irregularities (regarding jury members' conduct) that were held to be immaterial and not amounting to a miscarriage of justice were questionable decisions for Cunliffe. It appears unsurprising that these legal loopholes begged a magnified analysis of the issues surrounding this set of intriguing facts.

Medicine

Cunliffe posits that the reliance on medical reports and expert opinion, which indicated the rarity of SIDS in the four children's deaths, was controversial — even within the medical research community. The lack of medical consensus surrounding the certainty of SIDS and the growing inability to explain away sudden infant deaths primed the climate of suspicion for the emergence of murder as an alternative, and masked other possible causes of death. Chapter three contextualises the SIDS debate within the medical sphere. This is positioned against criminological discourses in the 1970s and mid-1990s, which, according to Cunliffe, saw a growing trend towards mistrust of mothers.

Chapter four digs deep into the debate on scientific versus legal methods of certainty. To be precise, the critical question is: to what extent the belief in scientific knowledge should conclusively inform 'truth finding' (Cunliffe 2011:41), particularly where there are differing expert opinions. Cunliffe also considers other similar cases at the time, including *R v Phillips* and *R v Clark*, which cautioned against convictions based on the limits of medical knowledge.

Chapter five succinctly summarises the key legal arguments put forward by both the defence and prosecution; and considers the presentation and manipulation of medical evidence by the prosecution. This is deserving of a chapter in itself because, as Cunliffe explains, the medical and scientific evidence occupied more than half of the court's time, including most of both counsels' closing addresses and the judge's summing up (Cunliffe 2011:72). The chapter provides an in-depth and even-handed analysis of the arguments and evidence presented. It concludes with a cautionary note on the evolving use of SIDS as a diagnosis and label that now seems to carry significantly graver implications.

The more pertinent question that Cunliffe poses for deeper academic consideration appears to be: to what extent the law should explicitly acknowledge expert disagreement, and the limitations of science in providing conclusive answers on a subject with divided

loyalties. The English cases suggest the answer is clear — that, in such cases, where additional evidence is lacking, the prosecution cannot proceed.

Motherhood

[I]f it can be shown that a mother had not “truly” loved her child — that is had not given her infant adequate care and devotion — then this might help to explain why she should have committed this heinous act. Alternatively, if it can be shown that she was a good and loving mother, then this would speak to her innocence (Raitt and Zeedyk quoted in Cunliffe 2011:70).

If, indeed, there was an absence of cogent evidence as Cunliffe persuasively argues, how was the case against Kathleen Folbigg successfully prosecuted? Cunliffe posits that the case for the prosecution was made on the basis of prosecutorial and legal construction of Folbigg as a mother who lacked the necessary parenting skills to cope with motherhood. This phenomenon, that is, the socio-legal representation, labelling and construction, of a parent in dichotomous descriptions of ‘good’ and ‘evil’, is not unusual in filicide cases in New South Wales; for example, in *R v BW & SW(No 3)*, *R v Pfitzner* and *R v Fraser*, to list just a few.

The dominant ideology of motherhood was given pre-eminence in the trial. As highlighted in chapter six, this involved the imposition, judgment and articulation of particular norms and standards in relation to women (Cunliffe 2011:100). These standards prescribe a set of expectations on how women should behave, act and construct women’s obligations in the home. Women, particularly mothers, who do not conform to these normative social roles and expectations tend to be labelled as ‘deviant’ or ‘bad’ mothers, and made to feel more vulnerable. Cunliffe gives the infamous example of Lindy Chamberlain, whose trial, including judgments by the public and the media, was mostly characterised by detailed scrutiny of Lindy’s every action (Chamberlain-Creighton 2004:122–242).

Cunliffe’s book suggests that the social and legal representations constructed by lawyers to explain away maternal violence dramatically emphasise the ideology, including the theatricality, of the good versus bad mother. Cunliffe demonstrates with the *Folbigg* case that the court, through its ‘theatre’ (Findlay 2001:28), reinforces and engages with the characterisation of mothers and fathers in accordance with the normative expectations arising from the nuclear family unit.

In chapter six, Cunliffe reconstructs the representations ascribed to Kathleen Folbigg: the emotional mother; the abusive mother; the working mother (at the expense of her parental obligations); and the socially isolated mother. It is not difficult to see that these constructions fit neatly within the prevailing perceptions — the ‘mad’, ‘bad’ and ‘sad’ affixations — on female criminality (Wilczynski 1997:421–24).

One might argue that socio-legal constructions of this sort can mystify the phenomenon of recurring, unexplained and general, infant deaths by obscuring the dearth of medical certainty and social understandings in the area. It was pointed out by Cunliffe that the predominant focus on women’s nurturing role (including polarising them into fixed representations) obscured crucial facts in the case (Cunliffe 2011:111). In particular, the prosecution’s representation of Kathleen Folbigg, coupled with the failure of the judge to warn the jury of the unreliability of (her then husband) Craig Folbigg’s differing accounts jeopardised the fundamentals of the legal proceedings. One might also interpret these loopholes as threatening the rigours of procedural and evidential law.

Chapter seven of the book discusses the controversy regarding the prosecution's construction of Kathleen's diaries as primary and core evidence of her guilt. Inherent in this discussion is the critical question whether the diary narratives are a direct representation of criminal guilt. Poignantly, Cunliffe reveals that the prosecution's selective choice of diary excerpts represented Kathleen as malevolent mother. Rather than seeing the diaries as representing an 'emotional repository' (Cunliffe 2011:138) or an outlet for Kathleen's parenting frustrations, they were used and constructed by the prosecutor as a 'mind-reading machine' (Cunliffe 2011:139) into her alleged homicidal intention and actions.

This chapter is perhaps the bleakest of all, because it showcases the inadequacies of the law when interpreting and understanding women's narratives, including the ways in which the ideology of motherhood is reinforced and reconstructed through the law. Though, of significance here is Cunliffe's point that expressions of remorse have a powerful influence on the criminal trial. It can shape legal outcomes, act as a reinforcement of society's normative expectations and manipulate audiences within and outside the theatre of the courtroom.

Chapter eight examines the role of the media and their construction of the accused, trial proceedings, and interpretation and reporting of the scientific evidence on SIDS. The key issue here is the selectivity of newspaper reporting and their failure to strike a balance when reporting the trial. This one-sidedness tended to portray Kathleen's guilt as certain, and their focus on the diaries framed Kathleen's experience of motherhood to her detriment, whilst appearing to favour Craig's account over hers in spite of the problems associated with his credibility at the trial.

It is troubling to read that the media also struck an uneven balance in their reporting of the SIDS debate. It not only produced an incomplete perspective (Cunliffe 2011:172), but completely mystified the state of knowledge on the subject. Cunliffe appears to be suggesting that the media, aside from merely presenting and reporting the news, also represents a moralising force in society. A force that is pivotal in endorsing certain deviant representations over others, rather than driven by the need to present a balanced story and entirely dependent on the degree of newsworthiness and titillating content within the dominant frameworks suggested here.

Conclusion

In conclusion, the book exposes the uneasy and ambiguous boundaries that law has had to navigate between medicine, motherhood, justice and the media (Cunliffe 2011:193). The relationships between each of these spheres, as the book importantly suggests, are mediated through gendered assumptions, selective representations, and normative expectations of women in their roles as mothers.

It is open to suggestion that social constructions such as canvassed in the *Folbigg* case can sometimes dangerously conceal, rather than reveal, hidden dysfunctionalities underlying children's deaths within the family unit (for example, male violence and, or, drug and alcohol abuse). It may be that the theatre, or 'environment' (Cunliffe 2011:204), of the criminal trial is solely concerned with the apportionment of individual criminal responsibility, and is not the best forum to interrogate the confluence of social triggers. This said, the book exposes the depths of the law, which now seem shallow when interpreting particular (for example, women's) narratives that sit outside of the dominant ideology, framework or culture.

Following this train of thought, surely it is not too far-fetched to conclude that the law, medicine and motherhood ultimately remain intrinsically bound to their patriarchal roots and masculine judgment. It would take much more to divorce stereotypical and commonly held assumptions and representations from the objectivity of science within these spheres to ensure the strictures of the law are followed as intended.

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Cases

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